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Article 24

Undertakings

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dismissal by the third-party plaintiff been pending on the date *Dole* was decided, his complaint would have been reinstated upon reaching the appellate level.[420] Alternatively, had he made no complaint theretofore, he would be permitted to do so now.[421] Even under *Slater*, he would not be barred from serving a complaint on another tortfeasor who could then obtain apportionment against the third-party defendant.[422]

Though *Slater* represents a new clarification on the issue of *Dole's* retroactivity, it can be construed as only a narrow limitation. As noted by the majority, it does not disturb the application of *Dole* to pending cases where no final judgment or order on the issue of indemnity has been entered.[423] Furthermore, it leaves unanswered the question of whether a tortfeasor against whom a judgment was docketed before *Dole* can now seek apportionment.[424] Admittedly, it would seem anomalous to allow such a tortfeasor recovery while denying it, as in *Slater*, to a defendant in an action that has not yet come to trial. Still, considering the emphasis placed on the finality of the unappealed order, it appears that *Slater* alone would not preclude such a tortfeasor from acquiring an apportionment of damages provided the issue of indemnification between the two parties had not been finally determined.

Undertakings

CPLR 5519(a)(2) grants an appellant who has filed an undertaking guaranteeing full payment of a judgment entered against him a stay of enforcement of the judgment pending the outcome of the

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420 *See* Brown v. City of New York, 40 App. Div. 2d 785, 337 N.Y.S.2d 685 (1st Dep't 1972).

421 *See* Glomboski v. Baltimore & O.R.R., 72 Misc. 2d 552, 338 N.Y.S.2d 1004 (Sup. Ct. Monroe County 1972) (mem.), *cited in* 7B McKINNEY'S CPLR 3019, commentary at 303 (1974).

422 33 N.Y.2d at 446, 310 N.E.2d at 301, 354 N.Y.S.2d at 622.

423 *Id.* at 447, 310 N.E.2d at 302, 354 N.Y.S.2d at 623.

424 Such an application of *Dole* was considered in Lampila v. Harrington, 76 Misc. 2d 423, 351 N.Y.S.2d 345 (Sup. Ct. Albany County 1974), wherein a tortfeasor who had satisfied the judgment against him before *Dole* was allowed apportionment against another tortfeasor who had not been in the original action. With respect to joint tortfeasors against whom there was a judgment pre-*Dole*, see Welborn v. DeLeonardis, 168 N.Y.L.J. 3, July 6, 1972, at 2, col. 4 (Sup. Ct. N.Y. County 1972), limiting the co-defendants to contribution under CPLR 1401 as then enacted. For a discussion of this question, see Farrell & Wilner, Dole v. Dow Chemical Co.: *A Leading Decision—But Where?*, 39 B'KLYN L. REV. 330, 335-39 (1972), wherein the authors urge retroactivity to judgments within a six-year statute of limitations period except with respect to defendants subject to joint judgments where contribution under CPLR 1401 would apply. Professor David D. Siegel urges retroactivity even between tortfeasors against whom there is a common judgment. 7B McKINNEY'S CPLR 3019, commentary at 303-04 (1974).

appeal.[425] It has recently been held, in *Nicholas v. Island Industrial Park*,[426] that where a third-party plaintiff has an appeal pending from an adverse judgment in the main action, CPLR 5519 requires the filing of an undertaking by a third-party defendant appealing the judgment entered against him in the third-party proceeding.

In *Nicholas*, the plaintiff sued Island Industrial Park of Patchogue, Inc., which, pursuant to CPLR 1007,[427] impleaded Jay Plastics, Inc. as a third-party defendant. The jury returned a verdict for Nicholas against Island in the main action, and for Island against Jay in the third-party action, apportioning liability between Island and Jay at 40 and 60 percent, respectively. Following this *Dole* apportionment, Island entered a judgment against Jay for 60 percent of the amount of the verdict in the main action.[428] Island then appealed from the judgment in the main action and filed an undertaking pursuant to CPLR 5519(a)(2).[429] Jay appealed the judgment in the third-party action without filing an undertaking. In conjunction with its appeal, Jay moved that the judgment against it be amended to reflect that its liability to Island was conditional "and . . . payable only upon Island's payment to plaintiff of more than Island's pro rata share . . . and that only then can execution issue upon the judgment in the third-party action."[430] In opposing this motion, Island contended that since it had guaranteed full satisfaction to the plaintiff, either Jay must file an undertaking for 60 percent of the judgment or Island should be entitled to immediately enforce its judgment.

The Supreme Court, Suffolk County, denied the motion of the third-party defendant. Justice Thom, relying on the basic fairness concepts of *Dole*,[431] reasoned that "to permit Jay to appeal without an

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425 CPLR 5519(a) provides in pertinent part:

> Service upon the adverse party of a notice of appeal . . . stays all proceedings to enforce the judgment or order appealed from pending the appeal . . . where:
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> . . . .
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> (2) the judgment or order directs the payment of a sum of money, and an undertaking in that sum is given that if the judgment or order appealed from . . . is affirmed, or the appeal dismissed, the appellant or moving party shall pay the amount directed to be paid by the judgment or order . . . .

See generally 10 CARMODY-WAIT 2d § 70:172, at 434 (1968).

426 171 N.Y.L.J. 111, June 10, 1974, at 22, col. 4 (Sup. Ct. Suffolk County).

427 CPLR 1007 reads in pertinent part: "After the service of his answer, a defendant may proceed against a person not a party who is or may be liable to him for all or part of the plaintiff's claim against him . . . ." For a discussion of this section, see H. WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 94 (4th ed. 1973); 2 WK&M ¶ 1007.01. The court did not indicate the underlying nature of the claim.

428 171 N.Y.L.J. 111, at 22, col. 4.

429 *See* note 425 *supra*.

430 171 N.Y.L.J. 111, at 22, col. 4.

431 The court concluded that the *Dole* decision represented an effort by the Court

undertaking, would be manifestly unfair and prejudicial to Island."[432] Consequently, Island "should be allowed to pursue its rights to enforce its judgment against Jay, unless the latter stays the enforcement by the filing of an undertaking."[433] The court's decision was prompted by its concern that Jay might become insolvent during the appeal, while Island, by filing the undertaking, had guaranteed payment of the entire judgment to the plaintiff in the main action.

In denying Jay's motion to render the judgment against it conditional upon Island's payment to the plaintiff of more than its pro rata share, *Nicholas* is in conflict with a long line of New York cases which have held that the enforcement of a third-party judgment is to be stayed until the third-party plaintiff has paid more than his pro rata share of the original judgment.[434] A recent post-*Dole* decision, *Adams v. Lindsay*,[435] has reinforced this conclusion regarding the payment of third-party judgments following a *Dole* apportionment. Despite the existence of such precedent, the *Nicholas* court apparently considered Island's filing of an undertaking as equivalent to actual payment by Island in the main action. This rendered immediately enforceable Island's previously conditional judgment against Jay. Consequently, enforcement of the third-party judgment could be stayed only if Jay filed an undertaking, pursuant to CPLR 5519, for 60 percent of the main judgment. The court's conclusion with respect to the effect of

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of Appeals to achieve an equitable apportionment of liability among joint tortfeasors. *Id.* Although this point was not fully explored, the court apparently felt that issues which are outgrowths of the *Dole* decision should be resolved with the basic fairness considerations of that decision in mind. *Id.*

432 *Id.* The court ordered that the undertaking be in an amount not less than Jay's proportionate share of the liability, *i.e.*, 60 percent of the judgment in the main action.

433 *Id.*

434 In McCabe v. Queensboro Farm Prod., Inc., 22 N.Y.2d 204, 239 N.E.2d 340, 292 N.Y.S.2d 400 (1968), the Court of Appeals held that a "third-party judgment would not be subject to execution until there is proof of such payment of the main judgment." *Id.* at 208, 239 N.E.2d at 342, 292 N.Y.S.2d at 403. *See* 125 West 45th St. Restaurant Corp. v. Fremax Realty Corp., 249 App. Div. 589, 293 N.Y.S. 216 (1st Dep't 1937); Occhipinti v. Buscemi, 71 N.Y.S.2d 766 (Sup. Ct. Kings County 1947) (holding that no third-party defendant will be required to pay upon a judgment unless and until the defendant has paid the judgment rendered against him); First Nat'l Bank v. Banker's Trust, 151 Misc. 233, 271 N.Y.S. 191 (Sup. Ct. N.Y. County 1934). It should be observed that these cases did not deal with appeals under CPLR 5519.

435 77 Misc. 2d 824, 354 N.Y.S.2d 356 (Sup. Ct. Monroe County 1974) *discussed in The Survey*, 49 ST. JOHN'S L. REV. 170, 207 (1974). The *Adams* court held that a third-party defendant is not obligated to indemnify the defendant under a *Dole*-grounded third-party judgment until the defendant himself has paid more than his pro rata share of the judgment in the main action. *See* 7B MCKINNEY'S CPLR 1007, supp. commentary at 92 (1974), wherein Dean McLaughlin concludes that *Adams* mandates the inclusion of a clause in all third-party judgments "forbidding its execution until such time as [defendant] has paid [plaintiff] more than [defendant's] pro rata share of the judgment." *Id. Adams* did not deal with an appeal pursuant to CPLR 5519.

the undertaking is at odds with a report of the New York State Law Revision Commission dealing with CPA 211-a, the predecessor to CPLR 1401. The Law Revision Commission concluded therein that "it seems reasonably clear that a joint tortfeasor cannot assert any claim to contribution by virtue of the fact that he has furnished an undertaking . . . [since] furnishing an undertaking is *not* the equivalent of payment."[436]

The court's desire to insure the solvency of the third-party defendant during the third-party plaintiff's appeal is understandable. Unfortunately, in fashioning a method to protect the third-party plaintiff, the Supreme Court, Suffolk County, failed to take into account well-established precedent. A third-party plaintiff, such as Island, may obtain a conditional judgment against a third-party defendant. The sole purpose of such a determination, however, is to fix the extent to which the third-party plaintiff may expect to be reimbursed. The third-party judgment matures only when the third-party plaintiff pays more than his *Dole* apportionment.[437] Consequently, the existence of an appeal by the third-party plaintiff from a judgment in the main action, coupled with the filing of an undertaking, cannot affect the conditional character of the third-party judgment. The reason for the *Nicholas* court's departure from the rule of conditional liability is unclear. Hopefully, courts confronting similar circumstances will not follow the *Nicholas* approach.

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436 1961 N.Y. LEG. DOC. No. 65(J), at 323 (emphasis added).
437 *See* notes 434-36 and accompanying text *supra*.