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CPLR 1007: Impleader Allowed Despite Allegations of Active Negligence in Complaint Where Bill of Particulars Indicates that Defendant Was Only Passively Negligent

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CPLR 602: Court permits consolidation of tripartite arbitrations.

Since arbitration is no longer deemed a special proceeding,[38] it was speculated that courts would refuse to extend the benefits of CPLR 602, which permits the consolidation of actions involving a common question of law or fact, thereto.[39] Nevertheless, in *Chariot Textiles Corp. v. Wannalancit Textile Corp.*,[40] the Court of Appeals adopted the viewpoint that the application to consolidate transmutes the arbitrations into special proceedings which, then, could be consolidated. Recently, the question arose as to whether tripartite arbitrations could also be consolidated.

In *Vigo Steamship Corp. v. Marship Corp.*,[41] Vigo Corp. (Vigo) had leased a ship owned by Marship Corp. (Marship) and subleased it to Frederick Snare Corp. (Snare). During a voyage by the latter, the ship was damaged and separate arbitration proceedings ensued between Marship and Vigo, and Vigo and Snare. Recognizing that common questions of law and fact were involved, the Court of Appeals ordered that the arbitrations be consolidated.

It should be emphasized that this decision could not have been reached were it not for the ingenuity of Vigo's counsel. For, in tripartite arbitration, each party nominates one arbitrator who in turn selects a third. Thus, under ordinary circumstances, consolidation would be definitionally impossible since four rather than three arbitrators would be chosen. However, counsel for Vigo overcame this obstacle by agreeing to abide by Marship's selection of an arbitrator, thereby preserving the structure of the three-man board: two partial arbitrators and a neutral one.

CPLR 1007: Impleader allowed despite allegations of active negligence in complaint where bill of particulars indicates that defendant was only passively negligent.

One area in which the CPLR is particularly fraught with substantive rather than procedural problems is that of third-party practice.[42] For, the right to institute a third-party action under CPLR 1007 is contingent upon the obligation of the third-party defendant to indemnify the named defendant.[43] This, in turn, often hinges on a determination of whether the defendant's alleged negligence was

38 *Compare* CPA 1459 *with* CPLR 7502.
39 *See* 7B McKINNEY'S CPLR 7502, supp. commentary at 117 (1964); 8 WK&M ¶ 7502.04.
40 18 N.Y.2d 793, 221 N.E.2d 913, 275 N.Y.S.2d 382 (1962).
41 26 N.Y.2d 157, 257 N.E.2d 624, 309 N.Y.S.2d 165 (1970).
42 *See* 2 WK&M ¶ 1007.02.
43 Putvin v. Buffalo Elec. Co., 5 N.Y.2d 447, 158 N.E.2d 691, 186 N.Y.S.2d 15 (1959).

active or passive. Generally, the third-party complaint will be allowed at the pleading stage, so long as "the original complaint can reasonably be interpreted as including an allegation of passive negligence on the part of the defendant."[44] But, what is a reasonable interpretation of the complaint? Could it include a consideration of extraneous matters? The Appellate Division, Third Department, held, in *Molino v. Tougher Heating & Plumbing Co.*,[45] that where the original complaint did not allege passive negligence, it was immaterial that the bill of particulars might indicate that such negligence was nonetheless present. The *Molino* court reasoned that "a bill [of particulars] may not supply an essential allegation which is lacking in the pleading"[46]; it may only "amplify" to the extent that it particularizes a general allegation.[47]

An opposite position was taken by the First Department in *Torres v. Transamerican Freight Line, Inc.*[48] There, the court denied a motion to dismiss a third-party complaint on the basis that "while the original complaint alleges what appears to be active negligence, the bill of particulars gives clear indication that what may be proved will be passive."[49]

This holding seems contra to the Court of Appeals decision in *Putvin v. Buffalo Electric Co.*,[50] wherein it was reasoned:

> True, if there is a variance between proof and pleadings, plaintiffs may move to conform the pleadings to the proof. The question here, [the character of the negligence for purposes of third-party practice] however, relates to the pleadings only.[51]

Nevertheless, the outcome in *Torres* is more in keeping with the intent of CPLR 1007 "to avoid circuity and multiplicity of law suits and to encourage the expeditious determination of all claims . . . ,"[52] and is most compelling when viewed in light of the liberal reading to which a third-party complaint is entitled at the pleading stage.[53]

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44 *Id.* at 455, 158 N.E.2d at 695, 186 N.Y.S.2d at 21. *See also* 2 WK&M ¶ 1007.02; Koerner, *Modern Third-Party Practice — Substantive or Procedural*, 3 N.Y.L.F. 159, 163 (1957); Comment, *Indemnity Among Joint Tort-Feasors in New York; Active and Passive Negligence and Impleader*, 28 FORDHAM L. REV. 782, 798-801 (1959).

45 23 App. Div. 2d 616, 256 N.Y.S.2d 885 (3d Dep't 1965).

46 *Id.* at 617, 256 N.Y.S.2d at 887.

47 *Id.*, 256 N.Y.S.2d at 888.

48 34 App. Div. 2d 538, 308 N.Y.S.2d 906 (1st Dep't 1970).

49 *Id.*, 308 N.Y.S.2d at 907.

50 5 N.Y.2d 447, 158 N.E.2d 691, 186 N.Y.S.2d 15 (1959).

51 *Id.* at 459, 158 N.E.2d at 698, 186 N.Y.S.2d at 25.

52 Morey v. Seabright Co., 41 Misc. 2d 1068, 1070, 274 N.Y.S.2d 306, 309 (Sup. Ct. Onondaga County 1964).

53 Braun v. City of New York, 17 App. Div. 2d 264, 268, 234 N.Y.S.2d 935, 939 (1st Dep't 1962).