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Should Lenders Share Fault for Damages?

Trend in the State Points to Expanding Application of Comparative Negligence Principles

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A MOTORIST is severely injured when a vehicle negligently switches lanes and causes a collision. His own negligence having at least partly caused the accident, the motorist sues to recover for personal injuries, but finds that his recoverable damages are diminished in proportion to his culpable fault. Remembering their law school torts class, most New York commercial litigators may conclude that such a fact pattern is a traditional (and unremarkable) example of comparative negligence under New York jurisprudence, confined to the personal injury sector, following the Court of Appeals' landmark decision in *Dole v. Dow Chemical Co.*, 30 N.Y.2d 143 (1972).

But in commercial situations, suppose that a borrower, although contractually obliged to do so, fails to turn over the proceeds of accounts receivable to its lender, whose collection practices were less than uniformly vigilant. May the borrower defend against the lender's conversion claim by urging that any recoverable damages be reduced because the lender failed to properly monitor the collateral it had been pledged?

Or perhaps a borrower receives advances from a lender against non-existing inventory fraudulently reported to comprise part of the borrower's inventory pool. Should the lender's fraud damages be reduced because it failed to verify borrower's inventory pool?

And suppose that after defaulting under commercial loan agreements that grant a broad security interest, borrower relocates, and then sells, collateral inventory, thereafter disposing of the sales proceeds. Can borrower claim that lender's recoverable conversion damages should be reduced because lender failed to adequately insure that the pledged inventory would not be removed and sold?

Altering commonly held notions about the "proper place" comparative negligence should occupy in commercial situations like these, a recent trend in New York case law points to an expanding application of comparative negligence principles and, by extension, to a lender's recoverable damages being reduced in proportion to the damages attributable to its culpable conduct. This article reviews the statutory authority in favor of an expansion of comparative negligence principles, and alerts the practitioner to case law from New York and other jurisdictions which supports (and opposes) the application of comparative negligence to intentional torts.

Text and Legislative History

Enacted in 1975, New York's comparative negligence rules are codified in Article 14-A of the New York Civil Practice Law and Rules (CPLR). Entitled "damages recoverable when contributory negligence or assumption or risk is established," Article 14-A's core provision, CPLR §1411, straightforwardly declares the operative rule:

> [i]n any action to recover damages for personal injury, injury to property, or wrongful death, the culpable conduct attributable to the claimant or to the decedent, including contributory negligence or assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages.

By referring to contributory negligence and assumption of risk (traditionally complete bars to recovery in negligence actions), but not to intentional torts, the titles of both CPLR Article 14-A and §1411 imply that New York's comparative negligence defense is assertable only in negligence actions. Such a limitation seems supported by the Thirteenth Annual Report of the Judicial Conference to Legislature on the Civil Practice Law and Rules (Feb. 1, 1975) (Legislative History), which states that Article 14-A was enacted to codify the fundamental rule of *Dole v. Dow*, supra. See Legislative History at pp 235-236; see also CPLR §1411, Siegel Practice Commentaries, C1411:1, p. 563 (CPLR §1411 is a natural extension of the principles of comparative fault that were adopted in *Dole v. Dow*, supra, which articulated comparative negligence principles among joint tortfeasors in a products liability negligence action).

Yet the terminology used in CPLR §1411 itself refers to a reduction of recoverable damages in "any action to recover damages for … injury to property…" in the proportion which the "culpable conduct" of the claimant bears "to the culpable conduct which caused the damages." The express terms of the statute, therefore, do not limit its application to negligence actions.

Comment (a) of the Legislative History appears to remove much doubt from the statute's intended omnibus scope: Article 14-A is applicable "not only to negligence actions, but to all actions brought to recover damages for personal injury, injury to property or wrongful death whatever the legal theory upon which the suit is brought." Legislative History at p. 240.

Comment (b) of the Legislative History explains that "culpable conduct" is used in CPLR §1411 instead of "negligent conduct" because "this article will apply to cases where the conduct of one or more of the parties will be found to be not negligent, but will nonetheless be a factor in determining the amount of damages." Id. Comment (b) further states that Article 14-A permits the apportionment of damages in cases where "the plaintiff's negligence may be the only

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negligence, but the defendant's conduct is nonetheless 'culpable' and therefore to be considered in determining damages." Id. (emphasis in original).

Additionally, comment (e) of the Legislative History states that in determining the total " 'culpable conduct which caused the damages,' the culpable conduct of the defendant as well as that of the claimant must be considered. The defendant's culpable conduct may include, but is not necessarily limited to, negligence, breach of warranty, a violation of statute giving rise to civil liability, conduct giving rise to liability based upon a theory of strict liability or *intentional misconduct*." Id. at p. 242 (emphasis added).

Further elucidating the Legislative History, Professor Vincent C. Alexander's CPLR Practice Commentaries conclude that the application of CPLR §1411 is not limited to negligence cases but is instead to be applied to any case that will support a claim for personal injury, property damage or wrongful death. See CPLR §1411, CPLR Practice Commentaries, C1411:1, p. 563. According to Professor Alexander, whenever the plaintiff's conduct causes its own damages, no matter what its cause of action may be, CPLR §1411 is potentially activated, except under four situations: (1) plaintiff's conduct is the sole cause of his injuries; (2) plaintiff's injuries are a direct result of his commission of a crime or illegal conduct; (3) there has been an express, or (4) a primary, assumption of risk. See id. at C1411:1-2, pp. 564-566.

With text, legislative background and expert commentary so ostensibly pellucid, one might wonder whether anything novel or controversial remained about interpreting a 27-year-old statute. Nonetheless, a conflict has emerged between the statutory text and commentary on the one hand, and the Legislature's stated reason for adopting §1411 in the first place: to diminish recoverable damages in a negligence action when the plaintiff's own culpable conduct contributed to its damages, rather than bar recovery through the traditional defenses of contributory negligence or assumption of risk.

Case Law Opposing Application

Before CPLR §1411 was adopted, the established rule was that a plaintiff's negligence could not be used as a defense to an intentional tort. See *Hartford Accident and Indemnity Company v. Walston & Co.*, 21 N.Y.2d 219, 221 (N.Y. 1967), adhered to by 22 N.Y.2d 672 (1968) (finding that negligent conduct of stock owner could not be used as a defense to claim that stockbroker converted stock). Although some New York courts advocated this rule, usually premised upon a public policy justification of not permitting a wrongdoer to benefit from intentional misconduct even after the adoption of CPLR §1411, see *Anderson v. WHEC-TV*, 92 A.D.2d 747 (4th Dept. 1983) (affirming lower court's dismissal of comparative negligence defense because plaintiff's culpable conduct is not a defense to intentional tort of trespass), the Appellate Division decision in *City of New York v. Corwen*, 164 A.D.2d 212 (1st Dept. 1990) became the leading authority for the proposition that CPLR §1411 was inapplicable to intentional tort actions.

In *Corwen*, New York City sued a group of landlords based upon their bribery of a city government official who approved city leases for property the landlords owned. Responding to claims to reform the leases to reduce the amount of rent by the extent of the bribery and to recover damages for breach of fiduciary duty, the landlords asserted a set-off defense that the city was negligent in appointing and failing to supervise its employee who accepted the bribes. Id. at 216.

Given the lack of a definitive ruling by the New York Court of Appeals and conflicting appellate decisions, whether a lender's damages in a commercial tort action will be reduced in proportion to its negligent conduct remains unresolved.

The trial court granted the city's motion to dismiss the landlord's set-off defense (among others), finding that comparative negligence was not applicable to a complaint alleging a felony (bribery) and serious violation of law. Id. at 217. The lower court also considered defendants' actions to be a superseding cause to plaintiff's injuries, thereby rendering comparative negligence inapplicable. Id. Affirming the lower court's ruling, the First Department concluded that a comparative fault defense was not assertable in an intentional tort action such as for breach of fiduciary duty. Id. at 218.

Other New York courts have relied upon *Corwen* in deciding that comparative negligence is not a defense to an intentional tort. See *Blue Cross and Blue Shield of New Jersey, Inc.*, 36 F.Supp.2d 560, 575-576 (E.D.N.Y. 1999) (Weinstein, J.) (in civil RICO action by medical health insurers to recover damages from tobacco companies and others, defendants barred from maintaining that negligent actions of smokers contributed to plaintiff's damages because neither contributory negligence nor comparative negligence was a defense to fraud); *Scott v. The Dime Savings Bank of New York*, 886 F.Supp. 1073, 1081 (S.D.N.Y. 1995), affirmed, 101 F.3d 107 (2d Cir. 1996), cert. denied, 520 U.S. 1122, 117 S.Ct. 1260 (1997) (court refused to reduce plaintiff's breach of fiduciary duty damages in proportion to plaintiff's culpable conduct because comparative negligence was held not to constitute a defense to breach of fiduciary duty and intentional tort claims).

Likewise, in a civil RICO action against perpetrators of a mortgage scam scheme, one court held that even if plaintiff-bank were negligent, negligence is not a defense to fraud. *Long Island Savings Bank, FSB v. Bigman*, 1991 WL 144224 at *6 (E.D.N.Y., June 25, 1991). Initially relying upon *Corwen* for the principle that negligence is no defense to fraud, Judge Jacob Mishler decided that "[a] person guilty of fraud should not be permitted to use the law as a shield" and that while the law should not encourage negligence, "when the choice is between the two (fraud and negligence) negligence is less objectionable than fraud." Id. at *7. The court further observed that although "one should not be inattentive to one's own business affairs, the law should not permit an inattentive person to suffer loss at the hands of a misrepresenter." Id.

Case Law Supporting Application

Conversely, many New York courts have invoked the express terms and Legislative History of CPLR Article 14-A to apply comparative negligence to intentional tort actions. See *Coty v. Steigerwald*, 262 A.D.2d 946, 946-947 (4th Dept. 1999), subsequent appeal, 291 A.D.2d 796 (4th Dept. 2002), appeal denied, 98 N.Y.2d 604 (2002) (comparative fault principles could be applied to cause of action for breach of fiduciary duty, but plaintiff's excess spending could not constitute conduct contributing to breach of fiduciary duty); *Haran v. New York Metropolitan Baseball Club, Inc.*, 131 Misc. 2d 392, 393 (Sup. Ct. Nassau 1986) (CPLR §1411 could be asserted as an affirmative defense to intentional tort cause of action). These courts largely based their holdings on the Court of Appeals' dicta in *Arbegast v. Board Of Education of South Berlin Central School*, 65 N.Y.2d 161 (N.Y. 1985).

In *Arbegast*, while ultimately deciding that plaintiff's express assumption of risk barred her strict liability action, the Court held that CPLR §1411 applied when the defendant was held strictly liable and the plaintiff was also negligent. Id. at 164. The Court, in dicta, noted that the Legislative History of CPLR Article 14-A reflected that it applied to all actions for the recovery of damages for personal injury, injury to property or wrongful death no matter the legal theory upon which the suit is brought, and that the term "culpable conduct" was used in the statute to reduce damages for any conduct that contributed to the damages. Id. at 166-167. The Court also focused on the causation of plaintiff's damages, determining that a party should only be held liable for those damages that it has caused, not damages caused by the plaintiff. Id. at 168.

Even though it involved a purely personal injury setting, *Arbegast* has been relied upon as authority for the invocation of CPLR §1411 as a defense to intentional torts in a commercial case. In *Bank of Brussels Lambert v. Chase Manhattan Bank, N.A.*, Judge Lawrence M. McKenna, applying New York state law, held that plaintiff bank's claims of fraud and breach of fiduciary duty were subject to the defense of comparative negligence under CPLR §1411. 1999 U.S. Dist. Lexis 14259 at *4-5 (S.D.N.Y., Sept. 8, 1999).

The court predicated its decision upon three reasons. First, it relied upon the Legislative History of CPLR Article 14-A. Id. at *5. Second, citing the *Arbegast* dicta and focusing on the causal nexus between the acts and damages involved, the court reasoned that plaintiff should not recover for damages attributable to its own culpable conduct even when the defendant has committed an intentional tort. Id. at *6-7. Finally, the court construed *Corwen*, supra, to be confined to situations where bribery or other criminal activities were at issue since such conduct violates public policy. Id. at *7-8. No such public policy violation being present in his case, Judge McKenna concluded that *Corwen* was not applicable. Id.

In a later case involving one of the same parties, Judge McKenna, again applying New York state law, decided that plaintiff's claims of (i) conversion, (ii) aiding and abetting conversion, and (iii) fraud, aiding and abetting fraud, and conspiracy to commit fraud, were all subject to comparative negligence defenses under CPLR §1411, as well as the judgment reduction rules for settlements set forth in New York's General Obligations Law §15-108 (which incorporates CPLR Article 14-A). *Bank of Brussels Lambert v. Credit Lyonnais (Suisse)*, 2000 U.S. Dist. Lexis 13466 at *4-6 (S.D.N.Y. Sept. 19, 2000), adhered to on reconsideration, 2000 U.S. Dist. Lexis 16403 (S.D.N.Y. Nov. 9, 2000).

Judge McKenna again cited favorably the *Arbegast*, supra, dicta and reasoned that the conduct involved did not violate public policy, as did the activities described in *Barker v. Kallash*, 479 N.Y.S.2d 201 (1984) (plaintiff who made and was injured by pipe bomb could not sue seller of firecrackers used to make bomb because plaintiff's actions constituted clear violation of public policy). Id. at *4-5. The court also concluded that the old rule that negligence was not a defense to conversion, as articulated in *Hartford Accident & Indemnity Co.*, supra, was modified and replaced by CPLR Article 14-A. Id.

Other Jurisdictions

Other jurisdictions have likewise addressed, with often inconsistent results, whether comparative negligence is assertable as a defense to intentional torts. Some jurisdictions have refused to apply comparative negligence to intentional torts because their statutory schemes specifically state that such a defense is only available in negligence actions. See *Heintzman v. Sunflower Bank , N.A.*, 1994 U.S. Dist. Lexis 17369 at *11-12 (D.Ka. Nov. 22, 1994) (comparative negligence could not be asserted as defense to conversion claim because Kansas comparative negligence statute by its very terms only applies to actions which seek damages for negligence); *Slack v. Farmers Insurance Exchange*, 5 P.3d 280, 285 (Colo. June 19, 2000), rehearing denied, 2000 Colo. Lexis 885 (Colo.) (stating in dicta that because Colorado's comparative negligence statute only refers to the negligent conduct of both the victim and the tortfeasor, comparative negligence is not a defense to intentional tort).

Other jurisdictions with statutes patterned after CPLR §1411 allow comparative negligence to be asserted as a defense to an intentional tort. See *Federal Insurance Comp. v. Banco Popular De Puerto Rico*, 750 F.2d 1095, 1100 (1st Cir. 1983) (because comparative negligence statute refers to the "fault or negligence" of the defendant, comparative negligence is a defense to conversion claim in Puerto Rico).

Still other jurisdictions have allowed comparative negligence to be interposed as a defense to intentional torts even when that jurisdiction's comparative negligence statute only refers to the negligence of the defendant. See *Blazovic v. Andrich*, 590 A.2d 222, 229 (N.J. 1991) (comparative negligence is a defense to intentional tort of assault and battery because although New Jersey's comparative negligence statute only refers to the negligent conduct of the defendant, the term "negligence" within the statute is "subsumed within the concept of tortious conduct"); *Bonupa v. Fagan*, 602 A.2d 287, 288-289 (N.J. Super. Ct. App. Div. 1992) (relying on *Blazovic*, the court found that party could assert comparative negligence defense in an assault and battery action).

Unresolved Question

Given the lack of a definitive ruling by the New York Court of Appeals and conflicting appellate decisions, whether a lender's damages in a commercial tort action will be reduced in proportion to its negligent conduct remains unresolved. Some courts accentuate the express terms of CPLR §1411 and its Legislative History in reaching the conclusion that if the lender's negligence contributed to its damages, its recoverable damages should be proportionately reduced by an amount equivalent to the damages caused by its culpable conduct. Other courts adopt the view that comparative negligence should be applied only in the traditional sense to negligence actions, and that an intentional tortfeasor should not be allowed to use CPLR §1411 to shield it from liability since intentional misconduct is far worse than negligence.

What seems fairly certain, however, especially in light of the *Arbegast* dicta and the *Scott* and *Bank of Brussels* cases, is that comparative negligence will not be sustained as a defense to an intentional tort if plaintiff's negligence bears no causal nexus to the damages alleged. Thus, even if a lender were negligent in its dealings with a borrower, that negligence may not reduce the lender's recoverable damages for a commercial tort unless the lender's negligence was a direct and proximate cause of the claimed damages. Although these questions must be answered on a case-by-case basis, the "causal connection" principle appears to narrow a lender's potential liability under CPLR §1411 notwithstanding the yet unresolved issue of whether comparative negligence applies to intentional torts.