

CPLR 1102: Poor Person Held Entitled to Assignment of Counsel in Action for Nonpayment of Rent

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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).

point⁹⁰ and then discussed the privileges which the law grants to indigents.

First, the court noted that CPLR 1102(d) waives jury fees.⁹¹ Second, it concluded that, while no statute waives witness fees, failure of the city or county to absorb the cost would deny to the poor equal access to the courts.⁹² Third, it held that the fourteenth amendment encompasses "the right of an indigent to assigned counsel . . . to defend his right to remain in possession of his dwelling. . . ."⁹³ The trial court was directed to assign counsel, if such were not available to defendant through a public or semi-public agency.⁹⁴

This decision confirms Professor McLaughlin's prescient observations that "[i]t was only a matter of time before [application of the equal protection clause of the fourteenth amendment to protect the indigent] would percolate into the field of civil litigation," and that "much more will be heard . . . about the right of the indigent in civil litigation."⁹⁵

Of course, whether the public must absorb the substantial cost of providing attorneys to indigent tenants in nonpayment of rent cases, and perhaps in other actions, is a matter ultimately resolvable by the United States Supreme Court.

ARTICLE 15 — ACTIONS AGAINST PERSONS JOINTLY LIABLE

CPLR 1502: A proceeding pursuant to article 75 can be a subsequent action.

When a co-obligor was not summoned in the original action, CPLR 1502 requires a subsequent action against him in order to procure a judgment enforceable against his individually held property.⁹⁶

⁹⁰ Tenant made a prima facie showing of indigency by her affidavit stating she was a recipient of public assistance and was without assets; and her sworn denial that she owed any rent was a sufficient showing of merit to support the motion. It was therefore error to deny her application for leave to defend as a poor person (CPLR 1101).

Id. at 834, 322 N.Y.S.2d at 140. *Accord*, *Emerson v. Emerson*, 33 App. Div. 2d 1022, 308 N.Y.S.2d 691 (2d Dep't 1970).

⁹¹ 66 Misc. at 834, 322 N.Y.S.2d at 140.

⁹² *Id.*, citing *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Jeffreys v. Jeffreys*, 58 Misc. 2d 1045, 296 N.Y.S.2d 74 (Sup. Ct. Kings County 1968), discussed in *The Quarterly Survey*, 46 *ST. JOHN'S L. REV.* 147, 157 (1971); *The Quarterly Survey*, 44 *id.* 135, 139 (1969).

⁹³ *Id.* at 835, 322 N.Y.S.2d at 141, citing *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971); *Tate v. Short*, 401 U.S. 395 (1971); *Griffin v. Illinois*, 351 U.S. 12 (1956).

⁹⁴ *Id.* at 836, 322 N.Y.S.2d at 142, citing *People ex rel. Baumgart v. Martin*, 9 N.Y.2d 351, 174 N.E.2d 475, 214 N.Y.S.2d 370 (1961).

⁹⁵ 7B MCKINNEY'S CPLR 1102, *supp. commentary* at 110 (1969).

⁹⁶ See *Funaro v. Houston*, 19 Misc. 2d 1078, 193 N.Y.S.2d 729 (Sup. Ct. Kings County 1959) (the court applied CPA 1201, the predecessor to CPLR 1502).