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CPLR 10007: Broad Indemnification Clause Held Not to Cover Active Negligence of Lessor Causing Injury to Lessee

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adding a claim for breach of warranty, on the ground that the defendant would be prejudiced in that his action to recover over would be barred by the statute of limitations.

This interpretation has now been approved by the Second Circuit, in *Caruloff v. Emerson Radio & Phonograph Corp.*[17] A television repairman had lost an eye when he was struck by a retainer wire spring on a tuner. He sued the manufacturer of the television, who impleaded, on grounds of negligence and breach of implied warranty, the manufacturer of the defective part. The district court held that the manufacturer was actively negligent in not warning repairmen of the danger involved in servicing the tuner and upheld the defense of the statute of limitations. It held that the cause of action for breach implied warranty accrued at the time of sale and not at the time of injury. The Court of Appeals for the Second Circuit affirmed.[18]

The fact that the defendant was guilty of active negligence makes this decision somewhat palatable. Nevertheless, a rule which bars a cause of action before it accrues is subject to strong criticism.[19] One can readily imagine a situation in which an innocent intermediary is without recourse under this rule; this raises constitutional questions about deprivation of property without due process of law. On balance, it appears that a claim-over based on warranty, like a claim-over in active negligence, should be deemed an action for indemnification.[20]

ARTICLE 10 — PARTIES GENERALLY

CPLR 1007: Broad indemnification clause held not to cover active negligence of lessor causing injury to lessee.

Redding v. Gulf Oil Corp.,[21] the first New York case concerning indemnification contracts to be reported since the Court of Appeals decided *Levine v. Shell Oil Co.*,[22] has narrowly construed the latter decision. The *Levine* Court had held that the *Thompson-Starrett* doctrine,[23] under which an indemnification contract would be recognized as encompassing active negligence only if it expressly stated that it should be so interpreted, was "no longer a viable statement of the

17 445 F.2d 873 (2d Cir. 1971), *aff'g* 314 F. Supp. 631 (S.D.N.Y. 1970).

18 *Id.* at 875.

19 *See, e.g.*, 7B McKINNEY'S CPLR 214, commentary at 430 (1972). "It would be far simpler if it were simply said that there is strict liability in tort, declared outright, without an illusory contract mask. W. PROSSER, TORTS 681 (3d ed. 1964)."

20 *Accord*, Siegel, *supra* note 13, at 69-70.

21 67 Misc. 2d 464, 324 N.Y.S.2d 490 (Sup. Ct. Nassau County 1971).

22 28 N.Y.2d 205, 269 N.E.2d 799, 321 N.Y.S.2d 81 (1971), *discussed in The Quarterly Survey*, 46 ST. JOHN'S L. REV. 355, 367 (1971).

23 Thompson-Starrett Co. v. Otis Elevator Co., 271 N.Y. 86, 2 N.E.2d 35 (1936).

law."[24] Previously, if the indemnified party could not point to a specific clause in the contract indemnifying him against his own active negligence, he would be denied indemnification no matter how broad the contract language.

The plaintiffs in *Levine* were employees of a tenant-operator of a gasoline service station owned by the defendant, Shell Oil Company. Injured by a fire and explosion caused by the allegedly negligent maintenance of a gas heater, they sued Shell, which impleaded the tenant-operator. The indemnification contract stated:

> 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.[25]

The Court, reasoning that contracts should not be construed so as to render them meaningless,[26] concluded that "the plain meaning of these words fairly includes the liability for the active negligence of Shell" and saw "no reason why more should be required to establish the unmistakable intent of the parties."[27]

Redding is also a case concerning an indemnification contract contained in a lease renting a service station. Therein, the lessee was injured due to the active negligence of the lessor. The contract read in pertinent part:

> Lessee agrees to exonerate, save harmless, protect and indemnify Lessor from any and all losses, damages, claims, suits or actions, judgments and costs which may arise or grow out of any injury to a death of any person or persons or damage to any property caused by or in any manner connected with the use, possession, repair or condition of said premise or any equipment or fixtures thereon.[28]

The Supreme Court, Nassau County, failed to find the unmistakable intent necessary for indemnification against active negligence.[29]

The test promulgated in *Levine* is whether the plain meaning of the indemnity clause would fairly include the active negligence of the

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[24] 28 N.Y.2d at 212, 269 N.E.2d at 802, 321 N.Y.S.2d at 86.

[25] *Id.* at 210, 269 N.E.2d at 801, 321 N.Y.S.2d at 84.

[26] *Id.* at 212, 269 N.E.2d at 802, 321 N.Y.S.2d at 86, *quoting* Kurek v. Port Chester Housing Authority, 18 N.Y.2d 450, 456, 223 N.E.2d 25, 28, 276 N.Y.S.2d 612, 615 (1966). *See also* Liff v. Consolidated Edison Co., 29 App. Div. 2d 665, 286 N.Y.S.2d 354 (2d Dep't 1968), *aff'd*, 23 N.Y.2d 854, 245 N.E.2d 800, 298 N.Y.S.2d 66 (1969).

[27] 28 N.Y.2d at 212, 269 N.E.2d at 212, 269 N.E.2d at 803, 321 N.Y.S.2d at 86.

[28] 67 Misc. 2d at 465, 324 N.Y.S.2d at 491.

[29] *Id.* at 467, 324 N.Y.S.2d at 493.

indemnified party.[30] The respective clauses in *Levine* and *Redding* are semantically distinct but not substantively different. It is puzzling that the *Redding* court recognized "that the words 'any and all' were sufficient to cover the owner's active negligence"[31] in *Levine*, but found them insufficient in the instant case. Since *Levine* indicated that no further evidence is required to establish the requisite intent under these circumstances, the court should have decided in favor of Gulf on this point.[32]

ARTICLE 22 — STAY, MOTIONS, ORDERS AND MANDATES

CPLR 2219(a): Case illustrates the futility of seeking to compel a judge to render a decision.

CPLR 2219(a) provides that an order determining a motion shall be made within sixty days. Should a court fail to comply with this rule, any party to the action can commence an article 78 proceeding to compel the judge to file a decision. The practical outcome of this proceeding, however, leaves much to be desired.

In October 1970, a proceeding was commenced in family court to terminate a mother's parental rights in her daughter. The mother moved to dismiss the case, and the judge reserved his decision. When, after six months, no decision was forthcoming, the mother initiated an article 78 proceeding to compel him to render a decision. In *Rothman v. Thurston*,[33] the Supreme Court, New York County, granted the petition. It noted that the respondent's delay was inexcusable and far in excess of the 60-day time limit of CPLR 2219(a).[34] In light of the fact that an infant's welfare was at stake, prompt disposition was deemed necessary. Therefore, the court ordered the respondent to decide the case within 10 days. If the respondent continued to withhold a decision

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30 28 N.Y.2d at 212, 269 N.E.2d at 803, 321 N.Y.S.2d at 86.

31 67 Misc. 2d at 466, 324 N.Y.S.2d at 492.

32 The *Redding* court stated:

> No more is submitted in support of Gulf's position than an affidavit of an attorney who points to the clause and submits a memorandum of law devoted to a discussion of the opinion in *Levine*. There has not been offered an affidavit of an officer, agent, employee, etc. of the Company with knowledge of the facts which would demonstrate the intention to indemnify against injury to the lessee.

Id. at 467, 324 N.Y.S.2d at 493.

However, *Levine* indicated that further evidence need not be proffered. 28 N.Y.2d at 212, 269 N.E.2d at 803, 321 N.Y.S.2d at 86.

33 67 Misc. 2d 543, 324 N.Y.S.2d 331 (Sup. Ct. N.Y. County 1971).

34 The 60-day time limit has been held to be merely directory and not mandatory. Kaminsky v. Abrams, 51 Misc. 2d 5, 272 N.Y.S.2d 530 (Sup. Ct. N.Y. County 1965). *See* 2A WK&M ¶ 2219.01, which also points out that "no sanction is imposed under this rule for failure of the judge to decide the motion within the specified time."