St. John's Law Review

Volume 25, May 1951, Number 2 Article 24

Practice and Pleading--Applicability of Section 23 of the Civil Practice Act--Change of Parties (Producers Releasing Corp. De Cuba v. Pathe Industries, Inc., 184 F.2d 1021 (2d Cir. 1950))

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present decision should have, and already has had,[31] that effect. Perhaps the cure lies in Congressional enactment of a permanent measuring rod.[32]

PRACTICE AND PLEADING—APPLICABILITY OF SECTION 23 OF THE CIVIL PRACTICE ACT—CHANGE OF PARTIES.—In 1946 plaintiff brought suit against PRC Pictures. The contracts upon which the complaint relied contained a nine-month period of limitation within which an action must be commenced on a claim arising under the contracts. Because of the failure of the plaintiff's president to obey court orders for examination before trial, plaintiff's action was dismissed on the merits.[1] On appeal the judgment was affirmed but modified to provide for dismissal not upon the merits.[2] Plaintiff then commenced a new action, after the time limited in the contracts but within one year after dismissal, against Pathe Industries, who in the meantime had acquired all the assets of the dissolved PRC, including the subject matter of the dismissed suit. The district court held the claim barred by the nine-month period of limitation.[3] *Held,* reversed. The suit was timely brought within the meaning of Section 23 of the New York Civil Practice Act.[4] The fact that defendant was not a party to the earlier suit is not controlling. Where the parties to the second suit are *identical in interest* with the parties to the first, Section 23 applies. *Producers Releasing Corp. De Cuba v. Pathe Industries, Inc.,* 184 F. 2d 1021 (2d Cir. 1950).

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[31] *See, e.g.,* Paramount Industries, Inc. v. Solar Products Corp., 88 U. S. Patent Quarterly 233 (2d Cir. 1951); Vapor Blast Manufacturing Co. v. Pangborn Corp., 186 F. 2d 230 (4th Cir. 1950); Ingersoll-Rand Co. v. Black and Decker Manufacturing Co., 94 F. Supp. 938 (D. C. Md. 1951).

[32] See Henry, *Standards of Invention in Mechanical Cases,* 32 J. PAT. OFF. SOC'Y 97 (1950).

[1] *Cf.* Producers Releasing Corp. De Cuba v. PRC Pictures, Inc., 8 F. R. D. 254 (S. D. N. Y. 1948).

[2] Producers Releasing Corp. De Cuba v. PRC Pictures, Inc., 176 F. 2d 93 (2d Cir. 1949).

[3] Producers Releasing Corp. De Cuba v. Pathe Industries, Inc., 10 F. R. D. 29 (S. D. N. Y. 1950) (the court held that the dismissal of the original suit had been for neglect to prosecute).

[4] N. Y. CIV. PRAC. ACT § 23 provides: "If an action is commenced within the time limited therefor, and a judgment therein is reversed on appeal without awarding a new trial, or the action is terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if he dies and the cause of action survives, his representative, may commence a new action for the same cause after the expiration of the time so limited and within one year after such a reversal or termination."

Section 23 applies to limitations by statute or contract. Littrell v. Allemania Fire Ins. Co., 224 App. Div. 523, 231 N. Y. Supp. 520 (3d Dep't 1928), *rev'd on other grounds,* 250 N. Y. 628, 166 N. E. 350 (1929).

The legal effect of Section 23 is to toll the operation of the statute of limitations [5] pending the continuance of an action and to start a new period of limitation from the dismissal provided the original action was instituted in proper time.[6] Since the purpose of Section 23 is to assure a decision on the merits [7] it has been held that its provisions must be liberally construed.[8] Thus, although in terms applicable only to actions, it has been construed to encompass special proceedings.[9] However, in order for the tolling provision of Section 23 to apply, it is necessary that the previous action be commenced,[10] that the present action would ordinarily now be barred by a statute of limitations [11] and that the former action had failed for some reason other than a decision on the merits,[12] a voluntary discontinuance [13] or a dismissal of the complaint for neglect to prosecute.[14] Its application is further delimited by the requirements that the former action be for the same cause,[15] that the new action be

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[5] Section 23 is inapplicable to those actions where the limitation is regarded as a condition precedent to the right to sue. Hill v. Supervisors, 119 N. Y. 344, 23 N. E. 921 (1890); Carr v. Yokohoma Specie Bank, 272 App. Div. 64, 69 N. Y. S. 2d 262 (1st Dep't 1947).

[6] Where the bar of the New York limitations is complete when a sister state action is commenced, Section 23 is inapplicable to a subsequent action brought in New York. Baker v. Cohn, 266 App. Div. 236, 41 N. Y. S. 2d 765 (1st Dep't 1943).

[7] People *ex rel.* Wheeler v. Neafsey, 142 Misc. 692, 255 N. Y. Supp. 477 (Sup. Ct. 1931).

[8] Gaines v. City of New York, 215 N. Y. 533, 109 N. E. 594 (1915).

[9] *In re* Schlesinger's Estate, 36 App. Div. 77, 55 N. Y. Supp. 514 (1st Dep't 1899).

[10] Erickson v. Macy, 236 N. Y. 412, 140 N. E. 938 (1923) (prior action held not commenced where service of summons by publication was obtained under a void order); Knox v. Beckford, 258 App. Div. 823, 15 N. Y. S. 2d 174 (3d Dep't 1939), *aff'd mem.*, 285 N. Y. 762, 34 N. E. 2d 911 (1941) (prior action not commenced where service of summons was set aside because of failure to file proper proof of service within the prescribed time). Section 23 has been held applicable where the prior action was dismissed for want of jurisdiction. Gaines v. City of New York, 215 N. Y. 533, 109 N. E. 594 (1915); Gustafson v. A-B Svenska Amerika Linier, 258 App. Div. 734, 14 N. Y. S. 2d 905 (2d Dep't 1939). See PRASHKER, NEW YORK PRACTICE § 37, n. 103 (1947).

[11] Holland v. Schwartz, 22 N. Y. S. 2d 283 (1940), *aff'd*, 259 App. Div. 1083, 22 N. Y. S. 2d 197 (2d Dep't 1940); Caulston v. Rosenfeld, 175 Misc. 479, 23 N. Y. S. 2d 909 (Sup. Ct. 1940) (Section 23 is not applicable where bar of limitations never became effective because of infancy).

[12] Buchholz v. United States Fire Ins. Co., 269 App. Div. 49, 53 N. Y. S. 2d 608 (1st Dep't 1945); Sauerbier v. Erie R. R., 195 Misc. 880, 90 N. Y. S. 2d 43 (Sup. Ct. 1949) (Section 23 is not applicable to action on theory of common law negligence where prior action under the Federal Employers' Liability Act was terminated on the merits).

[13] O'Neil v. Franklin Fire Ins. Co., 159 App. Div. 313, 145 N. Y. Supp. 432 (4th Dep't 1913), *aff'd without opinion*, 216 N. Y. 692, 110 N. E. 1045 (1915).

[14] Loomis v. Girard Fire and Marine Ins. Co., 256 App. Div. 443, 10 N. Y. S. 2d 283 (3d Dep't 1939).

[15] Victor Process Co. v. Pile Products Corp., 274 App. Div. 907, 83 N. Y. S. 2d 89 (2d Dep't 1948), *aff'd*, 299 N. Y. 561, 85 N. E. 2d 790 (1949).

commenced within a year after the termination of the prior action [16] and that the parties to both actions be the same.[17]

In the instant case the defendant, relying on *Breen v. State,*[18] contended that since it was not a party to the prior action Section 23 should not be applied. The court refused to follow the *Breen* case on the ground that it was in conflict with two earlier higher court decisions. The first of these, *Gaines v. City of New York,*[19] concerned a mistake in the court's jurisdiction and not a change in parties. The second case, *Van der Stegen v. Neuss, Hesslein & Co.,*[20] involved the addition of a party plaintiff in the second action and was affirmed by the Court of Appeals without implementing Section 23.[21] However, as noted by the court, the *Breen* case essentially involved a mistaken belief by the party that the court had jurisdiction and, as such, was in conflict with at least the spirit of the *Gaines* case. The *Breen* case was also in conflict with the spirit of the *Van der Stegen* decision insofar as the latter case held that the addition of a party plaintiff whose interest was the same as the previous plaintiff did not constitute a new cause of action.

The court then distinguished *Streeter v. Graham & Norton Co.*[22] on the basis that there the plaintiff in the second action did not represent the *identical interests* of the plaintiff in the first action. In the present action the defendant represented *all* the interests of the

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[16] McGovern v. Curran, 194 N. Y. Supp. 21 (Sup. Ct. 1922).

[17] Mehrer v. North Ninth Lumber Co., 195 Misc. 566, 90 N. Y. S. 2d 285 (Sup. Ct. 1949), *aff'd,* 275 App. Div. 1059, 92 N. Y. S. 2d 178 (2d Dep't 1949); Gibbon v. City of New York, 66 N. Y. S. 2d 34 (Supp. Ct. 1946) (a plaintiff is the same in both actions although he sues in a representative capacity in the second action).

[18] 179 Misc. 42, 37 N. Y. S. 2d 371 (Ct. Cl. 1942). The Court of Claims held that a Supreme Court action against a *state agency* having been dismissed on the ground that the court lacked jurisdiction, the action being *essentially* against the *state,* could not be revived under Section 23 in a suit against the *state* because the parties to both actions were not the same.

[19] 215 N. Y. 533, 109 N. E. 594 (1915). Here the earlier action was brought against the City of New York in the City Court where it was dismissed upon the ground that the City Court had no jurisdiction over actions against the city. Plaintiff, in a subsequent action brought in the proper court, was held entitled to the benefits of Section 23.

[20] 243 App. Div. 122, 276 N. Y. Supp. 624 (1st Dep't 1934).

[21] 270 N. Y. 55, 200 N. E. 577 (1936). Here the plaintiff brought the second action within the period of limitation. After the statutory period had expired the trustee in bankruptcy was brought into the action as an added party plaintiff. The court held that the addition of the trustee as a party did not create a new cause of action which would be barred by the statute of limitations. The court then stated: "We do not touch upon the effect of section 23. . . . We need not discuss it." *Id.* at 63, 200 N. E. at 580.

[22] 263 N. Y. 39, 188 N. E. 150 (1933). The first action was brought by an insurance carrier as statutory assignee of the beneficiaries entitled to recover damages for wrongful death. The action was dismissed on the ground that the plaintiff was not the assignee of all the persons entitled to share in the damages recovered. A second action brought by the administratrix representing all of the next of kin was held not saved by section 23 since it ". . . was not brought by the same plaintiff or representative." *Id.* at 44, 188 N. E. at 151.

defendant in the first action. The fact that the defendant may have represented other interests in addition to those derived from PRC Pictures was held immaterial.

In the determination of state law a federal court may not depart from what a lower state court announces as law unless convinced that a higher court of the state would decide otherwise.[23] It is submitted that the court was justified in refusing to adopt the strict *identity of party* test of the *Breen* case in view of its clash with the broad and liberal construction given to Section 23 by the Court of Appeals in the *Gaines* case.[24]

TORTS—DUTY OWED INVITEE AND LICENSEE.—Plaintiff stumbled and fell over a stone block while walking through an alleyway used in connection with defendant's bus terminal. Defendant was in possession of the alleyway under a lease wherein he agreed to promote the maximum flow of traffic through the terminal and passageway leading thereto. The objective of such promotion was to increase business in the stores, luncheonette and other concessions bordering upon and leading into the terminal, the alleys and arcade. Pedestrians to reach the stores in the terminal used the alleyway where the operative facts occurred. *Held,* judgment for plaintiff affirmed. Because of the provision in the lease to encourage business in the alleyway, plaintiff, a pedestrian, is an invitee or business guest and not a bare licensee or trespasser. *Pedro v. Newman,* 277 App. Div. 567, 101 N.Y.S. 2d 146 (1st Dep't 1950).

A business visitor or invitee is a person who is invited or permitted to enter or remain upon land for a purpose which directly or indirectly concerns the business of the occupier.[1] A licensee, on the other hand, is a person who is privileged to enter upon land merely by virtue of the possessor's consent.[2] The occupier of land must extend reasonable care to an invitee[3] as to activities[4] or con-

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[23] West v. American Telephone and Telegraph Company, 311 U. S. 223 (1940).

[24] "The statute is designed to insure to the diligent suitor the right to a hearing in court till he reaches a judgment on the merits. Its broad and liberal purpose is not to be frittered away by any narrow construction." Gaines v. City of New York, 215 N. Y. 533, 539, 109 N. E. 594, 596 (1915).

[1] Heskell v. Auburn L., H. & P. Co., 209 N. Y. 86, 102 N. E. 540 (1913); RESTATEMENT, TORTS § 332 (1934); PROSSER, TORTS 635 (1941).

[2] Meyer v. Pleshkopf, 277 N. Y. 576, 13 N. E. 777 (1938); RESTATEMENT, TORTS § 330 (1934); PROSSER, TORTS 625 (1941).

[3] Dorsey v. Chautauqua Institution, 203 App. Div. 251, 196 N. Y. Supp. 798 (4th Dep't 1922); RESTATEMENT, TORTS § 341 (1934).

[4] *See* Stelter v. Cordes, 146 App. Div. 300, 130 N. Y. Supp. 688 (2d Dep't 1911); RESTATEMENT, TORTS § 341 (1934).