Buffalo Law Review

Volume 12 | Number 1 Article 43

10-1-1962

Evidence—Documentary Evidence Under Rule 113(4) of the Rules of Civil Practice Defined

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practiced on the patient by reasoning that in any case it is a misuse of the license to practice. To the argument that for fraudulent reports to be the basis of a revocation of a license they must either be officially required or else affect a vital public interest, it is answered that even if true, a fraud on insurance companies or the Transit Authority affects such a vital interest. The Court also held that there is evidence that appellant committed the fraudulent acts *after* the "unprofessional conduct" regulation had been passed and that therefore the statute was not being applied retroactively. The Court further found that since the action of appellant was "malum in se," the Board could find it was "unprofessional" according to the standards set by physicians in the community. Since it was a unanimous vote of a quorum which found appellant guilty, the vote constituted a unanimous decision as required.

The Court has clearly announced what medical practices will constitute fraud and deceit within the statute and interpreted it to carry out the obvious intention of the Legislature in passing it. There is no necessity to interpret the statute strictly because this statute is not criminal in nature. All doctors should welcome a decision of this clarity, for the Court has set down guide lines to determine when doctors shall be subject to the action of the Committee.

R. W. S.

EVIDENCE

DOCUMENTARY EVIDENCE UNDER RULE 113(4) OF THE RULES OF CIVIL PRACTICE DEFINED

Plaintiff brought an action for a judicial determination of her marital status and that of the co-defendants. She asked Special Term for a declaratory judgment stating that the defendants Joseph Brill and Beverly Stiansen are not husband and wife, because the Mexican divorce allegedly obtained by defendant Brill is void. She further sought that any subsequent marriage between the defendants be annulled and that defendant Stiansen be enjoined from using the name Beverly Brill. Plaintiff believed that defendant Brill had obtained a Mexican divorce and married defendant Stiansen because he had declared that fact in the presence of several witnesses. Special Term granted defendants' motion for summary judgment under Rule 113, subdivision 4 of the Rules of Civil Practice, on the basis of certificates from the Civil Court in Chihuahua, Mexico, where defendant allegedly obtained the divorce, stating that officials had searched the files of the Court and had not found any registration of a divorce action instituted by defendant Brill during the period alleged by the plaintiff. The Appellate Division reversed on the ground that the certificates were not documentary evidence within the meaning of Rule 113, subdivision 4. The Court of Appeals *held*, that the certificates, though they only stated that certain documents could not be found, nevertheless satisfied

the requirements of Rule 113, subdivision 4. *Brill v. Brill*, 10 N.Y.2d 308, 178 N.E.2d 720, 222 N.Y.S.2d 321 (1961).

Before March 1, 1959, a party could move for summary judgment in only nine enumerated classes of action.[1] Under the new Rule 113, effective as of that date, parties in all actions, except one, may move for summary judgment. Matrimonial actions are the exception in which instance the summary method is open only to the defense. The purpose of the expanded rule is to relieve the courts of the large volume of cases congesting the calendar which are plainly without merit.[2] Balanced against this desire to dispose of unmeritorious cases quickly is the fear of depriving a party of his day in court. The rule does not require that the motion be denied if opposing facts are presented. Rather the rule is that the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact other than an issue as to the amounts or extent of damages.[3] It is the duty of the trial judge to analyze fully the affidavits and documentary evidence and decide whether a genuine factual issue is presented or if the pleadings include matter that is mere sham or presented in bad faith.[4]

Rule 113, subdivision 4 makes special provision for matrimonial actions because of the strong policy against disrupting the family unit; it does not permit summary judgment to the plaintiff. This is to prevent quick dissolution of marriages through summary action. The defendant, however, may secure summary judgment when his defense is established as a matter of law and supported by documentary evidence or official record. The documentary evidence presented by the defendant is always open to attack; a successful attack for instance will consist of a showing of a significant issue of fact.

The issue squarely presented to the Court of Appeals was whether or not the certificates of a Mexican Court, declaring that their records have been searched and that no divorce action instituted by defendant was registered were adequate documentary evidence under Rule 113, subdivision 4. The Court of Appeals stated that the substance of plaintiff's complaint depended on the existence of a foreign divorce decree and decided that the certificates of the Mexican Court, duly authenticated by the United States Vice-Consul satisfy the requirements of the rule. The dissent stated the certificates of the Mexican Court were not trustworthy because they were mere expressions of opinion by Mexican records examiners and were not documentary evidence under Rule 113, subdivision 4. The dissent further stated that even if these certificates were accepted as documentary evidence, the plaintiff has presented sufficient facts to require a trial.

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1. N.Y.R. Civ. Prac. 113.
2. Lavat v. Harris, N.Y.L.J., June 12, 1959, p. 11, col. 6.
3. Biloz v. Tioga County Patrons' Fire Relief Ass'n, — Misc. 2d —, 21 N.Y.S.2d 643 (Sup. Ct. 1940), aff'd, 260 App. Div. 976, 23 N.Y.S.2d 460 (3d Dep't 1940).
4. McDonald v. Amsterdam Bldg. Co., 232 App. Div. 382, 251 N.Y.S. 494 (3d Dep't 1931).

By accepting these certificates as documents within the meaning of Rule 113, subdivision 4, the Court has broadly construed the term "documentary evidence or official record." With a greater variety of evidence acceptable as documentary evidence or official record, the number of summary judgments in matrimonial actions will be increased. Since the purpose of the revised Rule 113 was plainly to make summary judgment more available, this decision will implement that purpose. The dissent raised the objection that such certificates are not conclusive. An example of the type of evidence the dissent might term conclusive for purpose of Rule 113 is an actual divorce decree. This might be described as the difference between positive documentary evidence and negative documentary evidence, the difference between the presentation of an actual document and the presentation of a certificate stating the non-existence of such a document. Positive documentary evidence is clearly more conclusive than negative documentary evidence. The value of negative documentary evidence varies in direct proportion to the effectiveness of the methods employed to produce such evidence. Since negative documentary evidence is not as conclusive as positive documentary evidence, it necessarily follows that if negative evidence is used, the adverse party should not be required to present as effective a case in opposition in order to avoid summary judgment. The process of evaluation remains the same, no matter what type of evidence is presented to the trial judge. He still must consider the evidence on both sides and decide whether or not to grant summary judgment. The dissent's argument, that the method of the Mexican Court's record-keepers can only be evaluated before a jury, is not convincing since even in the case of positive documentary evidence the trial judge must evaluate all the evidence presented on both sides, and may determine that even positive documentary evidence has been sufficiently rebutted so as to make jury determination necessary. Therefore, the dissent is wrong if it believes that the rule requires absolutely conclusive documentary evidence. Here, the plaintiff has presented the sworn affidavits of three witnesses stating that they heard the defendant declare that he had divorced the plaintiff in Mexico and that the co-defendant was the real Mrs. Brill. However, the circumstances under which this declaration was made probably explain why the Court did not consider the plaintiff's evidence sufficient to require trial. The plaintiff had arranged for a raid while the defendants were together in a house on Long Island. Interrupted during the middle of the night, the defendant vehemently declared that he was with his real wife and that he had divorced the plaintiff. The embarrassing manner in which it was obtained detracted so greatly from the weight of the plaintiff's evidence that the Court decided that further litigation was unnecessary. Such litigation would probably involve an attack on the reliability of the certificates of the Mexican Court and the presentation of instances of error committed by the records examiners of that Court. It might also involve statements as to the methods employed. In support of the certificates' reliability, the defendants here might attempt to show

that the methods employed by the Mexican Court to produce evidence were so effective as to make the evidence conclusive. The proper resolution of this conflict would involve extensive statistical inquiry into the error quotient of the Mexican records examiners. At what point does the effectiveness of records examiners reach a standard of excellence such that their certificates can be called conclusive when opposed by the plaintiff's evidence? This exact sort of dispute will be necessary in a case where the trial judge decides that there is an issue of fact. However, the Court of Appeals has decided against making such dispute inevitable. When, as in the instant case, it is unnecessary further to investigate at trial the conclusiveness of the defendant's evidence because of the weakness of the plaintiff's evidence, the trial court may grant summary judgment unfettered by a restrictive interpretation of Rule 113, sudivision 4.

A. D.

FAMILY LAW

CUSTODY OF CHILD—NATURAL PARENT VS. FOSTER PARENTS

The natural mother of a five-year-old boy born out of wedlock brought a habeas corpus proceeding against the foster parents to obtain custody of her son. To overcome the primary right of a natural parent to her child, the foster parents argued that the mother had abandoned the boy and was unfit to assume the obligations of parenthood. On appeal from an order of the Appellate Division which reversed a dismissal of the writ by Special Term, *held*, reversed, two judges concurring, one dissenting.[1] Upon the facts disclosed, the natural parent both abandoned the child and was unfit to raise the boy; therefore, the presumption that it is in the child's best interest to be raised by the parent failed. *People ex rel. Anonymous v. Anonymous*, 10 N.Y.2d 332, 179 N.E.2d 200, 222 N.Y.S.2d 945 (1961).

This delicate and much publicized area of litigation is controlled by long-established rules which courts utilize in deciding whether the natural or foster parents have better claim to the child. The natural parent has a primary right to the child,[2] but obviously the law must protect the child's interest; therefore, the foster parents are allowed to prove that it is not in the best interest of the child to be raised by the natural parent. This can be done by showing that the natural parent has abandoned the child, *i.e.*, "has shown a settled purpose to be rid of all parental obligations and to forego all parental rights,"[3] *or* that, based upon conduct and behavior, the natural parent is unfit to raise the child.[4]

In the instant case, the foster parents proved both abandonment and

1. 14 A.D.2d 41, 217 N.Y.S.2d 374 (2d Dep't 1961); reversing 27 Misc. 2d 190, 210 N.Y.S.2d 698 (County Ct. 1960).
2. People ex rel. Kropp v. Shepsky, 305 N.Y. 466, 113 N.E.2d 801 (1953).
3. Matter of Maxwell, 4 N.Y.2d 429, 433, 151 N.E.2d 848, 850, 176 N.Y.S.2d 281, 283 (1958).
4. People ex rel. Kropp v. Shepsky, supra note 2.