Michigan Law Review

Volume 51 | Issue 7

1953

FEDERAL PROCEDURE - JUDGMENTS - MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT REQUIRED BEFORE APPELLATE COURT CAN ENTER JUDGMENT

Joseph M. Kortenhof, S.Ed.
University of Michigan Law School

FEDERAL PROCEDURE — JUDGMENTS — MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT REQUIRED BEFORE APPELLATE COURT CAN ENTER JUDGMENT—Petitioner brought suit against respondent railroad under the Jones Act[1] for the wrongful death of her husband. At the completion of all the evidence, the railroad moved to dismiss the complaint and further asked for a directed verdict. The trial court submitted the case to the jury reserving its decision on the motion. A verdict was returned for the petitioner. Within ten days of the verdict, the railroad moved to have the verdict set aside on the ground that it was excessive, contrary to the law, to the evidence, and to the weight of the evidence. Two months later the trial court denied this motion as well as the pre-verdict motions for dismissal and directed verdict. On appeal, the court of appeals reversed, holding that the motion for directed verdict should have been

[1] 41 Stat. L. 1007 (1920), 46 U.S.C. (1946) §688.

granted.[2] Both parties agreed that the reversal required the trial court to enter judgment for the railroad. On certiorari, *held,* reversed, Justices Frankfurter, Jackson, Burton and Minton dissenting. Rule 50(b)[3] requires that a losing party move for judgment *n.o.v.* within ten days after verdict before an appellate court can enter judgment in his favor, and a motion to have the verdict set aside does not satisfy this requirement. *Johnson v. N.Y., N.H. & H.R. Co.,* 344 U.S. 48, 73 S.Ct. 125 (1952).

As a result of confusion brought about by three Supreme Court decisions[4] regarding directed verdicts and motions for judgment *n.o.v.,* rule 50 (b) was promulgated in 1938.[5] In essence, the rule provided that the trial court can reserve decision on a motion for directed verdict, without expressly stating so, by submitting the case to the jury and leaving the motion undecided. After the rendition of the verdict, the trial court may examine the verdict and upon proper motion by the party concerned either grant a new trial or a judgment *n.o.v.*[6] The question soon arose as to whether it was necessary for the losing party to ask for judgment *n.o.v.* before an appellate court could grant judgment in his favor. It was decided in *Cone v. West Virginia Pulp & Paper Co.*[7] that the failure of the losing party to ask for judgment *n.o.v.* within ten days after the rendition of the verdict precluded the appellate court from entering judgment for that party.[8] This holding was extended in *Liquor Co. v. San Roman*[9] to cover the situation where the trial court erroneously entered judgment for one party upon motion for directed verdict. Thus even where the case was not submitted to the jury the Supreme Court held that the losing party, if he is to get judgment on appeal, must ask the court which directed the verdict against him for a judgment *n.o.v.* This decision has been justly criticized on the ground that it requires the losing party to go through an empty ceremony, since it is extremely unlikely that a

[2] (2d Cir. 1952) 194 F. (2d) 194.

[3] Federal Rules of Civil Procedure, 28 U.S.C. (1946).

[4] Slocum v. New York Life Insurance Co., 228 U.S. 364, 33 S.Ct. 523 (1913). In this case it was held that a state statute which provided for a judgment *n.o.v.* in situations where the trial court should have directed a verdict could not be followed by the federal courts since it was contrary to the Seventh Amendment in that it allowed a "re-examination" of the verdict. Later in Northern Ry. Co. v. Page, 274 U.S. 65, 47 S.Ct. 491 (1927), the Supreme Court allowed the trial court to choose between alternative verdicts requested of the jury where the trial court was unable to decide whether a directed verdict was proper. Still later, in Baltimore & Carolina Line v. Redman, 295 U.S. 654, 55 S.Ct. 890 (1935), the Supreme Court held that where the trial court expressly reserved decision on the motion for directed verdict, distinguishing the Slocum case on this point, it could choose between the jury verdict and the motion for directed verdict without violating the Seventh Amendment.

[5] For an excellent insight into the problems which existed prior to the adoption of rule 50(b) in 1938, see Thayer, "Judicial Administration," 63 UNIV. PA. L. REV. 585 (1915).

[6] See Scott, "Trial by Jury and the Reform of Civil Procedure," 31 HARV. L. REV. 669 (1918), for the general background of rule 50(b).

[7] 330 U.S. 212, 67 S.Ct. 752 (1947).

[8] For interesting discussions of the case see 47 COL. L. REV. 1077 (1947) and 46 MICH. L. REV. 264 (1947).

[9] 332 U.S. 571, 68 S.Ct. 246 (1947).

court which directs a verdict against a party will later enter judgment notwithstanding that verdict.[10] The principal case again follows the literal language of rule 50(b) most strictly. However, the decision did not come without warning for in 1946 the Supreme Court refused to adopt an amendment to rule 50(b) proposed by the advisory committee which would have allowed an appellate court to enter judgment for the losing party even though he did not move for judgment *n.o.v.*[11] It is now necessary to ask for a judgment *n.o.v.* in almost so many words, and where this is not done an appellate court is powerless to award judgment for the losing party. The dissenting opinion strongly objects to the "abracadabra of obedience" to rule 50(b) required by the principal decision.[12] Whatever the merits of the dissenting opinion, it is well to remember that the Supreme Court has held that it will not tolerate anything less than full and literal compliance with rule 50(b). It becomes necessary, therefore, that a motion for judgment *n.o.v.* be made in express language within the ten day period[13] and, if this is not done, the appellate court is unable to enter judgment for the losing party.

Joseph M. Kortenhof, S.Ed.

[10] 5 MOORE, FEDERAL PRACTICE 2338 (1952).

[11] See 5 MOORE, FEDERAL PRACTICE 2308 et seq. (1952), for an analysis of the rationale underlying the advisory committee's proposal. See also, 2 BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE 783 (1950).

[12] Principal case at 57. The dissenting opinion strongly urges that nothing in rule 50(b) requires a losing party to move for judgment *n.o.v.* in a "particular form of words."

[13] "Respondent's motion should be treated as nothing but what it actually was, one to set aside the verdict—not one to enter judgment notwithstanding the verdict." Principal case at 51.