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Article 16

CPLR 1007: Third Party Action Based on Subrogation Where No Payment Has Been Made Allowed

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CPLR 602." [33] The court further stated that the factors involved which relate to a change of venue under CPLR 510 are relevant in the exercise of the court's discretion under CPLR 602.[34] Therefore, while the same factors may be inherent in a motion under CPLR 510 and CPLR 602, in the former these factors are controlling, whereas in the latter they are not.

ARTICLE 10 — PARTIES GENERALLY

CPLR 1007: Third party action based on subrogation where no payment has been made allowed.

CPLR 1007 provides in part that "a defendant may proceed against a person not a party who is or may be liable to him for all or part of the plaintiff's claim against him. . . ."

In *Krause v. American Guar. & Liab. Ins. Co.*,[35] plaintiff, trustee in bankruptcy for one of the victims of the great "salad oil swindle," sought recovery on broker's bonds issued by the defendant insurance company. The insurance company sought to implead the American Express Company and the issue was raised as to whether CPLR 1007 permits a third-party action based on subrogation where no payment has been made. The appellate division held that impleader was permissible under the statute and the Court of Appeals affirmed.

In its opinion the Court of Appeals distinguished *Ross v. Pawtucket Mut. Ins. Co.*[36] and apparently limited it to automobile collision cases. In *Ross*, the plaintiff-insured's contract with the defendant-insurer provided that the defendant's right to subrogation would not mature until payments were made under the policy. In *Krause* there was no such policy term. However, *Ross* also rested on the broader ground that impleader under CPLR 1007 should not be permitted to an insurer whose claim is based upon rights to be gained by subrogation. This concept is based on the reasoning of the dissent in *Madison Ave. Props. Corp. v. Royal Ins. Co.*[37] which required that "[t]he third party plaintiff must have, at least, some color of a present cause of action." [38]

The Court rejected this rationale finding it inappropriate to the realities of the commercial type of litigation presented in *Krause*. But, the *Ross* precedent was left undisturbed to govern

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[33] *Id.* 287 N.Y.S.2d at 974.
[34] *Id.*
[35] 22 N.Y.2d 147, 239 N.E.2d 175, 292 N.Y.S.2d 67 (1968).
[36] 13 N.Y.2d 233, 195 N.E.2d 892, 246 N.Y.S.2d 213 (1963).
[37] 281 App. Div. 2d 641, 120 N.Y.S.2d 626 (1st Dep't 1953).
[38] *Id.* at 646, 120 N.Y.S.2d at 631.

the automobile collision situation, where other policy considerations control.

The Court stated, *inter alia*, that the insurer should not "be required to make an election between its defense to the main action and its subrogation rights." [39] Furthermore, other features of the CPLR, such as severances, stays or separate trials, would provide an adequate remedy for the insured—should its rights be prejudiced in any way.[40]

While the instant case clearly indicates that the *Ross* rule will be undisturbed in the automobile collision situation, it seems apparent that impleader will now be available in virtually all subrogation situations. CPLR 1007 will still remain, however, the ward of judicial discretion.[41]

CPLR 1007: Court refuses to allow cause of action for implied indemnity where no common basis of liability exists.

In *Fladerer v. Needleman*,[42] the appellate division, third department, held that a vendor had no cause of action for implied indemnity against her attorney "not merely because of the failure to demonstrate an active-passive negligence situation but because . . . the contract vendor and her former lawyer occupy no common basis of liability to the contract vendee." [43]

Vendor brought suit against her contract vendee for repudiation of their contract and the vendee counterclaimed on the ground that the vendor's title was unmarketable. Consequently the vendor impleaded her attorney whom she alleged was primarily liable for any damages on vendee's counterclaim. The attorney interposed the statute of limitations to bar the third party action, but the lower court rejected this defense since an action for indemnity "accrues not at the time of the commission of the tort... but at the time of the payment of the judgment. . . ." [44]

The appellate division sustained this conclusion, but refused to allow the vendor's cause of action for implied indemnity, because the counterclaim rested on contract and the third party complaint rested on negligence. Moreover, there was a failure to demonstrate an active-passive negligence situation. One suspects that the court's somewhat restrictive view of implied indemnity was prompted by a desire to protect the lawyer from possibly becoming, in its words, an insurer of title.

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[39] 22 N.Y.2d at 156, 239 N.E.2d at 180, 292 N.Y.S.2d at 73.
[40] *Id.* at 153, 239 N.E.2d at 178, 292 N.Y.S.2d at 71.
[41] *See generally* 7B McKINNEY'S CPLR 1007, supp. commentary 56-60 (1968).
[42] 30 App. Div. 2d 371, 292 N.Y.S.2d 277 (3d Dep't 1968).
[43] *Id.* at 375, 292 N.Y.S.2d at 280.
[44] *Id.* at 373, 292 N.Y.S.2d at 278.