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APPENDIX A

STATE OF NEW YORK
COURT OF APPEALS

No. 118

Argued: October 11, 2018
Decided: November 14, 2018

CHARMAINE CLEMENT,

Appellant,

V.

THOMAS DURBAN, *et al.*,

Respondents.

Meir Katz, for appellant.
MacKenzie Fillow, for respondents.

FEINMAN, J:

New York's longstanding security for costs provisions treat resident and nonresident litigants differently. This appeal calls for us to decide whether, as a result of this different treatment, CPLR 8501(a) and 8503 violate the Privileges and Immunities Clause set forth in article IV, section 2 of the United States Constitution (Privileges and Immunities Clause). We conclude that they do not.

App. 2

I.

When plaintiff commenced this personal injury action, she was a New York resident. Plaintiff then relocated to Georgia, prompting defendants to move, pursuant to CPLR 8501(a) and 8503, for an order compelling plaintiff—a nonresident at the time the motion was made—to post a minimum of $500 security for costs in the event she lost the case (*see* CPLR 8101). Defendants also requested a stay of the proceedings pursuant to CPLR 8502 until plaintiff complied with the order. In opposition, plaintiff argued that CPLR 8501(a) and 8503 were unconstitutional because they violate the Privileges and Immunities Clause of the Federal Constitution[1] by impairing nonresident plaintiffs' fundamental right of access to the courts.[2]

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[1] Plaintiff now argues that the relevant provisions of CPLR article 85 impermissibly burden her access to the courts in violation of the privileges and immunities clause contained in the 14th Amendment of the U.S. Constitution, and violate her right to travel interstate in violation of both privileges and immunities clauses. These arguments are unpreserved because plaintiff failed to raise them in Supreme Court. We reject plaintiff's claim that raising these issues for the first time in the Appellate Division adequately preserves them for our review (*see Bingham v. New York City Tr. Auth.*, 99 N.Y.2d 355, 359, 756 N.Y.S.2d 129, 786 N.E.2d 28 [2003]).

[2] Though notified of plaintiff's challenge, the New

Supreme Court granted defendants' motion, opining that although access to the courts is a fundamental right protectable under the Privileges and Immunities Clause, CPLR 8501(a) and 8503 do not bar access to the courts (2013 WL 12182302, at *2 [Sup. Ct., Kings County, Sept 9, 2013, No. 8029/2011 (Trial Order)]). Supreme Court further stated that security for costs provisions are common nationwide (*id.*).

The Appellate Division unanimously affirmed. The court held that CPLR article 85 satisfied the standard set forth by the United States Supreme Court in *Canadian Northern R.R. Co. v. Eggen*, 252 U.S. 553, 40 S.Ct. 402, 64 L.Ed. 713 (1920), and re-affirmed in *McBurney v. Young*, 569 U.S. 221, 133 S.Ct. 1709, 185 L.Ed.2d 758 (2013), that nonresidents must be given "access to the courts of the state upon terms which in themselves are reasonable and adequate for the enforcing of any rights [they] may have" (*Eggen*, 252 U.S. at 562, 40 S.Ct. 402). On that basis, the Appellate Division held that "the challenged statutory provisions do not deprive noncitizens[3] of New York of

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York Attorney General chose not to intervene to defend the constitutionality of the provisions.

3 Although the Privileges and Immunities Clause and many of the cases interpreting it use the term "citizens," "for analytic purposes citizenship and residency are essentially interchangeable" (*Supreme*

reasonable and adequate access to New York courts" (*Clement v. Durban*, 147 A.D.3d 39, 44, 43 N.Y.S.3d 515 [2d Dept. 2016]). The Appellate Division granted plaintiff leave to appeal to this Court, certifying the question as to whether its order was properly made (2017 N.Y. Slip Op 73199[U], 2017 WL 1900870 [2d Dept. 2017]). For the reasons which follow, we now affirm.

II.

A. *The Privileges and Immunities Clause, art. IV, sec. 2 of the Federal Constitution*

The Privileges and Immunities Clause is the preeminent constitutional directive "to constitute the citizens of the United States [as] one people" (*Hicklin v. Orbeck*, 437 U.S. 518, 524, 98 S.Ct. 2482, 57 L.Ed.2d 397 [1978] [internal quotation marks and citation omitted]). In keeping with that goal, the Supreme Court has interpreted the clause to require "the State [to] treat all citizens, resident and nonresident, equally" and applies to only "those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity" (*Baldwin v. Fish & Game Commn. of Montana*, 436 U.S. 371, 383, 98 S.Ct. 1852, 56 L.Ed.2d 354 [1978]). The Supreme Court has identified certain "fundamental" privileges protected under the Privileges and Immunities Clause, which include

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Ct. of Va. v. Friedman, 487 U.S. 59, 64, 108 S.Ct. 2260, 101 L.Ed.2d 56 [1988]).

"[nonresidents'] pursuit of common callings within the State; in the ownership and disposition of privately held property within the State; and in access to the courts of the State" (*id.* [internal citations omitted]; *see also Blake v. McClung*, 172 U.S. 239, 249, 19 S.Ct. 165, 43 L.Ed. 432 [1898] [emphasizing the essential importance of "(t)he right of a citizen of one state ... to institute and maintain actions of any kind in the courts of (any other) state"]). Initially, the Court framed nonresidents' constitutional right to access to the courts broadly, declaring that "[t]he right to sue and defend in the courts .... must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens" (*Chambers v. Baltimore & O.R. Co.*, 207 U.S. 142, 148, 149, 28 S.Ct. 34, 52 L.Ed. 143 [1907]; *see also Miles v. Illinois Cent. R.R. Co.*, 315 U.S. 698, 704, 62 S.Ct. 827, 86 L.Ed. 1129 [1942] [prohibiting states from restricting their own citizens from litigating federal rights in other states' courts]; *McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 234, 54 S.Ct. 690, 78 L.Ed. 1227 [1934]).

Neither the Supreme Court nor this Court have insisted on equal treatment for nonresidents "to a drily logical extreme" (*Smith v. Loughman*, 245 N.Y. 486, 493, 157 N.E. 753 [1927] [internal quotation marks and citation omitted]; *see also Eggen*, 252 U.S. at 562, 40 S.Ct. 402 [disparate terms of Minnesota borrowing statute impacting nonresidents were constitutionally permissible "even though they may not be technically

and precisely the same in extent as those accorded to resident citizens"]). The Supreme Court has made clear that "the privileges and immunities clause is not an absolute" (*Toomer v. Witsell*, 334 U.S. 385, 396, 68 S.Ct. 1156, 92 L.Ed. 1460 [1948]; *see also United Bldg. & Constr. Trades Council of Camden County & Vicinity v. Mayor & Council of City of Camden*, 465 U.S. 208, 218, 104 S.Ct. 1020, 79 L.Ed.2d 249 [1984] ["Not all forms of discrimination against citizens of other States are constitutionally suspect"]; *City of New York v. State*, 94 N.Y.2d 577, 593, 709 N.Y.S.2d 122, 730 N.E.2d 920 [2000]). Rather, as the Supreme Court has explained, the Privileges and Immunities Clause prevents a state from imposing only "unreasonable" burdens on nonresidents, including with respect to access to the courts of the state (*see e.g. Baldwin*, 436 U.S. at 383, 98 S.Ct. 1852). In the specific context of access to the courts, the Supreme Court has held that "[t]he Privileges and Immunities Clause does not require States to erase any distinction between citizens and non-citizens that might conceivably give state citizens some detectable litigation advantage" (*McBurney*, 569 U.S. at 231, 133 S.Ct. 1709).

Indeed, a state is not prohibited from using "state citizenship or residency ... to distinguish among persons" (*Baldwin*, 436 U.S. at 383, 98 S.Ct. 1852) so long as "there are perfectly valid independent reasons for [the disparate treatment]" (*Toomer*, 334 U.S. at 396, 68 S.Ct. 1156; *see also Gordon v. Comm. on Character & Fitness*, 48 N.Y.2d 266, 271, 422 N.Y.S.2d 641, 397

N.E.2d 1309 [1979] [noting that the clause was intended to prevent states "from discriminating against nonresidents merely to further (their) own parochial interests or those of (their) residents"]). Therefore, any inquiry concerning a state's compliance with the Privileges and Immunities Clause "must ... be conducted with due regard for the principal [*sic*] that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures" (*Toomer*, 334 U.S. at 396, 68 S.Ct. 1156; *see also id.* at 398, 68 S.Ct. 1156 [a valid independent reason includes "something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed"]). For example, as this Court has clearly delineated, states may distinguish between residents and nonresidents where the purpose is to "withdraw[ ] an unfair advantage" that a nonresident would otherwise possess "with a view to the attainment in the end of a truer level of equality" (*Smith*, 245 N.Y. at 493–494, 157 N.E. 753). Indeed, this Court has recognized, at least in dicta, that provisions requiring nonresident litigants to post security for costs are a prime example of disparate treatment that does not violate the Privileges and Immunities Clause (*see Salla v. Monroe County*, 48 N.Y.2d 514, 521, 423 N.Y.S.2d 878, 399 N.E.2d 909 [1979]; *Smith*, 245 N.Y. at 493, 157 N.E. 753).

A two-step inquiry governs Privileges and Immunities Clause challenges to statutes providing for disparate treatment on the basis of residency. First,

"the court must decide whether the [statute] burdens one of those privileges and immunities protected by the Clause" (*United Bldg. & Constr. Trades Council of Camden Cty.*, 465 U.S. at 218, 104 S.Ct. 1020). When the provision implicates access to the courts, the court must assess whether nonresidents are given access on "reasonable and adequate ... terms ... for the enforcing of any rights [they] may have" (*Eggen*, 252 U.S. at 562, 40 S.Ct. 402 [opining that the "power (resides) in the courts ... to determine the adequacy and reasonableness of such terms"]; *see McBurney*, 569 U.S. at 232, 133 S.Ct. 1709 [citizen-only Virginia FOIA provision "d(id) not impermissibly burden noncitizens' ability to access (Virginia's) courts" because non-citizens had access to "*most* of the information that they sought" through other avenues] [emphasis added]). If nonresidents are provided reasonable and adequate access to the courts, even if not on terms that "are technically and precisely the same in extent as those accorded to resident citizens," then the "constitutional requirement is satisfied," inasmuch as no fundamental right protected by the Privileges and Immunities Clause has been burdened (*McBurney*, 569 U.S. at 231, 133 S.Ct. 1709 [internal quotation marks omitted]).

Second, should the court determine that the plaintiff's exercise of a fundamental right has been impinged, the burden shifts to the defendants, who have the opportunity to prove that the challenged restriction should be upheld even though it "deprives nonresidents of a protected privilege" (*Friedman*, 487

U.S. at 65, 108 S.Ct. 2260; see also *Schoenefeld v. Schneiderman*, 821 F.3d 273, 280–281 [2d Cir. 2016], cert. denied, ___ U.S. ___, 137 S.Ct. 1580, 197 L.Ed.2d 705 [2017]). The court should "invalidate [the challenged restriction] only if [it] conclude[s] that the restriction is not closely related to the advancement of a substantial state interest" (*Friedman*, 487 U.S. at 65, 108 S.Ct. 2260). "[A] state may defend its position by demonstrating that '(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective' " (*Lunding v. N.Y. Tax Appeals Tribunal*, 522 U.S. 287, 298, 118 S.Ct. 766, 139 L.Ed.2d 717 [1998], quoting *Supreme Ct. of N.H. v. Piper*, 470 U.S. 274, 284, 105 S.Ct. 1272, 84 L.Ed.2d 205 [1985]).[4]

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[4] To the extent the Appellate Division's statement that "when the privilege at issue is the right to access the courts, the Supreme Court has not required a state to [demonstrate that the restriction is closely related to the advancement of a substantial state interest]" implies that the Supreme Court has imposed a lower standard where the privilege is access to the courts, that statement is not precisely correct (*Clement*, 147 A.D.3d at 46, 43 N.Y.S.3d 515). If a court has determined that the provision at issue does not inhibit reasonable and adequate access to the courts, the provision does not unduly impinge on a fundamental right implicated by the Privileges and Immunities

B. *Security for Costs*

Statutes or court rules mandating that nonresident plaintiffs post security for anticipated costs for which they may be responsible if they lose their cases are a fixture in states across the country, including New York (*see e.g.* Minn Stat § 549.18; Mont Code Ann § 25–10–601; Nev Rev Stat § 18.130; Ohio Rev Code Ann § 2323.30; SD Codified Laws § 15–9–1; Rev Code Wash § 4.84.210; Wis Stat Ann § 814.28; *see also* Alaska Stat Ann § 09.60.060; Ark Code Ann § 16–68–301; Cal Civ Proc Code § 1030; Colo Rev Stat Ann § 13–16–101[2]; 735 Ill Comp Stat 5/5–101; Iowa Code Ann § 621.1; Me Rev Stat tit 14, § 601; Miss R Civ P 3[b]; NJ Stat Ann § 2A:15–67; Va Code § 17.1–607; DC Code Ann § 15–703; 7 GCA § 26616). Specifically, New York's directive, contained primarily in section 8501(a) of the CPLR, states in relevant part, as follows:

> "Except where the plaintiff has been granted permission to proceed as a poor person or is the petitioner in a habeas corpus proceeding, upon motion by the defendant without notice, the court or a judge thereof shall order security for costs

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Clause, which "obviat[es] the need for a tailoring inquiry" with regard to whether the state could otherwise justify a restriction imposing disparate treatment by residency (*see Schoenefeld*, 821 F.3d at 280–281).

> to be given by the plaintiffs where none of them is ... a resident of the state when the motion is made"

(CPLR 8501[a]).

Section 8501(a) expressly identifies limited circumstances in which nonresident plaintiffs do not have to post costs, including where the plaintiff qualifies for poor persons' relief (CPLR 8501[a]; *see also* CPLR 1101). CPLR 8503 specifies that the security "shall be given by an undertaking" of $500 in counties within New York City and $250 in all other counties, although the court retains the discretion to fix "such greater amount" as necessary, depending on the circumstances of the case and the degree of record support. Should the plaintiff refuse to post security ordered by the court within 30 days of the order staying the action, the court "may" dismiss the complaint (CPLR 8502). The legislative history for CPLR article 85 indicates that mandatory security for costs was "carried over from present statutes and case law" and was intended "to obviate the danger of the property being placed beyond reach of a court's process by a plaintiff, who has been ordered to pay the costs of litigation" (1959 Third Preliminary Rep of the Advisory Comm on Prac and Pro, at 443, 446).

III.

We now turn to the first step of the inquiry, i.e., whether sections 8501(a) and 8503 of the CPLR impair nonresident plaintiffs' fundamental right to access the courts.

As an initial matter, we reject plaintiff's assertion that she has met her burden simply by identifying a facially discriminatory restriction that relates to a protectable fundamental right. The Supreme Court's jurisprudence unequivocally holds that "the constitutional requirement [set forth in the Privileges and Immunities Clause] is satisfied if ... nonresident[s] [are] given [reasonable and adequate] access to the courts of the state," even if the access is not "technically and precisely the same in extent as those accorded to resident citizens" (*Eggen*, 252 U.S. at 562, 40 S.Ct. 402; *see McBurney*, 569 U.S. at 231, 133 S.Ct. 1709). To that end, disparate terms of access to the courts for nonresident plaintiffs, such as those contained in CPLR 8501(a) and 8503, may comply with the Privileges and Immunities Clause "even though [they] may not be technically and precisely the same in extent as those accorded to resident citizens" (*Eggen*, 252 U.S. at 561–562, 40 S.Ct. 402).

We hold that the security for costs provisions at issue here do not violate the Privileges and Immunities Clause because nonresidents are provided reasonable and adequate access to the New York courts. We are guided by several decisions from the Supreme Court which cite security for costs provisions as an example

of statutes that do not violate the Privileges and Immunities Clause (*see Blake*, 172 U.S. at 248, 256, 19 S.Ct. 165 [identifying security for costs provisions as constitutional impediments to access to the courts]; *Eggen*, 252 U.S. at 561, 40 S.Ct. 402 [1920] [same]; *Kentucky Fin. Corp. v. Paramount Auto Exch. Corp.*, 262 U.S. 544, 545–546, 43 S.Ct. 636, 67 L.Ed. 1112 [1923] [same]; *see also Salla*, 48 N.Y.2d at 521, 423 N.Y.S.2d 878, 399 N.E.2d 909 [noting same, relying on *Blake*, 172 U.S. at 248, 19 S.Ct. 165]; *Smith*, 245 N.Y. at 488, 157 N.E. 753 [noting same, relying on *Eggen*, 252 U.S. at 561, 40 S.Ct. 402]). Our holding aligns with a national understanding, as reflected by a nearly uniform body of decisions from state courts across the country, which have held this explicitly as to their analogous respective statutes (see e.g. *Landise v. Mauro*, 141 A.3d 1067, 1076 [D.C. 2016] [DC statute]; *Kilmer v. Groome*, 1897 WL 3399, at *1 [Pa. Com. Pl. 1897] [PA statute]; *Haney v. Marshall*, 9 Md. 194, 209–210, 1856 WL 2784 [1856] [MD statute]).[5]

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[5] In the only case in which a state's or territory's high court found that a security for costs provision violated the Privileges and Immunities Clause, the court had imposed a $6,000 security requirement—significantly more burdensome than the more modest $500 imposed here (*see Gerace v. Bentley*, No.2015–0046, 2016 WL 4442556, at *9 [V.I. Aug 22, 2016], *writ dismissed sub nom. Vooys v. Bentley*, 901 F.3d 172 [3d Cir. 2018]).

For these reasons, we conclude that sections 8501(a) and 8503 do not unduly burden nonresidents' fundamental right to access the courts because they impose marginal, recoverable security for costs on only those nonresident plaintiffs who do not qualify for poor persons' status pursuant to CPLR 1101, or fit any other statutory exemption. Where these nonresident plaintiffs do not prevail in their litigation, they must pay the same costs required of non-prevailing residents, but are simply required to post the security applied to those costs at an earlier date. Conversely, should nonresident plaintiffs prevail, their security is refunded, with any accrued interest (*see Smith*, 245 N.Y. at 493, 157 N.E. 753 ["the effect of the apparent discrimination is not to cast upon the non-resident a burden heavier in its ultimate operation than the one falling upon residents, but to restore the equilibrium by withdrawing an unfair advantage"]; *see also* CPLR 2601, 2605, 2607). Even if, as plaintiff contends, this provides resident litigants with "some detectable litigation advantage" (*McBurney*, 569 U.S. at 231, 133 S.Ct. 1709), imposing a "relatively minor hardship" (*Landise*, 141 A.3d at 1076) on a limited class of nonresident plaintiffs is not enough to constitute an impermissible burden, such that nonresident plaintiffs do not have reasonable and adequate access to the courts.

Plaintiff's failure to make an initial showing that CPLR article 85 impairs her fundamental right of access to our courts is dispositive. Therefore, we do not

address either defendants' proffered bases for the provisions or the closeness of the relationship between those bases and the disparate treatment of nonresident plaintiffs under the statutory scheme.

IV.

Accordingly, the order of the Appellate Division should be affirmed, with costs, and the certified question answered in the affirmative.

Chief Judge DiFiore and Judges Rivera, Stein, Fahey, Garcia and Wilson concur.

Order affirmed, with costs, and certified question answered in the affirmative.

APPENDIX B

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

No. 2014-01789

December 21, 2016

Ruth C. Balkin, J.P
Thomas A. Dickerson
Sandra L. Sgroi
Joseph J. Maltese, JJ.

CHARMAINE CLEMENT,
Appellant,

v.

THOMAS DURBAN, *et al.*,
Respondents.

OPINION & ORDER

APPEAL by the plaintiff, in an action to recover damages for personal injuries, from an order of the Supreme Court (Carl J. Landicino, J.), dated September

9, 2013, and entered in Kings County, which granted the defendants' motion pursuant to CPLR 8501(a) and 8503 to direct the plaintiff to post security for costs in the amount of $500.

The Berkman Law Office, LLC, Brooklyn, NY (Robert J. Tolchin of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York, NY (Francis F. Caputo and Andrew John Potak of counsel), for respondents.

DICKERSON, J.

Introduction

This appeal raises a constitutional issue of first impression in the appellate courts. CPLR 8501(a) and 8503 require nonresident plaintiffs maintaining lawsuits in New York courts to post security for the costs for which they would be liable if their lawsuits were unsuccessful. On this appeal, we are asked to determine whether this requirement violates the Privileges and Immunities Clause of the United States Constitution (U.S. Const. art. IV, § 2). We hold that the statutes, insofar as they are challenged, do not deprive nonresident plaintiffs of reasonable and adequate access to New York courts, and thus, do not violate the Privileges and Immunities Clause.

Factual and Procedural Background

The plaintiff was a passenger in a vehicle that was involved in a collision with a New York City Police Department vehicle at an intersection in Brooklyn. She

commenced this action to recover damages for personal injuries in the Supreme Court, Kings County. During the pendency of the action, the plaintiff moved to the State of Georgia.

The defendants moved pursuant to CPLR 8501(a) and 8503 to direct the plaintiff to post security for costs in the amount of $500. In opposition to the motion, the plaintiff contended that, as applied to natural persons, CPLR 8501(a) and 8503 violate the Privileges and Immunities Clause of the United States Constitution and are thus unenforceable (U.S. Const. art. IV, § 2). The Supreme Court rejected the plaintiff's contention and granted the defendants' motion, concluding that the statutes were constitutionally permissible. The plaintiff appeals.[1]

Security for Costs

CPLR 8101 provides that the "party in whose favor a judgment is entered is entitled to costs in the action, unless otherwise provided by statute or unless the court determines that to so allow costs would not be equitable, under all of the circumstances." CPLR 8201 provides that costs shall be in the amount of $200 for all proceedings before a note of issue is filed, plus $200

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[1] We note that the Attorney General of the State of New York has been notified, pursuant to CPLR 1012(b) and Executive Law § 71, that the plaintiff is challenging the constitutionality of CPLR 8501(a) and 8503, and has determined not to intervene.

for all proceedings after a note of issue is filed and before trial, plus $300 for each trial, inquest, or assessment of damages.

CPLR 8501, which is labeled "Security for costs," provides, in part:

> "Except where the plaintiff has been granted permission to proceed as a poor person or is the petitioner in a habeas corpus proceeding, upon motion by the defendant without notice, the court or a judge thereof shall order security for costs to be given by the plaintiffs where none of them is a domestic corporation, a foreign corporation licensed to do business in the state or a resident of the state when the motion is made" (CPLR 8501[a]).

CPLR 8503 provides that:

> "[s]ecurity for costs shall be given by an undertaking in an amount of five hundred dollars in counties within the city of New York, and two hundred fifty dollars in all other counties, or such greater amount as shall be fixed by the court that the plaintiff shall pay all legal costs awarded to the defendant."

CPLR 8502 provides that until security for costs is given pursuant to the order of the court, all proceedings other than to review or vacate such order shall be stayed, and that if the plaintiff shall not have given security for costs at the expiration of 30 days from the

date of the order, the court may dismiss the complaint upon motion by the defendant.

New York has had laws requiring nonresident plaintiffs to post security for costs since early in its history (see *Republic of Honduras v. Soto*, 112 N.Y. 310, 311–312, 19 N.E. 845 [discussing security for costs provisions located at former title 2, chapter 10, part 3 of the Revised Statutes and section 3268 of the former Code of Civil Procedure]; *State of Ohio ex rel. Fulton v. Saal*, 239 App.Div. 420, 420–421, 267 N.Y.S. 558 [discussing the security for costs provision in section 1522 of the former Civil Practice Act]). "Security for costs is 'a device ordinarily used against a nonresident plaintiff to make sure that if he loses the case he will not return home and leave defendant with a costs judgment that can be enforced only in plaintiff's home state'" (*Meister v. Engine Trans. Corp.*, 138 Misc.2d 880, 881, 525 N.Y.S.2d 785 [Civ. Ct., NY County], quoting Siegel, NY Prac. § 414). "By directing a nonresident to post a bond, the defendant is protected from frivolous suits and is assured that, if successful, he will be able to recover costs from the plaintiff" (*G.C.S. Co. v. Aresco, Inc.*, 88 A.D.2d 611, 612, 450 N.Y.S.2d 50; *see Dixie Dinettes v. Schaller's Furniture*, 71 Misc.2d 102, 105, 335 N.Y.S.2d 632 [Civ. Ct., Kings County]).

The Privileges and Immunities Clause

Pursuant to the Privileges and Immunities Clause of the United States Constitution, "[t]he Citizens of

each State [are] entitled to all Privileges and Immunities of Citizens in the several States" (U.S. Const. art. IV, § 2). "[T]he object of the Privileges and Immunities Clause is to 'strongly ... constitute the citizens of the United States [as] one people,' by 'plac[ing] the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned'" (*McBurney v. Young*, ___ U.S. ___, 133 S.Ct. 1709, 1714, 185 L.Ed.2d 758, quoting *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 296, 118 S.Ct. 766, 139 L.Ed.2d 717 [internal quotation marks omitted]).

"This does not mean ... that 'state citizenship or residency may never be used by a State to distinguish among persons' " (*McBurney v. Young*, ___ U.S. at ___, 133 S.Ct. at 1714, quoting *Baldwin v. Fish and Game Comm'n of Mont.*, 436 U.S. 371, 383, 98 S.Ct. 1852, 56 L.Ed.2d 354). "'Nor must a State always apply all its laws or all its services equally to anyone, resident or nonresident, who may request it so to do' " (*McBurney v. Young*, ___ U.S. at ___, 133 S.Ct. at 1714, quoting *Baldwin v. Fish and Game Comm'n of Mont.*, 436 U.S. at 383, 98 S.Ct. 1852). "Rather, ... the Privileges and Immunities Clause protects only those privileges and immunities that are 'fundamental'" (*McBurney v. Young*, ___ U.S. at ___, 133 S.Ct. at 1714; *see Baldwin v. Fish and Game Comm'n of Mont.*, 436 U.S. at 382, 388, 98 S.Ct. 1852).

In addition, "[w]here nonresidents are subject to different treatment, there must be 'reasonable ground for ... diversity of treatment'" (*Lunding v. New York Tax Appeals Tribunal*, 522 U.S. at 298, 118 S.Ct. 766, quoting *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 79, 40 S.Ct. 228, 64 L.Ed. 460). While the Privileges and Immunities Clause bars "'discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States,'" it does not "'preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it' " (*Lunding v. New York Tax Appeals Tribunal*, 522 U.S. at 298, 118 S.Ct. 766, quoting *Toomer v. Witsell*, 334 U.S. 385, 396, 68 S.Ct. 1156, 92 L.Ed. 1460).

> "'Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relationship to them. The inquiry must also, of course, be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures'" (*Lunding v. New York Tax Appeals Tribunal*, 522 U.S. at 298, 118 S.Ct. 766, quoting *Toomer v. Witsell*, 334 U.S. at 396, 68 S.Ct. 1156).

Discussion

"Enactments of the Legislature—a coequal branch of government—may not casually be set aside by the judiciary.... [S]tatutes are presumed constitutional; while the presumption is rebuttable, invalidity must be demonstrated beyond a reasonable doubt" (*Matter of McGee v. Korman*, 70 N.Y.2d 225, 231, 519 N.Y.S.2d 350, 513 N.E.2d 236; *see United States v. Morrison*, 529 U.S. 598, 607, 120 S.Ct. 1740, 146 L.Ed.2d 658).

In *Canadian Northern R. Co. v. Eggen*, 252 U.S. 553, 40 S.Ct. 402, 64 L.Ed. 713, the United States Supreme Court considered the constitutionality of a Minnesota statute that barred a plaintiff from maintaining a cause of action in Minnesota that arose out of state and was barred by the statute of limitations of the jurisdiction in which it arose "unless the plaintiff be a citizen of the state who has owned the cause of action ever since it accrued" (*id.* at 558 [internal quotation marks omitted]). In that case, the U.S. Supreme Court acknowledged that the right of a citizen of one state to institute and maintain actions of any kind in the courts of another was a fundamental privilege protected by the Privileges and Immunities Clause (*see id.* at 560–561). Nevertheless, the U.S. Supreme Court concluded that the Privileges and Immunities Clause is satisfied "if the nonresident is given access to the courts of the state upon terms which in themselves are reasonable and adequate for the enforcing of any rights he [or she] may have, even though they may not be technically and precisely the same in extent as

those accorded to resident citizens" (*id.* at 562). The U.S. Supreme Court concluded that the Minnesota statute satisfied this requirement, as a person "cannot be said to be denied, in a constitutional or in any rational sense, the privilege of resorting to courts to enforce his [or her] rights when he [or she] is given free access to them for a length of time reasonably sufficient to enable an ordinarily diligent [person] to institute proceedings for their protection" (*id.*).

In *McBurney v. Young*, ___ U.S. at ___, 133 S.Ct. at 1713, 1717, the U.S. Supreme Court held that the right of a noncitizen of Virginia to have reasonable and adequate access to Virginia courts was not infringed by the Virginia Freedom of Information Act, which only benefitted Virginia citizens. In doing so, the Court stated that the "Privileges and Immunities Clause does not require States to erase any distinction between citizens and non-citizens that might conceivably give state citizens some detectable litigation advantage" (*id.* at 1717).

Here, as in *Canadian Northern R. Co.* and *McBurney*, the challenged statutory provisions do not deprive noncitizens of New York of reasonable and adequate access to New York courts. The requirement that a nonresident plaintiff who has not been granted permission to proceed as a poor person post the modest sum of $500 as security for costs is reasonable to deter frivolous or harassing lawsuits and to prevent a defendant from having to resort to a foreign jurisdiction to enforce a costs judgment (*see G.C.S. Co. v.*

Aresco, Inc., 88 A.D.2d at 612, 450 N.Y.S.2d 50; *Meister v. Engine Trans. Corp.*, 138 Misc.2d at 881, 525 N.Y.S.2d 785; *Dixie Dinettes v. Schaller's Furniture*, 71 Misc.2d at 105, 335 N.Y.S.2d 632). If the subject lawsuit is successful, the plaintiff's security is returned to him or her. Notably, while the U.S. Supreme Court has never considered a direct challenge to a state statute requiring nonresident plaintiffs to post security for costs, it has cited such a requirement as an example of one that would not run afoul of the Privileges and Immunities Clause (*see Canadian Northern R. Co. v. Eggen*, 252 U.S. at 561–562, 40 S.Ct. 402; *Blake v. McClung*, 172 U.S. 239, 256, 19 S.Ct. 165, 43 L.Ed. 432 [stating that a state requirement that citizens of other states give a bond for costs "cannot reasonably be characterized as hostile to the fundamental rights of citizens of other states"]; *see also Kentucky Finance Corp. v. Paramount Auto Exchange Corp.*, 262 U.S. 544, 551, 43 S.Ct. 636, 67 L.Ed. 1112 [while finding that a statute violated the Equal Protection Clause of the 14th Amendment to the United States Constitution, the Court acknowledged that "(n)o doubt a corporation of one state seeking relief in the courts of another must conform to the prevailing modes of proceeding in those courts and submit to reasonable rules respecting the payment of costs or giving security therefor and the like"]).

Moreover, courts have found similar requirements of other jurisdictions to be permissible under the Privileges and Immunities Clause (see *In re Merrill Lynch*

Relocation Mgt., Inc., 812 F.2d 1116, 1122 [9th Cir.] [Oregon statute requiring the attorney of a nonresident plaintiff to either post security for costs or become liable for a cost judgment entered against the plaintiff]; *Brewster v. North Am. Van Lines, Inc.*, 461 F.2d 649, 651 [7th Cir.] [federal District Court local rule requiring a nonresident plaintiff to post security for costs]; *White v. Walker*, 136 La. 464, 465–466, 67 So. 332, 333 [Louisiana statute excusing pauper citizens of Louisiana from a general rule requiring all plaintiffs to post security for costs]; *Cummings v. Wingo*, 31 S.C. 427, 434–435, 10 S.E. 107, 108–109 [South Carolina statute and rule of court requiring nonresident plaintiffs to post security for costs]; *Haney v. Marshall*, 9 Md. 194, 209–210 [Maryland statute requiring nonresident plaintiffs to post security for costs]; *Kreitzer v. Puerto Rico Cars, Inc.*, 417 F.Supp. 498, 507 [D.P.R.] [federal District Court local rule requiring nonresident plaintiffs to post security for costs]; *Kilmer v. Groome*, 19 Pa.C.C. 339 [Pennsylvania court rule requiring nonresident plaintiffs to post security for costs]; *but see Gerace v. Bentley*, 2016 WL 4442556, 2016 VI Supreme Court LEXIS 31 [Sup.Ct. VI, S.Ct. Civ. No.2015–0046] [concluding that a U.S. Virgin Islands statute requiring nonresident plaintiffs to post security for costs violated the Privileges and Immunities Clause]).

The plaintiff contends that the statutes at issue in this case are similar to the statute held to be unconstitutional in *Ward v. Maryland*, 79 U.S. 418, 12 Wall.

418, 20 L.Ed. 449. We disagree. In *Ward*, the U.S. Supreme Court invalidated a statute that required nonresidents to pay $300 per year for a license to trade in goods not manufactured in Maryland, while resident traders were only required to pay a fee varying from $12 to $150 (see id. at 425–432). The U.S. Supreme Court held that the Privileges and Immunities Clause secured the right of nonresident citizens "to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens," and thus nonresident citizens should be permitted to sell goods in Maryland without being subjected to any higher tax or excise than resident citizens (*id.* at 430). In contrast, CPLR 8501(a) and 8503 do not impose higher costs on nonresident plaintiffs. Rather, they merely require nonresident plaintiffs, who are unlikely to have any attachable assets in New York, to post security for costs. Once his or her lawsuit is brought to a conclusion, a nonresident plaintiff is in the same position as a resident plaintiff.

The plaintiff further contends that the statutes at issue fail to satisfy the test articulated in *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 118 S.Ct. 766, 139 L.Ed.2d 717. In that case, in which the U.S. Supreme Court invalidated a New York statute that effectively denied only nonresident taxpayers an income tax deduction for alimony paid, the Court stated that:

> "when confronted with a challenge under the Privileges and Immunities Clause to a

> law distinguishing between residents and nonresidents, a State may defend its position by demonstrating that '(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective'" (*id.* at 298, 118 S.Ct. 766, quoting *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 284, 105 S.Ct. 1272, 84 L.Ed.2d 205).

However, when the privilege at issue is the right to access the courts, the U.S. Supreme Court has not required a state to make this showing. Rather, as discussed above, the U.S. Supreme Court has stated that the Privileges and Immunities Clause is satisfied so long as a nonresident "'is given access to the courts of the State upon terms which in themselves are reasonable and adequate for the enforcing of any rights he [or she] may have' " (*McBurney v. Young*, ___ U.S. at ___, 133 S.Ct. at 1717, quoting *Canadian Northern R. Co. v. Eggen*, 252 U.S. at 562, 40 S.Ct. 402). In any event, the statutes at issue here satisfy the test articulated in *Lunding*. There is a substantial reason for the difference in treatment between nonresidents and residents, namely, the fact that nonresident plaintiffs are unlikely to have assets in New York that may be used to enforce a costs judgment. And the discrimination practiced against nonresidents-requiring nonresident plaintiffs to post security for costs-bears a substantial relationship to the State's objective of

deterring frivolous or harassing lawsuits and preventing a defendant from having to resort to a foreign jurisdiction to enforce a costs judgment (*see G.C.S. Co. v. Aresco, Inc.*, 88 A.D.2d at 612, 450 N.Y.S.2d 50; *Meister v. Engine Trans. Corp.*, 138 Misc.2d at 881, 525 N.Y.S.2d 785; *Dixie Dinettes v. Schaller's Furniture*, 71 Misc.2d at 105, 335 N.Y.S.2d 632).

The plaintiff's remaining contentions, that CPLR 8501(a) and 8503 violate the Equal Protection and Due Process Clauses of the 14th Amendment to the United States Constitution, are improperly raised for the first time on appeal (s*ee Matter of McGee v. Korman*, 70 N.Y.2d at 231–232, 519 N.Y.S.2d 350, 513 N.E.2d 236; *Melahn v. Hearn*, 60 N.Y.2d 944, 945, 471 N.Y.S.2d 47, 459 N.E.2d 156; *Klein v. New York State Off. of Temporary & Disability Assistance*, 84 A.D.3d 1378, 1380, 924 N.Y.S.2d 521; *Scarangella v. Laborde*, 12 A.D.3d 660, 784 N.Y.S.2d 878).

Accordingly, the Supreme Court properly granted the defendants' motion pursuant to CPLR 8501(a) and 8503 to direct the plaintiff to post security for costs in the amount of $500. The order is affirmed.

ORDERED that the order is affirmed, with costs.

BALKIN, J.P., SGROI and MALTESE, JJ., concur.

ENTER:

[signature]

Aprilanne Agostino

Clerk of the Court

APPENDIX C

SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF KINGS

Index No. 008029/2011

September 9, 2013

HON. CARL L. LANDICINO, Justice

CHARMAINE CLEMENTE,

Plaintiff,

v.

THOMAS DURBAN, *et al.*,

Defendents.

DECISION AND ORDER

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of this motion:

Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	Papers 1 & 2
Opposing Affidavits (Affirmations)	Paper 3
Reply Affidavits (Affirmations)	Paper 4

Upon the foregoing papers, and after oral argument, the Court finds as follows:

The instant action results from an alleged automobile incident that occurred on January 22, 2010. On that day the Plaintiff Charmaine Clement (hereinafter "the Plaintiff") allegedly injured herself while a passenger in an automobile that was allegedly in a collision with a vehicle owned by Defendants the Police Department of the City of New York and the City of New York (hereinafter "the City").

The City now moves for an Order pursuant to CPLR § 8501(a) compelling the Plaintiff to furnish security for costs, and that all proceedings by stayed in this action until plaintiffs do so. The City argues that the Plaintiff is no longer a resident of New York State, and has since moved to Georgia. This is not disputed by the Plaintiff. In support of their motion the City contends that CPLR § 8501(a) provides the important function of ensuring the payment of costs in an action involving an out of state litigant. § 8501(a) of the CPLR provides in pertinent part that:

> "Except where the plaintiff has been granted permission to proceed as a poor person or is the petitioner in a habeas corpus proceeding, upon motion by the defendant without notice, the court or a judge thereof shall order security for costs to be given by the plaintiffs where none of them is a domestic corporation, a foreign corporation licensed to do business in the

> state or a resident of the state when the motion is made." C.P.L.R. 8501(a).

In opposition, the Plaintiff argues that the motion should be denied because CPLR § 8501(a) requiring security for costs from non-resident individuals violates the Privileges and Immunities Clause, Article IV, § 2 of the United States Constitution. The Plaintiff argues that CPLR § 8501(a) improperly discriminates against residents of other states. Specifically, the Plaintiff argues that she is being improperly discriminated against in as much as continuing access to the Court in New York depends on the payment of a fee merely because of the fact that she now resides in Georgia.

The Privileges and Immunities Clause of the US Constitution provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. Art. IV, § 2. Although discrimination between residents and non-residents is not always impermissible, the Privileges and Immunities Clause is implicated if "a state (1) infringes on a fundamental right or privilege, which promotes interstate harmony, and (2) the state infringes on that right on the basis of state residency." *Schoenefeld v. State of New York*, 1:09-CV-00504, NYLJ; *See Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 284 (1985).

In determining whether the Privileges and Immunities Clause applies Courts must first look to see if the activity at issue constitutes a fundamental right

or privilege. Within the context of access to the legal system, Courts have repeatedly found that the practice of law without discrimination on the basis of state residency is a privilege afforded protection under the Privileges and Immunities Clause. In *New Hampshire v. Piper*, the United States Supreme Court found unconstitutional a New Hampshire Law that required all attorneys seeking to practice law in New Hampshire to be state residents. More recently, in the above cited *Schoenfeld v. the State of New York*, the United State District Court for the Northern District of New York found unconstitutional a New York State law that required attorneys that were not New York State residents to have an office within the state of New York.

In the instant action, the Court must decide whether the security costs provided for by C.P.L.R. § 850l(a) violates a fundamental right or privilege. While access to our Courts is fundamental to the promotion of interstate harmony, unlike the state regulations found to be unconstitutional in *Schoenefeld* and *Piper*, C.P.L.R. § 8501(a) does not bar access to the Courts. An out of state Plaintiff seeking to initiate a proceeding within New York State can do so without any additional costs. In both *Piper* and *Schoenefeld*, attorneys seeking to practice law were required either to become state residents (*Piper*) or establish offices within the state (*Schoenfeld*) before they could properly practice in the state as attorneys.

That is not the case with C.P.L.R. § 8501(a), which requires that a party seeking security for costs must move the Court for such costs after the Plaintiff has initiated the proceeding.

In *Canadian N. Ry. Co. v. Eggen*, the United States Supreme Court recognized that security for costs was a fairly common and acceptable requirement for non-residents, and that the Privileges and Immunities Clause does not require the same exact treatment of residents as non-residents. *See Canadian N. Ry. Co. v. Eggen*, 252 U.S. 553, 561, 40 S. Ct. 402, 404, 64 L. Ed. 713 [1920]. The Court went on to state that

> "The principle on which this holding rests is that the constitutional requirement is satisfied if the nonresident is given access to the courts of the state upon terms which in themselves are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically and precisely the same in extent as those accorded to resident citizens. The power is in the courts, ultimately in this court, to determine the adequacy and reasonableness of such terms. A man cannot be said to be denied, in a constitutional or in any rational sense, the privilege of resorting to courts to enforce his rights when he is given free access to them for a length of time reasonably sufficient to enable an

> ordinarily diligent man to institute proceedings for their protection." *Id.*

More recently, the United States Supreme Court reiterated the position that while the Privileges and Immunities Clause has been applied to prevent a state from placing unreasonable burdens on citizens of other states, it does not require that the Privilges [*sic*] and Immunities Clause prevents a state government from distinguishing between residents and nonresidents. *See Baldwin v. Fish & Game Comm'n of Montana*, 436 U.S. 371, 403, 98 S. Ct. 1852, 1870, 56 L. Ed. 2d 354 [1978]. What is more, Federal Courts sitting in New York State have required that litigants provide security for costs. *See llro Prods., Ltd. v. Music Fair Enterprises, Inc.*, 94 F.R.D. 76, 81 [S.D.N.Y.1982]; *Fertilizantes Fosfatados Mexicanos, S.A. v. Chen*, 91 CIV. 2048 (MJL), 1992 WL 204394 [S.D.N.Y. 1992].

The statute provides discretion to deny that request if the Plaintiff is proceeding as a poor person or if the out of state resident is a petitioner in a 'habeas corpus proceeding. Moreover, the Courts have read C.P.L.R. § 8501(a) narrowly and have declined to require security for costs where the Plaintiff has become a resident of New York State after the motion was made, where the out of state resident has attachable property in the state, or is a litigant in a small claims action in Civil Court where costs are minimal. That is not the case here. *See G.C.S. Co. v. Aresco Inc.*, 88 A.D.2d 611, 612, 450 N.Y.S.2d 50, 51 [2nd Dept, 1982);

Meister v. Engine Trans. Corp., 138 Misc. 2d 880, 881, 525 N.Y.S.2d 785, 786 [Civ. Ct. 1988]. Moreover, additional costs associated with domesticating a judgment for costs relating to an out of state resident is in this Court's view a reasonable and legitimate concern and interest of this State and its citizens.

Based on the foregoing, it is hereby:

ORDERED that the motion for summary judgment is granted. The Plaintiff is hereby directed to comply with C.P.L.R. § 8503. The matter is hereby stayed pending such compliance pursuant to C.P.L.R. § 8502.

The foregoing constitutes the Decision and Order of the Court.

Enter:

[signature]
Carl J. Landicino
Justice Supreme Court

APPENDIX D

SUPREME COURT OF
THE STATE OF NEW YORK

APPELLATE DIVISION:
SECOND JUDICIAL DEPARTMENT

No. 2014-01789

May 9, 2017

Ruth C. Balkin, J.P
Sandra L. Sgroi
Joseph J. Maltese
Francesca E. Connolly, JJ.

CHARMAINE CLEMENT,
Appellant,

v.

THOMAS DURBAN, *et al.*,
Respondents.

DECISION & ORDER ON MOTION

Motion by the appellant for leave to appeal to the Court of Appeals pursuant to CPLR 5602(b)(1) from an opinion and order of this Court dated December 21,

2016, which affirmed an order of the Supreme Court, Kings County, dated September 9, 2013.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is granted, and the following question is certified to the Court of Appeals: Was the opinion and order of this Court dated December 21, 2016, properly made?

Questions of law have arisen, which, in our opinion, ought to be reviewed by the Court of Appeals (*see* CPLR 5713).

BALKIN, J.P., SGROI, MALTESE and CONNOLLY, JJ., concur.

ENTER:

[signature]
Aprilanne Agostino
Clerk of the Court

APPENDIX E

STATE OF NEW YORK

THIRD PRELIMINARY REPORT OF THE ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE

March 1, 1959

Title 150. Security for Costs

INTRODUCTION

In addition to simplifying language and incorporating some of the case law, the proposed title makes a number of substantive changes.

Mandatory security for costs has been restricted to those who are non-residents and to foreign corporations not licensed to do business in the state. This enumeration—carried over from present statutes and case law—gives protection against plaintiffs whose property is likely not to be readily available to satisfy a judgment for costs. Other instances in the civil practice act where costs are mandatory have been made discretionary or abolished. * * *

150.1 Security for costs.

(a) As of right. Except where the plaintiff has been granted permission to proceed as a poor person or is the petitioner in a habeas corpus proceeding, upon motion by the defendant without notice, the court or a judge thereof shall order security for costs to be given by the plaintiffs where none of them is a domestic corporation, a foreign corporation licensed to do business in the state or a resident of the state when the motion is made.

NOTES

This subdivision is based on subparagraphs A, B, and C of section 1522 and the first clause of section 1524 of the civil practice act. The phrase "at any time," currently found in section 1524, is omitted as unnecessary since it is implied from the fact that no limitation is embodied in the proposal.

The proposed subsection provides the exemption for poor persons implicit in sections 198, 198-a, 199 and part of section 196 of the civil practice act. *Cf.* proposed rule 94.2(d). * * * [Several paragraphs omitted]

Without statutory warrant, courts have reached the sound result that a foreign corporation licensed to do business in New York under the laws of the state becomes a domestic corporation for the purposes of section 1522 and is not required to give security for costs. *Standard Marine Ins. Co. v. Verity*, 243 App.

Div. 639, 640, 276 N.Y. Supp. 801, 802 (2d Dep't 1935) (insurance corporation); *Household Finance Corp. v. Worden*, 206 Misc. 614, 615, 134 N.Y.S.2d 608, 609 (Sup. Ct. 1954) (banking corporation). *Contra*, *Colgate Palmolive Peet Co. v. Planet Service Corp.*, 173 Misc. 494, 15 N.Y.S.2d 558 (Sup. Ct. 1939) (general corporation). This result has been explicitly incorporated in the proposed rule.

The requirement that persons imprisoned under execution for a crime and their assignees must give security for costs, found in subdivisions 3 and 4 of present section 1522, has been omitted. A prisoner in a state prison for a term less than for life may not bring an action in the courts. N.Y. Penal Law § 510; *Glena v. State of New York*, 207 Misc. 776, 138 N.Y.S.2d 857 (Ct. Cl. 1955). The provision in present law is, therefore, meaningful only as applied to prisoners in federal prisons, county jails and penitentiaries. *Cf. Bowles v. Habermann*, 95 N.Y. 246, 251 (1884); *In re O'Connor*, 173 Misc. 419, 17 N.Y.S.2d 758 (Sup. Ct. 1940). However, a prisoner is not immune from process and suit by virtue of his imprisonment when he is a cost debtor. *Cf.* N.Y. Civ. Prac. Act § 165; *Bowles v. Habermann*, *supra* at 248; *Matter of Weber*, 165 Misc. 815, 816, 1 N.Y.S.2d 809, 810 (Surr. Ct. 1938). Since the purpose of requiring security for costs is to obviate the danger of the property being placed beyond reach of a court's process by a plaintiff, who has been ordered to pay the costs of litigation, there seems to be no reason why an imprisoned person should be required, solely

on the ground of his imprisonment, to give security for costs.

The provision of subdivision 4 of section 1522 requiring the assignee or trustee for the benefit of creditors of a debtor or a debtor in possession or a receiver or trustee in bankruptcy to give security for costs has been made discretionary and is covered in proposed rule 150.1(b). The qualification that security may be required only when the cause of action arose before the appointment of the trustee or assignee has been omitted. * * *