

08-2149-cv  
Doyle v. American Home Products Corporation

**UNITED STATES COURT OF APPEALS**  
**FOR THE SECOND CIRCUIT**

August Term, 2008

(Argued: July 15, 2009            Decided: September 29, 2009)

Docket No. 08-2149-cv

- - - - -X

ROBERT DOYLE,  
Plaintiff-Appellant,

-v.-

08-2149-cv

AMERICAN HOME PRODUCTS CORPORATION AND  
AMERICAN CYANAMID COMPANY,  
Defendants-Appellees.

- - - - -X

Before:            JACOBS, Chief Judge, SACK, Circuit Judge, and  
                     GOLDBERG, Judge.\*

Plaintiff Robert Doyle appeals from a district court  
order dismissing his case as untimely under the relevant  
statute of limitations. The district court concluded that a

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\* The Honorable Richard W. Goldberg, United States  
Court of International Trade, sitting by designation.

1 dismissal in state court for failure to appear at a court  
2 conference constituted a dismissal "for neglect to  
3 prosecute" such that Doyle could not avail himself of a six-  
4 month tolling provision under New York Civil Practice Law  
5 and Rules section 205(a). For the foregoing reasons, we  
6 affirm the dismissal.

7

8 TODD C. BANK, Kew Gardens, New  
9 York, for Appellant.

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11  
12 LAUREN J. ELLIOT, (Daniel J.  
13 Thomasch, on the brief), Orrick,  
14 Herrington & Sutcliffe LLP, New  
15 York, New York, for Appellees.

16  
17  
18 DENNIS JACOBS, Chief Judge:

19 Robert Doyle's 1996 suit against a pharmaceutical  
20 manufacturer alleging injury for a drug he took in 1989 and  
21 1993, was dismissed in 2006 by the New York state court  
22 after Doyle and his attorney failed to appear at a  
23 scheduling conference. When Doyle later commenced this  
24 diversity suit on the same claim, Doyle resisted the drug  
25 company's limitations defense on the ground that the New  
26 York Civil Practice Law and Rules ("CPLR") section 205(a)  
27 tolls the statute of limitations during the pendency of the  
28 prior action, and for six months after dismissal, if the

1 prior action was dismissed for a technical reason, but not  
2 if the prior action was dismissed for "neglect to  
3 prosecute."<sup>1</sup> Doyle now appeals from the order entered by  
4 the United States District Court for the Eastern District of  
5 New York (Korman, J.) on April 1, 2008, which dismissed his  
6 federal action pursuant to Rule 12(c) of the Federal Rules  
7 of Civil Procedure on the ground that the statute of  
8 limitations--long exceeded--had not been tolled. Doyle v.  
9 Am. Home Prods. Corp., No. 06 Civ. 5392 (ERK) (E.D.N.Y. Mar.  
10 31, 2008). The question on appeal is whether the dismissal  
11 in state court constituted a dismissal "for neglect to  
12 prosecute."

13 **I**

14 The State Court Litigation. Doyle commenced this  
15 personal injury action in New York State Supreme Court,  
16 Kings County, in May 1996, alleging injuries arising from

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<sup>1</sup> The statute was amended in July 2008. However, that amendment was not in effect at the time of the state court dismissal (March 2006) or the district court dismissal (April 2008), and "[g]enerally, an amendment will have prospective application only, and will have no retroactive effect unless the language of the statute clearly indicates that it shall receive a contrary interpretation." N.Y. Stat. Law § 52. Section 205(a), as amended, contains no language indicating that it should be applied retroactively; accordingly, we do not apply it to the present dispute.

1 his 1989 and 1993 ingestion of "Minocin," a drug  
2 manufactured and sold by Defendants, American Home Products  
3 Corporation, now known as Wyeth Holdings Corporation, and  
4 its subsidiary, American Cyanamid Company ("Defendants").  
5 The suit asserted claims for negligence, warranty, strict  
6 products liability, and misrepresentation.

7 Defendants' motion for summary judgment was granted in  
8 March 2000, and re-argument was denied. In April 2000,  
9 Doyle appealed, and in August 2001, the Appellate Division  
10 (Second Department) affirmed the dismissal of all claims  
11 other than breach of warranty.

12 On return to the trial court, the parties moved to  
13 compel discovery. In August 2002, Doyle was ordered within  
14 60 days to (1) provide authorizations for the release of all  
15 medical records, and (2) respond to discovery requests that  
16 had been served five months earlier (in March 2002). More  
17 than three months later, Doyle had provided neither the  
18 authorizations nor the responses. A phone call to Doyle's  
19 attorney elicited a promise to provide the materials within  
20 two weeks. According to Defendants, neither Doyle nor his  
21 counsel provided the materials. In Doyle's affidavit, he  
22 insists that he served the authorizations upon Defendants

1 and that the issue was in dispute because Defendants  
2 mistakenly believed that they had not received all of the  
3 authorizations requested. Doyle does not explain or excuse  
4 his failure to submit the discovery requests.

5 For the next two years, Doyle admits he did nothing to  
6 litigate the action. In October 2005, Defendants served  
7 Doyle's attorney with a demand for resumption of  
8 prosecution. Doyle's attorney indicated that his client  
9 intended to resume litigation and requested that Defendants  
10 respond to interrogatories submitted by Doyle approximately  
11 four years earlier. In January 2006, Defendants reminded  
12 Doyle by letter that: (1) they had responded to the  
13 interrogatories three and one-half years earlier (in May  
14 2002); and (2) Doyle was out of compliance with the August  
15 2002 order requiring authorizations and responses within 60  
16 days.

17 On March 2, 2006, approximately two months after the  
18 Defendants' letter, the court scheduled a status conference  
19 for March 21, 2006. Neither Doyle nor his counsel appeared  
20 at the conference.

21 The Dismissal. Section 202.27 of New York's Uniform  
22 Civil Rules for the Supreme Court and the County Court

1 ("§ 202.27") confers authority on the court to dismiss a  
2 cause of action because of the failure of a party to appear  
3 at any court conference. 22 NYCRR § 202.27(b). On the day  
4 that Doyle and his attorney failed to appear, Justice Diana  
5 A. Johnson signed an order stating in its entirety:

6 Dismissed for failure to appear at  
7 March 21, 2006 Court Ordered Status  
8 Conference.  
9

10 The order was entered on April 3, 2006, and notice of entry  
11 of the order was served on Doyle's attorney on April 13,  
12 2006.

13 The Federal Court Action. Doyle filed no motion to  
14 vacate the default, and filed no appeal from the dismissal.  
15 Instead, on September 19, 2006 (approximately five months  
16 after the dismissal), Doyle commenced the current action pro  
17 se in the Eastern District of New York, alleging diversity  
18 jurisdiction and pleading all four claims from the initial  
19 state court complaint.<sup>2</sup>

20 After some procedural maneuvering and at least one  
21 conference, Defendants moved on February 16, 2007 for  
22 judgment on the pleadings or (in the alternative) for  
23 summary judgment. Among other things, Defendants argued

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<sup>2</sup> Doyle is now represented by counsel.

1 that Doyle's action was untimely and could not be saved by  
2 the tolling provision of CPLR 205(a), which affords no  
3 tolling when actions are dismissed "for neglect to  
4 prosecute." N.Y. CPLR 205(a). Doyle conceded that  
5 dismissal was appropriate for all claims except the breach  
6 of warranty claim (which was the only viable claim in state  
7 court by the time that action was dismissed). As to that  
8 remaining claim, Doyle invoked section 205(a), the relevant  
9 version of which provides:

10 If an action is timely commenced and is  
11 terminated in any other manner than by [1]  
12 a voluntary discontinuance, [2] a failure  
13 to obtain personal jurisdiction over the  
14 defendant, [3] a dismissal of the  
15 complaint for neglect to prosecute the  
16 action, or [4] a final judgment upon the  
17 merits, the plaintiff . . . may commence a  
18 new action upon the same transaction or  
19 occurrence . . . within six months after  
20 the termination . . . .

21  
22 N.Y. CPLR 205(a).

23 By Memorandum and Order dated March 31, 2008, the  
24 district court granted Defendants' motion and dismissed the  
25 action in its entirety, concluding that Doyle's laxness  
26 precluded him from the benefit of "the six-month time  
27 extension ordinarily awarded to a non-merits dismissal by  
28 CPLR 205(a)." (quotations omitted). By order dated July 16,

1 2008, the district court declined to reconsider its order  
2 and reaffirmed its conclusion:

3 [T]he immediate and precipitating cause  
4 of the dismissal . . . was the  
5 culmination of a course of conduct that  
6 plainly demonstrated a neglect to  
7 prosecute. Even though the order did not  
8 specifically allude to the plaintiff's  
9 dilatory tactics that spanned years, [the  
10 dismissal] should be treated as one for  
11 neglect to prosecute.  
12

13 Doyle v. Am. Home Prods. Corp., No. 06 Civ. 5392 (ERK), at 5  
14 (E.D.N.Y. Mar. 31, 2008). Doyle now appeals from that  
15 conclusion.

16 **II**

17 We review a dismissal under Rule 12(c) de novo. Morris  
18 v. Shroder Capital Mgmt. Int'l, 445 F.3d 525, 529 (2d Cir.  
19 2006).

20 Doyle argues on appeal that his failure to appear for a  
21 single court conference does not, in the circumstances  
22 presented here, constitute "neglect to prosecute" within the  
23 meaning of 205(a); accordingly, a dismissal under section  
24 202.27(b) does not preclude the application of section  
25 205(a)'s six-month tolling period. According to Doyle, it  
26 does not matter that a state court could have dismissed an  
27 action for failure to prosecute unless the state court



1 actually did so, and made findings to support that  
2 conclusion.

3 In response, Defendants argue that a dismissal for  
4 failure to appear can constitute a dismissal “for neglect to  
5 prosecute” when the record supports such a reading.  
6 Defendants argue that section 202.27 is simply a procedural  
7 tool available to effect such a dismissal.

8 **III**

9 The relevant version of section 205(a) provides that  
10 “[i]f an action is timely commenced and is terminated in any  
11 other manner than by . . . a dismissal of the complaint for  
12 neglect to prosecute the action . . . the plaintiff . . .  
13 may commence a new action . . . within six months after the  
14 termination . . . .” N.Y. CPLR 205(a). Case law exploring  
15 the purpose of 205(a) is well-developed and long-settled:  
16 the roots of 205(a) can be traced “to seventeenth century  
17 England,” and “the remedial concept embodied in CPLR 205(a)  
18 has existed in New York law since at least 1788.” Reliance  
19 Ins. Co. v. Polyvision Corp., 9 N.Y.3d 52, 56, 876 N.E.2d  
20 898, 899 (N.Y. 2007).

21 “The obvious purpose of CPLR § 205(a) . . . is to  
22 prevent the general statute of limitations from barring

1 recovery because a court has ordered a timely action to be  
2 terminated for some technical defect that can be remedied in  
3 a new one." Graziano v. Pennell, 371 F.2d 761, 763 (2d Cir.  
4 1967). The statute is "said to be an outgrowth of the  
5 ancient common law rule of 'journey's account,' a period  
6 allowed to permit a party, whose action had abated for  
7 matter of form, a reasonable time within which to journey to  
8 court to sue out a new writ." Id. (quotations omitted).  
9 However, in order to receive the benefit of 205(a) tolling,  
10 the litigant must have prosecuted his original claim  
11 diligently. Judge Cardozo described 205(a)'s precursor  
12 statute: "The statute is designed to insure to the diligent  
13 suitor the right to a hearing in court till he reaches a  
14 judgment on the merits." Gaines v. City of New York, 215  
15 N.Y. 533, 539, 109 N.E. 594, 596 (N.Y. 1915) (emphasis  
16 added). The New York courts have affirmed this point again  
17 and again: "[t]he very function of [CPLR 205(a)] is to  
18 provide a second opportunity to the claimant who has failed  
19 the first time around because of some error pertaining  
20 neither to the claimant's willingness to prosecute in a  
21 timely fashion nor to the merits of the underlying claim."  
22 George v. Mount Sinai Hosp., 47 N.Y.2d 170, 178-79, 390

1 N.E.2d 1156, 1161 (N.Y. 1979); see also Morris Investors,  
2 Inc. v. Comm'r of Fin. of City of New York, 503 N.Y.S.2d  
3 363, 366, 121 A.D.2d 221, 225 (1st Dep't 1986) (quoting  
4 George v. Mount Sinai Hosp.), aff'd, 509 N.E.2d 329 (N.Y.  
5 1987); Graziano, 371 F.2d at 763 (quoting Judge Cardozo in  
6 Gaines v. City of New York); Producers Releasing Corp. v.  
7 Pathe Indus., 184 F.2d 1021, 1023 (2d Cir. 1950) (same). In  
8 short, the purpose of 205(a) is to save cases otherwise  
9 dismissed on curable technicalities--but only when the  
10 litigant has diligently prosecuted the claim.

11 Here, the district court's dismissal was proper because  
12 the record plainly reflects that Doyle failed to diligently  
13 prosecute his claim. Doyle initially filed suit in state  
14 court in 1996, failed to submit to discovery, and admittedly  
15 failed to take any action in the case for a two-year period.  
16 After prompting by the Defendants, he sought to revive the  
17 action, only to fail to appear for a conference shortly  
18 thereafter. Under these circumstances, we have no trouble  
19 concluding that the dismissal for failure to appear amounted  
20 to a dismissal "for neglect to prosecute" barring  
21 application of 205(a) tolling. See, e.g., Villanova v. King  
22 Kullen Supermarkets, 558 N.Y.S.2d 55, 56, 163 A.D.2d 203,

1 203 (1st Dep't 1990).

2 **IV**

3 Our conclusion, based on statutory purpose, decides a  
4 question that is not clearly answered in New York caselaw,  
5 but that we decline to certify. The parties cite cases on  
6 whether 205(a) tolling is available absent an express  
7 finding on neglect to prosecute. Compare Burns v. Pace  
8 Univ., 809 N.Y.S.2d 3, 4, 25 A.D.3d 334, 335 (1st Dep't  
9 2006) ("we find that plaintiff was entitled to rely on the  
10 tolling provision in CPLR 205 (a) since the action was not  
11 dismissed for neglect to prosecute, even though there was  
12 sufficient evidence in the record to support such a  
13 dismissal"), with Andrea v. Arnone, 5 N.Y.3d 514, 520, 840  
14 N.E.2d 565, 567 (N.Y. 2005) ("Our decisions make clear that  
15 the 'neglect to prosecute' exception in CPLR 205 (a) applies  
16 not only where the dismissal of the prior action is for  
17 '[w]ant of prosecution' . . . but whenever neglect to  
18 prosecute is in fact the basis for dismissal . . . ."), and  
19 Flans v. Fed. Ins. Co., 43 N.Y.2d 881, 882, 374 N.E.2d 365,  
20 365 (N.Y. 1978) (concluding "inferentially" from the record  
21 before it that the "dismissal of the original, timely action  
22 was . . . for 'neglect to prosecute'"). These cases are

1 distinguishable from the facts before us on one ground or  
2 another: for example, Justice Johnson's order does not say  
3 whether "neglect to prosecute is in fact the basis for  
4 dismissal." Even so, we might ordinarily certify the  
5 question to the New York Court of Appeals. There are good  
6 reasons why we do not do so. First, the state courts have  
7 already thrown this case out, revived it, and then thrown it  
8 out again. They have expressed their desire to be rid of it  
9 (twice) and it would be an imposition on the state's highest  
10 court for us to serve it up again. Second, New York has  
11 well-developed case law on the purpose and application of  
12 CPLR 205(a) and its precursor statutes; that case law is  
13 unambiguous and provides more than ample foundation for our  
14 ruling. Third, certification is not necessary where  
15 precedent is clear and application of law to fact requires  
16 no grand or novel pronouncements of New York law. See,  
17 e.g., Regatos v. N. Fork Bank, 5 N.Y.3d 395, 400, 838 N.E.2d  
18 629, 631 (N.Y. 2005) (accepting certification when  
19 disposition of the case involved "novel, important questions  
20 of New York law"). Finally, all the plaintiff has lost is a  
21 claim in which he has shown no more than lackadaisical  
22 interest.

1

**CONCLUSION**

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For the foregoing reasons, the judgment and order of

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the district court is affirmed and the case dismissed.