St. John's Law Review

Volume 53, Summer 1979, Number 4 Article 16

N.Y.U.C.C. § 3-419: Contract Cause of Action Exists Against Bank for Collecting an Instrument Over Forged Indorsement

Neil M. Horwitz

which counsel may be obtained. In any event, the *Settles* case represents another affirmative effort by the Court to "breathe life into the requirement that a waiver of a constitutional right . . . be competent, intelligent and voluntary."[286]

Gregory J. O'Connell

UNIFORM COMMERCIAL CODE

N.Y.U.C.C. § 3-419: Contract cause of action exists against bank for collecting an instrument over forged indorsement

Prior to the passage of the Uniform Commercial Code (UCC), the payee of a negotiable instrument possessed valid causes of action in contract and tort against a bank that had collected the instrument over a forged indorsement.[287] By exercising control through collection in such a situation, the bank converted the instrument, and its liability for the conversion was limited by the 3-year tort statute of limitations.[288] The payee, however, could elect to ratify the bank's collection of the instrument, thereby waiving the conversion remedy, and proceed under an implied contract for money had and received,[289] with the resultant benefit of the longer

---

not depend on whether the defendant was represented. *Id.*

[286] People v. Hobson, 39 N.Y.2d 479, 484, 348 N.E.2d 894, 898, 384 N.Y.S.2d 419, 422 (1976).

[287] Henderson v. Lincoln Rochester Trust Co., 303 N.Y. 27, 100 N.E.2d 117 (1951) (contract); Hillsley v. State Bank, 24 App. Div. 2d 28, 263 N.Y.S.2d 578 (1st Dep't 1965) (tort), *aff'd*, 18 N.Y.2d 952, 223 N.E.2d 571, 277 N.Y.S.2d 148 (1966); Spaulding v. First Nat'l Bank, 210 App. Div. 216, 205 N.Y.S. 492 (4th Dep't) (tort), *aff'd mem.*, 239 N.Y. 586, 147 N.E 206 (1924); E. Moch Co. v. Security Bank, 176 App. Div. 842, 163 N.Y.S. 277 (1st Dep't 1917) (tort or contract), *aff'd*, 225 N.Y. 723, 122 N.E. 879 (1919). *See generally* Note, *Depositary Bank Liability Under § 3-419(3) of the Uniform Commercial Code*, 31 WASH. & LEE L. REV. 676 (1974) [hereinafter cited as *Depositary Bank Liability*].

[288] E. Moch Co. v. Security Bank, 176 App. Div. 842, 163 N.Y.S. 277 (1st Dep't 1917), *aff'd*, 225 N.Y. 723, 122 N.E. 879 (1919); *see* CPLR 214(4) (1972 & Supp. 1978-1979). Since the payee's indorsement had been forged, no title passed; therefore, when the bank processed the instrument for collection, it committed a conversion by wrongfully exercising control over a chattel to which it had no valid title. *See* E. Moch Co. v. Security Bank, 176 App. Div. at 846, 163 N.Y.S. at 280. The statute of limitations in tort runs from the date of the conversion. General Stencils, Inc. v. Chiappa, 18 N.Y.2d 125, 127, 219 N.E.2d 169, 170, 272 N.Y.S.2d 337, 339 (1966).

[289] E. Moch Co. v. Security Bank, 176 App. Div. 842, 846, 163 N.Y.S. 277, 280 (1st Dep't 1917), *aff'd*, 225 N.Y. 723, 122 N.E. 879 (1919). Since the collecting bank in *Hechter* had no title to the instrument because of the forged indorsement, *see* note 288 *supra*, by endeavoring to collect on the instrument, it became

> an agent [of the payee] for the purpose of collecting from the drawee bank the proceeds of the check delivered to it. When it [took] the check for collection, it

6-year statute of limitations for contract actions.[290] With the enactment of section 3-419 of the UCC,[291] uncertainty arose whether the payee of a wrongfully collected instrument still could maintain an action in contract against the collecting banks.[292] Recently, in

---

> assent[ed] to the agency and [became] bound by the terms of the instrument received. Those terms include[d] an obligation to pay the proceeds collected to the true payee owner *in the absence of a valid indorsement.* The moment the collecting bank receive[d] the proceeds it [held] money belonging to the owner of the check and [became] a debtor of such owner and of no one else in the absence of a valid indorsement.

Henderson v. Lincoln Rochester Trust Co., 303 N.Y. 27, 33, 100 N.E.2d 117, 120 (1951) (emphasis in original).

The agency relationship created by the bank's holding of the proceeds for the payee established the privity that was necessary for the payee to maintain an action in contract against the collecting bank. *See* Henderson v. Lincoln Rochester Trust Co., 303 N.Y. 27, 32, 100 N.E.2d 117, 120 (1951) (quoting National Union Bank v. Miller Rubber Co., 148 Md. 449, 455-56, 129 A. 688, 690 (1925)); 9 C.J.S. *Banks and Banking* § 357(c)(1) (1938). In order for the payee to claim that the funds collected were rightfully his, it also was required that the payee ratify the bank's collection of the check. *Depositary Bank Liability, supra* note 287, at 683.

Under the Negotiable Instruments Law, the payee had no cause of action in contract against the drawee bank due to the absence of privity. Henderson v. Lincoln Rochester Trust Co., 303 N.Y. 27, 31-32, 100 N.E.2d 117, 119 (1951). Thus, as against the drawee bank, the payee was limited to a suit for conversion. *Id.* at 31, 100 N.E.2d at 119; Sonnenburg v. Manufacturers Hanover Trust Co., 87 Misc. 2d 202, 204, 383 N.Y.S.2d 863, 865 (Sup. Ct. N.Y. County 1976); Forman v. First Nat'l Bank, 66 Misc. 2d 433, 434, 320 N.Y.S.2d 648, 649 (Sup. Ct. Sullivan County 1971); *accord,* National Union Bank v. Miller Rubber Co., 148 Md. 449, 129 A. 688, 690 (1925).

[290] *See* CPLR 213(2) (1972 & Supp 1978-1979). The action on the implied contract between the payee and the collecting bank accrues when the bank receives the proceeds from the drawee. Henderson v. Lincoln Rochester Trust Co., 303 N.Y. 27, 33, 100 N.E.2d 117, 119 (1951).

When more than one legal remedy is available to a plaintiff, the statute of limitations applicable to the action is that which governs the remedy the plaintiff elects to pursue. Dentists' Supply Co. v. Cornelius, 281 App. Div. 306, 307, 119 N.Y.S.2d 570, 571 (1st Dep't), *aff'd,* 306 N.Y. 624, 116 N.E.2d 238 (1953). Thus, where the payee of a negotiable instrument sues in conversion, the statute of limitations is 3 years, but should the payee choose to sue in contract, the action is subject to a 6-year time limitation.

In addition to time limitations, the amount of the damages that are recoverable also may be an important consideration in the payee's election of remedies. Prior to the enactment of the UCC, although the amount of recovery in tort was prima facie the face value of the instrument, *Depositary Bank Liability, supra* note 287, at 683, a bank could prove that because of the drawer's insolvency or some other reason, the actual value of the instrument was less than the face amount. *See* E. Moch Co. v. Security Bank, 176 App. Div. 842, 847, 163 N.Y.S. 277, 281 (1917), *aff'd,* 225 N.Y. 723, 122 N.E. 879 (1919). Under a contract theory, recovery would be the amount that the bank collected. *Id.; accord,* Mackey-Woodard, Inc. v. Citizens State Bank, 197 Kan. 536, 419 P.2d 847, 853 (1966). The UCC left undisturbed these measures of recovery in actions against parties other than the drawee; the latter's liability is absolutely deemed the face value of the instrument. N.Y.U.C.C. § 3-419, Comment 4 (McKinney 1964).

[291] N.Y.U.C.C. § 3-419 (McKinney 1964).

[292] N.Y.U.C.C. § 3-419 (McKinney 1964) provides in pertinent part:

Hechter v. New York Life Insurance Co.,[293] the Court of Appeals held that a payee still possesses a contract cause of action against a collecting bank subject to a 6-year limitations period.[294]

The plaintiff, named payee on three checks representing the proceeds of life insurance policies on her husband,[295] authorized her attorney to deposit the checks into her bank account.[296] The attorney, however, forged the plaintiff's indorsement and deposited the checks into his own account.[297] The plaintiff eventually obtained a default judgment against the attorney.[298] The default judgment was never satisfied, and the plaintiff therefore commenced an action against the collecting bank.[299] By this time, however, more than 5 years had passed since the attorney had deposited the instruments.[300] The collecting bank[301] moved for summary judgment on

---

(1) An instrument is converted when

. . . .

(c) it is paid on a forged indorsement.

According to the New York annotations, "[s]ubsection (1)(c) adopts the result in such cases as Henderson v. Lincoln Rochester Trust Co. . . . under which payment on a forged indorsement constitutes conversion of the instrument." N.Y.U.C.C. § 3-419, N.Y. Annots. at 372 (McKinney 1964): The *Henderson* Court, however, also held that the payee had a valid cause of action in *contract* against a collecting bank. 303 N.Y. 27, 32, 100 N.E.2d 117, 120 (1951). The UCC's failure to address expressly the contract cause of action has created confusion concerning the continued validity of this common-law action. Two lower courts have indicated that the action in contract has survived. *See* Sonnenberg v. Manufacturers Hanover Trust Co., 87 Misc. 2d 202, 204, 383 N.Y.S.2d 863, 865 (Sup. Ct. N.Y. County 1976); Forman v. First Nat'l Bank, 66 Misc. 2d 433, 434, 320 N.Y.S.2d 648, 649 (Sup. Ct. Sullivan County 1971).

[293] 46 N.Y.2d 34, 385 N.E.2d 551, 412 N.Y.S.2d 812 (1978), *aff'g* 59 App. Div. 2d 1069, 399 N.Y.S.2d 554 (1st Dep't 1977) (mem.).

[294] *Id.* at 39-40, 385 N.E.2d at 554-55, 412 N.Y.S. 2d at 815. The Court, however, did not decide the conditions under which the bank would be liable. *Id.* at 38 & n.3, 385 N.E.2d at 553 & n.3, 412 N.Y.S.2d at 814 & n.3; *see* notes 319-322 and accompanying text *infra*.

[295] 46 N.Y.2d at 36, 385 N.E.2d at 552, 412 N.Y.S.2d at 813. The three checks were drawn in April 1970, and totaled more than $135,000. *Id.*

[296] *Id.*

[297] *Id.* The attorney maintained a personal account with Chemical Bank, where he deposited the plaintiff's checks. After the checks had been processed for collection and honored by the drawee banks, the attorney withdrew all the money in his account, including the funds belonging to the plaintiff. *Id.*

[298] *Id.*

[299] *Id.* The action was instituted against Chemical Bank, the depository bank in the collection process. *Id.*

[300] *Id.* Because more than 3 years had passed since the attorney had deposited the checks, the conversion actions against the drawee and collecting banks were time-barred. *See* note 288 and accompanying text *supra*. Since the plaintiff was limited to an action in conversion against the drawee bank, *see* note 289 *supra*, she had no valid action against this bank. The attorney had long absconded with her funds, leaving the plaintiff with a viable action only in contract against the collecting banks, provided such a cause of action survived the adoption of the UCC.

the grounds that section 3-419(1)(c) of the UCC had abolished the contract action against a collecting bank for wrongfully collecting an instrument over a forged indorsement, and that since the 3-year tort statute of limitations had expired, the plaintiff's suit was time-barred.[302] Special term denied the motion,[303] and the appellate division unanimously affirmed.[304]

In a unanimous opinion written by Judge Cooke,[305] the Court of Appeals affirmed, concluding that the UCC did not abolish the contract remedy.[306] The Court observed that the contract action at common law was merely an illustration of the general rule that "a litigant may abandon his tort cause of action in favor of one grounded in contract."[307] While section 3-419 codifies the common-law principle that collection over a forged indorsement constitutes the tort of conversion,[308] the Court held that the section does not preclude the plaintiff from electing to proceed on a contract theory and, consequently, taking advantage of the 6-year statute of limitations.[309] Moreover, the Court found that the legislature had no design to abrogate the contract cause of action when it enacted section

[301] Chemical Bank's status as a collecting bank under the UCC was clear. 46 N.Y.2d at 36 & n.1, 385 N.E.2d at 552 & n.1, 412 N.Y.S.2d at 813 & n.1. A "collecting bank" is "any bank handling the item for collection except the payor bank." UCC 4-105(d).

[302] *See* 46 N.Y.2d at 36, 38, 385 N.E.2d at 552, 554, 412 N.Y.S.2d at 813, 814; note 288 *supra*. Chemical also sought summary judgment on the grounds that the indorsement of the plaintiff's signature was not forged inasmuch as the attorney was authorized to deposit the checks and, at any rate, the plaintiff had subsequently ratified the forged indorsements. Brief for Defendant-Appellant at 4 n. The trial judge held these contentions presented issues of fact for the jury to determine and Chemical Bank did not appeal this decision. 46 N.Y.2d at 36 n.2, 385 N.E.2d at 553 n.2, 412 N.Y.S.2d at 813 n.2; Brief for Defendant-Appellant at 4 n.

[303] 46 N.Y.2d at 36, 385 N.E.2d at 552-53, 412 N.Y.S.2d at 813.

[304] *Id.* at 36-37, 385 N.E.2d at 553, 412 N.Y.S.2d at 813.

[305] All the judges joined in the opinion of Judge Cooke except Judge Fuchsberg who did not participate in the decision. *Id.* at 40, 385 N.E.2d at 555, 412 N.Y.S.2d at 815.

[306] *Id.* at 39-40, 385 N.E.2d at 554-55, 412 N.Y.S.2d at 815. The Court held, therefore, that the plaintiff's action was not time-barred because it was commenced before the 6-year contract statute of limitations had expired. *Id.*

[307] *Id.* at 38, 385 N.E.2d at 554, 412 N.Y.S.2d at 814 (citing Terry v. Munger, 121 N.Y. 161, 24 N.E. 272 (1890)); *see* E. Moch Co. v. Security Bank, 176 App. Div. 842, 847, 163 N.Y.S. 277, 281 (1st Dep't 1917), *aff'd*, 225 N.Y. 723, 122 N.E. 879 (1919).

[308] *See* note 288 and accompanying text *supra*.

[309] 46 N.Y.2d at 38-39, 385 N.E.2d at 554, 412 N.Y.S.2d at 814-15. The Court noted that it previously had recognized the uncertainty surrounding a collecting bank's liability following the enactment of section 3-419(3) of the Code. *Id.*, *see* N.Y.U.C.C. § 3-419(3) (McKinney 1964); Hutzler v. Hertz Corp., 39 N.Y.2d 209, 217 n.3, 347 N.E.2d 627, 632 n.3, 383 N.Y.S.2d 266, 270 n.3 (1976); note 320 and accompanying text *infra*. The *Hechter* Court stated, however, that *Hutzler* did not "imply that such liability, if it continues to exist, may be asserted only in a conversion action." 46 N.Y.2d at 39, 385 N.E.2d at 554, 412 N.Y.S.2d at 815.

3-419.[310] Since the UCC was meant to be supplemented by the common law "[u]nless displaced by the *particular provisions* of [the] Act,"[311] the Court reasoned that the absence of a *specific* statutory nullification of the contract remedy indicated that the legislature had not intended to restrict the plaintiff's recourse to a suit for conversion.[312] To the contrary, the Court found in section 3-419(3), which states that the collecting bank is not liable "in conversion or otherwise" when it has dealt with the instrument "in good faith and in accordance with the reasonable commercial standards . . . [of] the business,"[313] a legislative purpose to continue all pre-UCC theories of recovery, subject to the defenses provided by that section.[314]

The significance of the *Hechter* Court's determination that the UCC did not supplant the contractual liability at common law of a collecting bank to the payee of an instrument collected over a forged indorsement is that a payee often may not become aware of the forgery until after the expiration of the tort statute of limitations.[315] It is submitted that it would be manifestly unjust to foreclose the innocent payee from recourse against the collecting bank, which often represents the only feasible source of recovery.[316] Moreover, the

---

[310] 46 N.Y.2d at 39, 385 N.E.2d at 554, 412 N.Y.S.2d at 815.

[311] UCC 1-103 (emphasis added).

[312] 46 N.Y.2d at 39, 385 N.E.2d at 554, 412 N.Y.S.2d at 815. The Court stated that, "[u]nder the plain import of this section, nothing short of an express code provision limiting plaintiff's remedy to a conversion suit would suffice to destroy the action *ex contractu.*" *Id.* (emphasis in original). The Court also relied on the basic principles of statutory construction that an unambiguous legislative intent is necessary to negate a rule of common law. *Id.; see, e.g.*, Jones v. City of Albany, 151 N.Y. 223, 228, 45 N.E. 557 (1896).

[313] N.Y.U.C.C. § 3-419(3) (McKinney 1964) provides:

> Subject to the provisions of this Act concerning restrictive indorsements a representative, including a depositary or collecting bank, who has in good faith and in accordance with the reasonable commercial standards applicable to the business of such representative dealt with an instrument or its proceeds on behalf of one who was not the true owner is not liable in conversion or otherwise to the true owner beyond the amount of any proceeds remaining in his hands.

[314] 46 N.Y.2d at 39, 385 N.E.2d at 554, 412 N.Y.S.2d at 815.

[315] *See, e.g.*, Sonnenberg v. Manufacturers Hanover Trust Co., 87 Misc. 2d 202, 383 N.Y.S.2d 863 (Sup. Ct. N.Y. County 1976); Gerber v. Manufacturers Hanover Trust Co., 64 Misc. 2d 687, 315 N.Y.S.2d 601 (N.Y.C. Civ. Ct. N.Y. County 1970). In *Hechter*, the plaintiff did not learn of the attorney's illegal conduct until after the expiration of the conversion statute of limitations. *See* Brief for Plaintiff-Respondent at 1.

[316] In a situation such as that found in *Hechter* the forger often has disappeared or is insolvent. *See* note 289 *supra.* Thus, without a contract action against the collecting bank, actions commenced without the 3-year tort statute of limitations would be limited to suits against the drawer of the instrument under section 3-804. N.Y.U.C.C. § 3-804 (McKinney 1964). Such actions, however, would require the plaintiff to post a security "not less than twice the amount allegedly unpaid on the instrument." *Id.* The prohibitive burden that this can place on the plaintiff is illustrated by the *Hechter* case where the checks represented more

decision comports with fundamentals of statutory construction that require an unambiguous or explicit provision to negate a common-law rule.[317]

By specifically holding that section 3-419 did not abolish the contract cause of action, the Court has resolved one of the problems that has arisen in cases involving that section.[318] Difficulties remain, however, in determining the circumstances under which a collecting bank would be liable, regardless of the form of the action.[319] Section 3-419(3) seems to provide immunity for a depositary or collecting bank that has acted reasonably and in good faith, whether the suit lies in "conversion or otherwise."[320] The Court's interpretation of the

---

than $135,000. 46 N.Y.2d at 36, 385 N.E.2d at 552, 412 N.Y.S.2d at 813. On the other hand, at least in the case of the depository bank in the collection process, the bank deals directly with the wrongdoer and is in a better position to prevent such improper payments. It is submitted that it would not be unfair to make the depositary bank bear the loss. *See also* Note, *Payee v. Depositary Bank: What is the UCC Defense to Handling Checks Bearing Forged Indorsements?*, 45 COLO. L. REV. 281, 297-304, 313 (1974).

In addition, prohibiting a direct suit against the collecting banks forces the plaintiff to sue the drawer or drawee, thus beginning a series of lawsuits leading circuitously to the collecting banks. As stated by one commentator:

> If [the payee] sues the drawer, the drawer will insist that that the drawee recredit his account and the drawee will then sue the depositary bank on the warranties of good title a depositary bank gives to the drawee when he passes a check down the collection stream. If our payee-owner sues the drawee directly, the same result follows: drawee pays payee and drawee sues depositary bank on the warranties.

J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 15-4, at 503 (1972) [hereinafter cited as WHITE & SUMMERS]. The direct suit against the depositary or collecting bank is not only more economical, since it avoids additional suits and the need to implead additional parties, but often results in making available more convenient defendants. *Id.* at 503-04. The thief who has stolen the instrument usually will negotiate it at a local bank, though it may have been drawn on a drawee bank located in another jurisdiction. In this situation, it would be less burdensome for the innocent owner of the negotiable instrument to sue the local bank. Moreover, as noted, by the *Hechter* Court, *see id.* at 504, if the reverse were true and the thief cashed the instrument in a depositary bank located in another city and the drawee bank were the owner's local bank, the owner could still commence an action against the drawee bank under UCC § 3-419.

[317] *See, e.g.*, Jones v. City of Albany, 151 N.Y. 223, 228, 45 N.E. 557, 560 (1896); UCC § 1-103; notes 25 & 26 and accompanying text *supra*. The UCC itself " 'derives from the common law' and 'assumes the continuing existence of a large body of pre-Code and non-Code law on which it rests for support,' without which the Code 'could not survive.' " WHITE & SUMMERS, *supra* note 316, at 6 (quoting Gilmore, *Article 9: What It Does for the Past*, 26 LA. L. REV. 285, 285-86 (1966)).

[318] For a discussion of the ambiguities existing in section 3-419, *see* WHITE & SUMMERS, *supra* note 316, at 499-509.

[319] *See* Hutzler v. Hertz Corp., 39 N.Y.2d 209, 217 n.3, 347 N.E.2d 627, 632 n.3, 383 N.Y.S.2d 266, 270 n.3 (1976); WHITE & SUMMERS, *supra* note 316, at 502-09; Note, *In Defense of U.C.C. § 3-419(3)*, 53 NOTRE DAME LAW. 972 (1978); *Depositary Bank Liability*, *supra* note 287.

[320] *See* note 313 *supra*. Despite the language of this section, many courts have held collecting banks liable employing such rationales as: (1) narrowly defining "representative,"

"or otherwise" language to include a contract cause of action would appear to extend the same defense to an action in contract.[321] Since the issue was not presented, however, the Court preferred to avoid any attempt to resolve it.[322] Nevertheless, the *Hechter* decision properly has placed the liability, and hence the duty to act with care and caution, on the collecting banks, the party best able to prevent the occurrence of such situations.

Neil M. Horwitz

---

see, e.g., Ervin v. Dauphin Deposit Trust Co., 84 Dauphin 280, 38 Pa. D. & C. 2d 473, 3 U.C.C. Rep. Serv. 311 (C.P. 1965); (2) narrowly defining "proceeds," *see, e.g.*, Cooper v. Union Bank, 9 Cal. 3d 123, 136-37, 507 P.2d 609, 619-20, 107 Cal. Rptr. 1, 11-12 (1973); Sonnenberg v. Manufacturers Hanover Trust Co., 87 Misc. 2d 202, 205, 383 N.Y.S.2d 863, 865 (Sup. Ct. N.Y. County 1976); (3) finding that "reasonable commercial standards" had not been used, *see, e.g.*, Federal Deposit Ins. Corp. v. Marine Nat'l Bank, 431 F.2d 341, 344 (5th Cir. 1970); Salsman v. National Community Bank, 102 N.J. Super. 482, 493, 246 A.2d 162, 168 (Super. Ct. Law Div. 1968), *aff'd*, 105 N.J. Super. 164, 251 A.2d 460 (Super. Ct. App. Div. 1969); Belmar Trucking Corp. v. American Trust Co., 65 Misc. 2d 31, 36-37, 316 N.Y.S.2d 247, 254 (N.Y.C. Civ. Ct. N.Y. County 1970); or (4) ignoring UCC § 3-419 (3), *see, e.g.*, Harry H. White Lumber Co. v. Crocker-Citizens Nat'l Bank, 253 Cal. App. 2d 368, 61 Cal. Rptr. 381, 385 (Ct. App. 1967); Mississippi Bank & Trust Co. v. County Supplies & Diesel Serv., Inc., 253 So.2d 828, 832-33 (Miss. Sup. Ct. 1971). The New York Court of Appeals has not decided the issue. *See* 46 N.Y.2d at 38 n.3, 385 N.E.2d at 553 n.3, 412 N.Y.S.2d at 814 n.3; Hutzler v. Hertz Corp., 39 N.Y.2d 209, 217 n.3, 347 N.E.2d 627, 632 n.3, 383 N.Y.S.2d 266, 270 n.3 (1976); note 309 *supra*.

[321] This would appear to be the logical result of the *Hechter* Court's reasoning. The Supreme Court, New York County, however, has held the defense to be invalid in a contract action because the bank had not paid the "proceeds" of the instrument to the forger; therefore, the proceeds remained in the bank's hands for the payee. *See* Sonnenberg v. Manufacturers Hanover Trust Co., 87 Misc. 2d 202, 205, 383 N.Y.S.2d 863, 865 (Sup. Ct. N.Y. County 1976).

[322] 46 N.Y.2d at 38 n.3, 385 N.E.2d at 553 n.3 412 N.Y.S.2d at 814 n.3; Hutzler v. Hertz Corp., 39 N.Y.2d 209, 217 n.3, 347 N.E.2d 627, 632 n.3, 383 N.Y.S.2d 266, 270 n.3 (1976).