

CPLR 1007: Indemnification Clause Interpreted To Cover Active Negligence

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CPLR 1007: Indemnification clause interpreted to cover active negligence.

In *Levine v. Shell Co.*,⁷³ the Court of Appeals liberalized the interpretation of indemnity clauses in order to allow third-party actions pursuant to CPLR 1007. The defendant had been found guilty of active negligence. It impleaded its tenant, on the theory that the lease agreement between the defendant and the third-party tenant contained an indemnity agreement which was broad enough to include even the active negligence of the defendant. The pertinent contractual language stated that

lessee shall indemnify Shell against any and all claims, suits, loss, cost and liability on account of injury or death of persons or damage to property, or for liens on the premises, caused by or happening in connection with the premises (including the adjacent sidewalks and driveways) or the condition maintenance, possession or use thereof or the operations thereon.⁷⁴

The Court held that this indemnification clause was broad enough to include active negligence by Shell and therefore allowed the third-party action. The Appellate Division, Second Department, reversed,⁷⁵ under *Thompson-Starrett Co. v. Otis Elevator Co.*,⁷⁶ which held that a contractual provision which purports to indemnify one against his own negligence must be stated in "unequivocal terms." The Second Department reasoned that since a person is under no duty to indemnify, his contract must be strictly construed and there must appear an unmistakable intention to indemnify.⁷⁷ The Court of Appeals reversed. It held that the *Thompson-Starrett* doctrine had been vitiated by *Kurek v. Port Chester Housing Authority*⁷⁸ and *Liff v. Consolidated Edison Co.*⁷⁹ In *Kurek*, the Court had modified the doctrine by not requiring that the indemnification clause be in "unequivocal terms" if there was an intention to indemnify.⁸⁰ In *Liff*, an indemnification clause which simply stated that the party liable would indemnify "against any and all liability" had been sustained.⁸¹

Levine has extended the *Kurek* and *Liff* holdings. These cases dealt with indemnification clauses which contained terms such as "of

⁷³ 28 N.Y.2d 205, 269 N.E.2d 799, 321 N.Y.S.2d 81 (1971).

⁷⁴ *Id.* at 208, 269 N.E.2d at 801, 321 N.Y.S.2d at 84.

⁷⁵ 35 App. Div. 2d 575, 313 N.Y.S.2d 581 (2d Dep't 1970).

⁷⁶ 271 N.Y. 36, 41, 2 N.E.2d 35, 37 (1936).

⁷⁷ 35 App. Div. 2d at 576, 313 N.Y.S.2d at 584.

⁷⁸ 18 N.Y.2d 450, 223 N.E.2d 25, 276 N.Y.S.2d 612 (1966).

⁷⁹ 23 N.Y.2d 854, 245 N.E.2d 800, 298 N.Y.S.2d 66 (1969).

⁸⁰ 18 N.Y.2d at 456, 223 N.E.2d at 27, 276 N.Y.S.2d at 615.

⁸¹ 23 N.Y.2d at 855.

whatsoever kind or nature" in reference to losses for which the indemnifying party would be liable. The indemnification clause in *Levine* contained no such language. The Court held that the language in *Levine* manifested a clear intent of indemnification for all claims, including the active negligence of Shell. Now the test is whether the plain meaning of the indemnity clause would fairly include the active negligence of the indemnified party.⁸²

ARTICLE 11—POOR PERSONS

CPLR 1102: Poor person held entitled to assignment of counsel in action for nonpayment of rent.

Mindful that accessibility to the courts is often determined by economic status, the legislature has extended to poor people certain privileges under CPLR 1102.⁸³ Free stenographic transcripts are made available to an indigent,⁸⁴ and costs and fees are waived for him.⁸⁵ Additionally, the court "may assign an attorney."⁸⁶ Prior to the CPLR, an order which did not include assignment of an attorney was held defective.⁸⁷ There is disagreement as to whether such assignment is discretionary under the statute.⁸⁸ Is this conflict rendered merely academic, on the ground that a poor person's right to assignment of counsel is implicit in the equal protection clause of the fourteenth amendment?

In *Hotel Martha Washington Management Co. v. Swinick*,⁸⁹ the Appellate Term, First Department, reversed the New York City Civil Court, New York County, which had denied defendant tenant's motions to proceed as a poor person and for appointment of counsel. The lower court had held that defendant failed to satisfy the requirements of CPLR 1101, for she had neither stated her name nor provided a list of her property and its value. The appellate court reversed on this

⁸² This test is the minority view regarding indemnification clauses. See Collins & Dugan, *Indemnification Contracts—Some Suggested Problems and Possible Solutions*, 50 MARQ. L. REV. 77, 81, 82 (1966).

⁸³ See 2 WK&M ¶ 1102.

⁸⁴ CPLR 1102(b).

⁸⁵ CPLR 1102(d). If the poor person receives a settlement or recovers a judgment, public funds expended on his behalf in the course of the litigation may be recovered out of that sum.

⁸⁶ CPLR 1102(a).

⁸⁷ *Schechter v. Lichtenstein*, 223 App. Div. 60, 61, 227 N.Y.S. 245, 246 (1st Dep't 1928); *Pankawicus v. Nichols Copper Co.*, 169 App. Div. 419, 420, 155 N.Y.S. 123, 124 (2d Dep't 1915). See SIXTH REP. 172-73.

⁸⁸ Compare 7B MCKINNEY'S CPLR 1102, commentary at 480 (1963) (no discretion) with 2 WK&M ¶ 1102.01 (discretion).

⁸⁹ 66 Misc. 2d 833, 322 N.Y.S.2d 139 (App. T. 1st Dep't 1971).