Buffalo Law Review

Volume 5 | Number 1 Article 22

10-1-1955

Civil Procedure And Evidence—Res Judicata

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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).

The Court also held that another cause of action for accrued rent, and expenses and attorney's fees incurred in collecting the rent (a clause for such assessment being part of the leasehold agreement) was not barred as res adjudicata by the prior injunction action. This cause of action is based on the refusal of the tenant to pay additional rent rather than a refusal to allow access to the premises. The court maintained defendant's refusals showed a violation of two rights by two distinct legal wrongs. The New York rule is that no suit for future rent can be brought in the absence of an acceleration clause,[54] and since the amount of plaintiff's expense could not be ascertained until the conclusion of the injunction suit, it followed that an action to recover such rent is not barred by a judgment in a previous action.[55]

Deposit in Lieu of Bail

New York Civil Practice Act §859, which governs the disposition of deposits in lieu of bail, is divisible into a discretionary and a mandatory clause. Distribution under the former comes into operation only where there is an arrest pursuant to a court order under New York Civil Practice Act §827. In any other arrest situation,[56] the distribution is mandatory.

Defendant husband was arrested pursuant to a court order under Civil Practice Act §827, and his wife made application to have the money he deposited in lieu of bail applied in partial satisfaction of a judgment for accrued alimony and counsel fees. The Court *held,* that the special term had no power as a matter of law to direct payment of money so deposited pursuant to such an arrest in satisfaction of a money judgment for alimony arrears antedating his arrest, where the defendant had at all times kept himself amenable to the court process.[57]

Although it has been held that money so deposited by a third person can be used to satisfy a judgment,[58] (a fortiori if deposited by the defendant rather than by a third person) the decision is not surprising in the light of earlier cases which recognized the distinction between the two clauses. *Subernick v. Subernick*[59] held that the sole purpose of bail in a matrimonial action is to insure the husband's presence in court so that the court may enforce its orders in an authorized manner. Recourse may not be had to bail under Civil Practice Act §859 for payment of

54. *McCready v. Lindenborn,* 172 N. Y. 400, 65 N. E. 208 (1902).
55. *Smith v. Kirkpatrick,* 305 N. Y. 661, 11 N. E. 2d 209 (1953).
56. E.g., New York Civil Practice Act §826.
57. *Chancer v. Chancer,* 308 N. Y. 204, 124 N. E. 2d 283 (1955).
58. *Lichter v. Raff,* 149 Misc. 53, 266 N. Y. Supp. 748 (1933) (arrest here under C. P. A. §826).
59. 123 Misc. 174, 204 N. Y. Supp. 437 (1924); Cf. *Wesenberg v. McCormack,* 110 Misc. 775, 198 N. Y. Supp. 340, 341 (1922).