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Civil Procedure—Motion for Directed Verdict—Time for Motion: Home Fire and Marine Ins. Co. v. Pan Am. Petroleum Corp., 381 P.2d 675 (N.M. 1963)

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CIVIL PROCEDURE—MOTION FOR DIRECTED VERDICT—TIME FOR MOTION* —During the presentation of evidence in the course of a lengthy trial, it often becomes clear that no right to recovery exists. Can a motion be made at that time, before the opponent's case is completed, for a directed verdict?

Once the trial has begun,[1] most states do not allow a motion for a directed verdict until the close of the opponent's case,[2] or until the close of all the evidence.[3] A few states, notably California,[4] have adopted a more liberal approach which allows the motion during the opponent's case in certain limited situations. The New Mexico Supreme Court has indicated approval of this liberal approach.[5]

Home Fire and Marine Ins. Co. v. Pan Am. Petroleum Corp.[6] was an action by a drilling company's insurer against the well owner and welding contractor for damages sustained from a rig fire. The fire was apparently caused by a welding spark which ignited excess oil accumulated in the cellar over which the welding took place. The controlling issues were (1) whether a duty existed to keep the cellar free from oil, and (2) if so, whether that duty rested on the drilling contractor (plaintiff) or on the owner. The plaintiff's first witness was the drilling contractor's tool pusher, Reynolds, who testified that it was his crew's duty to keep the cellar free from oil and that he had made no inspection to determine if the cellar was free from oil

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* Home Fire and Marine Ins. Co. v. Pan Am. Petroleum Corp., 381 P.2d 675 (N.M. 1963).

1. This comment will not discuss the problem of motions for directed verdicts on the basis of opening statements of counsel. See generally Otis Elevator Co. v. Monks, 191 F.2d 1000 (1st Cir. 1951); Annot., 129 A.L.R. 557 (1940); Annot., 83 A.L.R. 221 (1933).

2. Service Cas. Co. v. Carr, 101 Ga. App. 70, 113 S.E.2d 175 (1960); Strzelecki v. The Fair, 299 Ill. App. 113, 19 N.E.2d 624 (1939); Budner v. Giunta, 16 App. Div. 2d 780, 228 N.Y. Supp. 2d 764 (Sup. Ct. 1962); Warren v. Winfrey, 244 N.C. 521, 94 S.E.2d 481 (1956); Williamson v. Holloway, 69 Okla. 254, 172 Pac. 44 (1918); Murphy v. Eraas, 41 S.D. 500, 171 N.W. 326 (1919); Atchley v. Sims, 23 Tenn. App. 167, 128 S.W.2d 975 (1938); Bethers v. Wood, 10 Utah 2d 313, 352 P.2d 774 (1960); Mau v. Stoner, 10 Wyo. 125, 67 Pac. 618 (1902).

3. Jacobs v. Connecticut Co., 137 Conn. 189, 75 A.2d 427 (1950); Dyar Sales & Mach. Co. v. Mininni, 132 Me. 79, 166 Atl. 620 (1933); Dunbar v. Fant, 170 S.C. 414, 170 S.E. 460 (1933).

4. Perry v. First Corp., 167 Cal. App. 2d 359, 334 P.2d 299 (1st Dist. Ct. App. 1959), and cases cited therein. See also State *ex rel.* McConnell v. District Court of Seventeenth Judicial Dist., 120 Mont. 253, 182 P.2d 846 (1947), which expressly adopts the California rule; and Glass v. Carnation Co., 60 Wash. 2d 341, 373 P.2d 775 (1962), which adopts an identical rule.

5. Home Fire and Marine Ins. Co. v. Pan Am. Petroleum Corp., 381 P.2d 675 (N.M. 1963); Moody v. Hastings, 381 P.2d 207 (N.M. 1963); Turner v. Judah, 59 N.M. 470, 286 P.2d 317 (1955); Hatch v. Strebeck, 58 N.M. 824, 277 P.2d 317 (1954).

6. 381 P.2d 675 (N.M. 1963).

before he directed the welder to work over it. On the basis of this testimony, which pointed strongly to the plaintiff's negligence, the defendant moved for a directed verdict. The plaintiff objected and offered evidence which would tend to show that it was the owner's duty to keep the cellar free from oil and that the operations were under the control of the owner. The trial court refused to hear the evidence and directed a verdict for the defendant. On appeal to the New Mexico Supreme Court, *held*, Reversed.[7] The motion was premature in that the plaintiffs had not presented all their evidence on the issue of liability, and the trial court erred in refusing to hear the offered testimony which might reveal the plaintiff's witness' testimony as mistaken, thereby destroying the inference of contributory negligence.[8]

In *Home Fire and Marine*, the court based its decision on *Hatch v. Strebeck*,[9] an action for a broker's commission, in which the plaintiff called the defendant as an adverse witness. On the basis of testimony elicited from the defendant, the plaintiff moved for a directed verdict. The plaintiff had not rested; the defendant had not begun to put on his case. The trial court denied the motion, and the supreme court affirmed, holding that "from the point of view of the orderly administration of justice and by the wording of Rule 50(a) of the [New Mexico] Rules of Civil Procedure,[10] . . . [s]uch a motion *ordinarily* cannot be made until movant's adversary has presented his case or rested."[11] The report of the *Hatch* case does not disclose what evidence was elicited from the defendant which led the plaintiff to move for a directed verdict; however, it may be assumed that the defendant admitted making the brokerage contract under which the supreme court ultimately held the plaintiff was entitled to recover.

The court in *Home Fire and Marine* distinguished two prior cases in which the court had allowed a premature motion for a directed verdict or for

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7. 381 P.2d at 682.

8. 381 P.2d at 680-81.

9. 58 N.M. 824, 277 P.2d 317 (1954).

10. N.M. Stat. Ann. § 21-1-1(50)(a) (1953):

> A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor.

The New Mexico Rules of Civil Procedure, N.M. Stat .Ann. §§ 21-1-1(1)—(91) (1953, Supp. 1963), are cited as N.M. R. Civ. P. throughout this comment.

11. Hatch v. Strebeck, 58 N.M. 824, 826, 277 P.2d 317, 318 (1954). (Emphasis added.)

dismissal under Rule 41(b).[12] In the first case, *Turner v. Judah*,[13] an election contest proceeding, the trial court allowed a motion "in the nature of a motion for judgment on the pleadings" made by the defendant during the presentation of the plaintiff's case. Before the motion, at the court's request, the plaintiff's counsel stated to the court and read into the record what he expected to prove by his remaining witnesses; the trial court then granted the motion "considering such [offered] evidence as might be admissible, as though it were in evidence."[14] The supreme court upheld the action of the trial court, saying:

> Thus it appears that the trial court did not refuse to hear the evidence tendered by the appellant's counsel but considered the admissible parts as though the witnesses had testified and decided the case on all of the admissions and evidence offered by both parties.[15]

The second case distinguished by the court, *Moody v. Hastings*,[16] was a workmen's compensation action in which the plaintiff had filed suit prematurely. A motion to dismiss for lack of jurisdiction was made and sustained after the plaintiff had presented all of his evidence except the testimony of his medical expert. The objction to the prematurity of the motion was first made in the supreme court. The court held that since all of the plaintiff's evidence on the issue of liability except the medical testimony had been introduced, it was not error for the trial court to grant the motion to dismiss, since the plaintiff's remaining testimony could only affect the extent, not the existence, of defendant's liability.

The decision in *Home Fire and Marine*, when compared with the holdings in the *Hatch*, *Moody*, and *Turner* cases, clarifies the court's position as to when a motion for dismissal or directed verdict will be considered fatally premature. A synthesis of these decisions and the court's explanation of these

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12. N.M. R. Civ. P. 41(b):
After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for dismissal upon the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52 (a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

13. 59 N.M. 470, 286 P.2d 317 (1955).

14. *Id.* at 475, 286 P.2d at 320.

15. *Id.* at 476, 286 P.2d at 321.

16. 381 P.2d 207 (N.M. 1963).

prior cases in *Home Fire and Marine* indicates that the court has adopted the more liberal rule, *i.e.*, a motion for a directed verdict may be made before the close of the opponent's case in limited situations. This raises the questions: (1) under what circumstances is the premature motion proper; (2) what device may be used to terminate the trial during opponent's presentation of evidence; (3) is the liberal rule correct?

Under what circumstances can the motion be made? The New Mexico rule as outlined by *Home Fire and Marine* is closely comparable to the approach taken by the California courts.[17] From a reading of the cases in both jurisdictions, it is clear that the motion can be granted only if the party moved against has presented all of his evidence on an issue necessary to proof of liability,[18] or if he makes no further offer of proof on such issue.[19] If this evidence is insufficient to establish the moving party's liability, or if it establishes an affirmative defense,[20] then the motion can be granted under the rule as adopted in New Mexico. However, elements of surprise can enter here.

When a party has been genuinely surprised by evidence which negates the inference of liability, the court might well grant a continuance or a re-call of witnesses to enable the party to salvage his case.[21] If surprise testimony leads to

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17. See Perry v. First Corp., 167 Cal. App. 2d 359, 334 P.2d 299 (1st Dist. Ct. App. 1959); Dineen v. City and County of San Francisco, 38 Cal. App. 2d 486, 101 P.2d 736 (1st Dist. Ct. App. 1940); Skelton v. Schacht Motor Car Co., 22 Cal. App. 144, 133 Pac. 504 (2d Dist. Ct. App. 1913).

18. Moody v. Hastings, 381 P.2d 207 (N.M. 1963); see note 16 *supra* and accompanying text. See also Perry v. First Corp., 167 Cal. App. 2d 299 (1st Dist. Ct. App. 1959).

19. State *ex rel.* McConnel v. District Court of Seventeenth Judicial Dist., 120 Mont. 253, 182 P.2d 846 (1947). In *McConnell* the court expressly adopted the California rule.

20. The problem of what evidence will entitle a party to a directed verdict or dismissal is beyond the scope of this comment. See generally Bell v. Ware, 69 N.M. 308, 366 P.2d 706 (1961); Sandoval v. Brown, 66 N.M. 235, 346 P.2d 551 (1959).

21. In Glass v. Carnation Co., 60 Wash. 2d 341, 373 P.2d 775 (1962), the plaintiff had completed his presentation of evidence on the issue of defendant's liability without having proved liability. His only remaining evidence was medical testimony. The defendant moved for dismissal and the plaintiff's counsel asked that the plaintiff be allowed to testify again on the issue of liability. The trial court refused and granted the dismissal. The Supreme Court of Washington reversed:

> [T]he trial court abused its discretion in failing to grant the request to recall the plaintiff on the issue of liability. Our reluctance to grant a new trial is attributable to our feeling that the trial court was correct in its conclusion that this would be a futile gesture; nevertheless, the plaintiff was entitled to the further opportunity to attempt to establish the liability of the defendant by his own testimony or that of other witnesses then present and ready to testify. This would have occasioned only a trifling delay. We would agree that an offer of relevant proof would have been necessary to justify the delay involved in securing any witnesses not then available.

373 P.2d at 776.

But see Dineen v. City and County of San Francisco, 38 Cal. App. 2d 486, 101 P.2d

an inference of an affirmative defense, such as contributory negligence, there seems to be stronger reason for allowing the continuance. The liberal approach evidenced by the rule permitting premature motions should not be allowed to work a retreat from the liberal approach of allowing each party his day in court.

Even if the party moved against makes an offer of further proof, the motion can be granted if the court treats all the offered proof as being in evidence when ruling on the motion.[22] When this procedure is being followed, it is suggested that counsel make an effort to have the procedure reflected either in the record or in the order granting the motion. If this is not done, the appellate court might conclude that the trial court refused to consider the offered evidence.[23]

What device may be used? The New Mexico Rules of Civil Procedure provide four means for terminating an action on the merits before it has run its course. These are (1) judgment on the pleadings,[24] (2) summary judgment,[25] (3) dismissal for failure to show a right to relief,[26] and (4) directed verdict.[27] The motions for judgment on the pleadings and for summary judgment are ordinarily confined to pre-trial situations,[28] and the dismissal for failure to show a right to relief and directed verdict provisions are intended for use after trial has begun. Therefore, the proper motion after trial has begun is

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736 (1st Dist. Ct. App. 1940), where the plaintiff's counsel stated at the conclusion of his proof of liability that he had other witnesses on the issue of liability who were not available at the time but would be available in five days. The defendant moved for dismissal. The trial court granted the motion after denying the plaintiff's request for continuance. The District Court of Appeals affirmed, holding that it was not an abuse of discretion to deny the continuance.

22. Turner v. Judah, 59 N.M. 470, 286 P.2d 317 (1955); see notes 13-15 *supra* and accompanying text.

23. This might have occurred in *Home Fire and Marine.* Even though the trial court refused to allow the introduction of the plaintiff's remaining evidence, it may have considered that evidence in its ruling on the motion.

24. N.M. R. Civ. P. 12(c).

25. N.M. R. Civ. P. 56.

26. N.M. R. Civ. P. 41(b).

N.M. R. Civ. P. 12(b)(6) provides for a motion to dismiss for "failure to state a claim upon which relief can be granted." The rule provides that this motion "shall be made before pleading if a further pleading is permitted." Thus the motion is clearly a pre-trial device. While N.M. R. Civ. P. 12(h) provides that the defense presented by this motion is not waived by failure to assert it either in a motion or a responsive pleading, it is clear that the function of this motion is served by the N.M. R. Civ. P. 50(a) and 41(b) motions once the trial has begun.

27. N.M. R. Civ. P. 50(a).

28. N.M. R. Civ. P. 12(c), provides for a motion for judgment on the pleadings "after the pleadings are closed but within such time as not to delay the trial." N.M. R. Civ. P. 56(c) provides that "the motion [for summary judgment] shall be served at least ten [10] days before the time fixed for the hearing." These provisions clearly indicate that both devices are intended for use before trial.

either for dismissal under Rule 41(b)[29] in a non-jury trial or for a directed verdict under Rule 50(a)[30] in a jury trial. It is now clear that the motion to dismiss for failure to show a right to relief is merely the non-jury trial complement of the motion for a directed verdict.[31] Both rules provide for the motion at the close of the opponent's evidence but neither forbids the motion at an earlier time.[32] The New Mexico Supreme Court has already indicated[33] that, on the issue of prematurity,[34] it will not distinguish between the motion for directed verdict and the motion for dismissal.

Is the liberal rule correct? The liberality of the Rules of Civil Procedure is reflected in two sometimes competing notions. One notion is that justice is best served by allowing each party his day in court; this is reflected in the rules allowing amendments to pleadings and continuances.[35] The other notion is that justice is subserved by a more rapid procedure for deciding actions; this is reflected in the liberal discovery rules[36] and the various procedures discussed above for bringing fruitless actions to a halt.

The rule allowing premature motions for dismissal or for a directed verdict in certain circumstances, which New Mexico apparently now follows, does not conflict with the liberality of the Rules of Civil Procedure. When it becomes evident that a party cannot establish his right to recovery, courts should not look with disfavor upon a motion made at that time to end the trial.

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29. N.M. R. Civ. P. 41(b).

30. N.M. R. Civ. P. 50(a).

31. *Cf.* O'Brien v. Westinghouse Elec. Corp., 293 F.2d 1 (3d Cir. 1961); Wolf v. Reynolds Elec. & Eng'r Co., 304 F.2d 646 (9th Cir. 1962). See also Advisory Committee's Note to the 1963 amendment of Fed. R. Civ. P. 41(b), Federal Rules of Civil Procedure 157 (Foundation Press, 1963).

32. N.M. R. Civ. P. 41(b) provides that the motion for dismissal *may* be made after the plaintiff has completed the presentation of his evidence. N.M. R. Civ. P. 50(a) states that "a party who moves for a directed verdict at the close of the evidence offered by an opponent" neither waives his right to present evidence if the motion is denied nor waives a jury trial. While this language obviously permits the motion at the close of the opponent's proof, it is clear that it does not forbid the motion at an earlier time.

33. In Turner v. Judah, 59 N.M. 470, 286 P.2d 317 (1955), the defendant made a motion "in the nature of a motion for judgment on the pleadings." *Id.* at 475, 286 P.2d at 320. Since the trial court made findings of fact when it rendered judgment, and since the motion was made during the presentation of the plaintiff's case, the motion which was made is indistinguishable from a motion for dismissal under N.M. R. Civ. P. 41(b).

34. Note, however, that upon a motion for dismissal in a non-jury trial under N.M. R. Civ. P. 41(b), the trial court is not required to consider the evidence in the light most favorable to the party moved against, but is free to make findings as the trier of facts. See Hickman v. Mylander, 68 N.M. 340, 362 P.2d 500 (1961).

35. N.M. R. Civ. P. 15.

36. N.M. R. Civ. P. 26-30.