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Civil Procedure And Evidence—Appeal—Review of Discretionary Decisions

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Plaintiffs, representing themselves and other tenants of Glen Oaks Village, brought an action to require the landlord to account for loss and damages sustained due to allegedly excessive rent. The Court affirmed the dismissals by the courts below⁸⁵ on the dual grounds of lack of jurisdiction over the subject matter and of failure to state a cause of action.⁸⁶

The defendant owned an F.H.A. housing project the rental of which was fixed by the Federal Administrator under the provisions of the National Housing Act.⁸⁷ The determination of rent schedules by the Administrator was Federal governmental action by an authorized Federal officer.

Plaintiff contended that while defendant charged no more than maximum rent, the Administrator based his determination of maximum rental upon fraudulent misrepresentations, made by the defendant, as to the cost of the property rented.

The plaintiff may have had a cause of action had defendant exceeded the maximum rental,⁸⁸ but the tenant who claims to have been deprived of rights under rent laws by false misrepresentations to government authorities has no remedy by suit in a state court unless there is a specific statute giving him such a remedy.⁸⁹ Here plaintiff cited no such statute.

Thus the plaintiffs can have no relief in the state court until they are able to get the rent schedules set aside by Federal authority, or until Congress authorizes such suits. To allow them to bring an action before this is accomplished would have the effect of permitting a state court, by its decision on collateral attack, to substitute its determination for that of a Federal administrative agency.

Appeal—Review of Discretionary Decisions

In *O'Connor v. Papertsian*,⁹⁰ the Court was again faced with the question of whether the Appellate Division has the power to render final judgment upon

85. 206 Misc. 137, 132 N.Y.S. 2d 88 (Sup. Ct. 1954); 285 App. Div. 814, 136 N.Y.S. 2d 539 (2d Dep't 1955).

86. N. Y. R. CIV. PRAC. 106. After the service of the complaint, the defendant may serve notice of motion for judgment dismissing the complaint . . . where it appears on the face thereof: 1.) That the court has not jurisdiction of the subject of the action . . . 4.) That the complaint does not state facts sufficient to constitute a cause of action.

87. 12 U.S.C.A. 1743 et. seq.

88. *Brinkman v. Urban Realty Co.*, 10 N. J. 113, 89 A2d 394 (1952); *Parkin v. Damen-Ridge Apts.*, 348 Ill. App. 428, 109 N.E. 2d 363 (1952).

89. *Rosner v. Textile Binding & Trimming Co.*, 300 N.Y. 319, 90 N.E. 2d 481 (1950).

90. 309 N.Y. 465, 131 N.E. 2d 883 (1956).

a stipulation of defendant to increase the amount of damages,⁹¹ or whether it is bound by the trial term's grant of a new trial because of an inadequate verdict. The Court affirmed the decision of the Appellate Division, on the grounds that this was neither an abuse of discretion on the part of the Appellate Division nor a denial of trial by jury,⁹² and was a power granted under Civil Practice Act, section 584.⁹³

Although the decision to grant a new trial absolutely or to do so only upon the condition that the adverse party refuses to consent to a reduction or increase in the amount of damages is discretionary with the trial court,⁹⁴ this does not mean that the Appellate Division, vested with the same discretion as the trial term by virtue of its also being a branch of the Supreme Court, may not modify a discretionary decision of the trial term merely because there was no abuse of discretion on the part of the latter.⁹⁵

Section 584, granting the Appellate Division the power to reverse, affirm or modify judgments and orders appealed from the special or trial term, includes in this grant the power to do anything the trial court could have done.⁹⁶ The Court indicated in the instant case that the trial term could have made its grant of a motion for a new trial conditional upon defendant's refusal to acquiesce to an increase in damages, and that therefore the Appellate Division's decision was not an unwarranted interference with the discretion of the trial term.

A party has, of course, a constitutional right to a trial by jury,⁹⁷ but this does not give the right to two jury trials. Since the Appellate Division is not reversing a factual finding of the jury, but is rather, in the light of those facts, giving the party the maximum benefit commensurate with such findings, there is no denial of the Constitutional right to a trial by jury.⁹⁸

In the instant case, no right of the complaining party is abridged, in that the Appellate Division merely decides that the trial term should have made its grant of a new trial conditional. This in no way disturbs the findings of fact of the

91. 284 App. Div. 245, 130 N.Y.S. 2d 817 (1st Dep't 1954).

92. N. Y. CONST. Art. I, §2.

93. "Upon an appeal from a judgment or an order, any appellate court to which the appeal is taken, which is authorized to review such judgment or order, may reverse or affirm, wholly or in part, or may modify the judgment or order appealed from . . ."

94. *Branagan v. L.I.R.R. Co.*, 28 App. Div. 461, 51 N.Y. Supp. 112 (2d Dep't 1898).

95. *Herrman v. United States Trust Co.*, 221 N.Y. 143, 116 N.E. 865 (1917).

96. *United Paperboard Co. v. Iroquois Pulp & Paper Co.*, 249 N.Y. 588, 164 N.E. 594 (1928).

97. N. Y. CONST. Art. I, §2.

98. See *Herrman v. United States Trust Co.*, 221 N.Y. 143, 116 N.E. 865 (1917).

jury and is not inconsistent with the power of the Appellate Division as a branch of the Supreme Court.

Subpoena in Non-Judicial Proceeding

Under a New Jersey statute⁹⁹ allowing freeholders to petition for an investigation into municipal expenditures, the Superior Court of New Jersey appointed an "expert" to take testimony concerning the alleged corruption in Jersey City. In *In re Klein*,¹ appellant, who formerly had contractual dealings with that city, sought to have a subpoena, issued pursuant to this inquiry, vacated on the ground that the investigation was not an "action, suit or special proceeding" within section 310 of the Civil Practice Act.² This section deals with the taking of depositions for use outside the state.

A subpoena will be granted only in judicial proceedings wherein issue is joined and the evidence sought is relevant to the issue.³ A judicial proceeding is one which investigates, declares and enforces liabilities as they stand on past or present facts and under laws supposed already to exist.⁴ In administrative proceedings, which are quasi-judicial, the elements of investigation, declaration and enforcement of liabilities must still be present.⁵ This is in accord with sections 4 and 5 of the Civil Practice Act.⁶

In examining the New Jersey statute involved in the instant case, the majority held that it lacked all of the essential elements, and was therefore, non-judicial in character. The court pointed out that the New York counterpart of this statute,⁷ which leaves out all discretionary elements and requires that an injunction be

99. N. J. REV. STAT. §40:6-1.

1. 309 N.Y. 474, 131 N.E. 2d 288 (1956).

2. N. Y. CIV. PRAC. ACT §310. In what cases depositions may be taken. A party to an action, suit or special proceeding, civil or criminal, pending in a court without the state, either in the United States or in a foreign country, may obtain by the special proceeding described in this article, the testimony of a witness and, in connection therewith, the production of books and papers, within the state, to be used in the action, suit or special proceeding.

3. The question of whether a subpoena should issue is a matter of procedural law to be determined by New York, the forum, rather than by New Jersey law. See 3 BEALE, CONFLICTS OF LAWS §584.1, 589.0, 590.1.

4. See *In Matter of Isaacs*, 148 App. Div. 157, 132 N.Y.S. 1023 (1st Dep't 1911) *Bernard v. Lefcourt*, 233 App. Div. 609, 253 N.Y.S. 383 (1st Dep't 1931) *Matter of Intercean Mercantile Corp. (Hoops)*, 203 App. Div. 284, 197 N.Y.S. 706, (1st Dep't 1923) 236 N.Y. 587, 142 N.E. 295.

5. *Hecht v. Monaghan*, 307 N.Y. 461, 121 N.E. 2d 421 (1954), 4 BUFFALO L. REV. 26 (1954).

6. N. Y. CIV. PRAC. ACT §4. The word "action," when applied to judicial proceedings, signifies an ordinary prosecution in a court of justice by a party against another party for the enforcement or protection of a right, the redress or prevention of a wrong or the punishment of a public offense.

7. N. Y. CIV. PRAC. ACT §5. Every other prosecution by a party for either of the purposes specified in the last section is a special proceeding.