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Civil Procedure And Evidence—Lis Pendens

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of frauds may not be raised as a bar to granting relief by way of constructive trust against unjust enrichment accomplished by abusing a confidential relationship.[23]

Charge Limiting Use of Evidence

The Court of Appeals, in an action to recover brokerage commissions, held, receipt in evidence of broker's unsuccessful efforts to sell property was not only immaterial but in this case prejudicial error which was not cured by the trial court's belated charge to limit the use of such evidence to corroboration.[24]

The rule of substantive law that a broker can not recover for his unsuccessful efforts is basic.[25] The rule of adjective law upon which this case was decided must by its very nature depend in its application upon the facts of the individual case. There is, however, ample precedent for its use. An early case[26] in referring to this rule, said the effect of prejudicial evidence is not obviated by the judge's direction to disregard it. This principle was again enunciated when the court on the basis of the above decision held that the reception of this type of evidence was error which was not cured by the charge.[27] Again, in 1943, the Appellate Division said, "In our opinion it may not be said that the hearsay statements . . . were harmless because the court instructed the jury to disregard them."[28] The rule as applied in these cases depends in the main on whether the court in its discretion feels there is a need for it.

Lis Pendens

Where plaintiff had filed a summons, complaint and notice of pendency of action in county court, but had not served any defendant within sixty days after filing,[29] plaintiff was not entitled after cancellation of the notice to file another.[30]

The filing of lis pendens is a privilege[31] granted by statute.[32] Although other

23. *Wood v. Rabe*, 96 N. Y. 414 (1884); *Goldsmith v. Goldsmith*, 145 N. Y. 313, 39 N. E. 1067 (1895).
24. *Fred W. Hoch Assoc. v. Western News U.*, 308 N. Y. 461, 126 N. E. 2d 749 (1955).
25. *Sibbald v. Bethlehem Iron Co*, 83 N. Y. 378 (1881).
26. *Erbin v. Lorillard*, 19 N. Y. 299 (1859).
27. *Arthur v. Griswald*, 55 N. Y. 400 (1874).
28. *Greenberg v. Prudential Ins. Co. of America*, 266 App. Div. 685, 40 N. Y. S. 2d 494 (2d Dep't, 1943).
29. Civil Practice Act §120.
30. *Israelson v. Bradley*, 308 N. Y. 511, 127 N. E. 2d 313 (1955).
31. *Cohen v. Biber*, 123 App. Div. 528, 108 N. Y. Supp. 249 (2d Dep't 1908).
32. Note 1, *supra*.

theories for cancellation of notice for failure to serve within the statutory time limit have been advanced,[33] the doctrine that failure to so serve is a form of unreasonable neglect to proceed, and the court in its discretion may cancel,[34] has prevailed.[35] The Court here did not decide this question, because here the cancellation was by consent, but it hinted that it was not satisfied that this was the correct test, saying that the unreasonable neglect to proceed dealt with in C.P.A. §123 applies only where an action has been commenced; i.e., a summons has been served.[36]

It has also been a general rule, if lis pendens has been cancelled because of failure to commence an action, that another one cannot be filed.[37] The underlying theory is that the cancellation was an adjudication on the subject and determined the rights of the parties in so far as they could be affected by the filing of a notice of pendency. Otherwise, the statute would be negated,[38] and hardship and injustice would result.[39] The decision in this case affirmed the existing rule disallowing refiling after a cancellation has been effected, but has left confused the question of whether such cancellation is mandatory or discretionary.

Prima Facie Case

When the plaintiff makes out a prima facie case and an appellate court reverses on the ground that the jury verdict is against the weight of the evidence a new trial must be granted. A dismissal of the complaint does not lie[40] when the plaintiff is entitled to a jury trial as a matter of right.[41] Thus, a final judgment on findings contrary to those made by the jury can not be given in such situations.[42] In non-jury cases a reversal and dismissal is possible,[43] but new findings of fact are necessary.[44]

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33. Note 3, *supra*. *Lipschitz v. Watson*, 113 App. Div. 408, 99 N. Y. Supp 418 (2d Dep't 1906).
34. Civil Practice Act §123.
35. *Cohn v. Ratkowsky*, 43 App. Div. 196, 59 N. Y. Supp. 344 (1st Dep't 1899); *Lipschutz v. Horton*, 55 Misc. 44, 104 N. Y. Supp. 850 (1907); *Shostack v. Haskell*, 116 Misc. 475, 190 N. Y. Supp. 174 (1921); *Levy v. Kon*, 114 App. Div. 795, 100 N. Y. Supp. 205 (2d Dep't 1906); *Nassau Lake Realty v. Hilts*, 106 N. Y. S. 2d 216 (1951).
36. Civil Practice Act §218.
37. *Shostack v. Haskell*, note 35, *supra*.
38. *Cohen v. Ratkowsky*, note 35, *supra*.
39. *Lipschutz v. Horton*, note 35, *supra*.
40. *Caldwell v. Nicolson*, 235 N. Y. 209, 139 N. E. 243 (1923).
41. New York State Costitution, Art. I, sec. 2.
42. *Imbrey v. Prudential Insurance Co.*, 286 N. Y. 434, 36 N. E. 2d 651 (1941); N. Y. CONST., C. P. A. §584 (1).
43. NEW YORK STATE CONSTITUTION, Art. 6 sec. 8; C. P. A. §584.
44. Rules of Civil Procedure, Rule 239.