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# CPLR 4544: Provision of Residential Lease Inadmissable for Failing to Comply with Statutory Size Specifications Notwithstanding Its Legibility

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ARTICLE 45 — EVIDENCE

*CPLR 4544: Provision of residential lease inadmissible for failing to comply with statutory size specifications notwithstanding its legibility*

CPLR 4544 provides that a provision in a residential lease or a consumer transaction agreement is not admissible into evidence where the print is "not clear and legible and is less than eight points in depth or FIVE AND ONE-HALF POINTS IN DEPTH FOR UPPER CASE TYPE."[97] Since a literal reading of the statute would suggest that a lease provision must be both illegible *and* printed in small type before it may be found inadmissible, there has been some question as to whether CPLR 4544 would achieve its purpose of protecting the public.[98] Recently, in *Koslowski v. Palmieri*,[99] the Appellate Term, Second Department, gave effect to the legislative intent and ruled that a jury trial waiver clause in a residential lease must be printed clearly and legibly *and* be of the requisite type size to be received in evidence.[100]

In *Koslowski*, Joseph Palmieri demanded a jury trial in a summary dispossess proceeding brought by his landlord.[101] Although his lease contained a jury waiver clause,[102] Palmieri contended that the

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[97] CPLR 4544 (Supp. Pam. 1964-1978). CPLR 4544 provides, in pertinent part:

> The portion of any printed contract or agreement involving a consumer transaction or a lease for space to be occupied for residential purposes where the print is not clear and legible and is less than eight points in depth or five and one-half points in depth for upper case type may not be received in evidence in any trial, hearing or proceeding on behalf of the party who printed or prepared such contract or agreement, or who caused said agreement or contract to be printed or prepared.

[98] *See id.*, commentary at 248 (Supp. Pam. 1964-1978). In fact, one court has found the statute to be unconstitutionally ambiguous. Creative Housing Mgt. v. Shim, N.Y.L.J., June 23, 1978, at 14, col. 5 (N.Y.C. Civ. Ct. Kings County).

[99] N.Y.L.J., Feb. 1, 1979, at 12, col. 4 (Sup. Ct. App. T. 2d Dep't 1978), *rev'g*, 94 Misc. 2d 555, 404 N.Y.S.2d 799 (N.Y.C. Civ. Ct. Kings County).

[100] N.Y.L.J., Feb. 1, 1979, at 12, col. 4.

[101] 94 Misc. 2d at 555, 404 N.Y.S.2d at 799-800. The dispossess proceeding was brought for the nonpayment of three months rent. *Id.* at 555, 404 N.Y.S.2d at 800.

[102] *Id.* CPLR 4101 enumerates several actions in which jury trials are required absent a waiver by the parties. CPLR 4101 (1963). Generally, these actions are those which "evolved through the common law courts." D. SIEGEL, NEW YORK PRACTICE § 377, at 486 (1978). Thus, a jury trial is required for actions in which the remedy is "for a sum of money only." CPLR 4101(1) (1963), "action[s] of ejectment . . . [and] for waste," and actions that determine claims to real property. CPLR 4101(2) (1963). The right to a jury trial that is conferred by CPLR 4101 must be timely interposed, *see* Brenner v. Great Cove Realty Co., 6 N.Y.2d 435, 442, 160 N.E.2d 826, 829, 190 N.Y.S.2d 337, 342 (1959), by demanding it in the note of issue at the time the note is filed. Downing v. Downing, 32 App. Div. 2d 350, 350-51, 302 N.Y.S.2d 334, 336 (1st Dep't 1969) (dictum). Once a demand has been made it may not be withdrawn without the consent of the other parties provided they have not previously

type size of the waiver clause failed to comply with CPLR 4544's requirements, and, therefore, the provision should not be given effect.[103] Observing that the statute is phrased in the conjunctive, however, the Civil Court, Kings County, ruled that the waiver clause was valid because it was clear and legible.[104] The court reasoned that exclusion of a lease provision is required only where the print used fails to meet *both* requirements of CPLR 4544.[105]

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indicated their preference for a nonjury trial. Gonzalez v. Concourse Plaza Syndicates, Inc., 41 N.Y.2d 414, 415, 361 N.E.2d 1011, 1012, 393 N.Y.S.2d 362, 363 (1977) (per curiam), *discussed in The Survey,* 51 ST. JOHN'S L. REV. 786, 806 (1977); *see* CPLR 4102 (1963). A jury trial may also be waived contractually by the inclusion of a jury waiver provision. *See* Fay's Drug Co. v. P & C Property Coop. Inc., 51 App. Div. 2d 887, 887, 380 N.Y.S.2d 398, 400 (4th Dep't 1976); Waterside Holding Corp. v. Lask, 233 App. Div. 456, 457, 253 N.Y.S. 183, 184 (1st Dep't 1931) (per curiam); Arol Dev. Corp. v. Goodie Brand Packing Corp., 83 Misc. 2d 477, 480, 372 N.Y.S.2d 324, 328 (N.Y.C. Civ. Ct. Bronx County), *aff'd,* 84 Misc. 2d 493, 378 N.Y.S.2d 231 (Sup. Ct. App. T. 1st Dep't 1975) (per curiam); International Roofing Corp. v. Van Der Veer, 43 Misc. 2d 93, 94, 250 N.Y.S.2d 387, 388 (Sup. Ct. Monroe County 1964).

[103] 94 Misc. 2d at 555, 404 N.Y.S.2d at 800. The lease involved in *Koslowski,* although clear and legible, was printed in 6-point type. *Id.* at 556, 404 N.Y.S.2d at 800. CPLR 4544 requires that provisions in leases or consumer transaction agreements be at least eight points in depth. *See* note 97 *supra.*

[104] 94 Misc. 2d at 556, 404 N.Y.S.2d at 800.

[105] *Id.* Stating that the "purpose of CPLR 4544 is to put teeth into the requirement that printed contracts be legible," the Civil Court viewed the statutory type size requirement as merely a "technical" requirement. *Id.* (citing Hall v. Coburn Corp. of America, 26 N.Y.2d 396, 259 N.E.2d 720, 311 N.Y.S.2d 281 (1970)). The civil court reasoned that its position was bolstered by the acquiescence of the legislature in its failure to amend the statute. 94 Misc. 2d at 556, 404 N.Y.S.2d at 800. *Hall* involved the type-size requirement of N.Y. PERS. PROP. LAW § 402 (McKinney 1976), part of the Retail Instalment Sales Act, *id.* art. 10. The *Hall* Court indicated that such type size requirements were "technicalities." 26 N.Y.2d at 403, 259 N.E.2d at 723, 311 N.Y.S.2d at 285. The Court, however, was concerned with the propriety of a class action brought under the former version of CPLR 1005, ch. 318, § 4, [1962] N.Y. Laws 2086, now replaced by article 9 of the CPLR, to recover penalties imposed for the willful violation of the Retail Instalment Sales Act. *See* N.Y. PERS. PROP. LAW § 414 (McKinney 1976). CPLR 1005 required a common interest among plaintiffs before allowing a class action to be maintained. *See* Brenner v. Title Guar. & Trust Co., 276 N.Y. 230, 235-36, 11 N.E.2d 890, 892 (1937); *cf.* Jacobson v. Shore Road Gardens, Inc., 17 App. Div. 2d 952, 953, 233 N.Y.S.2d 782, 783 (2d Dep't 1962) (class action for declaratory relief from a rent increase proposed by landlord maintainable notwithstanding that complaint stated facts entitling members of the class to bring suit in their individual capacities).

The *Hall* plaintiffs claimed that a common interest existed in that all were victimized by an alleged violation of the statutory print-size requirement. 26 N.Y.2d at 399-400, 259 N.E.2d at 720, 311 N.Y.S.2d at 282. In determining that the common interest claimed by the plaintiffs did not support class action status, the Court noted that the 6-point type was sufficiently large for the purchasers to see. Thus, the Court found that the statutory type-size requirement was "a technicality which [did] not reach the base of the problem." *Id.* at 403, 259 N.E.2d at 723, 311 N.Y.S.2d at 285.

It is submitted, however, that the *Hall* Court was not assessing whether a type-size requirement must be strictly complied with; rather, the violation was held to be insufficient to establish the kind of pressing need required to maintain a class suit so as to justify foregoing the common interest requirement in granting class status. Presumably, nonadherence to the statutory terms might constitute a violation in any given individual suit.

On appeal, a unanimous Appellate Term panel reversed.[106] In so holding, the court looked beyond "the letter of [the] law" to avoid an "unreasonable result" that would be contrary to the legislative intent underlying the statute.[107] The Appellate Term reasoned that to find otherwise would lead to a situation where an unclear and illegible contract provision would be admissible so long as the print was of the requisite size.[108] Since such a "strained and ludicrous interpretation" was to be avoided, the waiver clause in Palmieri's lease was not given effect.[109]

It is submitted that the *Koslowski* court's ruling that the print in a residential lease must be of *both* sufficient size and clarity to satisfy CPLR 4544 will serve to effectuate the policies underlying that statute. The drafters of CPLR 4544 intended to eliminate "fine print" clauses from residential leases and consumer transaction agreements.[110] Typically found in adhesion contracts, such clauses

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[106] N.Y.L.J., Feb. 1, 1979, at 12, col. 4. The panel was composed of Justices Hirsch, Mangano and Weinstein.

[107] *Id.* (citing Le Drugstore Etats Unis, Inc. v. Board of Pharmacy, 33 N.Y.2d 298, 302, 307 N.E.2d 249, 251, 352 N.Y.S.2d 188, 191 (1973); N.Y. STATUTES § 111 (McKinney 1976)).

[108] N.Y.L.J., Feb. 1, 1979, at 12, col. 4.

[109] *Id.* (citing Sorbonne Apartments Co. v. Kranz, 96 Misc. 2d 396, 409 N.Y.S.2d 83 (N.Y.C. Civ. Ct. Kings County 1978)). In *Sorbonne Apartments,* as in *Koslowski,* a residential lease contained a jury waiver clause. *Id.* Although legible, the provision was not in conformity with the print-size specifications of CPLR 4544. 96 Misc. 2d at 396-97, 409 N.Y.S.2d at 83. The landlord in *Sorbonne Apartments* contended that, since the print was "clear and legible," it was unnecessary to fulfill the "merely technical" size requirement. *Id.* at 397, 409 N.Y.S.2d at 83. The *Sorbonne Apartments* court found the language of CPLR 4544 to be "clear and unequivocal" in requiring that the print be both of proper size *and* clear and legible before a provision of a lease may be admitted into evidence. 96 Misc. 2d at 397, 409 N.Y.S.2d at 83. According to the court, the legislature enacted CPLR 4544 to ensure that a person signing a residential lease or a consumer contract would have reasonable notice of its terms. 96 Misc. 2d at 397, 409 N.Y.S.2d at 83. Since the right to trial by jury is a substantial one which may be waived only where a party has adequate notice, the court construed the statute so as to protect the trial by jury guarantee. *Id.* at 398, 409 N.Y.S.2d at 84 (citing Pansa v. Damiano, 14 N.Y.2d 356, 200 N.E.2d 563, 251 N.Y.S.2d 665 (1964)).

[110] Prior to the signing of the bill containing CPLR 4544, various recommendations to Governor Carey stressed the need to eliminate fine print in consumer contracts and residential leases. *See* Memorandum of Louis J. Lefkowitz, Attorney General, to Hugh Carey, Governor (June 25, 1975) (purpose of bill is to eliminate "miniscule type size" which is hallmark of adhesion contracts); Letter from Assemblyman Edward H. Lehner, sponsor of bill, to Hon. Judah Gribetz (June 18, 1975) (purpose of bill is to "induce landlords . . . not to print contracts in type that is so small as to be difficult to read"); Letter from George L. Graff, Chairman of Ass'n of Bar of City of N.Y., to Hon. Judah Gribetz (June 20, 1975) ("small print" should be eliminated because it prohibits clauses from being brought to attention of the lessee). In his commentary on CPLR 4544, Dean McLaughlin notes that its purpose is to eliminate "small, illegibly printed clauses" in consumer transaction agreements and residential leases. CPLR 4544, commentary at 248 (Supp. Pam. 1964-1978). As observed by a spokesman for the CPLR Committee of the New York State Bar Association, CPLR 4544 was designed to protect "consumers and leases from 'hidden' provisions" in leases and consumer

have worked in the past to bind lessees and consumers to contractual provisions of which they were unaware.[111] The purpose of the statute would be subverted if effect were given to clauses that, although legible, are printed in type so small as to go unnoticed or, despite being the requisite size, are printed in a style of type that is unreadable.[112]

The result reached in *Koslowski* is also consistent with the policy of strictly construing jury waiver clauses against the draftsman.[113] Although the parties to a lease may generally waive their

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transaction agreements. Letter from Donald I. Strauber, Chairman of CPLR Committee of the New York State Bar Ass'n, to Hon. Judah Gribetz (June 20, 1975).

[111] Generally, ignorance of the terms of a contract will not relieve the parties of their obligations under it. Pimpinello v. Swift & Co., 253 N.Y. 159, 162-63, 170 N.E. 530, 531 (1930); Manufacturers & Traders Trust Co. v. Commercial Door & Hardware, Inc., 51 App. Div. 2d 362, 366, 381 N.Y.S.2d 709, 711 (4th Dep't 1976); James Talcott, Inc. v. Wilson Hosiery Co., 32 App. Div. 2d 524, 525, 299 N.Y.S.2d 460, 461 (1st Dep't 1969) (per curiam). Thus, writing in support of CPLR 4544, the State Consumer Protection Board stated that the purpose of CPLR 4544 is to "protect consumers from being bound by contractual terms of which they are unaware" by eliminating small print. Memorandum of State Consumer Protection Board to Hon. Judah Gribetz (June 20, 1975). The legislature recently enacted N.Y. GEN. OBLIG. LAW § 5-702 (McKinney Supp. 1978-1979), which mandates the use of "plain language" in residential agreements. This would appear to indicate a continuing concern on the legislature's part that consumers be made fully aware of their contractual obligations.

[112] Courts have a duty to construe statutes according to the intent of the legislature. Carr v. Board of Elections, 40 N.Y.2d 556, 559, 356 N.E.2d 713, 715, 388 N.Y.S.2d 87, 89 (1976) (per curiam); Pell v. Coveney, 37 N.Y.2d 494, 496, 336 N.E.2d 421, 422, 373 N.Y.S.2d 860, 862 (1975) (per curiam); Albana v. Kirby, 36 N.Y.2d 526, 529-30, 330 N.E.2d 615, 618, 369 N.Y.S.2d 655, 658-59 (1975). Furthermore, the "literal meanings of words are [not] to be adhered to [when they] defeat the general purpose and manifest policy intended to be promoted." Capone v. Weaver, 6 N.Y.2d 307, 309, 160 N.E.2d 602, 603, 189 N.Y.S.2d 833, 835 (1959) (citing New York Post Corp. v. Leibowitz, 2 N.Y.2d 677, 685-86, 143 N.E.2d 256, 260, 163 N.Y.S.2d 409, 415 (1957)). It seems proper, therefore, to require the print in residential leases and consumer contracts to meet the minimum size prescriptions of the statute in addition to its clarity requirement; otherwise, the legislative purpose of preventing the use of fine print in leases would be frustrated. In like manner, Dean McLaughlin urges courts to "enforce the spirit of [CPLR 4544], rather than its artless letter." CPLR 4544, commentary at 248 (Supp. Pam. 1964-1978).

A profitable comparison may be made with the language of N.Y.U.C.C. § 2-316(2) (McKinney 1964), which requires a "conspicuous" writing for effective disclaimer of implied warranties of fitness. A writing is "conspicuous" within the meaning of 2-316(2) "when it is so written that a reasonable person against whom it is to operate ought to have noticed it." N.Y. U.C.C. § 1-201(10) (McKinney 1964). If the legislature had not intended that print meet the size specified in CPLR 4544, it could have required that the lease provision only be "conspicuous."

[113] *See, e.g.*, Cantor v. Techlease, Inc., 59 App. Div. 2d 699, 398 N.Y.S.2d 286 (2d Dep't 1977); Barrow v. Bloomfield, 30 App. Div. 2d 947, 293 N.Y.S.2d 1007 (2d Dep't 1968) (per curiam); Tilden Financial Corp. v. Malerba, Abruzzo, Downes & Frankel, 89 Misc. 2d 1074, 393 N.Y.S.2d 499 (Dist. Ct. Suffolk County 1977); David v. Manufacturers Hanover Trust Co., 55 Misc. 2d 1080, 287 N.Y.S.2d 503 (N.Y.C. Civ. Ct. Kings County 1968), *rev'd on other grounds*, 59 Misc. 2d 248, 298 N.Y.S.2d 847 (Sup. Ct. App. T. 2d Dep't 1969).

right to a jury trial,[114] CPLR 4544 places guidelines on how this may be done.[115] In light of the considerable bargaining advantage enjoyed by landlords in obtaining lease terms favorable to them, it seems particularly appropriate to require that the print in leases be both legible and of sufficient size.[116] In the future, it is hoped that the courts will follow the lead of *Koslowski* and interpret CPLR 4544 in a manner that will serve its intended purpose.

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## ARTICLE 75—ARBITRATION

### *CPLR 7503(b): Clearly implied condition precedent to arbitration insufficient to invoke threshold judicial resolution*

Upon an application to stay arbitration under CPLR 7503(b),[117] courts are empowered to determine whether the parties have com-

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[114] *See* note 102 *supra.*

[115] In other contexts, jury trial waiver clauses are proscribed by statute. For example, waiver clauses in leases are void in actions for personal injury or property damage. N.Y. REAL PROP. LAW § 259-c (McKinney 1968); *see* Fay's Drug Co. v. P & C Property Coop., Inc., 51 App. Div. 2d 887, 380 N.Y.S.2d 398 (4th Dep't 1976); Avenue Assocs. v. Buxbaum, 83 Misc. 2d 719, 373 N.Y.S.2d 814 (Sup. Ct. App. T. 1st Dep't 1975) (per curiam). Jury trial waivers are also prohibited in retail instalment contracts and credit agreements. N.Y. PERS. PROP. LAW §§ 403 (2)(h), 413 (10)(f) (McKinney 1976). The *Koslowski* court's reading of CPLR 4544 to give effect to the legislative intent finds support in the recent interpretation of a similar provision in the Vehicle and Traffic Code which requires that notices of cancellation of automobile insurance be printed in 12-point type. *See* N.Y. VEH. & TRAF. LAW § 313(1)(a) (McKinney Supp. 1978-1979). In Nassau Ins. Co. v. Hernandez, 65 App. Div.2d 551, 408 N.Y.S.2d 956 (2d Dep't 1978), since the notice failed to meet the type-size requirements of the statute, the insured was not deemed to have actual knowledge of its contents, despite the insured having "read, and understood the notice." *Id.* at 553, 408 N.Y.S.2d at 957; *see* Reliance Ins. Co. v. Rabinowitz, 65 App. Div. 2d 619, 409 N.Y.S.2d 539 (2d Dep't 1978); Lion Ins. Co. v. Reilly, 61 App. Div. 2d 1047, 403 N.Y.S.2d 117 (2d Dep't 1978).

[116] In Sorbonne Apartments Co. v. Kranz, 96 Misc. 2d 396, 409 N.Y.S.2d 83 (N.Y.C. Civ. Ct. Kings County 1978), the court observed that the lease in question was a form prepared by the Real Estate Board which was widely used in New York City. *Id.* at 397, 409 N.Y.S.2d at 84. The court stated that "such leases heavily favor landlords and are onerous . . . to tenants who are . . . in a virtually impossible bargaining position." *Id.* In fact, the *Sorbonne Apartments* court contemplated declaring such leases void as against public policy. *Id; see* 1625 Emmons Ave. Owners, Inc. v. Abbamonte. N.Y.L.J., March 20, 1978, at 14, col. 6 (Sup. Ct. Kings County).

[117] CPLR 7503(b) provides in part:

> [A] party who has not participated in the arbitration and who has not made or been served with an application to compel arbitration, may apply to stay arbitration on the ground that a valid agreement was not made or has not been complied with or that the claim sought to be arbitrated is barred by limitation under subdivision (b) of section 7502.

CPLR 7503(b) (Supp. Pam. 1964-1978).