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Civil Procedure—Rules Of Civil Practice—Automatic Dismissal Of Action Marked Off Calendar and Not Restored Within One Year, Ineffective Where Litigation Was Actually In Progress

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RULES OF CIVIL PRACTICE—AUTOMATIC DISMISSAL OF ACTION MARKED OFF CALENDAR AND NOT RESTORED WITHIN ONE YEAR, INEFFECTIVE WHERE LITIGATION WAS ACTUALLY IN PROGRESS

In 1936 a stockholder's derivative action was commenced in the Supreme Court of New York on behalf of a Delaware corporation and its stockholders. The corporation was a nominal defendant and its former directors were individual defendants. A tremendous amount of legal maneuvering, irrelevant to the procedural issue of the instant case, has occurred since the action was commenced. During 1955 and 1956, calendar proceedings in the Supreme Court became confused. On January 4, 1955, the case was marked off the trial calendar. On January 27, 1955, defendants obtained a stay of all proceedings by plaintiff until after a pretrial examination to which plaintiff has not yet submitted. The case then appeared on the April 20, 1955, "General Call Calendar of Cases Marked 'Off.'" Three appeals from orders were argued before the Appellate Division, Second Department, November 28, 1955. Those appeals were decided February 27, 1956, but pursuant to rule 302 dismissal should have automatically occurred January 4, 1956.[1] On June 11, 1956, a motion by defendants to dismiss the complaint for failure to prosecute was denied, and a motion to strike the complaint for plaintiff's willful failure to appear for a pretrial examination was denied on the condition that plaintiff appear for the examination before July 26, 1956. Claiming illness, plaintiff failed to appear, and judgment was entered dismissing the complaint on August 28, 1956. Plaintiff and the nominal defendant appealed from the examination order, obtaining reversal and order by the Appellate Division for a hearing on the question of plaintiff's willfulness concerning the examination. After the hearing and another motion by defendants to strike the complaint for plaintiff's willful failure to appear for pretrial examination, the motion was granted and judgment entered in January 1958. Two months later plaintiff began a new action in the United States District Court for the Southern District of New York.[2] The assertion that the minutes of the supreme court clerk were conclusive proof of automatic and final dismissal on January 4, 1956, was made for the first time by defendants on August 4, 1959. By that time defendants had been party to appeals and had commenced other proceedings. Furthermore, the rubber stamp entry of dismissal for failure to comply with rule 302 was

1. N.Y.R. Civ. Prac. 302(2):
In the supreme court and county courts a cause hereafter marked "off" or struck from the trial term or special term calendar or unanswered on a clerk's calendar call, and not restored within one year thereafter, shall be deemed abandoned, and the complaint and counterclaim, if any, shall be dismissed without costs for failure to prosecute, and the clerk shall make appropriate entry to that effect pursuant to this rule without necessity of further order.

2. Marco v. Dulles, 177 F. Supp. 533 (S.D.N.Y. 1959). This action was begun pursuant to N.Y. Civ. Prac. Act § 23, providing that where an action is terminated other than by voluntary discontinuance, dismissal of complaint for neglect to prosecute or a final judgment upon the merits, a new action for the same cause may be commenced within one year.

undated, all other entries on that page being dated, and the "April 5, 1956 Ready Day Calendar" of Kings County Supreme Court evidences restoration of the case in accordance with a request by nominal defendants' counsel, including an entry that the action was stayed.[3] Dismissal was denied.[4] Defendants then moved in the Supreme Court to vacate the January 1958 judgment and to set aside all proceedings after January 4, 1956, for lack of jurisdiction. The motion was granted.[5] From a unanimous affirmance[6] the Court of Appeals, *held,* reversed, three judges dissenting. Where litigation was actually in progress and defendants not only did not object to proceedings after January 4, 1956, but also invoked jurisdiction to serve their own ends, they are precluded from claiming benefit by the operation of rule 302. *Marco v. Sachs,* 10 N.Y.2d 542, 181 N.E.2d 392, 226 N.Y.S.2d 353 (1962).

When an occasion for statutory construction arises, courts generally are concerned with legislative intent. That is not the case when the proper interpretation of a rule of court is in question. The courts have direct responsibility for administering and promulgating rules to promote justice and efficiency in the judicial process.[7] The rules of the supreme court relate to practice and procedure in that court and, consequently, their enforcement and administration are ordinarily under its control.[8] Of course, the Court of Appeals has power to review final judgments concerning supreme court rules whether they are appealed on constitutional[9] or other grounds.[10]

Mere failure of a party to adhere to the procedure prescribed by a court rule does not deprive the court of jurisdiction.[11] In the interest of preserving substantial rights it has the power to overlook or provide relief against the violation of a technical rule that, by a literal interpretation, would cause those rights to be sacrificed.[12] There is apparently no reason why a court should not have the discretion to overlook or provide affirmative relief in the case of a rule that has been declared "automatic and self-executing."[13] Indeed, when a court has thought that the circumstances justified relief, it has opened dis-

3. In view of the clerk's immediately preceding, undated entry of dismissal it defies explanation how he determined compliance with Kings County Supreme Court rule 17(e), governing procedure for restoration to the calendar of causes and proceedings marked "off," and why a minute was entered that the action was stayed.

4. Marco v. Dulles, supra note 2.

5. Marco v. Sachs, 25 Misc. 2d 763, 202 N.Y.S.2d 681 (Sup. Ct. 1960).

6. Marco v. Sachs, 12 A.D.2d 774 (2d Dep't 1961).

7. Evans v. Backer, 101 N.Y. 289, 4 N.E. 516 (1886); Martine v. Lowenstein, 68 N.Y. 456, 51 How. Pr. 353 (1877).

8. Ibid.

9. See Rose v. Brenner, 6 N.Y.2d 848, 160 N.E.2d 88, 188 N.Y.S.2d 555 (1959).

10. See Gair v. Peck, 6 N.Y.2d 97, 160 N.E.2d 43, 188 N.Y.S.2d 491 (1959), cert. denied, 361 U.S. 374 (1960), reversing 5 A.D.2d 303, 171 N.Y.S.2d 594 (3d Dep't 1958); Delcambre v. Delcambre, 210 N.Y. 460, 104 N.E. 950 (1914).

11. Matter of Benedict, 239 N.Y. 440, 147 N.E. 59 (1925).

12. Broome County Farmers' Fire Relief Ass'n v. State Elec. & Gas Corp., 239 App. Div. 304, 268 N.Y. Supp. 131 (3d Dep't 1933), aff'd mem., 264 N.Y. 614, 191 N.E. 591 (1934).

13. Wheelock v. Wheelock, 3 A.D.2d 25, 26, 157 N.Y.S.2d 752, 754 (1st Dep't 1956), aff'd mem., 4 N.Y.2d 706, 148 N.E.2d 311, 171 N.Y.S.2d 99 (1958).

missals caused by the operation of rule 302.[14] Nothing would seem to prevent a court from completely overlooking the effect of rule 302 if, as in this case, a desirable result could not be achieved by affirmative action to open a default automatically entered.

In order to avoid what the Court considered an undesirable result of automatic dismissal pursuant to rule 302, it held in the instant case that the rule never seems to have been intended to effect dismissal when litigation was actually in progress. On that basis the Court appears to have interpreted the rule rather than merely exercised discretion to overlook its operation. Assuming that the Court rested its decision on interpretation, it then proceeded to supplement and support the result. The Court said that defendants waived any benefit they could have claimed from the operation of the rule by not only participating in appeals but also initiating further proceedings after the alleged date of dismissal.[15] Defendants' argument that the operation of rule 302 caused all further proceedings to be a nullity was rejected.[16] In rejecting that argument the Court suggested it could be accepted in a case where there had been a period of complete inaction, but the same reasoning could not be applied where plaintiff earlier would have been granted a motion to open the default. Furthermore, the Court said that the defendants were precluded from attacking a judgment secured upon their motion and in their favor.[17] The dissenting judges objected that rule 302 automatically deprived the court of jurisdiction, that no party could be estopped or waive the effect of its operation and that the Court of Appeals was without power to nullify a dismissal already construed to be effective by the Court in which it was entered.

The Court's interpretation of rule 302 seems to fall squarely within its inherent power over rules administration. It would seem that the long history of unabating litigation and confused circumstances giving rise to the alleged dismissal justify continuation of the action, notwithstanding a contrary decision and affirmance in the lower courts. This is not the first time that a finding of lack of intent to abandon an action has been weighed in favor of a party seeking to avoid termination of the action as a result of rule 302.[18] Although a literal construction of the rule would make it difficult to say that the phrase

14. See Needleman v. Manufacturers Trust Co., 8 A.D.2d 705, 185 N.Y.S.2d 654 (1st Dep't 1959) (per curiam); People ex rel. Weiss v. Boyland, 3 A.D.2d 738, 160 N.Y.S.2d 235 (1st Dep't 1957) (per curiam); H. R. Jacoby, Inc. v. Kushner, 3 A.D.2d 905, 162 N.Y.S.2d 657 (1st Dep't 1957) (per curiam); Adriance v. Clifford, 278 App. Div. 735, 103 N.Y.S.2d 285 (3d Dep't 1951) (per curiam).

15. This is implied rather than classical waiver because the intent to relinquish a known right has to be imputed from the existence of the rule. It seems clear that the defendants did not have actual knowledge that rule 302 had operated at the time either of the appeals or their 1956 and 1957 motions to dismiss.

16. For full development see Brief for Defendants-Respondents, pp. 26-28.

17. In support of that proposition the Court cited Krause v. Krause, 282 N.Y. 355, 26 N.E.2d 290 (1940); Brown v. Brown, 242 App. Div. 33, 272 N.Y. Supp. 877 (4th Dep't 1934), aff'd mem., 266 N.Y. 532, 195 N.E. 186 (1935); Starbuck v. Starbuck, 173 N.Y. 503, 66 N.E. 193 (1903).

18. See People ex rel. Weiss v. Boyland, supra note 14.

"deemed abandoned" only suggests a rebuttable presumption that the rule applies unless facts show the cause was not actually abandoned, it appears that the proposers of the rule never considered its possible effect on litigation actually in progress. Upon recommendation of the rule the Judicial Council stated that "the principal advantage of such a rule providing for automatic dismissal of a case which has remained dormant for one year after it has been marked off or stricken from the calendar is that cases actually dead are legally buried. . . ."[19] The expressed purpose was to prevent revival of stale claims. Although the declarations of a recommending report should never be considered as conclusive of meaning, they are highly persuasive. Admittedly, the instant case is an example of protracted litigation, but certainly the claim is not stale. It should be noted that the Court's assertion that defendants were precluded from attacking their previous judgment is weak. The authorities used for that assertion[20] illustrate not estoppel but rather the principle that when a party has invoked jurisdiction of a court it may not subsequently pose a *collateral* attack that the adjudication was invalid.[21] An action has been said to be parallel with previously undertaken proceedings where "the object of both was the same."[22] Applying that as a test it appears that the instant case is a parallel attack upon the 1958 judgment of dismissal.[23] Notwithstanding this weakness, the Court's decision rests soundly on its duty to protect parties from unwarranted injury to substantial rights and the peculiar facts of this case.[24] Although there is virtually no possibility that a future case will be factually identical, the Court's apparent interpretation of rule 302 should be some comfort to the litigant of an action in actual progress but subjected to dismissal for mere mistake in calendar procedure.

J. O. D.

SUMMARY JUDGMENT GRANTED WHERE ISSUES, ALTHOUGH FORMAL, WERE NOT SUBSTANTIAL AND FAIRLY ARGUABLE

Plaintiff contracted with Proser Enterprises, Inc., a sublessee of night-club premises, for the exclusive right to operate various concessions in La Vie Room, now the site of Basin Street East. The agreement provided that plaintiff would lend sublessee 25,000 dollars, repayment to be made from plaintiff's rent for concession privileges. Subsequently plaintiff contracted with the primary lessee, Shelton Properties, to secure a right to repayment of the loan from

19. 8 N.Y. Jud. Council Rep. 383 (1942). (Footnote omitted.)
20. Cases cited note 17 supra.
21. See Krause v. Krause, supra note 17, at 357-59, distinguishing Stevens v. Stevens, 273 N.Y. 157, 7 N.E.2d 26 (1937); cf. Matter of Morrisson, 52 Hun 102, 5 N.Y. Supp. 90 (1st Dep't), aff'd mem., 117 N.Y. 638, 22 N.E. 1130 (1889). See generally Annot., 3 A.L.R. 535 (1919). See the rule as stated id. at 535.
22. Krause v. Krause, supra note 17, at 358-59, 26 N.E.2d at 292.
23. Compare McDonald v. Maybee, 243 U.S. 90 (1917); Stevens v. Stevens, supra note 21.
24. Even the court clerk was confused, as is evidenced by the fact that the action was stayed three months after the undated entry of dismissal was apparently made.