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Civil Procedure—Summary Judgment Granted Where Issues, Although Formal, Were Not Substantial And Fairly Arguable

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"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.

rent if the premises reverted and were operated or leased by Shelton Properties as a nightclub or restaurant. Nonpayment of rent caused termination of the sublease before the loan was repaid, but primary lessee, continuing to use the premises, refused to allow plaintiff its alleged concession rights under the contract. Four months after the nightclub premises had reverted, primary lessee sold the unexpired term of its lease to Shelton Towers Corp., guaranteeing the purchaser or its assigns indemnification for any liability to plaintiff. Since that sale the primary lease has been the subject of several assignments. Plaintiff commenced an action after the sale, contending as second and third causes of action that the concessions contract was binding upon assignees and that certain defendants were in conspiracy to induce breach of contract. As to those preceding two causes of action, the only counts running against the moving defendants, attorneys and successors in interest of Shelton Properties, the Appellate Division granted summary judgment.[1] Upon appeal, *held*, affirmed, two judges dissenting and another joining the dissent as to the third cause of action only. Because the concessions agreement was a mere license and none of the alleged facts indicated a conspiracy before breach of the contract, plaintiff had no arguable cause of action against the moving defendants. *Senrow Concessions, Inc. v. Shelton Properties, Inc.*, 10 N.Y.2d 320, 178 N.E.2d 726, 222 N.Y.S.2d 329 (1961).

The object of summary judgment is to provide a method for obtaining judgment on affidavits, without trial, where either the claim or defense is not substantial and fairly arguable.[2] Such a procedure saves the expense of unnecessary trials and reduces the size of trial calendars. "Fear of depriving a party of his day in court because he says, in his affidavit, things that, if true, would present a question of fact, should not permit him to evade the actualities by merely making these statements. The rule [N.Y.R. Civ. Prac. 113] does not require that the motion be denied if opposing facts are presented."[3] There is no deprivation of jury trial unless there are issues of fact to be resolved.[4]

The concessions agreement contained the words "license" and "licensee" which, while not conclusive,[5] are highly indicative of intent.[6] The exclusive right to operate various concessions does not in itself constitute a lease.[7]

1. Senrow Concessions, Inc. v. Shelton Properties, Inc., 13 A.D.2d 646, 214 N.Y.S.2d 50 (1st Dep't 1961) (per curiam), reversing order denying summary judgment, N.Y.L.J., Oct. 11, 1960, p. 13, col. 7F (Sup. Ct.). The justice denying summary judgment only said in the order that "there are present mixed questions of law and fact which cannot be summarily disposed of on the basis of the conflicting affidavits submitted."
2. Commonwealth Fuel Co. v. Powpit Co., 212 App. Div. 553, 209 N.Y. Supp. 603 (2d Dep't 1925); see Curry v. Mackenzie, 239 N.Y. 267, 146 N.E. 375 (1925).
3. Paston, Summary Judgment in New York xviii (Supp. 1960).
4. Fidelity & Deposit Co. v. United States, 187 U.S. 315 (1902).
5. Feder v. Caliguira, 8 N.Y.2d 400, 171 N.E.2d 316, 208 N.Y.S.2d 970 (1960).
6. Wash-O-Matic Laundry Co. v. 621 Lefferts Ave. Corp., 191 Misc. 884, 82 N.Y.S.2d 572 (Sup. Ct. 1948).
7. Hess v. Roberts, 124 App. Div. 328, 108 N.Y. Supp. 894 (1st Dep't 1908).

It is more in the nature of a license,[8] a mere privilege to use or occupy land for some specific purpose.[9] Because a license does not confer on the licensee any interest in property, the privilege cannot be enforced against a lessee of the property unless that lessee was a party to the agreement. Regardless of interest or lack of it in the property, a conspiracy to induce breach of contract would be actionable either as interference with an economic interest[10] or as a prima facie tort.[11] However, where a conspiracy is alleged but "there are no specifications of the where and when . . . or anything beyond plaintiff's say so" the allegations are merely conclusory, not raising an issue that would warrant denial of summary judgment.[12]

In order to avoid the idle ceremony of a trial upon formal but not genuine issues of fact, the Court in the instant case granted summary judgment to the moving defendants. The dissenting judges were impressed with plaintiff's affidavits, showing it had control over two specified areas on the nightclub premises, and looked with suspicion upon the numerous assignments between groups having identical interests. They favored preserving an opportunity for plaintiff to prove its contentions at trial.

Although plaintiff's affidavits showed that it was in complete control of space made available on the premises for a darkroom and coatroom, the contract contained only a promise that space would be made available to the "licensee." The agreement did not refer to any specific space and it seems clear that the concessionaire would carry on the various aspects of that trade in virtually every portion of the nightclub open to the public.[13] It is not consistent with good reason to suppose that a concessionaire would intend to lease small portions of the premises for purposes dependent upon a license to perform services and mingle with patrons in other parts of the premises. Notwithstanding exclusive possession of the coatroom and darkroom the Court seems to indicate that this kind of concession, absent specific demise of space, evidences only a licensee relationship.[14] Cases involving contracts for apartment house installation of coin-operated washing machines have resulted in similar determinations.[15] It seems equally certain, assuming a breach of the

8. People v. Horowitz, 309 N.Y. 426, 131 N.E.2d 715 (1956); Planetary Recreations, Inc. v. Kerns, Inc., 184 Misc. 340, 54 N.Y.S.2d 418 (N.Y. City Ct. 1945).

9. Kaypar Corp. v. Fosterport Realty Corp., 69 N.Y.S.2d 313 (Sup. Ct.), aff'd mem., 272 App. Div. 878, 72 N.Y.S.2d 405 (1st Dep't 1947).

10. See S. C. Posner Co. v. Jackson, 223 N.Y. 325, 119 N.E. 573 (1918). See generally Prosser, Torts § 106 (2d ed. 1955).

11. See Advance Music Corp. v. American Tobacco Co., 296 N.Y. 79, 70 N.E.2d 401 (1946). See generally Halpern, International Torts and the Restatement, 7 Buffalo L. Rev. 7 (1957).

12. Shapiro v. Health Ins. Plan, 7 N.Y.2d 56, 63, 163 N.E.2d 333, 337, 194 N.Y.S.2d 509, 515 (1959).

13. Compare People v. Horowitz, supra note 8.

14. See Planetary Recreations, Inc. v. Kerns, Inc., supra note 8.

15. See Greenbro Coin Meter Corp. v. Bosch, 205 Misc. 853, 132 N.Y.S.2d 875 (Sup. Ct. 1954); Muller v. Concourse Investors, 201 Misc. 340, 111 N.Y.S.2d 678 (Sup. Ct. 1952); Polner v. Arling Realty, Inc., 194 Misc. 598, 86 N.Y.S.2d 891 (Sup. Ct. 1949); id. at 831, 88 N.Y.S.2d 348. Compare Isaacson v. Ken Drug Corp., 195 Misc. 246, 85 N.Y.S.2d 253 (Sup. Ct. 1949).

concessions agreement prior to negotiations for sale of the primary lease,[16] that the allegation of conspiracy to induce breach of contract lacks sufficient factual support to constitute a fairly arguable issue. It should be noted, however, that the Court apparently concluded there was a breach of the concessions agreement by Shelton Properties after termination of the sublease for nonpayment of rent and before sale of the primary lease. A reading of the record does not seem to support such a conclusion. The agreement provides that if the premises should revert and be "leased or operated as a *nightclub or restaurant* [Senrow Concessions] . . . shall continue in possession of concession rights,"[17] but plaintiff's affidavit shows that Shelton Properties used the premises "by leasing or renting the same out to various persons, corporations and entities as a place of public assembly for holding dances, and other forms of entertainment, including dinner functions."[18] Whether or not use of the premises for such functions can be said to be within the meaning of the word "nightclub" or "restaurant" seems deserving of comment.

J. O. D.

CONFLICTS OF LAWS

TAX LIABILITY OF A FOREIGN JURISDICTION NOT REDUCED TO A JUDGMENT UNENFORCEABLE

During the years 1954 to 1959, the defendant lived and conducted a public parking lot in Philadelphia, Pennsylvania. Then in force was a local tax ordinance[1] requiring him to obtain a license, file tax returns monthly, and pay a ten per cent tax on his gross receipts. Defendant complied with this ordinance but in December of 1958 an audit of his receipts showed that he still owed over five thousand dollars in back taxes. Notice of such deficiency was received by defendant, who failed to petition the administrative board for review within the requisite sixty days or to pay the amount allegedly due. Instead, defendant moved from Philadelphia to New York State. The failure to petition allowed the determination of the Board to become final. The city of Philadelphia, although having no judgment against the defendant in any state, brought an action in the New York State Supreme Court for the tax deficiency. The complaint was dismissed on defendant's demurrer. On appeal to the Court of Appeals, *held*, affirmed, one judge dissenting. Neither the full faith and credit

16. In its opinion the Court said: "There is, what is most important, no showing of any fraudulent connection between these parties prior to the breach of the contract by Shelton Properties, Inc., in 1956. Obviously the respondents, in the absence of such facts, cannot be held to be co-conspirators in a breach of contract which had occurred prior to the time they began negotiations to acquire the prime lease." Senrow Concessions, Inc. v. Shelton Properties, Inc., 10 N.Y.2d 320, 326, 178 N.E.2d 726, 729, 222 N.Y.S.2d 329, 333 (1961).

17. Record, p. 39. (Emphasis added.)

18. Id. at 104.

1. Philadelphia Code of Gen. Ord. ch. 9-601, subd. (4); ch. 19-1200.