

Res Judicata: Mills v. Gabriel Applicable Where Plaintiff Is a Car Rental Agency

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for the protection of the [debtor]. . . ."¹⁰⁹ Thus, the affidavit must contain enough information to enable a creditor to carry out an investigation to determine whether the confession is bona fide.

In holding that the affidavit in the instant case was insufficient, the court observed that the debtor's affidavit stated the county in which he resided, and authorized the entry of a \$40,000 judgment "for a debt justly due to the plaintiff arising from the following facts: Money loaned by Plaintiff to Defendant and not repaid."¹¹⁰ This general statement provides little means of determining whether the confession was bona fide. The court stated that the affidavit lacked information as to the amount of the loan, the date of the loan, the amount repaid, and how much of the amount confessed was principal or interest.¹¹¹ Because of these deficiencies, the court vacated the judgment.

This case should remind the practitioner that it is important to include sufficiently detailed information concerning the obligation in the debtor's affidavit. Adherence to the guidelines established by the court should insure that the judgment will not be subject to a motion to vacate.

Res judicata: Mills v. Gabriel applicable where plaintiff is a car rental agency.

Section 388 of the Vehicle and Traffic Law imputes to the owner of a motor vehicle the negligence of one who uses or operates it with his permission for the purpose of imposing on the owner liability to an injured third party. The section was authoritatively interpreted by the Court of Appeals in *Mills v. Gabriel*,¹¹² where plaintiff brought an action to recover for damages done to her automobile in a collision. Both plaintiff's driver, who was driving with plaintiff's permission but in her absence, and the defendant, owner-operator of the other vehicle, were found to be negligent. However, this negligence was not imputed to plaintiff so as to bar her recovery for damages.¹¹³

¹⁰⁹ 4 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3218.03 (1964).

¹¹⁰ County Nat'l Bank v. Vogt, 28 App. Div. 2d 793, 280 N.Y.S.2d 1016, 1018 (3d Dep't 1967).

¹¹¹ See also Wood v. Mitchell, 117 N.Y. 439, 22 N.E. 1125 (1889), where the affidavit contained rather general information concerning the obligation, therefore justifying the Court of Appeals' finding that the affidavit was too indefinite.

¹¹² 259 App. Div. 60, 18 N.Y.S.2d 78 (2d Dep't 1940), *aff'd mem.*, 284 N.Y. 755, 31 N.E.2d 512 (1940). *Mills* interpreted § 59 of the Vehicle and Traffic Law, the predecessor of present § 388.

¹¹³ The *Mills* court stated: "The statute does not change the common-law rule respecting the owner's right to recover from third persons under the

In the recent case of *Continental Auto Lease Corp. v. Campbell*,¹¹⁴ the Court of Appeals was faced with a classic *Mills* situation. Plaintiff, engaged in the automobile rental business, sought to recover damages against the driver of an automobile which was involved in a collision with one of plaintiff's leased automobiles. The jury had previously found that both plaintiff's driver and the defendant were guilty of negligence. Applying *Mills* in the present action, the Court allowed plaintiff recovery holding that the negligence of plaintiff's driver was not imputable to plaintiff so as to bar recovery.

The defendant sought to distinguish the case from *Mills* on two grounds. First, the defendant contended that since here a commercial bailment was involved as opposed to a gratuitous bailment, a different rule should apply. The Court stated that this alone was not enough to deny plaintiff a recovery for damages.¹¹⁵ Second, the defendant sought to bring the case within the rule of *Gochee v. Wagner*.¹¹⁶ Under *Gochee*, if the owner's relationship to the operator is such that a degree of physical control over the operator can reasonably be deemed to exist, the negligence of the driver can be imputed to the owner so as to bar his recovery against a negligent third party. The Court dismissed this second contention because it felt that plaintiff had no right to control its lessee's conduct as a driver.¹¹⁷

The decision in *Continental* clarifies the *Mills* rule in regard to leased automobiles, and puts to rest any doubt that a different rule might be applied in the automobile leasing situation.

Res judicata: No *res judicata* where a decision is rendered without a judgment.

In *Mandracchia v. Russo*,¹¹⁸ plaintiff and defendant had, in an earlier suit, litigated the issues involved with their respective positions reversed. The judge, in the earlier action, had rendered a decision, after a non-jury trial, but judgment was never entered because the parties settled in accordance with the terms of the decision. In the present action, the appellate term, second department, held that the earlier decision was not *res judicata* as to the present action since judgment had never been entered thereon.

circumstances disclosed by this record. Nor may it be invoked for the purpose of imputing the operator's negligence to the owner. It is applicable for that purpose only in actions brought by third persons against the owner." *Mills v. Gabriel*, 259 App. Div. 60, 62, 18 N.Y.S.2d 78, 80 (2d Dep't 1940).

¹¹⁴ 19 N.Y.2d 350, 227 N.E.2d 28, 280 N.Y.S.2d 123 (1967).

¹¹⁵ *Id.* at 353, 227 N.E.2d at 30, 280 N.Y.S.2d at 125.

¹¹⁶ 257 N.Y. 344, 178 N.E. 553 (1931).

¹¹⁷ *Continental Auto Lease Corp. v. Campbell*, 19 N.Y.2d 350, 354, 227 N.E.2d 28, 30, 280 N.Y.S.2d 123, 125 (1967).

¹¹⁸ 53 Misc. 2d 1018, 280 N.Y.S.2d 429 (App. T. 2d Dep't 1967).