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Civil Procedure—Release—Existence of Cause of Action

Walter Barrett

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).

1952 after protracted negotiations, a general release in exchange for $225.00 and the surrender of a conterclaim for $722.98. The release by its terms applied to "all manner of action . . . causes of action, suits, . . . controversies, . . . claims and demands whatsoever" which plaintiff "ever had, now has or which his heirs, executors, or administrators, hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever . . . to the day of the date of these presents."[30]

In May, 1952, plaintiff commenced the present action, seeking among other things, a declaration that his expulsion was null and void, his reinstatement to union membership and damages for loss of earnings, and naming as defendants the union and various officers who were sued as individuals as well.

The Court held that since the cause of action for wrongful expulsion, if such it was, existed at the time the release was given, the release applied to all issues, including this, which might have been adjudicated as a result of pre-existing controversies. The officers sued were held to be released as well as the union and its treasurer, the named releasees. "It is well established that the release of one joint tort-feasor releases all of them, absent a reservation to the contrary."[31]

Judge Van Voorhis dissented. Conceding the rule "that where a release is general in its terms and there is no limitation by way of recital or otherwise, the instrument itself is the only competent evidence of the agreement of the parties and if the words fairly import a general discharge, their effect may not be limited so as to exclude a demand simply upon proof that the time of its execution the particular claim or demand was not discussed,"[32] he argues that the limits of the rule, as formulated in *Kirchner v. New Home Sewing Machine Co.*, [33] were reached in *Simon v. Simon.*[34] That case held that a release in general terms given by a wife in a property settlement attending a divorce proceeding was given in connection with the discharge of the husband from any claim of the wife that she had an interest in his copartnership, and did not bar her action to recover jewelry which she alleged her husband was wrongfully withholding, although there was no recital of any particular disputed claim in the release. Thus he sees a triable issue in the instant case as to whether the release was given for the purpose of precluding an action for reinstatement in the union. The dissent also argues that a cause of action for illegal expulsion is a continuing cause, in that, if such expulsion was indeed wrongful (a triable issue), the duty of reinstatement continues past the time of release from liability for damages. As in cases arising under the Civil Service Law and the Education Law, where the short statute of limitations is

30. 2 N.Y.2d at 161, 157 N.Y.S.2d at 952.
31. *Id.* at 162, 157 N.Y.S.2d at 952.
32. *Id.* at 164, 157 N.Y.S.2d at 954.
33. 135 N.Y. 182, 31 N.E. 1104 (1892).
34. 274 App.Div. 447, 84 N.Y.S.2d 307 (1st Dep't 1948).

deemed not to apply to actions for reinstatement by wrongfully discharged persons, the reason is that "the illegal act occurs *in the future,* when a demand is refused for reinstatement."[35]

The case can hardly be said to overrule the decision in *Simon v. Simon* inasmuch as the logical distance between an interest in a copartnership and an interest in personal jewelry is considerably greater than that between a claim for damages for wrongful expulsion from a union and a demand for reinstatement therein.

Right To Appeal Intermediate Order After Trial

In *Cohen v. Cohen,*[36] an action by the wife for legal separation was discontinued and the settlement was embodied in a judicial stipulation. In compliance with his only affirmative duty under this stipulation, the husband moved out of the house. The wife was to retain the income from the house in lieu of alimony or support for herself or child. In the event of the sale of the house, the proceeds would be divided equally between the parties.

Years later, the wife alleged that there never was any net income from the house which could be used for support as provided in the stipulation. The wife's motion for an order modifying the stipulation to provide support was denied, but a subsequent motion to set aside the stipulation and restore the case to the court calendar was granted. The trial resulted in favor of the wife, and then the husband appealed the intermediate order, restoring the case to the court calendar. The right to appeal, the intermediate order, after an adverse trial result, is the only question presented to the Court.

Where an intermediate order affects a final determination, it is a proper subject matter for an appeal.[37] Mere participation in the proceedings after such an intermediate order does not waive the right to appeal.[38] It is, however, a general rule that a party who accepts the benefits of a judgment or order waives his right to appeal from it.[39]

The Appellate Division[40] concluded that the intermediate order vacating the stipulation relieved the husband from complying with its provisions; that the husband accepted this benefit of relief and, therefore, waived his right of appeal.

35. 2 N.Y.2d at 167, 157 N.Y.S.2d at 956.
36. 3 N.Y.2d 339, 165 N.Y.S.2d 449 (1957).
37. N. Y. CIV. PRAC. ACT §580.
38. Matter of New York Central & H.R.R., 60 N.Y. 112, 116 (1875); Johnson v. International Harvester Co., 237 App. Div. 778, 779, 263 N.Y.Supp. 262, 263 (3rd Dep't 1933).
39. In re Silverman, 305 N.Y. 13, 17, 110 N.E.2d 402, 403 (1953).
40. 2 A.D.2d 680, 152 N.Y.S.2d 691 (2d Dep't 1956).