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Civil Procedure And Evidence—Prima Facie Case

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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.

This rule was reaffirmed by the court in *Sagorsky v. Malyon*,[45] an action on a policy by insureds against the insurer of property. If the loss occurred while the property was in or upon an automobile unattended by the insured, his permanent employee, or a person whose sole duty it was to attend the auto, there was no coverage. The loss occurred while the plaintiff's car was parked in a public garage attended by an employee of that garage. The Court *held*, a prima facie case had been established by application of the rule that facts adduced at the trial are to be considered in the aspect most favorable to the plaintiff, who is entitled to every favorable inference which can reasonably be drawn from those facts.[46] Thus, they reversed the Appellate Division[47] (which found the jury verdict to be against the weight of the evidence and dismissed the complaint) and granted a new trial.

The two dissenters felt that *no evidence* raising a question of fact had been presented, so a dismissal was proper[48], this in spite of the Appellate Division's wording that the verdict was against the weight of the evidence. They would have dismissed the complaint having found as a matter of law that the trial court committed error in failing to grant defendant's motions for dismissal of the complaint and directed verdict.

Res Adjudicata

Where access to premises was ordered by mandatory injunction against tenant, a later suit by the landlord for damages arising out of the same transaction was barred as res adjudicata.[49] The rule is that where a cause of action has been finally adjudicated on its merits, it is final as to all matters which might have been litigated as well as those actually litigated.[50] Since plaintiff could have demanded damages in the injunction action, he was precluded from a suit for damages in a later action.[51] This follows from the fact that the distinction between law and equity has been abolished in this state;[52] this was a "violation of but one right by a single legal wrong."[53]

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45. 307 N. Y. 584, 123 N. E. 2d 79 (1955).
46. *Osipoff v. City of New York*, 286 N. Y. 422, 36 N. E. 2d 646 (1941); *DeWald v. Seidenberg*, 297 N. Y. 335, 79 N. E. 2d 430 (1948).
47. 283 App. Div. 859, 129 N. Y. S. 2d 900 (1st Dep't 1954).
48. *DeWald v. Seidenberg*, note 46 *supra*.
49. *Maflo Holding Corp. v. S. J. Blume Inc.*, 308 N. Y. 570, 127 N. E. 2d 558 (1955).
50. *Schuylkill Fuel Corp. v. B. & C. Nieberg R. Corp.*, 250 N. Y. 304, 165 N. E. 456 (1929).
51. *Interlied v Whaley*, 85 Hun. 63, 32 N. Y. Supp. 640 (4th Dep't 1895); *aff'd.*, 156 N. Y. 658, 50 N. E. 1118 (1898); *Hahl v. Sugo*, 169 N. Y. 109, 62 N. E. 135 (1901).
52. Civil Practice Act §8.
53. *DeCross v. Turner & Blanchard Inc.*, 267 N. Y. 207, 211; 196 N. E. 28, 30 (1935).