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Article 62

CPLR 4213: Properly Utilized When Essential Fact Absent from Record on Appeal

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right to make a jury demand within ten days of filing.[234] The appellate court, however, concluded that the defendant had not waived his right to a jury trial[235] and, carrying out its duty under CPLR 4103, afforded the defendant thirty days in which to demand a jury. This case illustrates how, as a matter of practice, CPLR 4103 is to be applied.

CPLR 4111: Used to specifically provide a means of interpreting a jury verdict.

The courts should employ CPLR 4111 in cases wherein two conflicting theories of liability are presented to the jury. In *Dore v. Long Island R.R.*,[236] the case was presented to the jury on the issues of ordinary negligence and last clear chance.[237] The jury rendered a general verdict and the appellate court was unable to determine upon which theory the verdict rested. It was obvious that the evidence produced would not support both theories. In remanding, the court stated that when inconsistent theories are presented to the jury, the trial court should utilize the procedure available under CPLR 4111, which permits either the rendition of a special verdict[238] or a general verdict accompanied by written answers to written interrogatories.[239]

ARTICLE 42 — TRIAL BY THE COURT

CPLR 4213: Properly utilized when essential fact absent from record on appeal.

CPLR 4213(b) provides that in a nonjury trial, the decision of the court shall state the facts it deems essential.[240] However, on appeal, when the record does not contain essential facts, the court has three possible alternatives: (1) reverse and remand for a new trial; (2) make de novo findings of fact; or (3) remand to the court of original instance for the essential findings of fact.[241] In *Conklin v. State*,[242] the lower court failed to allocate specific

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234 CPLR 4102(a).

235 See Micro Precision Corp. v. Brochi, 4 App. Div. 2d 697, 164 N.Y.S.2d 454 (2d Dep't 1957).

236 23 App. Div. 2d 502, 256 N.Y.S.2d 425 (2d Dep't 1965).

237 Jasinski v. New York Cent. R.R., 21 App. Div. 2d 456, 461-63, 250 N.Y.S.2d 942, 947-49 (4th Dep't 1964).

238 CPLR 4111(b); see Martin Fireproofing Corp. v. Maryland Cas. Co., 45 Misc. 2d 354, 257 N.Y.S.2d 100 (Sup. Ct. 1965).

239 CPLR 4111(c).

240 CPLR 4213; see 4 WEINSTEIN, KORN & MILLER, *op. cit. supra* note 216, ¶ 4213.09.

241 4 WEINSTEIN, KORN & MILLER, *op. cit. supra* note 216, ¶4213.09.

242 22 App. Div. 2d 481, 256 N.Y.S.2d 477 (3d Dep't 1965).

awards to separate plots of condemned land, which was required since the lands were not homogeneous. Therefore, the appellate division held that the trial court had failed to provide facts which would permit adequate judicial review, and remanded the case to the lower court to formulate proper findings of fact. Although the court indicated its basic reluctance to make findings of fact, it clearly implied that it would, in appropriate circumstances, exercise its jurisdiction as a trial court to determine the essential facts itself under CPLR 4213.[243]

ARTICLE 52 — ENFORCEMENT OF MONEY JUDGMENTS

CPLR 5201: Debt, a property subject to enforcement.

In the case of *Fishman v. Sanders,*[244] the second department held that the insurer's contractual obligation in an automobile liability policy to defend and indemnify the insured is a debt or cause of action capable of being attached.[245] It thus rejected the argument that the insured's interest in the policy was purely contingent. This position was recently reaffirmed in *Seider v. Roth.*[246] In this decision, however, Judge Ughetta, who had concurred in *Fishman,* dissented stating that the court in *Fishman* "indulged in erroneous dictum." He remarked that the insurer's obligation was not attachable because the indebtedness was not absolutely payable.[247]

It has been held, however, that a purchaser's right in airplanes subject to a conditional sales contract, in which the vendor retained legal title, was attachable by the vendee's creditors. This was so, even though the vendor could recover possession of the aircraft from the vendee or creditor upon a default in the contract.[248] The solution to the question of what is contingent and thus not attachable is not readily ascertainable. In the practical light of enforcing money judgments, it would appear that if a right or property is able to be given a monetary value it is sufficiently

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[243] The appellate division generally confines the exercise of such power to instances where the record is complete and the missing facts are of a non-technical nature. See Mellon v. Street, 23 App. Div. 2d 210, 259 N.Y.S.2d 900 (3d Dep't 1965).

[244] 18 App. Div. 2d 689, 235 N.Y.S.2d 861 (2d Dep't 1962).

[245] *Cf.* Matter of Riggle, 11 N.Y.2d 73, 181 N.E.2d 436, 226 N.Y.S.2d 416 (1962).

[246] 23 App. Div. 2d 787, 258 N.Y.S.2d 795 (2d Dep't 1965).

[247] *Id.* at 788, 258 N.Y.S.2d at 796. In support of the uncertainty of actual indebtedness, Judge Ughetta noted that several conditions had to be satisfied before the policy became effective and that nothing was due under the policy until the plaintiff recovered a judgment. *Ibid.*

[248] Intermediate Credit Corp. v. Overseas Nat'l Airways, Inc., 41 Misc. 2d 522, 245 N.Y.S.2d 749 (Sup. Ct. 1963).