Buffalo Law Review

Volume 8 | Number 1 Article 19

10-1-1958

Civil Procedure—Res Judicata—Judgment for Defendant on Non-appearance of Plaintiff No Bar to Subsequent Action

Buffalo Law Review

the Court of Appeals does not say that *any* incompetent who has not been judicially declared so may successfully sue while alleging his own incompetence. The holding merely permits a trial court, in its discretion, to permit such a person to go forward with an action, if it appears that under the circumstances of that particular case the interests of the incompetent would be better protected than by requiring the appointment of a committee and a judicial declaration of incompetency.

Res Judicata—Judgment for Defendant on Non-appearance of Plaintiff no Bar to Subsequent Action

The defendant, in *Greenberg v. DeHart,* [13] made a motion to dismiss the complaint pursuant to Rule 107 of the Rules of Civil Practice. Prior to the commencement of the present action, the Greenbergs had asserted the same causes of action against DeHart in an action commenced in King's County. This action was consolidated with an action to recover damages for injury to property commenced by DeHart, since both actions arose out of the same automobile collision. When the consolidated action came up for trial, the Greenbergs did not appear. At this point in the proceedings, the claim asserted by DeHart had been settled and there remained to be tried only the issues in the Greenbergs' personal injury action. The attorney for defendant appeared and waived a jury trial and the court proceeded to take evidence from defendant's witnesses. At the close of the evidence, the trial court granted defendant's motion to dismiss the complaint on the merits and judgment of that effect was entered. It is this judgment, purportedly rendered on the merits, that constituted the basis of defendant's motion to dismiss in the present action. The Court held that the doctrine of res judicata did not apply and accordingly reinstated the order of the special term denying the defendant's motion to dismiss in the present action.

A judgment must be rendered upon the merits if it is to be used as an estoppel to the prosecution of subsequent action.[14] The effectiveness of the adjudication will depend, not on its form, but on the nature of the proceedings in which it was made.[15] After a careful analysis of the proceedings, the Court concluded that the judgment relied on by DeHart as a bar to the present action was no more than a nonsuit.[16] A recital in the judgment that it is upon the merits lends no efficacy to it for purposes of res judicata. But the defendant alleged that the lower court authoritatively rendered a judgment on the merits pursuant to section 494-a of the Civil Practice Act which provides for the

13. 4 N.Y.2d 511, 176 N.Y.S.2d 344 (1958).
14. Rudd v. Cornell, 171 N.Y. 114, 63 N.E. 823 (1902).
15. Bannon v. Bannon, 270 N.Y. 484, 1 N.E.2d 975 (1936); *but see* Ziegler v. International Railway Co., 232 App. Div. 43, 248 N.Y.Supp. 375 (4th Dep't 1931).
16. See Honsinger v. Union Carriage & Gear Co., 175 N.Y. 229, 67 N.E. 436 (1903).

rendering of a default judgment upon failure of a party to appear or proceed to trial. Relying on *Mink v. Keim*,[17] the Court reaffirmed its position that a judgment under this section may be entered only upon a complaint or counterclaim. The defendant had no action on which to proceed since his property damage action had been settled and his contention was accordingly rejected.

Separate Trial Where Insurance Company Joined as Party Defendant

In *Kelly v. Yannotti*,[18] appellant, an insurance company, had been impleaded by the defendant in a negligence action. When a jury trial was demanded, appellant moved under section 96 of the Civil Practice Act to sever the actions. The issue before the Court of Appeals was whether denial of this motion by the trial court constituted an abuse of discretion.

The New York courts have long held that in actions where insurance companies are impleaded a finding that the plaintiff is entitled to recover might influence the jury in its determination of the separate issue of whether defendant was covered by the alleged insurance contract, or that conversely, a finding that defendant is covered by insurance might influence the determination of plaintiff's right to relief. Thus, motions for severance have been allowed so as not to have the same jury pass on both issues.[19]

In the present case the Court held that denial of the motion to sever constituted an abuse of discretion since there would be no impairment of a substantial right of any party and the insurance company probably would be subject to some prejudice if the main action and the third party action were tried by the same jury.

Res Judicata and Collateral Estoppel—Identity of Parties

In *Commissioners v. Low*, [20] the State Insurance Fund (workmen's compensation insurer for the State of New York) brought the action as statutory assignee of the representative of a state employee, killed in an accident while on duty in a state automobile. The suit was brought against the private motorist and owner of the other car in the accident which resulted in the employee's death. Prior to this action by the State Insurance Fund, the private motorist had himself sued the State of New York on the theory that the accident was caused solely by the

17. 291 N.Y 300, 52 N.E.2d 444 (1943).
18. 4 N.Y.2d 603, 176 N.Y.S.2d 660 (1958).
19. See, *e.g.*, Simpson v. Foundation Co., 201 N.Y. 479, 95 N.E. 10 (1911); Taplin v. Stevens, 280 App. Div. 960, 117 N.Y.S.2d 606 (4th Dep't 1952); Warner v. Star Co., 162 App. Div. 458, 147 N.Y.Supp. 803 (2d Dep't 1914); Delany v. Allen, 200 Misc. 734, 105 N.Y.S.2d 635 (Sup.Ct. 1951); Butera v. Donner, 177 Misc. 966, 32 N.Y.S.2d 633 (Sup.Ct. 1942).
20. 3 N.Y.2d 590, 170 N.Y.S.2d 795 (1958).