St. John's Law Review

Volume 28
Number 1 *Volume 28, December 1953, Number 1*

Article 15

Statute of Limitations--Contract Period Applied to Breach of Implied Warranty (Blessington v. McCrory Stores Corp., 305 N.Y. 140 (1953))

St. John's Law Review

Moreover, as regards limited partnerships, since the limited partners are akin to corporate stockholders and since limited partnerships are statutory creations, there is good reason to regard them as legal entities.[26] In any event, for those who fear the inroads of the entity theory in the law of partnerships,[27] the decision does not relieve the partners from their full individual liability for *partnership* debts.

STATUTE OF LIMITATIONS — CONTRACT PERIOD APPLIED TO BREACH OF IMPLIED WARRANTY.—A cowboy suit, which decedent's mother had bought from the defendant, caught fire and fatally burned the child. In an action by the father, as administrator of his infant son's estate, on the theory of breach of implied warranty of fitness for use, the negligence statute of limitations was pleaded as a defense, since more than three years had elapsed from the happening of the accident. In affirming the lower court's denial of an order to dismiss the complaint, the Court of Appeals *held* that the six-year contract limitation period is applicable to actions for breach of implied warranty. *Blessington v. McCrory Stores Corp.*, 305 N. Y. 140, 111 N. E. 2d 421 (1953).

New York decisions have indicated that the form in which a complaint is framed, whether *ex contractu* or *ex delicto,* is immaterial in determining the applicable statute of limitation. The deciding factor is the true gravamen of the action.[1] In *Schlick v. New York Dugan Bros., Inc.*,[2] the three-year negligence period of limitation was held applicable to breach of implied warranty actions. The court clearly indicated the reasoning which motivated its decision when it stated that "[a]n action to recover damages for personal

---

[26] *See* Lanier v. Bowdoin, 282 N. Y. 32, 38, 24 N. E. 2d 732, 735 (1939); Skolny v. Richter, 139 App. Div. 534, 537-538, 124 N. Y. Supp. 152, 154-155 (1st Dep't 1910) (shows how a special partner is related in a "detached and impersonal" way to the partnership); see N. Y. PARTNERSHIP LAW §§ 91 (permitting creation of limited partnership), 115 (limited partner not a proper party to proceeding by or against a partnership); CRANE, PARTNERSHIPS 117-120 (2d ed. 1952).

[27] See Williston, *The Uniform Partnership Act, With Some Remarks on Other Uniform Commercial Laws,* 63 U. OF PA. L. REV. 196, 208-209 (1915).

[1] Webber v. Herkimer & Mohawk St. R. R., 109 N. Y. 311, 16 N. E. 358 (1888); Loehr v. East Side Omnibus Corp., 259 App. Div. 200, 18 N. Y. S. 2d 529 (1st Dep't 1940), *aff'd mem.*, 287 N. Y. 670, 39 N. E. 2d 290 (1941); Hermes v. Westchester Racing Ass'n, 213 App. Div. 147, 210 N. Y. Supp. 114 (1st Dep't 1925); Burrell v. Preston, 54 Hun 70, 7 N. Y. Supp. 177 (Sup. Ct. 1889).

[2] 175 Misc. 182, 22 N. Y. S. 2d 238 (N. Y. City Ct. 1940).

injuries based on breach of warranty is only nominally based on contract. Essentially it is a tort action." [3] Other jurisdictions have taken the opposite position and applied the contract period of limitation.[4] An early lessening of the tort emphasis in New York had been indicated by the refusal of the courts to insist on proof of negligence in actions for breach of implied warranty.[5] In *Buyers v. Buffalo Paint & Specialties, Inc.*,[6] the court extensively considered the question of limitation governing implied warranties, and applied the three-year period in an action for property damage. The court indicated, however, that had the action been for personal injuries, the six-year period would be applicable.[7] This possibility was not predicated upon a contract theory, but upon Section 48, subdivision 3 of the Civil Practice Act which provides for a six-year limitation in *personal injury* actions where no period is elsewhere prescribed.[8] An almost identical provision, Section 49, subdivision 7, provides for a three-year limitation in *property damage* cases not otherwise limited.[9] It was upon this section that the *Buyers* decision rested.

The instant decision rests upon Section 48, subdivision 1,[10] which is the general contract statute of limitations, irrespective of the nature of the damage. This raises a distinct question regarding the conformity of the decision with the apparent legislative intent. In enacting Section 48, subdivision 3, and Section 49, subdivision 7, the Legislature quite evidently sought to prescribe different periods of limitation for property damage and personal injury actions. As far as actions for breach of implied warranty are concerned, such a distinction has apparently been obliterated by the instant decision.

---

[3] *Id.* at 183, 22 N. Y. S. 2d at 239.

[4] Southern California Enterprises, Inc. v. D. N. & E. Walter & Co., 78 Cal. App. 2d 750, 178 P. 2d 785 (1947) (by implication); Challis v. Hartloff, 136 Kan. 823, 18 P. 2d 199 (1933).

[5] Rinaldi v. Mohican Co., 171 App. Div. 814, 157 N. Y. Supp. 561 (3d Dep't 1916), *aff'd*, 225 N. Y. 70, 121 N. E. 471 (1918).

[6] 199 Misc. 764, 99 N. Y. S. 2d 713 (Sup. Ct. 1950).

[7] *Id.* at 768, 99 N. Y. S. 2d at 717.

[8] *Id.* at 768, 99 N. Y. S. 2d at 718; N. Y. CIV. PRAC. ACT § 48: "The following actions must be commenced within six years after the cause of action has accrued:

". . .

"3. An action to recover damages for a personal injury, except in a case where a different period is expressly prescribed in this article."

[9] N. Y. CIV. PRAC. ACT § 49: "The following actions must be commenced within three years after the cause of action has accrued:

". . .

"7. An action to recover damages for an injury to property, except in the case where a different period is expressly prescribed in this article."

[10] *Id.* § 48: "The following actions must be commenced within six years after the cause of action has accrued:

"1. An action upon a contract obligation or liability express or implied . . . ."

An interesting consideration in the instant case is the theory upon which the plaintiff intends to prove a contract. He is suing as his child's administrator, for damages due to conscious pain and suffering prior to death, pursuant to Sections 119 and 120 of the New York Decedent Estate Law.[11] This right of action is that which the decedent would have possessed had not death intervened, and whatever damages are recovered form part of his estate.[12] The New York rule is that ". . . an implied warranty of . . . fitness for a particular purpose as against . . . a retailer does not inure to the benefit of a third party who is a stranger to the contract . . . ." [13] Likewise, since a parent is not presumed, unless so authorized, to act as agent for his child,[14] the basis upon which the deceased child's privity of contract with the defendant retailer will be established is not immediately apparent. However, in *Pearlman v. Garrod Shoe Co.*,[15] the court, after stating the rule above quoted, went on to indicate the possibility that under certain circumstances an exception to this general statement might exist.[16] It may well be that the facts in the instant case will constitute one of the situations the court there envisioned.

In conclusion, it is suggested that the decision under consideration might well have rested upon Section 48, subdivision 3 of the Civil Practice Act, rather than upon subdivision 1 of the same section. The same result would thus have been attained as to the instant case, but without the undesirable effect of nullifying the legislative effort to establish different limitation periods for property damage and personal injury actions.

TORTS — ABSOLUTE IMMUNITY FOR DEFAMATION IN JUDICIAL PROCEEDINGS.—Plaintiff sued to recover for damages suffered as a result of two allegedly defamatory statements included by Justice Pette in an opinion written by him [1] and subsequently published, as a mat-

---

[11] N. Y. DEC. EST. LAW §§ 119, 120. An action for wrongful death pursuant to Section 130 was barred by that section's special two-year period of limitation.

[12] *See* Stutz v. Guardian Cab Corp., 273 App. Div. 4, 10, 74 N. Y. S. 2d 818, 824 (1st Dep't 1947); Matter of von Kauffmann, 167 Misc. 83, 84, 3 N. Y. S. 2d 486, 487 (Surr. Ct. 1938).

[13] Pearlman v. Garrod Shoe Co., 276 N. Y. 172, 176, 11 N. E. 2d 718, 719 (1937).

[14] Strawn v. O'Hara, 86 Ill. 53, 56 (1887); *see* Mott v. Scholes, 147 App. Div. 82, 85, 131 N. Y. Supp. 811, 814 (2d Dep't 1911); McDonald v. City of Spring Valley, 285 Ill. 52, 120 N. E. 476, 478 (1918); see 67 C. J. S. 795.

[15] See note 13 *supra*.

[16] *Id.* at 177, 11 N. E. 2d at 719; see Fagan, *Sales and Security Law*, 26 ST. JOHN'S L. REV. 72, 81 (1951).

[1] The statements were from an opinion written by a United States dis-