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Article 37

CPLR 6212: Forum Non Conveniens Dismissal Allows Recovery on Attachment Bond

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damages, which were assessed at an inquest, ordered subsequent to plaintiff's default at an examination before trial. The Court faced the issue of whether the judgment was appealable, notwithstanding that it was based in part on the default of the defendants.[156] Since the judgment appealed from was based only in part upon defendant's default, the Court of Appeals found that the defendant was entitled to a review of the matters which defendant's counsel challenged when he appeared at the inquest. The Court found that the defendant's attorney contested (1) the sufficiency of the complaint, (2) the measure of compensatory damages, and (3) the availability of punitive damages. The Court, therefore, considered this appeal, but limited its review to the contested issues.

ARTICLE 62 — ATTACHMENT

CPLR 6212: Forum non conveniens dismissal allows recovery on attachment bond.

CPLR 6212(b) provides that when an order of attachment is made the plaintiff must furnish an undertaking of an amount fixed by the court in order to protect the defendant from damages due to the attachment in the event the defendant prevails or it is finally decided that the plaintiff was not entitled to attachment. If the cause of action is dismissed without an adjudication on the merits, the defendant will not be able to recover on the undertaking.[157]

In *Minskoff v. Fidelity and Casualty Co.*,[158] defendant's prior action had been dismissed on the ground of forum non conveniens. Plaintiffs' property had been attached in that action and they subsequently sued on the attachment bond to recover damages resulting from the attachment. The sole issue was whether a forum non conveniens dismissal was a final determination that defendant was not entitled to an attachment. The majority concluded that although it had not been decided in the prior action whether defendant had a meritorious claim against the plaintiffs, a forum non conveniens dismissal was a final determination that no right to an attachment in this state had existed.

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and directing an inquest on matters of damages in an action for interference with the collection of a judgment. The Court dismissed this appeal since the order did not finally determine the action and was therefore non-appealable.

[156] James v. Powell, 19 N.Y.2d 249, 250, 225 N.E.2d 741, 742, 279 N.Y.S.2d 10, 12 (1967).

[157] *See* Apollinaris Co. v. Venable, 136 N.Y. 46, 32 N.E. 555 (1892).

[158] 28 App. Div. 2d 85, 281 N.Y.S.2d 410 (1st Dep't 1967).

The dissent believed that the majority confused forum non conveniens and lack of jurisdiction. It stated that forum non conveniens is a discretionary measure and implicit in such a dismissal is the acknowledgment of jurisdiction. The court in the earlier action [159] had valid in rem jurisdiction via the attachment but chose to decline this jurisdiction for reasons of convenience and expediency. Were the facts in this controversy altered slightly the court might well have retained jurisdiction.[160]

Both the majority and the dissent referred to *Apollinaris Co. v. Venable* [161] in support of their respective positions. In *Apollinaris* defendants' temporary injunction had been vacated because of their contemptuous conduct *following* the issuance of the injunction. Plaintiff sued on the bond originally posted prior to issuance of the injunction. Relief was denied because his right to recover was predicated upon whether defendants were *originally* entitled to the injunction, and the vacating of the injunction on the ground of subsequent contempt did not mean that they were not so entitled.

Although this case would seem to support denial of recovery on the bond in *Minskoff*, as was advocated by the dissent, the majority held that, unlike *Apollinaris*, there was no *initial* right to the attachment. The majority also thought it important, as the *Apollinaris* Court pointed out, that were the court to hold otherwise plaintiff could always discontinue his action prior to a determination on the merits and escape liability for damages. Although the dissent did not address itself to this argument, a viable solution was given by the *Apollinaris* Court itself:

> Where the plaintiff *ex parte*, and without the consent of the defendants, enters an order vacating the injunction and discontinuing the action, this is equivalent to an adjudication that the plaintiff was not entitled to the injunction [or attachment] when granted.[162]

Under the *Minskoff* decision a non-resident plaintiff faces a dilemma when he seeks to sue a non-resident defendant in New York. He must decide whether to attach New York property, and assume the risk of a forum non conveniens dismissal and therefore liability on the undertaking, or to bring the action elsewhere where there may not be any property with which to satisfy his judgment.

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[159] Harsh Inv. Corp. v. Minskoff, 24 App. Div. 2d 842, 263 N.Y.S.2d 684 (1st Dep't 1966) (memorandum decision).

[160] Ketz v. Liston, 22 App. Div. 2d 205, 254 N.Y.S.2d 389 (1st Dep't 1964).

[161] 136 N.Y. 46, 32 N.E. 555 (1892).

[162] Apollinaris Co. v. Venable, 136 N.Y. 46, 49, 32 N.E. 555, 556 (1892).