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escape liability because of the failure of his operator to comply with the regulations would cast a burden upon the innocent party and open the door to wilful deception.

Although the view advanced is humane and seems very logical, it fails to fully regard the position of the owner who expressly limits the use.

The problems presented in this controversy will largely be avoided in the future, for the inclusion of Section 207.4 (a)(3) provides that leases to an authorized carrier are not to be for terms less than 30 days.³⁶ The Section was not in effect at the time of this accident.

D. R. K.

“PREVIOUSLY MADE” AND “UNSETTLED” CLAIMS UNDER SUBCONTRACT BAR DEFENSE OF RELEASE

In *Corhill Corp. v. S. D. Plants, Inc.*,³⁷ plaintiff subcontractor sued the defendant contractor for breaches of warranty and of contract. The defendant contractor moved to dismiss plaintiff's amended complaint on the ground of release. The Appellate Division reversed³⁸ Special Term's dismissal of the motion.³⁹ The Court of Appeals was faced with the question whether on the record there were “facts tending to obviate” the “objection.”⁴⁰ Defendant contended that under the subcontract the “making and acceptance of the final payment shall constitute a waiver . . . of all claims by the subcontractor, except those *previously made and unsettled.*” (Emphasis supplied.) Were the claims at bar “previously made” and “unsettled” at the time of final payment? The Court referred to an affidavit given by plaintiff company's president in opposition to the defendant's motion. This affidavit averred that conferences were held during the course of work under the subcontract and that at these meetings the plaintiff's claims, such as delay by the defendant, were made known. The plaintiff's affidavit also stated that the defendant urged it to finish the work at which time adjustments would be made, but they never were. Final payment was made on the completion of the contract. In a reply affidavit the defendant's vice-president averred that “There *were no unsettled . . .*” claims of plaintiff at the time final payment was made. Defendant had made the same assertion in his moving affidavit. In spite of this, defendant argues that there is no factual dispute.

In addition to the above the Court noted that as the result of plaintiff's requests for relief from the defendant, the defendant itself wrote to the owner, General Aniline and Film Corp., asking it to make good plaintiff's loss for reasons of equity and fairness. This request was subsequently refused. The Court was of the opinion that the import of this letter was not resolved by

36. *Supra* note 26.

37. 9 N.Y.2d 595, 217 N.Y.S.2d 1 (1961).

38. 11 A.D.2d 980, 205 N.Y.S.2d 426 (1st Dep't 1960).

39. 23 Misc. 2d 349, 198 N.Y.S.2d 998 (Sup. Ct. 1960).

40. N.Y. Rules Civ. Prac., Rule 108; see generally *Zimmer v. Whiting-Buick*, 274 App. Div. 967, 84 N.Y.S.2d 839 (4th Dep't 1948).

the affidavits so as to justify defendant's request for summary relief. For this reason and because of the factual issue apparent on the face of the affidavits, the Court reversed the Appellate Division and denied defendant's motion to dismiss.

Bd.

CORPORATIONS

PUBLIC POLICY TEST IN MEMBERSHIP CORPORATION CHARTER APPLICATIONS OVERRULED

Section 10 of the Membership Corporations Law of New York provides that five or more persons may become a membership corporation "for any lawful purpose." In addition, however, the New York courts have required that the purposes of the proposed membership corporation be in accord with community interests and the public policy of the State. In *Association for the Preservation of Freedom of Choice, Inc. v. Shapiro*,¹ the Court of Appeals rejected the public policy and community interest tests previously used by the lower courts in deciding whether to approve applications for incorporation under the Membership Corporations Law.

The Supreme Court refused to approve the Association's certificate on the grounds that its stated purposes of urging people to support freedom in association and to reject governmental encouragement of either discrimination or anti-discrimination were contrary to public policy and injurious to the community, although admittedly not unlawful.²

The Appellate Division unanimously dismissed a petition to order the Supreme Court Justice to revoke his two opinions³ and on appeal this decision was reversed. The Court of Appeals held, first that "the public policy of the State is not violated by purposes which are not unlawful."⁴ This holding makes

1. 9 N.Y.2d 376, 214 N.Y.S.2d 388 (1961). Consolidated with the main case was an action by the Association pursuant to Article 78 to compel the Secretary of State to file its unapproved charter application because Section 10 of the Membership Corporation Law was allegedly unconstitutional. The Supreme Court, New York County, dismissed the petition because Section 10 was not unconstitutional. *Association for the Preservation of Freedom of Choice v. Simon*, 22 Misc. 2d 1016, 201 N.Y.S.2d 135 (Sup. Ct. 1960). The Appellate Division unanimously affirmed. 11 A.D.2d 927, 206 N.Y.S.2d 532 (1st Dep't 1960). The Court of Appeals affirmed without discussion.

2. In 17 Misc. 2d 1012, 187 N.Y.S.2d 706 (Sup. Ct. 1959) at pages 1013 and 707 respectively the Justice said:

In passing upon an application for the approval of a membership corporation, the duty of the court is not merely to see to it that the requirements of the statute have been met, but also to judicially determine whether the objects and purposes of the proposed corporations are lawful, in accord with public policy and not injurious to the community.

When asked to reconsider he replied in 18 Misc. 2d 534, 188 N.Y.S.2d 885 (Sup. Ct. 1959) at pages 535 and 887 respectively:

Certainly the sponsors of the proposed membership corporation are completely free to associate for the purposes they spell out in the proposed certificate. . . . But they may not compel the state to grant them, for these purposes, the benefits and privileges of incorporation as a membership corporation.

3. 10 A.D.2d 873, 202 N.Y.S.2d 218 (2d Dep't 1960).

4. 9 N.Y.2d 376, 382, 214 N.Y.S.2d 388, 394 (1961).