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Civil Procedure—Summary Judgment—Determination of the Nature of the Action

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The burden is upon the insured to establish that their claim for relief is authorized by the terms of the policy.[16] Since the insured did not properly allege the necessary degree of tort liability, to establish a prima facie claim for breach of the policy contract, his motion for summary judgment on the pleadings, must fail for insufficiency.

Insured further contended that insurer is estopped from denying liability under the policy because they undertook the defense of a prior action to determine insured's tort liability under the original claim for damages.[17] The Court rejected this assertion by pointing out that the insurer had in fact given notice of its intention to reserve claim before defending the action and was therefore not estopped.[18]

The Court had thus probed deeply into the facts surrounding a motion for summary judgment on the pleadings. Although summary judgment is an efficient, expedient measure to quickly eliminate ungrounded controversies from today's overcrowded court calendars, it must be used with utmost care and discretion. If this caution is not observed, we will open wide the dangerous door to denial of due process, in the guise of judicial expediency.

Summary Judgment—Determination Of The Nature Of The Action

In *Erbe v. Lincoln Rochester Trust Company*,[19] the plaintiffs brought an action against the executor-trustee of a trust which had been concluded nine years before, alleging certain wrongful acts of self-dealing which had taken place more than ten years before this action. The plaintiffs had unsuccessfully alleged bad faith on the part of the defendant in prior proceedings relating to the termination of the trust but brought the present action alleging newly discovered evidence of fraud, apparently resulting from a perusal of the Surrogate's Court records pertaining to the trust.

The complaint was dismissed in Special Term[20] on the grounds that the action, though for damages in fraud, was precluded by the six year statute of limitations[21] since the plaintiffs had sufficient knowledge of the events at the

16. Lavine v. Indemnity Insurance Co. of North America, 260 N.Y. 339, 183 N.E. 897 (1933).
17. Moore Construction Co. v. United States Fidelity & Guarantee Co., 293 N.Y. 119, 56 N.E.2d 74 (1944); Gerka v. Fidelity & Casualty Co. of New York, 251 N.Y. 51, 57, 167 N.E.169, 170 (1929).
18. Moore Construction Co. v. United States Fidelity & Guarantee Co., 293 N.Y. 119, 125, 56 N.E.2d 74, 76 (1944); Knauss Inc. v. Indemnity Ins. Co. of North America, 270 N.Y. 211, 215, 216, 200 N.E. 791-93 (1936).
19. 3 N.Y.2d 321, 165 N.Y.S.2d 107 (1957).
20. 1 Misc.2d 413, 145 N.Y.S.2d 788 (Sup. Ct. 1955).
21. N. Y. CIV. PRAC. ACT §48 (5).

time they occurred to infer the allegations made in this complaint. The Appellate Division[22] sustained the dismissal, but on the grounds that the gravamen of the complaint was constructive fraud and therefore barred by the ten year statute.[23] Finally, the Court of Appeals[24] reversed, holding the action to be one in actual fraud, but stating that the record failed to show a sufficient basis for imputing knowledge of fraud before the time alleged.

Since a complaint asking for relief barred by the lapse of time will not preclude inconsistent relief, the barred application for relief being a mere nullity,[25] it seems clear that the Appellate Division incorrectly excluded consideration of the cause of action in extrinsic fraud. And as to the knowledge necessary to commence the running of the statute of limitations for fraud, the facts known must be such that the plaintiff ought to have known of the fraud, or of such possibility of fraud, that a prudent person would investigate.[26] This, of course, is a question of fact. Since the record indicated concealment on the part of the defendants, the Court of Appeals justifiably postponed further determination of the truth of these allegations until trial.

Release—Existence Of Cause Of Action

Where a cause of action exists at the time a general release of liability is given, but has not ripened into litigation, is it proper to give summary judgment for a defendant who pleads the release as a bar to the action, or is the question of whether such a cause of action was actually in dispute between the parties at the time of the settlement one to be determined on trial?

In *Lucio v. Curran*,[27] the Court held that summary judgment was proper, affirming the decision of the Appellate Division,[28] which had reversed the denial of the defendant's motion for summary judgment by the Supreme Court at Special Term.[29]

Plaintiff's expulsion from the National Maritime Union in 1949 was upheld by the union's national convention the same year. In 1950 he sued the treasurer of the union in Municipal Court of New York City for wages plus vacation and severance pay, in the total amount of $495.00. While the case was pending, plaintiff offered to deliver a release limited to the pending Municipal Court action in return for a proposed settlement. Defendant demanded and received in February

22. 2 A.D.2d 242, 154 N.Y.S.2d 179 (4th Dep't 1956).
23. N. Y. CIV. PRAC. ACT §53.
24. See note 19 *supra*.
25. Schenk v. State Line Telephone Co., 238 N.Y. 308, 144 N.E. 592 (1924).
26. Higgins v. Crouse, 147 N.Y. 411, 42 N.E. 6 (1895).
27. 2 N.Y.2d 157, 157 N.Y.S.2d 948 (1956).
28. 284 App.Div. 1039, 135 N.Y.S.2d 880 (1st Dep't 1954).
29. 122 N.Y.S.2d 443 (Sup. Ct. 1952).