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Section 302(a)(2)--Commission of a "Tortious Act"

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taining service pursuant to section 308(4), holds *in effect* that an endeavor to serve a defendant outside the state under section 313 is *not* a condition precedent to the use of section 308(4).[23]

Section 302(a)(2) — Commission of a "Tortious Act"

Section 302(a)(2) of the CPLR provides that a non-domiciliary is subject to in personam jurisdiction if the cause of action arises out of his commission of a tortious act within the state. An interesting case, and one which has taken a restrictive approach to section 302(a)(2), is *Feathers v. McLucas.*[24]

In that case, the defendant Darby Corporation, incorporated under the laws of, and having its only place of business in Kansas, had no direct contacts with New York. It manufactured cargo pressure tanks used for the transportation of liquefied petroleum products. Darby sold one of these tanks to a Missouri corporation, having its principal place of business in that state; this vendee affixed the tank to a trailer chassis and wheels. The completed tank trailer was sold to a Pennsylvania corporation engaged in interstate commerce. While this trailer was being driven through New York to Vermont, the tank ruptured and exploded, giving rise to an alleged cause of action for personal injuries and property damage. Relying on section 302(a)(2), the plaintiff served the president of the defendant Darby Corporation in Kansas, which is permissible under section 313 in a section 302 case. The defendant successfully moved to set service aside (*i.e.,* made a motion under rule 3211(a)(8)), contending that the court lacked in personam jurisdiction.

In resolving this issue, the court examined the cases decided under the Illinois "longarm statute," Section 17 of the Illinois Practice Act, on which section 302(a) is based, and adopted the distinction between a tortious act and a tortious injury, as drawn by a federal district court in Illinois in *Hellriegel v. Sears*

avenues have been exhausted unsuccessfully." 7B MCKINNEY'S CPLR § 308, commentary 475.

[23] The fact that § 308 (service in New York) precedes § 313 (service outside New York) indicates that § 308(4) clearly contemplates only the exhaustion of in-state service under § 308(1)-(3) without reference to extra-state service under § 313. In any event, that numerical position of § 308(4) offers good ground for such a determination. As a practical matter, § 308(4) might become a comparatively useless tool if, before an order could be moved for under it, service in a foreign nation had to be resorted to. If the service ordered under § 308(4) is such as to satisfy due process — and in the *Totero* case the agent designated for service seemed a reliable source to assure that the defendant would be notified — it seems preferable to permit application for an order under § 308(4) without requiring that extra-state service first be attempted under § 313.

[24] 41 Misc. 2d 498, 245 N.Y.S.2d 282 (Sup. Ct. 1963).

Roebuck & Co.[25] Thus, while the tortious act, the construction of the tank, was performed in Kansas, the tortious injury occurred in New York. Seizing upon the language of section 302(a)(2) to the effect that a defendant is subject to jurisdiction if "in person or through an agent, he . . . commits a tortious act within the state," the court drew the "act-injury" distinction in finding that the act was committed in Kansas.[26] Thus, the court held that the occurrence of the injury in New York will not suffice; the "tortious act" must be committed here.

A fact situation similar to *Feathers* arose in the controversial Illinois case of *Gray v. American Radiator & Standard Sanitary Corp.*[27] In *Gray,* the Illinois court sustained jurisdiction on the theory that "the place of a wrong is where the last event takes place which is necessary to render the actor liable."[28] It also noted that it was impossible to separate the alleged tortious act, *i.e.,* the out-of-state manufacture of a water heater, from the injury within the state.

Recognizing that a manufacturer rarely does business directly with consumers, the court in *Gray* stated:

> [I]t is not unreasonable, where a cause of action arises from alleged defects in his product, to say that the use of such products in the ordinary course of commerce is sufficient contact with this State to justify a requirement that he defend here.[29]

It is thus apparent that *Feathers* is directly contra to *Gray,* the latter sustaining jurisdiction when only the injury occurs within the jurisdiction. With respect to the "act-injury" distinction, the *Feathers* result is the same as the *Hellriegel* case, and to this extent the *Feathers* position is not without some authority (albeit authority which appeared before the *Gray* case was decided).

To be contrasted with *Feathers* is the case of *Fornabaio v. Swissair Transp. Co.*[30] Plaintiff, a Port Authority employee, was injured on property leased to Swissair at New York's Kennedy International Airport. It was alleged that defendant S. & C. Electric Company sold equipment to Westinghouse Electric Supply Corporation, which in turn sold it to defendant Swissair. It was further contended that the equipment was defectively

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[25] 157 F. Supp. 718 (N.D. Ill. 1957).

[26] *Accord,* Muraco v. Ferentino, 247 N.Y.S.2d 598 (Sup. Ct. 1964), where, on facts almost identical to those in the case of Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961), the supreme court adopted the "act-injury" distinction and granted a motion to dismiss on the ground of lack of jurisdiction.

[27] *Supra* note 26.

[28] *Id.* at 434-35, 176 N.E.2d at 762-63.

[29] *Id.* at 438, 176 N.E.2d at 766.

[30] 247 N.Y.S.2d 203 (Sup. Ct. 1964).

manufactured by S. & C. and that this defect was the cause of the injury to plaintiff.

Defendant S. & C., in support of its motion to vacate service under rule 3211(a)(8), alleged that it was a Delaware corporation and that it did no business in New York. In considering the issue of jurisdiction under section 302(a)(2), the court cited, with approval the Illinois *Gray* case.[31] The court made a factual determination that "defendant's products are used and consumed in this state in sufficient quantity and this defendant knew that its product was being shipped to New York for us [*sic*] therein." [32] On this basis the court suggested that sufficient "contact" with New York was present. No reference was made to the *Feathers* decision.

Perhaps the distinguishing factor between *Feathers* and *Fornabaio* lies in the statement above quoted. However, the distinction is of questionable validity. The *Feathers* case did not rely on the quantity of the defendant's New York contacts; it held, simply, that if the tortious act occurred outside the state, section 302(a)(2) is inapplicable. There is some merit in defendant's contention that it committed no act in the state and that section 302(a)(2) requires such act, but this was not held to be a bar in the analogous *Gray* case under a similarly worded statute. Supporting the *Fornabaio* case is *Lewin v. Bock Laundry Machine Co.*,[33] which distinguished *Feathers* as involving only an "isolated" contact that defendant had with New York.

Section 302(a)(3) — Real Property Activities

The only significant case interpreting section 302(a)(3) is *Hempstead Medical Arts Co. v. Willie*.[34] In that case, defendant rented office space in New York from plaintiff. During the term of the lease he vacated the premises and defaulted in his payment of rent. At the time of the commencement of this action for rent due and for expenses incurred in re-letting the premises, defendant was a domiciliary of Maine. His motion to dismiss for lack of jurisdiction under rule 3211(a)(8) was denied. The court held that jurisdiction existed by virtue of section 302(a)(3), since the action arose out of defendant's use or possession of real property located in the state.[35]

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[31] *Supra* note 26.
[32] Fornabaio v. Swissair Transport Co., 247 N.Y.S.2d 203 (Sup. Ct. 1964).
[33] (Sup. Ct., Kings County), 151 N.Y.L.J., Apr. 15, 1964, p. 17, col. 1.
[34] (Sup. Ct., Nassau County), 150 N.Y.L.J., Dec. 9, 1963, p. 18, col. 6.
[35] There is as yet no reported case on § 302(a)(3).