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Civil Procedure—Summary Judgment

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the decedent's car, and that the bus driver, while bringing his bus to a stop, turned back into his own lane where defendant's photographs showed it.

The dissent, while not challenging the existence of these rules, disagreed with the majority's interpretation of the facts. The inferences seen by the majority as reasonable were found by the minority to be insufficient to establish logically that the proximate cause of the accident was due to the negligence of the defendant. Furthermore, such inferences which might be possible are found by the dissent to be contradicted by the "actual physical facts" as established by the photographs. What the dissent failed to consider, however, is the fact that the photographs in question did not show the "actual physical facts" at the crucial point of impact but only a picture of the vehicles as they came to rest after the bus had pushed the car a distance of 29 feet from the point of impact.

Since the weight of authority in this jurisdiction supports the proposition that where there is a conflict of evidence, as in the instant case, it is within the province of the jury to decide on the issue of credibility and give appropriate weight to the proffered evidence,¹⁴ the majority of the Court was doubtlessly correct in reinstating the verdict of the jury.

Summary Judgment

The object of a motion for summary judgment is to save the moving party from the burden of a trial, where there is no substantial or genuine question of fact involved.¹⁵ Official records which provide a defense sufficient as a matter of law, will entitle the defendant to a summary judgment, unless the plaintiff raises an issue as to the verity or conclusiveness of this evidence by affidavit or other proof.¹⁶

In *Maddaus v. Goffen*,¹⁷ the plaintiff performed services for an estate in its death action against a railroad company, but he withdrew as its counsel before the final adjudication. In subsequent actions instituted by the railroad company and estate to determine whether the plaintiff had any lien upon the recovery awarded to the estate, the plaintiff by affidavit, disclaimed any such lien. He then brought

14. *Kraus v. Birnbaum*, 200 N. Y. 130, 93 N. E. 474 (1910); *Meiselman v. Crown Heights Hosp.*, 285 N. Y. 389, 34 N. E. 2d 367 (1941); *Sadowski v. Long Island R. R. Co.*, 292 N. Y. 448, 55 N. E. 2d 497 (1944).

15. *Richard v. Credit Suisse*, 242 N. Y. 346, 152 N. E. 110 (1926).

16. N. Y. R. CIV. PRAC. §113. When an answer is served in any action . . . setting forth a defense which is sufficient as a matter of law, where the defense is founded upon facts established prima facie by documentary evidence or official record, the complaint may be dismissed on motion unless the plaintiff by affidavit, or other proof, shall show such facts as may be deemed by the judge hearing the motion, sufficient to raise an issue with respect to the verity and conclusiveness of such documentary evidence or official record.

17. 2 N. Y. 2d 32, 137 N. E. 2d 22 (1956).

this action against the attorney who succeeded him in the death action, to impose a trust upon the legal fees received by him, by virtue of an alleged agreement between them. The Court held (4-3), affirming the Appellate Division,¹⁸ that the disclaimers by affidavits by the plaintiff were not sufficient to warrant the motion for summary judgment.

A prior motion to dismiss the complaint on the ground that the decision in the Surrogate's Court was *res judicata* to the present proceeding was denied because the affidavits were filed in proceedings which determined the liabilities of parties foreign to the present case. There was no adjudication of the rights between the present plaintiff and defendant, but rather only a disclaimer of any rights which the plaintiff might have against the estate or railroad company. Therefore, this is not the type of official record which proves a *prima facie* case for the defendant and the controversy should be adjudicated at a trial.

The dissent concludes that the affidavits were a final repudiation by the plaintiff of all of his rights by looking into what it calls the obvious purpose of the plaintiff in filing these affidavits. However, if an analysis of the plaintiff's motive is necessary to determine the effect of his disclaimer, then it seems that there is a sufficient question of fact involved to preclude a summary judgment and warrant a trial of the issues.

Right of Appellate Court to Dismiss Jury's Verdict

*Kline v. Pans*¹⁹ was an action to foreclose a mortgage wherein the defendant counterclaimed for rescission of the mortgage on the ground that plaintiff had fraudulently induced him to execute the mortgage on the false representation that his wife was indebted to the plaintiff. The Court held that the defendant introduced sufficient evidence to establish a *prima facie* case and therefore the dismissal of the counterclaim by the Appellate Division²⁰ after a jury verdict²¹ for the defendant was error.

In jury trial cases, a court may dismiss a complaint if there is insufficient

18. 1 A. D. 2d 804, 148 N. Y. S. 2d 807 (1st Dep't 1956).

19. 1 N. Y. 2d 15, 133 N. E. 2d 447 (1956).

20. 285 App. Div. 981, 138 N. Y. S. 2d 152 (3d Dep't 1955).

21. It is uncertain whether the jury was advisory under the N. Y. CIV. PRAC. ACT §430 or whether the plaintiff had a right to the jury under N. Y. CIV. PRAC. ACT §425. §430 reads . . . where a party is not entitled as of right to trial by jury, the court in its discretion may direct that . . . questions of fact . . . be tried by a jury. . . . §425 reads . . . an issue of fact must be tried by a jury . . . : . . . 2. An action for determination of a claim to real property under article fifteen of the real property law. N. Y. REAL PROPERTY LAW art. XV §500, . . . a person [who] . . . claims an . . . interest in real property . . . may maintain an action against any other person . . . to compel the determination of any claim adverse to that of the plaintiff