

**Doyle v John Pegno Partners**

2007 NY Slip Op 33279(U)

October 5, 2007

Supreme Court, Queens County

Docket Number: 0026699/2006

Judge: David Elliot

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Administratrix of the Estate of Dermot Power and guardian of Jake Colton Doyle. By order dated May 11, 2006, Justice Judith J. Gische dismissed the New York County action as Lisa Doyle was not the Administratrix of the Estate of Dermot Power, without prejudice to the recommencement of the action by a proper party. The order was filed in the office of the New York County Clerk on June 2, 2006. The pleadings in the present action were filed on December 1, 2006. A supplemental summons and verified complaint were filed with the Queens County Clerk on December 5, 2006.

Pursuant to CPLR 205(a),

If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if the plaintiff dies, and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period.

Contrary to the contentions of movants, the prior action was not voluntarily discontinued, and the termination of the original action did not occur until entry of the order on June 2, 2006. (Trepel v Motor Vehicle Acc. Indem. Corp., 267 AD2d 228 [1999].) Hence, the filing of the second action on December 1, 2006 was within six months of the prior termination.

With respect to the timeliness of the original action, the claim for personal injuries was interposed within the required three-year period after the event. (CPLR 214.) As to the wrongful death claim, decedent's infant son was his only distributee. While a distributee has a prior right to letters of administration (SCPA 1001), an infant is ineligible to receive such letters. (SCPA 707[1][a].) The commencement of the wrongful death action is, therefore, tolled under CPLR 208 until a guardian is appointed for the minor or until the distributee reaches majority, whichever occurs first. (Hernandez v New York City Health and Hosps. Corp., 78 NY2d 687 [1991].) Following the appointment of a guardian, a personal representative may commence

an action. Inasmuch as the wrongful death claim was originally brought within two years after the appointment of a guardian, it was timely commenced. (EPTL 5-4.1; Hernandez v New York City Health and Hosps., 78 NY2d 687, supra.) Moreover, as in Vasquez v Wood, (18 AD3d 645 [2005]), the dismissal of the original action was due to plaintiff's lack of capacity to sue and, therefore, the six-month extension under CPLR 205(a) applies. (See, Carrick v Central Gen. Hosp., 51 NY2d 242 [1980]; Mendez v Kyung Yoo, 23 AD3d 353 [2005].)

Although the present action is timely as to previously served defendants, the six-month extension does not extend to a defendant, such as Transport, that was never named or served in the prior action. Due to the lack of personal jurisdiction, CPLR 205(a) does not provide an extension of the limitation period over Transport. (See, George v Mt. Sinai Hosp., 47 NY2d 170 [1979].)

Accordingly, the action is dismissed as against Transport.

As to Favelle, this court will first address the issue of jurisdiction. Plaintiff initially asserts that Favelle has waived this objection by failing to move within sixty days after serving its pleading, which included the affirmative defense. Inasmuch as the service of the Favelle answer was on March 26, 2007 and the motion was made on May 15, 2007, plaintiff's contention is without merit.

As to the manner of service, plaintiff utilized Business Corporation Law § 307 to effectuate service on Favelle, a foreign corporation not authorized to do business in New York. Assuming at this juncture that a predicate for jurisdiction exists under CPLR 301 or 302, Business Corporation Law § 307 prescribes the method for service of process. While plaintiff complied with Business Corporation Law § 307(b) by serving the Secretary of State, the statute provides a precise sequence of actions to complete the acquisition of jurisdiction. (Stewart v Volkswagon of Am., 81 NY2d 203 [1993].) Additional service components require either personal delivery without the state in accordance with Business Corporation Law § 307(b)(1) or mailing to the foreign corporation by registered mail with return receipt requested in conformance with section 307(b)(2). An affidavit of compliance together with the process indicating proof of service must be filed with the Clerk of the Court within 30 days after service. (Business Corporation Law § 307[c][1], [2].) Because the appointment of the Secretary of State as the agent for an unauthorized foreign corporation is imputed rather than actual,

the statutory procedures are designed to satisfy due process requirements of actual notice. (Flick v Stewart-Warner Corp., 76 NY2d 50 [1990].) As a result, strict compliance is required to effect service. (Id.)

In the instant case, there is no proof of compliance with section 307(b)(1) or 307(b)(2) and a review of court records indicates that plaintiff has not filed the necessary affidavit of compliance. The failure to abide by the statutory procedures divests the court of jurisdiction over this defendant. (Flannery v General Motors Corp., 86 NY2d 771 [1995].)

Accordingly, in the absence of jurisdiction over Favelle the motion to dismiss is granted and the remaining contentions raised need not be addressed.

Defendants Pegno/Tully move to dismiss on the basis of the statute of limitations. As to John Pegno Partners, this entity was not named and apparently not served in the New York County action. Thus, CPLR 205(a) does not apply to this claim and the filing of this action on December 1, 2006 and subsequent service on December 11, 2006 were beyond the statutory period.

Accordingly, the action is dismissed as against John Pegno Partners.

The remaining defendants, A.J. Pegno Construction Corp./Tully Construction Inc., a joint venture, were parties to the New York action. As previously stated, the original action was timely interposed and receives the benefit of the CPLR 205(a) extension. The filing of this action against these defendants was, therefore, timely and the motion to dismiss made on their behalf is denied.

Dated: October 5, 2007

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J.S.C.