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Summary Judgment in New York: The New Rule 113

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LEGISLATION

SUMMARY JUDGMENT IN NEW YORK: THE NEW RULE 113

The trend in New York toward more liberal application of summary judgment has culminated with the adoption of a new rule 113 of the Rules of Civil Practice, effective March 1, 1959.[1] The limita-

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[1] 160 N.Y. LAW REPS. & SESS. LAWS 1-2 (Weekly Advance Sheets, Feb. 18, 1959); 141 N.Y.L.J. No. 38, p. 3, col. 5 (Feb. 26, 1959). The new rule is as follows:

"Rule 113. Summary judgment. When an answer is served in an action,

1. In any action, after issue has been joined, any party may move for summary judgment. In a matrimonial action as defined below, however, the right so to move shall be limited as set forth below.

2. A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions, written admissions, etc. The affidavit must be by a person having knowledge of the facts; it must recite all the material facts; and it must show that there is no defense to the action or claim or that the action or claim has no merit, as the case may be. The motion shall be granted if, upon all the papers and proof submitted, the action or claim or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment, interlocutory or final, in favor of any party. The motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact other than an issue as to the amount or the extent of the damages. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion.

3. The existence of a triable issue of fact as to the amount or the extent of the damages shall not bar the granting of summary judgment. If only such a triable issue of fact is presented the court shall order an immediate hearing before a referee, before the court, or before the court and a jury, whichever may be proper, to assess the amount or the extent of the damages. Upon the rendering of the assessment, the court shall direct the entry forthwith of the appropriate summary judgment.

4. In a matrimonial action, to wit, an action or counterclaim to annul a marriage, for a divorce, for a separation or for a judicial determination affecting the marital status, after issue has been joined, a motion for summary judgment may be made only on the basis of documentary evidence or official records which establish a defense to the action or counterclaim. The motion shall be granted if, upon such evidence or records, the defense shall be established sufficiently to warrant the court as a matter of law in directing judgment.

5. Except as otherwise provided herein with respect to a matrimonial action, in any action summary judgment may be granted as to one or more causes of action or claims, in favor of any one or more parties, to the extent warranted, on such terms as may be just. The court may also direct: (a) that the cause of action or claim as to which summary judgment is granted shall be severed from any remaining cause of action or claim, and (b) that the

tion of nine exclusive actions in which summary judgment might be granted plaintiff, and to which defendant's motion was limited in the absence of documentary evidence or official record has been eliminated, with the relief now available upon affidavit in all causes of action with specified limitations in matrimonial cases.[2]

Nature and Purpose

The purpose of summary judgment is to expedite adjudication in civil cases where there is no issue of material fact meriting trial.[3] The judge may not usurp the power of a jury, but on the basis of affidavit, the pleadings and other available proof,[4] the court may go beyond apparent triable issues indicated by the pleadings, discriminate between those which are real and feigned, and enter judgment for either party where judgment is warranted as a matter of law.[5] Moreover, the existence of complex issues of law alone is not sufficient grounds for its denial.[6] Although an issue as to foreign law is an issue of fact which may require the denial of the motion,[7] in the absence of any evidence to the contrary it may be presumed that the common law of a foreign jurisdiction is the same as the common law

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entry of the summary judgment shall be held in abeyance pending the determination of any remaining cause of action or claim.

6. Except as otherwise provided herein with respect to a matrimonial action, this rule shall be applicable: (a) to counterclaims, so that any party may move for summary judgment upon any counterclaim as if it were an independent action; (b) to any controversy between parties, as provided in section 264, C.P.A. and (c) to any claim and cross-claim made and to any defense and counterclaim asserted, as provided in section 193-a, C.P.A., relating to third party practice."

[2] *Ibid.*

[3] General Inv. Co. v. Interborough Rapid Transit Co., 235 N.Y. 133, 139 N.E. 216 (1923); PRASHKER, NEW YORK PRACTICE § 259 (3d ed. 1954); SHIENTAG, SUMMARY JUDGMENT 3 (1941). See Glove City Amusement Co. v. Smalley Chain Theatres, 167 Misc. 603, 4 N.Y.S.2d 397 (Sup. Ct. 1938).

[4] N.Y.R. CIV. PRAC. 113(2), *supra* note 1.

[5] Rubin v. Irving Trust Co., 305 N.Y. 288, 113 N.E.2d 424 (1953); General Inv. Co. v. Interborough Rapid Transit Co., 235 N.Y. 133, 139 N.E. 216 (1923). See Sprung v. Jaffe, 3 N.Y.2d 539, 147 N.E.2d 6, 169 N.Y.S.2d 456 (1957); Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 144 N.E.2d 387, 165 N.Y.S.2d 498 (1957).

[6] Roer Constr. Corp. v. New Rochelle, 207 Misc. 46, 136 N.Y.S.2d 414 (Sup. Ct. 1954); Kennilwood Owners' Ass'n v. Wall, 148 Misc. 67, 264 N.Y. Supp. 135 (Sup. Ct. 1932); Coutts v. J. L. Kraft & Bros., 119 Misc. 260, 196 N.Y. Supp. 135 (Sup. Ct. 1922), *aff'd mem.*, 206 App. Div. 625, 198 N.Y. Supp. 908 (2d Dep't 1923).

[7] Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99 (1954); Chappell v. Chappell, 186 Misc. 968, 60 N.Y.S.2d 447 (Sup. Ct. 1946); see Phelps v. Phelps, 68 N.Y.S.2d 650 (Sup. Ct. 1947). N.Y. CIV. PRAC. ACT §§ 344-a, 391. *But see* Credito Italiano v. Rosenbaum, 246 App. Div. 687, 284 N.Y. Supp. 177 (1st Dep't 1935), *aff'd*, 271 N.Y. 583, 3 N.E.2d 196 (1936).

of New York.[8] The motion may not be granted on the basis of mere technical defects in the pleadings of an adversary, but must be predicated on the merits of the case.[9]

Development in New York

Summary judgment was introduced in New York in 1921 with the adoption of rule 113 of the Rules of Civil Practice.[10] It was based on the English rules under the Judicature Act,[11] and its constitutionality was upheld in *General Inv. Co. v. Interborough Rapid Transit Co.*, where the court said:

> The argument that rule 113 infringes upon the right of trial by jury guaranteed by the Constitution cannot be sustained. The rule in question is simply one regulating and prescribing procedure, whereby the court may summarily determine whether or not a *bona fide* issue exists between the parties to the action.[12]

The initial measure was extremely narrow in scope, the right to invoke the motion being limited to the plaintiff and only in an action for recovery of a debt or a liquidated demand arising on a contract, or on a judgment for a stated sum.[13] Eleven years later the measure was expanded to encompass eight causes of action, and the existence of an issue as to the amount of damages was eliminated as a bar to judgment.[14] An amendment of 1933 finally made the relief available to the defendant on his defense or counterclaim;[15] the court was also authorized to withhold entry of the summary judgment until the

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[8] Walgren Co. v. Diamond, 249 App. Div. 387, 292 N.Y. Supp. 513 (1st Dep't 1937) (per curiam).

[9] Curry v. Mackenzie, 239 N.Y. 267, 146 N.E. 375 (1925); Gray v. Met Contracting Corp., 4 App. Div. 2d 495, 167 N.Y.S.2d 498 (1st Dep't 1957); Bright v. O'Neill, 3 App. Div. 2d 728, 159 N.Y.S.2d 742 (2d Dep't 1957) (memorandum decision).

[10] Conboy, *Deposition, Discovery and Summary Judgment*, 22 A.B.A.J. 881, 884 (1936); Clark & Samenow, *The Summary Judgment*, 38 YALE L.J. 423, 445 (1929). Prior to Sept. 16, 1938, the effective date of the Federal Rules of Civil Procedure, rule 113 applied under the Conformity Act of 1872, ch. 255, §§ 5-6, 17 Stat. 196. Maslin v. Columbia Nat. Life Ins. Co., 3 F. Supp. 368 (S.D.N.Y. 1932), and cases cited therein.

[11] 36 & 37 Vict. c. 66, Schedule, Rule 7 (1873); Millar, *Notobilia of American Civil Procedure*, 50 HARV. L. REV. 1017, 1054-56 (1937).

[12] 235 N.Y. 133, 142-43, 139 N.E. 216, 220 (1923). See also Hanna v. Mitchell, 202 App. Div. 504, 196 N.Y. Supp. 43 (1st Dep't 1922), *aff'd mem.*, 235 N.Y. 534, 139 N.E. 724 (1923).

[13] PASTON, SUMMARY JUDGMENT IN NEW YORK 33 (1958); Saxe, *Summary Judgments in New York*, 19 CORNELL L.Q. 237 (1934); Clark & Samenow, *supra* note 10, at 445, 446.

[14] Finch, *Extension of the Right of Summary Judgment*, 4 N.Y.S.B.A. BULL. 264, 268 (1933); Finch, *Summary Judgment Procedure*, 19 A.B.A.J. 504, 505 (1933).

[15] SHIENTAG, SUMMARY JUDGMENT 11 (1941).

disposition of the undecided claim or counterclaim.[16] The effect of this latter provision was to safeguard against an irresponsible party who might squander a collected money judgment and later be "judgment proof" against an unfavorable determination arising out of the same litigation. The case of *Lederer v. Wise Shoe Co.*[17] further extended the procedure to *any case* where the moving defendant established a denial by documentary evidence or official record; it had previously been allowed to a moving defendant only on affirmative defenses based on this type of evidence when the case was outside the stipulated categories. A 1944 amendment adopted this holding.[18] A later amendment added the action for a declaratory judgment to the list of exclusive causes.[19]

Summary judgment has proven a most beneficial device in alleviating a crowded court calendar and relieving parties of lengthy trials of frivolous and feigned claims, counterclaims and defenses.[20] The elimination of practically all restrictions on causes to which it might be applied seems the inevitable climax to a long-standing movement towards greater application.

Changes in the Rule

The new rule 113 allows any party to move for summary judgment on a claim or counterclaim in *any action,* except matrimonial, where the motion is supported by affidavit, a copy of the pleadings and other available proof.[21] A motion in a matrimonial action may be made only on the basis of documentary evidence or official records which establish a defense to the action or counterclaim.[22] The limiting provision of the rule stems from the requirement that material allegations in a suit for divorce must be proved in open court even when defendant defaults, and no decree of divorce, separation or annulment may be made as a matter of course because of the default of the defendant.[23] Prior to the new rule, summary judg-

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[16] *Id.* at 16.

[17] 276 N.Y. 459, 12 N.E.2d 544 (1938).

[18] PRASHKER, NEW YORK PRACTICE 447-48 nn.6-7 (3d ed. 1954). See 1944 LEG. DOC. No. 15(G), REPORT, N.Y. JUDICIAL COUNCIL 332 (1944).

[19] PRASHKER, *op. cit. supra* note 18, at 439 n.9. See, *e.g.,* Wilner v. Department of Health, 5 Misc. 2d 331, 159 N.Y.S.2d 601 (Sup. Ct. 1957). See also 1952 LEG. DOC. No. 26, REPORT, N.Y. JUDICIAL COUNCIL 72 (1952).

[20] Clark & Samenow, *The Summary Judgment,* 38 YALE L.J. 423, 455-56 (1929). As early as 1934, the recommendation was made in New York that summary judgment be made available in all causes of action. 1934 LEG. DOC. No. 50, REPORT, N.Y. COMMISSION ON THE ADMINISTRATION OF JUSTICE 287-88 (1934).

[21] N.Y.R. CIV. PRAC. 113. See note 1 *supra.*

[22] N.Y.R. CIV. PRAC. 113(4). A matrimonial action is described as an action or counterclaim to annul a marriage, for a divorce, for a separation or for a judicial determination affecting the marital status. *Ibid.*

[23] N.Y. CIV. PRAC. ACT § 1150; N.Y.R. CIV. PRAC. 282, 283; Corey v. Corey,

ment was permissible in actions for declaratory judgment affirming the continuance of the marital relation of the parties.[24] Since, technically, a declaratory judgment does not affect the status of the parties but merely defines it, it is possible that summary judgment would be available in actions for declaratory judgment to declare the existence of a valid divorce or separation.[25]

In addition, the new rule eliminates previously existing doubts regarding the relationship of summary judgment to third-party practice and controversies between parties under section 264 of the Civil Practice Act. The rule is made expressly applicable to any claim and cross-claim made and to any defense and counterclaim asserted under section 193-a of the Civil Practice Act, and to any controversy between parties provided for in section 264 of the Civil Practice Act.[26]

Rule 114

The expansion of rule 113 also widens the scope of cases to which partial summary judgment may be applied under rule 114, which has remained unchanged. Rule 114 provides that plaintiff may have summary judgment for that part of a claim which is admitted or to which there is no defense.[27] The defendant may move to dismiss a complaint when rule 113 applies to only one or more of several causes of action, or to one or more of several parties plaintiff or defendant.[28] Such actions may be severed with only the remaining causes going to trial.[29] The courts have held that the causes of action not included under rule 113 were also excluded as to partial summary judgment under rule 114,[30] and therefore with the expansion of the controlling rule there will be an increase of encompassed cases under rule 114.

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62 N.Y.S.2d 796, 801, 804 (Sup. Ct. 1946) (dictum); Shuart v. Shuart, 183 Misc. 270, 274, 51 N.Y.S.2d 359, 364 (Sup. Ct. 1944) (dictum); Yates v. Yates, 183 Misc. 934, 939, 51 N.Y.S.2d 135, 140 (Sup. Ct. 1944) (dictum).

[24] Edelman v. Edelman, 3 App. Div. 2d 859, 161 N.Y.S.2d 717 (2d Dep't 1957) (memorandum decision); Buckley v. Buckley, 10 Misc. 2d 596, 172 N.Y.S.2d 367 (Sup. Ct. 1958).

[25] See Henricks v. Henricks, 275 App. Div. 642, 92 N.Y.S.2d 338 (1st Dep't 1949), *aff'd*, 301 N.Y. 626, 93 N.E. 916 (1950).

[26] N.Y.R. CIV. PRAC. 113(6). See text accompanying note 1 *supra*.

[27] N.Y.R. CIV. PRAC. 114.

[28] *Ibid.*

[29] *Ibid.*; Sheehan v. Cone Gen. Advertising Agency, 176 Misc. 882, 29 N.Y.S.2d 317 (App. T. 1st Dep't 1941).

[30] Berson Sydeman Co. v. Waumbeck Mfg. Co., 212 App. Div. 422, 208 N.Y. Supp. 716 (1st Dep't 1925); Hilring v. Mooney, 130 Misc. 273, 223 N.Y. Supp. 303 (N.Y. City Ct. 1927); see Appelbaum v. Gross, 117 Misc. 140, 191 N.Y. Supp. 710, *aff'd mem.*, 200 App. Div. 914, 192 N.Y. Supp. 913 (2d Dep't 1922).

Causes of Action Previously Excluded

In examining the causes of action previously excluded and now encompassed by rule 113, it must be noted that generally these cases, because of the nature of their fact patterns, did not lend themselves to summary judgment proceedings.[31] Actions for money as a penalty under a statute were expressly excluded under the old rule,[32] and were probably best decided after full trial because of the almost penal character of the remedy. Most actions sounding in tort were excluded with the exception of replevin, which was expressly provided for.[33] Thus, a motion for summary judgment was not allowed in an action for conversion,[34] fraud,[35] libel [36] or negligence.[37] For the most part the old rule covered causes of action in contract and business transactions,[38] and the list of cases where the motion was denied merely because the cause of action was not provided for in the rule is extensive.[39]

Two recent cases construing the new rule in automobile negligence actions give some indication of the problems existing in the tort area. In *Johnson v. Freeman*,[40] summary judgment was denied plaintiff although there was apparently no dispute as to the facts contained in the moving affidavits. The court felt that a jury was necessary to decide whether the facts actually constituted negligence. However, in *Phelan v. Houghton*,[41] the same judge granted the mo-

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[31] See generally SHIENTAG, SUMMARY JUDGMENT 4-7 (1941).

[32] PRASHKER, NEW YORK PRACTICE § 260, at 439 (3d ed. 1954); see Von Doemming v. Cross, 81 N.Y.S.2d 35 (Sup. Ct. 1948).

[33] PRASHKER, *op. cit. supra* note 32.

[34] Progressive Credit Union v. Mount Vernon Wiping Cloth Corp., 5 App. Div. 2d 166, 170 N.Y.S.2d 765 (1st Dep't 1958); Formel v. National City Bank, 152 Misc. 275, 273 N.Y. Supp. 817 (App. T. 1st Dep't 1934) (per curiam).

[35] Lieberman v. Penn-Union Steel Corp., 69 N.Y.S.2d 595 (N.Y. City Ct. 1947). See Macomber v. Wilkinson, 6 N.Y.S.2d 608 (Rochester City Ct. 1938).

[36] Salmaggi v. Kaufman, 66 N.Y.S.2d 257 (Sup. Ct. 1946).

[37] Ottone v. American London Shrinkers Corp., 55 N.Y.S.2d 243 (N.Y. Munic. Ct. 1945).

[38] SHIENTAG, SUMMARY JUDGMENT 5 (1941). See PRASHKER, NEW YORK PRACTICE § 261, at 440 (3d ed. 1954).

[39] It has been held that motion for summary judgment was not allowed by rule 113 in actions for injunction—Motzkin Bros. Cleaners & Dyers, Inc. v. Dime, 81 N.Y.S.2d 625 (Sup. Ct. 1948); to reform an instrument—Comas Holding Corp. v. Handel, 148 Misc. 439, 265 N.Y. Supp. 873 (N.Y. City Ct. 1933); to impress a trust—Freilich v. Freilich, 108 N.Y.S.2d 786 (Sup. Ct. 1951); based on arbitrator's award—Sargant v. Monroe, 67 N.Y.S.2d 591 (Sup. Ct. 1944); to dispossess a tenant—Macomber v. Wilkinson, 6 N.Y.S.2d 608 (Rochester City Ct. 1938). See also PRASHKER, NEW YORK PRACTICE § 261 (3d ed. 1954). For an extensive discussion of summary judgment by type of case see PASTON, SUMMARY JUDGMENT IN NEW YORK 76-277 (1958).

[40] 141 N.Y.L.J. No. 68, p. 1, col. 7 (Sup. Ct. April 9, 1959).

[41] 141 N.Y.L.J. No. 68, p. 1, col. 8 (Sup. Ct. April 9, 1959).

tion of the plaintiff where the facts clearly indicated negligence and the opposing affidavit contained only argument and was made by an attorney who had no personal knowledge of the facts.[42] The plaintiff's papers included testimony of the defendant on examination before trial and before the Bureau of Motor Vehicles.

The cases reveal a hesitancy on the part of the court to apply the "reasonable man" test [43] except where the conclusion is clearly indicated by a high quantum and quality of proof, preferably documentary evidence or official record.

Under the cases construing the prior New York law it appeared that where a seemingly valid counterclaim was interposed, plaintiff's motion for summary judgment would generally be denied, particularly where the damages demanded by the counterclaim exceeded the plaintiff's damages.[44] A motion for partial summary judgment under rule 114 met the same fate when a larger counterclaim was interposed.[45] However, where the counterclaim was for less than the plaintiff's claim, the courts have granted the difference and left the balance of the claim to the trial of the action as provided for under rule 114.[46] Although the cases held otherwise, it would have been feasible under a literal interpretation of the old rule 113 to grant summary judgment for plaintiff's smaller claim, and to stay entry of judgment until the counterclaim in the larger amount was disposed of on the trial.[47] The new rule would seem to embrace this approach, allowing broad power to the court to grant the motion for a claim *in toto,* whether it be larger or smaller, and to sever the cause of action or claim as to which summary judgment is granted.[48] The proceeds of the judgment may be protected from an

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[42] Opposing affidavits in both the *Johnson* and *Phelan* cases suffered from this fatal defect of lack of personal knowledge. See N.Y.R. CIV. PRAC. 113(2).

[43] See note 86 *infra* and accompanying text.

[44] Ilsen, *Recent Developments in Federal Procedure,* WEST'S FEDERAL RULES OF CIVIL PROCEDURE 271, 355 (1947); see Treacy v. Melrose Paper Stock Co., 269 N.Y. 155, 199 N.E. 40 (1935); Hellmuth v. Brandin, 3 App. Div. 2d 997, 164 N.Y.S.2d 307 (1st Dep't 1957) (memorandum decision); Plaut v. Plaut, 255 App. Div. 375, 7 N.Y.S.2d 583 (1st Dep't 1938); Aetna Life Ins. Co. v. National Dry Dock & Repair Co., 230 App. Div. 486, 245 N.Y. Supp. 365 (1st Dep't 1930); Moser v. Fieland, 5 Misc. 2d 937, 158 N.Y.S.2d 1020 (App. T. 1st Dep't 1956) (per curiam); Bank of United States v. Slifka, 148 Misc. 60, 264 N.Y. Supp. 204 (Sup. Ct. 1933).

[45] 5 CARMODY-WAIT CYCLOPEDIA OF NEW YORK PRACTICE 180-81 (1953); see Nussbaum v. Sobel, 269 App. Div. 105, 54 N.Y.S.2d 228 (1st Dep't 1945); Gregor v. Bird Aircraft Corp., 145 Misc. 755, 260 N.Y. Supp. 164 (Sup. Ct. 1932).

[46] Irving Trust Co. v. Leff, 253 N.Y. 359, 171 N.E. 569 (1930); Dairymen's Co-op. Ass'n v. Egli, 228 App. Div. 164, 239 N.Y. Supp. 152 (4th Dep't 1930). See Tatum v. Maloney, 226 App. Div. 62, 234 N.Y. Supp. 614 (1st Dep't 1929).

[47] SHIENTAG, SUMMARY JUDGMENT 17-18 (1941).

[48] N.Y.R. CIV. PRAC. 113(5).

irresponsible party by holding the entry of the summary judgment in abeyance pending the outcome of any remaining cause of action or claim.[49]

Where the cause of action was within the categories of former rule 113 but the facts upon which the motion for summary judgment was made were exclusively within the knowledge of the moving party, the relief requested was generally denied.[50] These decisions were predicated on the need for cross-examination to evaluate these facts,[51] and the inability of the opposing party to feign a defense or claim dependent upon facts outside his knowledge.[52] However, if the facts were a matter of public record or otherwise fully available to the opposing party, a plea of lack of knowledge might be disregarded, and motion for summary judgment granted.[53] Actions on insurance policies comprise an area of cases where the motion of the insured plaintiff has often been denied because of exclusive knowledge.[54] Such was the situation in *Suslensky v. Metropolitan Life Ins. Co.*,[55] where plaintiff's motion was denied on a claim for double indemnity since the alleged fact of insured's accidental death from drinking poison was clearly outside the knowledge of the defendant-insurer. There is no reason to believe that the courts will change their approach to this type of case under the new rule. On the contrary, reason dictates a continuance of the policy of evaluating exclusive knowledge at the trial.

The Affidavit

The affidavit, under the new rule, takes on added significance since it now becomes the minimum requirement of proof, where no

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[49] *Ibid.*

[50] Woodmere Academy v. Moskowitz, 212 App. Div. 457, 459, 208 N.Y. Supp. 578, 580 (2d Dep't 1925); Lyons v. Central Sur. & Ins. Corp., 84 N.Y.S.2d 25 (Sup. Ct. 1948); Edelman & Trust Co. v. Public Nat'l Bank, 136 Misc. 213, 214, 239 N.Y. Supp. 335, 336 (N.Y. City Ct. 1930); PASTON, SUMMARY JUDGMENT IN NEW YORK 58 (1958); SHIENTAG, *op. cit. supra* note 47, at 83.

[51] See Warren v. Commercial Travelers Mut. Acc. Ass'n, 271 App. Div. 989, 68 N.Y.S.2d 464 (1st Dep't 1947) (per curiam); L. Barton Brookov, Inc. v. Glens Falls Ins. Co., 190 Misc. 792, 78 N.Y.S.2d 350 (N.Y. City Ct. 1947).

[52] SHIENTAG, SUMMARY JUDGMENT 83 (1941).

[53] General Inv. Co. v. Interborough Rapid Transit Co., 235 N.Y. 133, 141, 139 N.E. 216, 219 (1923); Bower v. H. Samuels & Co., 226 App. Div. 769, 234 N.Y. Supp. 379, 380 (2d Dep't), *aff'd mem.*, 252 N.Y. 549, 170 N.E. 138 (1929).

[54] SHIENTAG, *op. cit. supra* note 52, at 86. See, *e.g.*, Newman v. Newark Fire Ins. Co., 281 App. Div. 852, 119 N.Y.S.2d 73 (2d Dep't 1953) (memorandum decision); Warren v. Commercial Travelers Mut. Acc. Ass'n, *supra* note 51; Brooklyn Clothing Corp. v. Fidelity-Phenix Fire Ins. Co., 205 App. Div. 743, 200 N.Y. Supp. 208 (2d Dep't 1923).

[55] 180 Misc. 624, 43 N.Y.S.2d 144 (App. T. 1943), *aff'd mem.*, 267 App. Div. 812, 46 N.Y.S.2d 888 (1st Dep't 1944).

other form of proof is available, to enable a party to move for summary judgment in any cause of action, except matrimonial actions.[56] The basic requisites of the affidavit are apparently unchanged: the statement must be made by a party or any person having actual knowledge of the facts, and must recite all the material facts;[57] the sources of information must also be stated.[58] If the motion for summary judgment is made by the plaintiff, his affidavit must show that no defense to the action or claim exists.[59] If it is made by the defendant, he must show that there is no meritorious cause of action or claim.[60] Only those materials which would be admitted at a trial will be acceptable in the affidavit.[61]

Assessing Damages

The new rule retains for the court the power to order a hearing to ascertain the quantum of damages and to thereafter render summary judgment, if the amount of the damages was the only issue of material fact.[62] Whether the assessment is to be made by the court alone, by a referee, or by the court and a jury is purely within the discretion of the court, and the mode of assessment cannot be demanded by the parties as a matter of right.[63] Similarly, as under the old rule, the party opposing the motion for summary judgment may participate at the assessment hearing and defend on the issue of damages as he would at an ordinary trial.[64] Issues only indirectly related to the amount of damages have arisen and been determined at assessment hearings.[65] In *Pace v. Allied Freightways, Inc.*,[66]

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[56] N.Y.R. CIV. PRAC. 113(2), (4).

[57] N.Y.R. CIV. PRAC. 113(2); Smolenack v. Hess, 274 App. Div. 907, 83 N.Y.S.2d 79 (2d Dep't 1948) (memorandum decision); Lonsky v. Bank of United States, 220 App. Div. 194, 221 N.Y. Supp. 177 (1st Dep't 1927).

[58] N.Y.R. CIV. PRAC. 113(2); Emmco Ins. Co. v. Firemen's Ins. Co., 11 Misc. 2d 875, 172 N.Y.S.2d 598 (App. T. 1st Dep't 1957) (per curiam); Arenstein v. Notre Paris Corp., 189 Misc. 69, 66 N.Y.S.2d 846 (Sup. Ct. 1946). See Bevelyn Realty Corp. v. Brooklyn Constr. Co., 140 Misc. 74, 249 N.Y. Supp. 41 (App. T. 2d Dep't 1930) (per curiam).

[59] N.Y.R. CIV. PRAC. 113(2); Freund v. James McCullagh, Inc., 268 App. Div. 875, 50 N.Y.S.2d 740 (2d Dep't 1944) (memorandum decision); Weinman v. Weinman, 75 N.Y.S.2d 880 (Sup. Ct. 1947).

[60] N.Y.R. CIV. PRAC. 113(2).

[61] Luisoni v. Barth, 2 Misc. 2d 315, 137 N.Y.S.2d 169 (Sup. Ct. 1954) (hearsay evidence); see Clayton v. Farish, 191 Misc. 136, 73 N.Y.S.2d 727 (Sup. Ct. 1947) (incompetent letters, telegrams, and interoffice memoranda).

[62] N.Y.R. CIV. PRAC. 113(3).

[63] Livingston v. Blumenthal, 248 App. Div. 138, 289 N.Y. Supp. 5 (1st Dep't 1936).

[64] See Woodson v. Draper, 109 N.Y.S.2d 598 (Sup. Ct. 1951).

[65] Pace v. Allied Freightways, Inc., 66 N.Y.S.2d 42 (N.Y. City Ct. 1946); Krasilovsky Bros. Trucking Corp. v. Maryland Cas. Co., 184 Misc. 571, 54 N.Y.S.2d 60 (N.Y. City Ct. 1945).

[66] 66 N.Y.S.2d 42 (N.Y. City Ct. 1946).

title was determined to goods lost by a common carrier, where the issue did not arise prior to the hearing and only a small doubt existed.

The Federal Approach

The changes in rule 113 have brought the field of operation of the New York procedure for summary judgment into closer conformity with that of rule 56 of the Federal Rules of Civil Procedure.[67] The federal rule permits any party to move for summary judgment upon a claim, counterclaim or cross-claim in any action, including one against the United States or an officer or agency thereof,[68] upon the pleadings, depositions and admissions on file, with or without supporting affidavits.[69]

Although the scope of the two rules is now practically identical, some differences remain. In New York, the motion may be made only after joinder of issue;[70] in the federal court, a claimant may move at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party.[71] A defending party may move at any time.[72] An order denying summary judgment, being interlocutory, is usually not appealable.[73] Bankruptcy cases, where interlocutory decrees in many instances are appealable, provide exceptions,[74] and the District of Columbia possesses a special statute authorizing appeal from interlocutory orders in civil cases under certain conditions.[75] In addition, the federal rule contains a penalty clause for affidavits made in bad faith.[76]

The experience of the federal courts in the application of summary judgment may perhaps be helpful in anticipating the effect of the expansion of the New York rule. Certain types of cases, although technically within the purview of rule 56, are nevertheless

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[67] *Compare* N.Y.R. CIV. PRAC. 113, *with* FED. R. CIV. P. 56. The federal rule of summary judgment is the broadest form of the procedure currently in use and is followed in many states. PASTON, SUMMARY JUDGMENT IN NEW YORK 400-38 (1958).

[68] FED. R. CIV. P. 56; see Person v. United States, 112 F.2d 1 (8th Cir.), *cert. denied*, 311 U.S. 672 (1940); Boerner v. United States, 26 F. Supp. 769 (E.D.N.Y. 1939).

[69] FED. R. CIV. P. 56(b), (c).

[70] N.Y.R. CIV. PRAC. 113.

[71] FED. R. CIV. P. 56(a).

[72] FED. R. CIV. P. 56(b).

[73] 28 U.S.C. § 1291; Douhler Metal Furniture Co. v. United States, 149 F.2d 130, 135 (2d Cir. 1945). See also 28 U.S.C.A. § 1292 (Supp., 1958), particularly subsection (b).

[74] 66 Stat. 423 (1952), 11 U.S.C. § 47(a) (1952); Cohen v. Eleven West 42d St., Inc., 115 F.2d 531 (2d Cir. 1940).

[75] Farley v. Abbetmeier, 114 F.2d 569 (D.C. Cir. 1940).

[76] FED. R. CIV. P. 56(g).

generally excluded because of practical considerations. These considerations will undoubtedly prove to be obstacles in similar cases arising in the New York courts.

The federal courts have been hesitant to grant summary judgment in cases involving complex factual situations.[77] Patent cases provide the foremost examples,[78] where highly technical and complex problems have precluded judges from granting motions since the distinction between feigned and genuine issues is not obvious in the absence of proof that would ordinarily be offered at the trial.[79] Exceptions can be noted where there was clearly no genuine issue of material fact,[80] and in one case summary judgment was granted on mere ocular examination of the objects in question.[81] In *United States v. Bethlehem Steel Corp.*,[82] an action to enjoin a proposed merger of two of the largest steel companies in the United States, the court denied summary judgment, considering the vast amount of factual material to be analyzed and, interestingly, the grave implications the decision would have on the steel industry and the economy of the country, as grounds for denying the motion. The feeling of the court was that vital and far-reaching decisions necessitate a full trial and thorough examination. A similar approach was taken in *Pacific Am. Fisheries, Inc. v. Mullaney*,[83] where the court declared it error to grant defendant's motion for summary judgment because of the importance of a suit attacking the constitutionality of a license fee for nonresident fishermen.

Causes of action involving state of mind are not factual situations conducive to the granting of motions for summary judgment.

> In many recent cases, where motive, intent, subjective feelings and reactions, consciousness and conscience were to be searched, and examination and cross-examination were necessary instruments in obtaining the truth, we have pointed out that and why the issues may not be disposed of on summary judgment. Other courts have done the same.[84]

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[77] Ilsen, *Recent Cases and New Developments in Federal Practice and Procedure*, 16 ST. JOHN'S L. REV. 1, 47-48 (1941).

[78] *Ibid.*

[79] See, *e.g.*, Chenault v. Nebraska Farm Prods., Inc., 107 F. Supp. 635 (D. Neb. 1952); Staffin Lewis Corp. v. Rose Derry Co., 9 F.R.D. 704 (D. Mass 1950); Refractolite Corp. v. Prismo Holding Corp., 25 F. Supp. 965 (S.D.N.Y. 1938).

[80] See, *e.g.*, Bridgeport Brass Co. v. Bostwick Labs., Inc., 181 F.2d 315 (2d Cir. 1950); Alex Lee Wallau, Inc. v. J. W. Landenberger & Co., 121 F. Supp. 555 (S.D.N.Y. 1954); Bulldog Elec. Prods. Co. v. Cole Elec. Prods Co., 59 F. Supp. 588 (E.D.N.Y. 1944).

[81] Millburn Mills, Inc. v. Meister, 4 FED. RULES SERV. 56a.24, Case 4 (S.D.N.Y. Nov. 23, 1940).

[82] 157 F. Supp. 877 (S.D.N.Y. 1958).

[83] 191 F.2d 137 (9th Cir. 1951).

[84] Alabama Great So. R.R. v. Louisville & N.R.R., 224 F.2d 1, 5 (5th Cir. 1955). See also Loew's, Inc. v. Bays, 209 F.2d 610, 614 (5th Cir.

In the case of *Alvado v. General Motors Corp.*,[85] where the issue of unlawful discrimination against veterans was largely dependent on the good faith of the defendant, the granting of summary judgment was declared error.

Summary judgment is found to be not usually feasible in negligence cases where the standard of the reasonable man must be applied.[86] A study conducted in one federal district revealed that in 292 negligence cases pending in a particular year, only one motion for summary judgment was made and that was denied.[87] However, the procedure has proven appropriate in some instances. It has been properly granted on motion by the defendant where it conclusively appeared that the plaintiff was barred by law from recovery on the basis of uncontroverted facts.[88] In the case of *American Airlines, Inc. v. Ulen*,[89] a suit for personal injuries suffered in an airplane crash, the granting of plaintiff's motion for summary judgment was affirmed where it was conclusively shown that the flight plan had called for an altitude less than government regulations required and this fact was the proximate cause of the accident. But apparently it is only the exceptional negligence case that invokes the rule.

The Seventh Circuit, in reversing summary judgment for the plaintiff in an action for specific performance, declared the procedure inapplicable to equity actions, even if there is no genuine issue as to material fact, since "plaintiff was not entitled to judgment as a matter of law. . . ." [90] However, other courts have not been so overly literal, and have properly affirmed the grant of summary judgment for specific performance.[91] The federal courts have also upheld the grant of summary judgment for an injunction.[92]

1954); Gray Tool Co. v. Humble Oil & Ref. Co., 186 F.2d 365 (5th Cir. 1951).

[85] 229 F.2d 408 (2d Cir. 1955); *cf.* Subin v. Goldsmith & Co., 224 F.2d 753 (2d Cir. 1955). *But see* Orvis v. Brickman, 196 F.2d 762 (D.C. Cir. 1952).

[86] See, *e.g.*, Jacob v. Pennsylvania R.R., 203 F.2d 290 (6th Cir. 1953); Dulansky v. Iowa-Illinois Gas & Elec. Co., 191 F.2d 881 (8th Cir. 1951); Wesch v. Amalgamated Sugar Co., 154 F. Supp. 3 (S.D. Idaho 1957); Abrams v. Baltimore & O.R.R., 147 F. Supp. 521 (W.D. Pa. 1957).

[87] Note, 36 MINN. L. REV. 515, 519 (1952).

[88] See, *e.g.*, Surkin v. Charteris, 197 F.2d 77 (5th Cir. 1952); Thomas v Furness (Pac.) Ltd., 171 F.2d 434 (9th Cir. 1948); Wilkinson v. Powell, 149 F.2d 335 (5th Cir. 1945).

[89] 186 F.2d 529 (D.C. Cir. 1949).

[90] Seaboard Sur. Co. v. Racine Screw Co., 203 F.2d 532, 534 (7th Cir 1953). See also Clayton v. James B. Clow & Sons, 154 F. Supp. 108 (N.D. Ill. 1957). *But see* Elias v. Manis, 292 S.W.2d 836, 838 (Tex. 1956), in which the *Seaboard* case is criticized.

[91] Dale v. Preg, 204 F.2d 434 (9th Cir. 1953); Palmer v. Chamberlin, 191 F.2d 532, *rehearing denied*, 191 F.2d 859 (5th Cir. 1951).

[92] See Damelle v. ICC, 219 F.2d 619 (1st Cir.), *cert. denied*, 350 U.S. 824 (1955); Houghton Mifflin Co. v. Stackpole Sons, 113 F.2d 627 (2d Cir. 1940); Reddix v. Lucky, 148 F. Supp. 108 (W.D. La. 1957).

It has been held in the District of Columbia that summary judgment granting a divorce would not be proper; strong public policy requires that a divorce should be granted only after proof in open court, even in default cases.[93] However, summary judgment for the defendant, resulting in the dismissal of a divorce action, might be granted.[94] This attitude is similar to that in New York.[95]

Conclusion

The experience of the federal courts, with a rule of summary judgment similar in scope to the recently adopted New York rule, portends less drastic effects from the changes in rule 113 than a literal reading might indicate. Complex and technical fact patterns and the need for cross-examination to evaluate exclusive knowledge and state of mind are inherent obstacles generally precluding summary judgment.[96] The test of the reasonable man is best applied by the jury, and the veracity of testimony is best evaluated by cross-examination and scrutiny of the demeanor of the witness.[97] Where the decision is of grave import, the courts seem to favor full trial. All these factors work against the grant of motion for summary judgment, and the newly encompassed cases often involve just such problems. However, within the broad scope of the federal rule 56, motions for summary judgment have often been granted, and the New York courts will undoubtedly find greater use for the procedure than the often conservative and cautious federal courts.

The new rule is more explicit in granting broad discretion to the court in the presence of counterclaims, allowing the grant of summary judgment to the "extent warranted, on such terms as may be just." This power probably existed in the past but was not exercised, resulting in the trial of claims which might have been summarily disposed of, with entry of judgment withheld when the situation demanded it.

Improperly applied, summary judgment can merely extend litigation and add additional burden to the court calendar. However, the New York experience has been favorable and justifies the extension of the rule.

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[93] Rea v. Rea, 124 F. Supp. 922 (D.D.C. 1954).
[94] *Id.* at 923. *But see* Hicks v. Hicks, 80 F. Supp. 219 (D.D.C. 1941).
[95] N.Y.R. CIV. PRAC. 113(4). See text accompanying note 22 *supra*.
[96] See Bozant v. Bank of New York, 156 F.2d 787 (2d Cir. 1946).
[97] See Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946).