St. John's Law Review

Volume 39, December 1964, Number 1 Article 55

Summary Judgment May Be Granted in a Summary Proceeding

St. John's Law Review

This case illustrates a method by which a defendant may end up with a judgment under 3211 for which he had not even moved. It should make plaintiffs aware of a possible pitfall in moving under 3211(b).

Summary judgment may be granted in a summary proceeding.

The appellate term of the first department has held that a "summary judgment device is applicable to summary proceedings."[211] The holding arose out of a summary proceeding brought to oust holdover tenants wherein the landlord moved for summary judgment and to dismiss an affirmative defense. The trial court denied the motion. The appellate term, in reversing, noted that it had been generally accepted that the summary proceeding must be "strictly followed and that there could be no departure from the mode of trial . . . provided by the statute." [212]

The court cited instances in which prior courts had treated a motion for summary judgment made in a summary proceeding in different ways so as to achieve a just result. The opinion continued:

> Are we not hypocritical in holding that a motion for summary judgment is not applicable to a summary proceeding? It would seem that since the purpose of the summary proceeding is to provide a means for an expeditious determination, anything which will afford even speedier justice is not opposed to the philosophy of summary proceeding.[213]

The court noted that there is no justification for making such a motion unavailable in a summary proceeding. The court then pointed out that CPLR 3212 permits any party to move for summary judgment in any action except a matrimonial one. The changes made in the transition of Article 83 of the CPA to Article 7 of the Real Property Actions and Proceedings Law were then cited. Section 1428 of the CPA required a trial by a jury in a summary proceeding if either party so requested. The new Article 7 of the RPAPL provides a trial only "where triable issues of fact are raised. . . ." [214] Therefore, the court concluded, if there are no triable issues of fact a summary judgment is proper and entirely consistent with the purpose of a "summary" proceeding.

The logic of the court's reasoning is unimpeachable. Whatever distinctions prior law may have made concerning summary proceedings, there is no justification under the RPAPL or the CPLR to exclude the summary judgment device from such pro-

---

[211] Metropolitan Life Ins. Co. v. Carroll, 43 Misc. 2d 639,—, 251 N.Y.S.2d 693, 697 (Sup. Ct. 1964).
[212] *Id.* at—, 251 N.Y.S.2d at 695.
[213] *Id.* at—, 251 N.Y.S.2d at 695.
[214] RPAPL § 745.

ceedings. It is, in fact, the most expeditious method, when there are no genuine fact issues, for concluding *any* proceeding and would appear most appropriate of all for a "summary" one.

The court then directed its attention to the second motion made by the landlord to dismiss an affirmative defense pursuant to 3211(b) of the CPLR. The court stated that the question to be determined is not whether the pleadings appear to be sufficient, nor whether they are technically correct, but whether there is "substance behind the facade." [215] Under CPLR 3211 the court's inquiry must be directed to whether "the pleader *has* a claim or defense rather than whether he has properly stated one." [216] This distinction is an important one for the practitioner. It permits him to introduce evidence on the motion to determine if the pleading has substance. It makes no difference that it purports on its face to state a cause of action.

The case is a valuable one in that it establishes, as a simple proposition, that CPLR 3211 and 3212 are available as procedural tools to assist in the determination of summary proceedings.

ARTICLE 34 — CALENDAR PRACTICE; TRIAL PREFERENCES

Statement of readiness — Even upon consent of both parties, restoration of a case to the calendar must be at the foot thereof.

In *Scully v. Jefferson Truck Renting Corp.*[217] the action was removed from the calendar for failure to file a timely statement of readiness. The parties submitted a stipulation consenting to the placement of the action to its original numerical position on the trial calendar. The court reinstated the action, but did so at the foot of the trial calendar. The court held that it has no authority, regardless of the cause for delay, to return this action to its original numerical position.[218]

The statement of readiness is governed by the rules of the court in the four departments respectively. The rules for the second department, which the court in the instant case has applied, are contained in part 7 of the second department court rules and provide that a negligence action may be placed upon the calendar without a statement of readiness being filed. However, an action so filed will be removed from the calendar if the statement is not filed within one year after the filing of the note of issue. It is

---

[215] *Supra* note 211, at —, 251 N.Y.S.2d at 697.

[216] 4 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3211.01 (1964).

[217] 43 Misc. 2d 48, 249 N.Y.S.2d 983 (Sup. Ct. 1964).

[218] Scully v. Jefferson Truck Renting Corp., 43 Misc. 2d 48, 52, 249 N.Y.S.2d 983, 987 (Sup. Ct. 1964).