St. John's Law Review

Volume 44
Number 3 *Volume 44, January 1970, Number 3*

Article 42

Election of Remedies: Summary Judgment Against Bankrupt Precludes Showing of Fraud in Subsequent Action

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This fact would also make CPLR 2212(a) applicable. That section states:

> A motion on notice in an action in the supreme court shall be noticed to be heard in the judicial district where the action is triable or in a county adjoining the county where the action is triable.

Although the "adjoining county" provision is discretionary with the court, and courts will usually exercise this discretion to transfer the motion to the judicial district where the action is triable,[250] the *Shapiro* facts clearly fall within the intendment of this statute as well. Thus, in view of the circumstances and the clear statutory authority for hearing the motion, the Supreme Court, Queens County should have granted the relief sought.

Election of Remedies

Election of Remedies: Summary judgment against bankrupt precludes showing of fraud in subsequent action.

In In re *Galich*,[251] the respondent objected to petitioners' motion to discharge its judgment pursuant to section 150 of the New York Debtor and Creditor Law.[252] Previously, in 1966, the respondent had sold clothing valued in excess of $1000 to the petitioners on credit. Two weeks later, they filed petitions in bankruptcy. However, some two months before petitioners were adjudicated bankrupts, the respondent obtained an order for summary judgment against them. The judgment entered upon this order was the one in question in the instant proceeding.

Respondent contended that the petitioners had falsely represented their solvency in a credit statement it had requested at the time of the sale. This allegation, it argued, prevented discharge of the judgment it had obtained.[253] The court examined the complaint in the action for summary judgment and found no allegation as to fraud. Moreover, there was no basis whatsoever in either the pleadings or the judgment from which fraud could be deduced. Apparently, the respondent had

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250 7B McKinney's CPLR 2212, supp. commentary 14 (1968).

251 59 Misc. 2d 836, 300 N.Y.S.2d 670 (Monroe County Ct. 1969).

252 N.Y. Debt. & Cred. Law § 150 (McKinney 1945).

253 A party shall not be discharged where he obtains money or property on credit "in reliance upon a materially false statement in writing respecting his financial condition made or published or caused to be made or published in any manner whatsoever with intent to deceive. . . ." Bankruptcy Act, ch. 575, § 1, 52 Stat. 851 (1938), 11 U.S.C. § 35(a)(2) (1964).

been so intent upon receiving summary judgment before the bankruptcy adjudication that it saw no need to raise allegations as to fraud which required more than "paper proof" if they were to be sustained.

Where a judgment exists, a court is bound by that judgment and it may not go behind it.[254] Thus, the *Galich* court was foreclosed from inquiring into any facts existing outside of the pleadings and the record in the former actions, and, because of this inability, the court could see nothing which prevented discharge of the judgment even though circumstantial evidence as to fraud was unquestionably present. The case serves to demonstrate that summary judgment is an inadequate remedy against a purchaser who has perpetrated a fraud and has sought refuge in bankruptcy.

FORUM NON CONVENIENS

Forum non conveniens: Doctrine invoked by Nassau County District Court on intrastate basis.

Since 1929, when the term *forum non conveniens* was first popularized by a much cited law review article,[255] the doctrine has been widely accepted, and today New York courts will, in the absence of special circumstances, refuse to hear tort actions between nonresidents when the cause of action did not arise within the state.[256]

In the recent case of *Suriano v. Hosie*,[257] the District Court of Nassau County extended the doctrine by applying it where both parties were residents of Queens County and the cause of action arose in that county. The court stated that there was no reason why the "doctrine should not be invoked . . . as it pertains to non-residents of Nassau County since the same policy considerations prevail . . ." on the intrastate and interstate levels.[258] The court, however, granted the dismissal on the express condition that defendant submit to the jurisdiction of the appropriate Queens county court.[259]

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254 *In re* Benoit, 124 App. Div. 142, 108 N.Y.S. 889 (1st Dep't 1908), *aff'd*, 194 N.Y. 549, 87 N.E. 1115 (1909).

255 Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929).

256 Aetna Ins. Co. v. Creole Petroleum Corp., 27 App. Div. 2d 518, 275 N.Y.S.2d 274 (2d Dep't 1966).

257 59 Misc. 2d 973, 302 N.Y.S.2d 215 (Dist. Ct. Nassau County 1969).

258 *Id.* at 974-75, 302 N.Y.S.2d at 217. This appears to be the first instance since the establishment of the Uniform Court Acts and during the life of the CPLR that *forum non conveniens* has been invoked on an intrastate basis.

259 The ability to attach such conditions has been held to be within a court's discretion. *See, e.g.*, Ginsburg v. Hearst Publishing Co., 5 App. Div. 2d 200, 170 N.Y.S.2d 691 (1st Dep't 1958), *aff'd*, 5 N.Y.2d 894, 156 N.E.2d 708, 183 N.Y.S.2d 77 (1959).