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Procedure—Summary Judgment

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on the basis of evidence indicating the absence of any other cars in the vicinity, and on an expert's testimony that the nature of the child's injury was such as is most frequently found to have been caused by contact with an automobile.

The Court cites several cases in support of this decision which involved injury to adults where no direct evidence was available as to what happened at the time of the accident;[9] the instant case is even stronger in that the plaintiff child was as a matter of law[10] incapable of contributory negligence.

Summary Judgment

In *Elgar v. Kress & Co.*,[11] the defendant moved for summary judgment in an action brought to enjoin a nuisance caused by defendant's loading operations, which allegedly interfered with the quiet use and enjoyment of the plaintiff's premises. The Court, reversing the Appellate Division,[12] denied the motion on the ground that the allegations in the complaint raised an issue of fact as to the nuisance, and that summary judgment could not be granted under these circumstances.

It is well established that the purpose of summary judgment is to dispose of unmeritorious claims at a pre-trial stage, and may be granted only in the absence of a genuine issue.[13] Under Rule 113 of the Rules of Civil Practice it has been held[14] that a defendant is entitled to summary judgment, outside of the nine categories enumerated therin, in *any* kind of action where his defense is based on affidavits and on facts established prima facie by documentary evidence or official record, and the plaintiff fails to show by affidavit facts sufficient to raise an issue as to the verity of such documentary evidence.[15]

The Court held that the complaint in the case at bar could not be dismissed on motion, even though it is generally held that normal operations of a loading platform as an incident of permitted use are not subject to restraint as a nuisance.[16] Since the defense to the nuisance was based solely on affidavits, and was not supported by any documentary evidence or official record of the kind necessary

9. *Scantlebury v. Lehman*, 305 N. Y. 713, 112 N. E. 2d 784 (1953); *Klein v. Long Island Ry. Co.*, 278 App. Div. 980, 105 N. Y. S. 2d 999 (2d Dep't 1951).
10. *Verni v. Johnson*, 295 N. Y. 436, 68 N. E. 2d 431 (1946).
11. 308 N. Y. 533, 127 N. E. 2d 325 (1955).
12. 280 App. Div. 621, 116 N. Y. S. 2d 527 (1st Dep't 1952).
13. *Hanna v. Mitchell*, 202 App. Div. 505, 196 N. Y. Supp. 43 (1st Dep't 1922); *Brawer v. Mendelson*, 262 N. Y. 53, 186 N. E. 200 (1933).
14. *Lederer v. Wise Shoe Co.*, 276 N. Y. 459, 12 N. E. 2d 544 (1938).
15. *Pross v. Foundation Properties*, 158 Misc. 304, 285 N. Y. Supp. 796 (1935); *McGreevey v. McGrevey*, 279 App. Div. 705, 108 N. Y. S. 2d 643 (4th Dep't 1951).
16. *Gravenhorst v. Zimmerman*, 236 N. Y. 22, 139 N. E. 766 (1923); *Solof v. Heitner*, 280 App. Div. 937, 115 N. Y. S. 2d 918 (2d Dep't 1952).

for summary judgment in a non-enumerated action of the type at bar, the decision seems entirely justified.

Judicial Review of Administrative Decisions

Section 81 of the New York Insurance Law requires the approval of the Superintendent of Insurance for purchases of real property to be used for business purposes and not investment. Guardian Life Insurance Company decided to purchase a new building to be used either as an investment (to be rented as an office building) or to be used as the company's own principal office building. Consequently, Guardian sought the Superintendent's approval and was granted a hearing by the Superintendent, although none is required by law. Guardian had proceeded with the purchase before the hearing had been granted, and sought in the courts to have the Superintendent's refusal to grant his approval reviewed and reversed. The courts below denied the review, and the Court of Appeals affirmed.[17]

Although "in the absence of a clear expression by the Legislature to the contrary, the courts may review the exercise of a discretionary power vested in an administrative officer or body to determine whether the case discloses circumstances which 'leave no possible scope for the reasonable exercise of discretion in such manner,"[18] the legislature can proscribe judicial review of certain acts of administrative officers and boards.[19] It is conceded by the mapority that power of review is always retained by the courts where a Board has exceeded or ignored the statutory grant of authority.[20] The dissent here claims that the Superintendent of Insurance ignored the standard set by the statute;[21] therefore review, in spite of any possible inferred mandate in the statute, is feasible and necessary. The majority in interpreting the statutory scheme disregarded the common law power of the courts to review, though this power has never been relinquished.

17. *Guardian Life Insurance Co. v. Bohlinger,* 308 N. Y. 174, 124 N. E. 2d 110 (1954).

18. *Schwab v. McElligott,* 282 N. Y. 182, 186, 26 N. E. 2d 10 (1940).

19. *Millman v. O'Connell,* 300 N. Y. 539, 89 N. E. 2d 255 (1949). In this case §121 of the Alcoholic Beverage Control Law was involved; it authorizes judicial review for some acts, but not for others. It was held that this was a legislative mandate against judicial review where not specifically authorized. However, §2 of this law provides that the authority's power is "subject only to the right of judicial review hereinafter provided for"; there is no such deliberate mandatory phrase in the Insurance Law.

20. *Barry v. O'Connell,* 303 N. Y. 46, 100 N. E. 2d 127 (1951).

21. According to the dissent, approval should be refused only when the company's action is clearly unauthorized, or the property is unrelated to the company's business, or there is fraud or no reasonable business reason for acquiring the property. Here the Superintendent relied on his own judgment as to what is a reasonable business use, rather than relying on the business experience of petitioner's officers.