Buffalo Law Review

Volume 10 | Number 1 Article 20

10-1-1960

Civil Procedure—Libel: Sufficiency of Complaint

Buffalo Law Review

Follow this and additional works at: https://digitalcommons.law.buffalo.edu/buffalolawreview

 Part of the Civil Procedure Commons

Recommended Citation

Buffalo Law Review, *Civil Procedure—Libel: Sufficiency of Complaint*, 10 Buff. L. Rev. 83 (1960).
Available at: https://digitalcommons.law.buffalo.edu/buffalolawreview/vol10/iss1/20

This The Court of Appeals Term is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

and actionable; the duty does not have to be a legal one but only a moral or sound duty of imperfect obligation.[56]

It is qualified because it doesn't extend beyond such statements as the writer makes in the performance of such duty and in good faith believing them to be true.[57]

The defendant moved for summary judgment pleading this privilege and the plaintiff filed answering affidavits charging the defendants with malice and a desire to injure him in his profession. This rebuttal, in its attempt to lift the protective panelopy of the defendants, is founded upon certain alleged past disagreements between the parties over policy matters, mistatement by the defendants of the facts surrounding the plaintiff's dismissal from hospital staffs and lack of fairness in the administrative proceeding leading up to his removal from his medical group. He leveled charges of conspiracy and "a plot to get him" against the defendant officers and the plaintiff's insurer in an attempt to show that actual malice had destroyed the immunity of qualified privilege.

The trial court,[58] with the Appellate Division affirming,[59] denied the motion for summary judgment, stating that they could not hold as a matter of law that the answering affidavits had failed to present evidentiary facts sufficient to raise an inference of malice. Rule 113 of the Civil Practice Act requires that a motion for summary judgment be granted unless the answering affidavits show evidentiary facts sufficient to establish the existence of a triable issue.[60]

The Court of Appeals reversed and granted the motion. It ruled that the plaintiff had not met the burden of overcoming the presumption of privilege. They looked upon the fact recitation in the answering affidavits as being devoid of specific content and refused to accept conclusary allegations of malice as a substitute for the statutory requisite of a jury issue. The opinion indicates that "mere suspicion, surmise and accusations", characteristic of the instant case, suggesting a conspiracy to injure the plaintiff, are not sufficiently germane unless substantiated by particular facts setting forth a triable issue as to malice and bad faith.

LIBEL: SUFFICIENCY OF COMPLAINT

In *Drug Research Corporation v. Curtis Publishing Company*,[61] a libel action, plaintiff sought general damages for an article which appeared in the

56. Supra note 53, at 150, 19 N.E. 75 (1888).

57. More than a mere scintilla of evidence is required to overcome the qualified privilege. Ashcroft v. Hammond, 197 N.Y. 488, 90 N.E. 524 (1910); Hemmens v. Nelson, 138 N.Y. 517, 34 N.E. 424 (1893).

58. 12 Misc. 2d 1051, 173 N.Y.S.2d 74 (Sup. Ct. 1958).

59. 7 A.D.2d 733, 180 N.Y.S.2d 573 (2d Dep't 1958).

60. New York Rules Civ. Prac., Rule 113 § 2:
The motion shall be granted if upon all the papers and proof submitted the action or claim or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment . . . in favor of any party. (It) . . . shall be denied if any party shall show facts sufficient to require a trial of any issue of fact . . . other than the extent of damages.) . . .

61. 7 N.Y.2d 435, 199 N.Y.S.2d 33 (1960).

Saturday Evening Post entitled, "Don't Fall For The Mail Frauds". The article described some of the mail-fraud schemes prevalent today and made particular reference to the product "Regimen", a weight reducing pill, and one of its distributors—The Wonder Drug Corporation.

The complaint stated that the article was libelous to both the product Regimen and plaintiff, Drug Research Corporation, who is both a distributor and the manufacturer of Regimen.

In the complaint, plaintiff set out the article in full, alleged the loss of customers and the refusal of various advertising agencies to carry plaintiff's advertising, and demanded damages in the sum of $5,000,000. No special damages were pleaded.

The Supreme Court denied defendant's motion to dismiss for insufficiency and the Appellate Division affirmed.[62] The Court of Appeals reversed dismissing the complaint.[63]

It has been the law of New York since *Tobias v. Harland*[64] that when the words are spoken of the product and not of the manufacturer, the plaintiff must plead and prove special damages—unless the words impute to the manufacturer deceit or malpractice in manufacturing or selling his product. If the loss of customers is claimed, they must be named. If persons have refused to purchase, they too must be named.[65]

In *Marlin Fire Arms Company v. Shields*,[66] the publisher of a magazine printed allegedly libelous letters about the Marlin Rifle. The Marlin Company sought equitable relief in the form of an injunction to restrain defendant from printing any more articles concerning plaintiff's rifles. Plaintiff contended that they had no adequate remedy at law because it was impossible to compute mathematically their damages. The Court refused the request, holding, *inter alia*, that plaintiff's remedy was at law where they had to plead and prove special damages. In *Stillman v. Paramount Pictures Corporation*,[67] defendant produced a fictional motion picture in which one of the characters uttered words to the effect that he could go to Stillman's Gym and get a punch-drunk fighter. The Court held that since the reference was to Stillman's Gym and not to plaintiff personally, special damages had to be pleaded and proved.

The Court dismissed plaintiff's complaint here because plaintiff was not mentioned with particularity in the article. On its face, the article concerned the product Regimen and the nefarious activities of the Wonder Drug Corporation. Nowhere was plaintiff specifically referred to in the article. The Court ruled that libelous language must be tested by a fair and not a broad reading

62. 7 A.D.2d 285, 182 N.Y.S.2d 412 (1st Dep't 1959).
63. Supra note 61.
64. 4 Wend. 537 (1830).
65. Reporters' Ass'n v. Sun Printing and Publishing Company, 186 N.Y. 437, 79 N.E. 710 (1906).
66. 171 N.Y. 384, 64 N.E. 163 (1902).
67. 2 A.D.2d 18, 153 N.Y.S.2d 190 (1st Dep't 1956).

of the text and to rule that plaintiff was referred to with any specificity in the article would be quite inconsistent with a fair reading.

In any libel action, the principle of free speech and expression of opinion is always present in the court's mind and the courts will be very hesitant about ruling in any manner that might infringe or impose upon this principle. This statement is especially true and should always be borne carefully in mind when the area of critical business opinions is approached.

The dissent argued that if this pill does not reduce weight at all as the article says, then no manufacturer could have produced it without intending that it be sold under false pretenses. Therefore, the complaint alleges a libel against plaintiff as well as against its product.

At first blush, this argument appears convincing if you accept the major premise as true—for the manufacturer could very well have been honestly mistaken.

A closer examination of this argument, however, reveals that the effect of ruling this way would be to overrule the rule of special damages completely and allow any manufacturer to plead general damages in an action for libel on his product. Who couldn't argue, in this light, that if any article produced by a manufacturer does not perform the function that he implies it will, then the manufacturer could not possibly have produced it without intending that it be sold under false pretenses.

The Court of Appeals in dismissing plaintiff's complaint indicates very clearly that they intend to hold the line exactly where it is, i.e. that of requiring special damages to pleaded and proved where plaintiff's product and not his reputation or integrity is attacked.

Summary Judgment Requires Absence of Triable Issue of Fact

A motion for summary judgment in New York may be made by either party after issue is joined,[68] and must be supported by affidavits and other available proof.[69] If the claim or defense is established sufficiently to warrant the court as a matter of law in directing judgment the motion will be granted.[70] "Issue-finding rather than issue-determination is the key to the procedure,"[71] however, and the motion will be granted only when it is clear that no triable issue of fact is presented.[72] If there is any doubt as to the existence of such issue[73] or if the issue is arguable,[74] the motion should be denied. The motion may not be defeated by surmise, conjecture or suspicion,[75] however, and if the

68. N.Y. Rules Civ. Prac., Rule 113(1).
69. N.Y. Rules Civ. Prac., Rule 113(2).
70. Ibid.
71. Esteve v. Abad, 271 App. Div. 725, 727, 68 N.Y.S.2d 322, 324 (1st Dep't 1947).
72. Di Menna & Sons v. City of New York, 301 N.Y. 118, 92 N.E.2d 918 (1950).
73. Braun v. Carey, 280 App. Div. 1019, 116 N.Y.S.2d 857 (3d Dep't 1952).
74. Barrett v. Jacobs, 255 N.Y. 520, 175 N.E. 275 (1931).
75. Bank for Savings in City of New York v. Rellim Const. Co., 285 N.Y. 708, 34 N.E.2d 485 (1941).

issue is not genuine but feigned, in truth there being nothing to try, the motion is properly granted.[76]

In *Falk v. Goodman*,[77] a suit to recover monies deposited in escrow based on an escape clause voiding a contract for the sale of a dwelling if the purchaser was unsuccessful in obtaining a mortgage, the defendant raised an affirmative defense of fraud in the execution of the contract. He alleged that the plaintiffs wilfully understated their income in their mortgage applications in order to activate the escape clause and thus circumvent their contractual obligation. His affidavit, in opposition to plaintiffs' motion for summary judgment, alleged that when he advised plaintiffs in the course of their preliminary negotiations that in order to obtain the intended mortgage it would be necessary to prove a weekly income of $200, plaintiff replied, "Well, we don't have a thing to worry about. I can show easily that I earn more than that." In the mortgage application plaintiffs stated their weekly income to be only $102.

On the theory that this evidence would be barred by the parol evidence rule, the trial court granted plaintiffs' motion for summary judgment[78] and the Appellate Division affirmed.[79] The Court of Appeals reversed holding that inasmuch as the issue was not one of fraud in the making of the contract but rather of fraud in its execution, the parol evidence rule did not apply. Moreover, the bad faith pleaded charged a wilful non-performance of a condition subsequent which, if established, would defeat the plaintiffs' right to recover their deposit. Without considering whether this defense could be established at the trial, the Court determined that the *allegations* gave rise to a triable issue of fact.

In a strong dissent, Judge Desmond looked beyond the bare allegations, considering also the evidentiary matter submitted in opposition to the motion. He argued that even if the sole evidence advanced in support of the defendant's allegations, the plaintiff's alleged pre-contract remark, was established at the trial it still would fail to make a jury question of the alleged wilful nonperformance of the contract. Therefore, he deemed the motion for summary judgment properly granted, albeit on erroneous grounds.

The summary judgment procedure was adopted in order to expedite adjudication of civil cases by enabling the court to summarily determine whether or not a bona fide issue exists between the parties.[80] While the court may not usurp the function of a jury, it has been well established that it may look beyond an apparent triable issue presented by the pleadings in deciding whether

76. Rubin v. Irving Trust Co., 305 N.Y. 288, 113 N.E.2d 424 (1953).
77. 7 N.Y.2d 87, 195 N.Y.S.2d 645 (1959).
78. 14 Misc. 2d 964, 178 N.Y.S.2d 471 (Sup. Ct. 1958).
79. 7 A.D.2d 1014, 185 N.Y.S.2d 231 (2d Dep't 1959).
80. General Inv. Co. v. Interborough Rapid Transit Co., 235 N.Y. 133, 139 N.E. 216 (1923).

or not there is a real issue for the jury.[81] *Falk v. Goodman*[82] seems to indicate a departure from this practice which is unfortunate, for if the purpose of the summary judgment procedure is to be fully realized, clearly the court must require more from litigants than mere allegations of a triable issue of fact.

> (1.) In any action, after issue has been joined, any party may move for summary judgment . . . (2.) . . . the motion shall be granted if upon all the papers and proof submitted, the action or claim or defense shall be established sufficiently to warrant the court as a matter of law in directing judgement . . . in favor of any party. 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 amount . . . of the damages . . .[83]

In *Stone v. Goodson,*[84] plaintiff moved for summary judgment against defendant on an alleged breach of contract. Plaintiff claimed that defendant had used plaintiff's literary materials in the production of defendant's program THE PRICE IS RIGHT without paying plaintiff the royalties agreed to in the contract of sale.

The facts of the case as they were set out in the opinion were as follows: On December 7, 1953, plaintiff submitted to defendant a proposed television series which he titled THE PRICE IS RIGHT. On January 29, 1954, plaintiff sold all of his rights in the materials to defendant in return for defendant's promise to pay plaintiff royalties on the materials if defendant used them. On November 1, 1956, plaintiff and defendant entered into another agreement whereby plaintiff sold the title THE PRICE IS RIGHT to defendant for $1,000. This contract also incorporated the terms of the January 29, 1954 agreement whereby defendant promised to pay certain royalties if he used the literary material that plaintiff had previously submitted to him.

About one month after the November 1, 1956 agreement, defendant broadcast the program THE PRICE IS RIGHT which plaintiff claims was a use of the materials he submitted to defendant.

Upon defendant's refusal to pay the royalties that plaintiff contended were due him, plaintiff brought an action in the Supreme Court for breach of contract. The Supreme Court had before it the materials that plaintiff had submitted to the defendant and the format for defendant's show. Plaintiff moved for summary judgment contending that all the evidence was before the court and the court should decide whether defendant's program was a use of plaintiff's materials.[85] Plaintiff argued that there was a substantial similarity between the two programs—the most significant of which was the use of the

81. Ibid.; Shapiro v. Health Ins. Plan of Greater N.Y., 7 N.Y.2d 56, 194 N.Y.S.2d 509 (1959); Sprung v. Jaffe, 3 N.Y.2d 539, 169 N.Y.S.2d 456 (1957); Rubin v. Irving Trust Co., supra note 76.

82. Supra note 70.

83. N.Y. Rules of Civ. Prac., Rule 113.

84. 8 N.Y.2d 8, 200 N.Y.S.2d 627 (1960).

85. Park v. Warner Brothers, 8 F. Supp. 37 (S.D.N.Y. 1934); Weitzenkorn v. Lesser, 40 Cal. 2d 778, 256 P.2d 947 (1953).

retail price of merchandise as the central theme. Plaintiff also set forth defendant's admission that this was the first quiz program defendant had ever produced that used retail price as its central theme.

The Supreme Court granted plaintiff's motion,[86] and the Appellate Division reversed.[87] The Court of Appeals affirmed the Appellate Division, holding that an arguable issue of fact had been raised by defendant's answer.

The substance of plaintiff's submission is as follows: A sole participant selects an item from a group of articles displayed at retail price. The master of ceremonies then asks four questions and each time a correct answer is given, the price is automatically reduced to half. For example, if the four questions are answered correctly, a $200 item is reduced to $12.50. The participant may purchase the article at any stage of the questioning, and the money received is, at the show's conclusion, donated to a charity. This procedure is repeated with two subsequent contestants. The fourth contestant is a representative of a charitable organization. He too, is asked four questions, but instead of receiving merchandise at a reduced price, a special jackpot is multiplied by two each time a correct answer is given.

On defendant's program, an article of merchandise, the retail price of which is not revealed, is exhibited to a panel of four contestants, who, in an effort to estimate the price, proceed to bid for the item. At the conclusion of the bidding, the retail price is then made known. The article is then given to the contestant who comes the closest to the retail price without exceeding it. This procedure is then repeated with another article of merchandise until the conclusion of the show. Then, the contestant who has accumulated the most (dollar wise) is invited to participate on the next program. An added attraction for the benefit of the home viewing audience is the "Showcase" contest where a multitude of articles are displayed. The person who then mails in a card stating the total retail price of all the items displayed, without exceeding it, receives all the merchandise without charge.

Defendant, an alleged expert on programs of this type, had averred that there was no substantial similarity between the plaintiff's and defendant's programs. In addition, defendant submitted an affidavit by the alleged originator of defendant's program which stated that he had written the program that defendant had based THE PRICE IS RIGHT upon.

It is well established, the Court of Appeals ruled, that if the issue is fairly debatable, a motion for summary judgment must be denied.[88] To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented.[89]

86. 17 Misc. 2d 652, 188 N.Y.S.2d 660 (Sup. Ct. 1959).
87. 9 A.D.2d 646, 191 N.Y.S.2d 394 (1st Dep't 1959).
88. Falk v. Goodman, 7 N.Y.2d 87, 195 N.Y.S.2d 645 (1959); Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1952).
89. DiMenna and Sons v. City of New York, 301 N.Y. 118, 92 N.E.2d 918 (1950); Braun v. Carey, 280 App. Div. 1019, 116 N.Y.S.2d 857 (3d Dep't 1952).

The issue that was raised by defendant's answer, the Court thought, was that of user, i.e. whether defendant had actually based his program upon the materials that plaintiff had submitted to him. However, the Court went on to say that it was of the opinion that plaintiff's theme was substantially lifted by defendant in the production of his show.

The reasoning of the Court in determining that there is an arguable issue of fact here is difficult to follow. The Court admits that, in their opinion, defendant had pirated plaintiff's central theme, yet they say that an arguable issue of user exists, i.e. whether defendant had actually based his program upon the plaintiff's format. They also say that no plagiarist can excuse himself by showing how much of plaintiff's work that he did not pirate, and still they conclude with the determination that an arguable issue of fact exists.

Perhaps what the Court really was interested in was getting more expert testimony from literary experts. Possibly they felt that the question of substantial similarity in cases involving literary materials can best be disposed of with the aid of unbiased experts at a trial.

At the same time, however, Rule 113's specific purpose is to allow the courts to lighten their calendars by summarily disposing of cases where reasonable men could not differ in arriving at a verdict. In order for the trial courts to grant these motions, however, they have to know exactly what criteria to use but this decision does not clearly point out when a motion for summary judgment is in order.

CONSTITUTIONAL LAW

Admissibility of Confessions Obtained After Indictment

The Court of Appeals, by a recent decision, *People v. Di Biasi*,[1] has placed New York in the advanced guard among states in the protection of the right to counsel of persons accused of crimes. The position taken by Chief Judge Desmond in his dissenting opinion in *People v. Spano*[2] is now the law in New York State.

In the *Di Biasi* case, defendant was indicted in 1952 for first degree murder. But it was not until 1958 that defendant surrendered to the police, by arrangement with his attorney, to plead to the indictment. The defendant was questioned by the Assistant District Attorney and several officers in the District Attorney's office for an unspecified time and made certain statements to these officials which were admitted in evidence at his trial. These admissions were to the effect that he knew the deceased victim, was a partner of the deceased in a night club, and that he knew certain persons either involved in or witnesses to the murder. Defendant also stated that he was drunk when he

1. 7 N.Y.2d 544, 200 N.Y.S.2d 21 (1960).
2. 4 N.Y.2d 256, 173 N.Y.S.2d 793 (1958), rev'd infra note 3.