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Article 21

CPLR 3101(d): Second Department Adopts Liberal View with Regard to Disclosure of Witnesses' Names

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demnity suit (*i.e.*, one instituted before service of an answer) was permitted in *W. T. Grant Co. v. Uneeda Doll Co.*[81] by the first department where the main suit was instituted in Connecticut, presumably because the New York courts could not exercise control over that litigation.[82]

Apparently in the absence of the "jurisdictional problem" presented in a case such as *Grant*, the courts will not permit such suits.[83] Thus, in *Lasker-Goldman Corp. v. Delma Engineering Corp.*,[84] the first department recently reversed an order granting plaintiff partial summary judgment on a cause of action based upon an indemnity clause. The clause was unambiguous as to defendant's potential liability, but third party complainants had done no more than file claims for damages at the time judgment was rendered. The plaintiff was therefore clearly not yet entitled to recovery and the denial of the motion for summary judgment was proper.

ARTICLE 31 — DISCLOSURE

CPLR 3101(d): Second department adopts liberal view with regard to disclosure of witnesses' names.

In *Peretz v. Blekicki*,[85] the second department gave appellate affirmation to the policy, recently promulgated by a supreme court in that department,[86] of liberal disclosure of a witness' name.

In modifying the lower court decision to allow the disclosure of the identity of a witness to an accident, unless it appears that such matter is otherwise privileged under CPLR 3101(c) or (d), the appellate division relied upon both *Hartley v. Ring*[87] and *Allen v. Crowell-Collier Publishing Co.*[88] In *Allen*, the Court of Appeals promulgated a test of "usefulness and reason" which should be liberally construed so as to require pre-trial disclosure of a witness' name.

The importance of *Peretz* lies in the fact that it puts the weight of the appellate division behind the pronouncement previously issued

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81 19 App. Div. 2d 361, 243 N.Y.S.2d 428 (1st Dep't 1963).

82 *See* 7B MCKINNEY'S CPLR 3014, supp. commentary 117, 118 (1968).

83 *See* Lasker-Goldman Corp. v. Delma Eng'r Corp., 32 App. Div. 2d 513, 298 N.Y.S.2d 747 (1st Dep't 1969); Morey v. Sealright Co., 41 Misc. 2d 1068, 1070, 247 N.Y.S.2d 306, 308-09 (Sup. Ct. Onondaga County 1964).

84 32 App. Div. 2d 513, 298 N.Y.S.2d 747 (1st Dep't 1969).

85 31 App. Div. 2d 934, 298 N.Y.S.2d 805 (2d Dep't 1969).

86 *See* Hartley v. Ring, 58 Misc. 2d 618, 296 N.Y.S.2d 394 (Sup. Ct. Queens County 1969). *See also The Quarterly Survey of New York Practice*, 44 ST. JOHN'S L. REV. 135, 140 (1969) for an analysis of the history leading to this decision.

87 58 Misc. 2d 618, 296 N.Y.S.2d 394 (Sup. Ct. Queens County 1969).

88 21 N.Y.2d 403, 235 N.E.2d 430, 288 N.Y.S.2d 449 (1968). *See also The Quarterly Survey of New York Practice*, 43 ST. JOHN'S L. REV. 302, 324-25 (1968).

in *Hartley*. Thus, the ability of a party to "hide" the name of a witness, which was ended in theory by *Allen*, is also being terminated by the lower courts in practice.

ARTICLE 32 — ACCELERATED JUDGMENT

CPLR 3212: Dobkin *"real party in interest doctrine" not extended to motion for summary judgment.*

In *Kopperman v. Zar*,[89] plaintiff was injured while riding as a passenger in one co-defendant's vehicle when it struck the rear of the other co-defendant's vehicle. Both defendants were insured by the same liability carrier, and there was no question but that the accident was caused by the negligence of either or both defendants. Since she clearly was not contributorily negligent, the plaintiff, relying upon *Dobkin v. Chapman*,[90] sought summary judgment against the insurer on the grounds that it was the "real party in interest."

The "real party in interest issue" arose in *Dobkin* when the defendants moved to set aside service because of an alleged denial of due process. Defendants could not be located for service after they had become involved in an automobile accident in New York, and the Court upheld service whereby the summons and complaint were mailed to defendant's last known address in New York and a copy thereof was delivered to defendant's insurance carrier — the real party in interest. The *ratio decidendi* of *Dobkin* is that the requirements of due process have been met if defendant has been given reasonable notice. And the question of reasonableness depends upon a balancing of interests after consideration is given to all the attendant circumstances.[91] Accordingly, it noted that in view of "the plaintiff's need, the public interest, the reasonableness of the plaintiff's efforts under all the cricumstances to inform the defendant, and the availability of other safeguards for the defendant's interest,"[92] service in *Dobkin* was reasonable, whereas the same manner of service in another case might fail to meet the requirements of due process.

It is readily apparent from the tone of the *Kopperman* opinion that the "real party in interest" theory may well be limited and restricted to those situations in which a plaintiff would otherwise be unable to serve the proper defendant. The court suggests three problems which

89 59 Misc. 2d 102, 298 N.Y.S.2d 150 (N.Y.C. Civ. Ct. Queens County 1969).

90 21 N.Y.2d 490, 236 N.E.2d 451, 289 N.Y.S.2d 161 (1968). *Dobkin* is a consolidation of three cases. *See The Quarterly Survey of New York Practice*, 43 ST. JOHN'S L. REV. 302, 310 (1968). *See also* 7B MCKINNEY'S CPLR 308, supp. commentary 167 (1968).

91 7B MCKINNEY'S CPLR 308, supp. commentary 167 (1968).

92 21 N.Y.2d at 503, 236 N.E.2d at 458, 289 N.Y.S.2d at 172.