3 N.Y.2d 395 (1957)

Leonard Sillman et al., Appellants,

v.

Twentieth Century-Fox Film Corporation, Respondent, et al., Defendants.

Court of Appeals of the State of New York.

Argued February 26, 1957.

Decided July 3, 1957.

Jay Leo Rothschild and *Max Chopnick* for appellants.

Whitman Knapp, *David Simon* and *David D. Brown, III*, for respondent.

CONWAY, Ch. J., VAN VOORHIS and BURKE, JJ., concur with FROESSEL, J.; FULD, J., dissents in an opinion in which DESMOND and DYE, JJ., concur.

FROESSEL, J.

Defendant Berman Swarttz Productions, Inc., (hereinafter called Swarttz) entered into *separate* contracts, under date of June 30, 1953, with plaintiffs and various other persons interested in the Broadway musical revue "New Faces of 1952", in order to produce a motion picture version of the stage production. Plaintiffs' contracts may be summarized as follows:

Swarttz agreed to pay each plaintiff a certain percentage of the net profits of the picture. In exchange, The Intimate Revue Company (hereinafter called Revue), in the basic agreement, granted Swarttz the exclusive right to use the physical properties of the show; New Faces, Inc., (hereinafter called New Faces) granted Swarttz the exclusive right to use its trade names; Julian K. Sprague (and others) invested moneys in the picture by way of interest-bearing loans; and Leonard Sillman agreed to act as the associate producer.

In addition, in the Revue and Sprague contracts, Swarttz agreed to give the distributor of the picture a "Notice of Irrevocable Authority" directing it to pay directly to Revue and Sprague their share of the profits. Similarly, in the New Faces and Sillman contracts, Swarttz agreed to deliver a "Notice of Irrevocable Assignment and Authority" directing the distributor to pay directly to New Faces and Sillman their share of the profits and also agreed that their share would be so paid. All of the contracts permitted assignment.

It was originally contemplated that the picture was to be distributed by the United Artists Corporation in third dimension and color. Shortly thereafter, however, so as to obtain the

benefits of the CinemaScope process, it was decided to distribute the picture through defendant Twentieth Century-Fox Film Corporation (hereinafter called Twentieth Century).

In order to effect these new arrangements, Swarttz, on September 8, 1953, entered into a contract with defendant National Pictures Corporation (hereinafter called National), which had a CinemaScope license and a distribution agreement with Twentieth Century. Under this contract, Swarttz assigned to National all of Swarttz's rights under the various agreements with persons, including plaintiffs, having an interest in the production. In consideration, National agreed to pay Swarttz a certain percentage of the net profits of the picture less the percentages to be paid to the persons, firms and corporations, including plaintiffs, entitled thereto. National accepted such assignments and expressly assumed all of Swarttz's obligations thereunder. National also agreed to give Twentieth Century a "Notice of Irrevocable Authority" directing the latter to pay to Chemical Bank and Trust Company for the accounts of Swarttz and of plaintiffs their percentages of the profits and that the bank was to pay these sums directly to Swarttz and plaintiffs.

National's distribution agreement with Twentieth Century had been entered into on April 16, 1951, or more than two years prior to the making of any of the aforesaid agreements. Twentieth Century alleges that plaintiffs knew of this contract before Swarttz's contract with National, but plaintiffs deny that they had any knowledge of the contract until November, 1953. Under its terms, National is to furnish Twentieth Century with 7 to 10 pictures during the ensuing 7 years, each picture to cost a minimum of $400,000 and to be free from all incumbrances and from the claims of owners of any material used in the pictures.

At least 10 days prior to the delivery of each picture, National is to deliver to Twentieth Century: "Photostat copies of all contracts for the acquisition of literary or other material used in the Picture and with producers, directors, musicians, actors, actresses and any other persons who render services for or in connection with the production of the Picture." Twentieth Century is given the right (but not the obligation) to examine such contracts and if, in the opinion of Twentieth Century's attorneys, they are not sufficient to permit full exercise of Twentieth Century's rights or the picture fails to conform to the agreement, National shall, upon written notice within 60 days of receipt of the contracts, be deemed in default. Twentieth Century may terminate the contract upon any default of National. Acceptance of the picture by Twentieth Century shall not be construed to release or relieve National of any of its representations, warranties, indemnities or covenants in the agreement, one of which was to "discharge (1) all claims".

After deduction of a distribution fee and expenses, the receipts of the picture are "payable to *or for the account* of" National (emphasis supplied). Except for assignments by National to two named corporations, or for the the purpose of securing loans by a prescribed procedure, article TWENTY-FOURTH of the agreement provides, among other things: "(a) * * * neither party hereto shall assign this agreement, in whole or in part, or any rights or monies payable hereunder, without the prior written consent of the other party, nor shall any right hereunder or any property or contract covered hereby devolve by operation of law or otherwise upon any receiver, trustee, liquidator, successor or other person through or as

representative of either party." It was further provided that Twentieth Century shall not be required to pay any sum payable to National to anyone except National or one designee only; that Twentieth Century shall not be required to recognize any assignments; and that if Twentieth Century shall receive notice of the existence of any assignment, *it shall have the right to withhold payments* until the assignment is cancelled or withdrawn.

Under the provisions of this agreement, plaintiffs' contracts with Swarttz and Swarttz's contract with National were submitted for inspection to Twentieth Century, which evinced no objection to any part of these contracts. The picture, although costing only $220,000 instead of the required $400,000, was delivered to and accepted and distributed by Twentieth Century under this agreement. Shortly after the first release of the picture, plaintiffs' attorney gave notice to Twentieth Century's attorney of the direct payment provisions in plaintiffs' contracts and was assured by him that Twentieth Century could and *would* "hold up distribution of moneys to National" under its contract.

Chemical Bank and Trust Company has refused to accept such funds as a distribution agent, and this contributed to the present controversy. Twentieth Century now holds a portion of the receipts deposited with defendant "Chase National Bank" and *threatens to distribute* such receipts *in disregard* of plaintiffs' claims. Both National and Swarttz have refused to execute notices of irrevocable authority as required by their contracts.

In this action, plaintiffs seek a declaration of their rights, the impression of a lien upon the receipts of the picture, a direction to pay to each of them a stated percentage of such receipts, an injunction prohibiting Twentieth Century from otherwise distributing them, an accounting and a money judgment for such sums as they claim are now due them. In addition, specific performance is sought of the agreements of National and Swarttz to execute and deliver the irrevocable notices. At Special Term, Twentieth Century's motion for summary judgment, or, in the alternative, for joinder of indispensable parties, was denied. The Appellate Division reversed on the law, and granted summary judgment without passing on the motion for joinder.

Both National and Swarttz are California corporations doing no business and having no assets in New York. They were served only in California and neither has appeared in this action, although the corporate defendant Swarttz has executed stipulations by Swarttz as president for extensions of time to answer. Other persons, whose contracts with Swarttz in regard to this picture entitle them to similar percentage payments as plaintiffs, have brought suit in California where their claims in some respects are said to conflict with those of plaintiffs.

In our opinion, Special Term was correct in denying defendants' alternative prayer for relief, viz., that assignees other than plaintiffs be brought into this action as *indispensable* parties. They are not such parties. Each of the plaintiffs in the case relies on a separate and distinct agreement. Even if we deemed them and other assignees as united in interest and conditionally necessary parties, they are all without the jurisdiction of this State, and therefore are not required to be brought into this action, for it can effectively be disposed of without them (Civ. Prac. Act, § 194; *Keene v. Chambers*, 271 N.Y. 326; *Howard v. Arthur*

Murray, Inc., 281 App. Div. 806; *Silberfeld v. Swiss Bank Corp.*, 266 App. Div. 756; see *China Sugar Refining Co. v. Anderson, Meyer & Co.*, 6 Misc 2d 184). And so with the defendants, National and Swarttz, plaintiffs' assignors (*Bergman v. Liverpool & London & Globe Ins. Co.*, 269 App. Div. 103). Though also outside the jurisdiction of this State, they have nevertheless been named as parties defendant in this action, have been served outside the State under the provisions of sections 232-235 of the Civil Practice Act, and are subject to an in rem judgment.

Since plaintiffs have no direct contractual relationship with Twentieth Century, they can prevail in their claim for direct payments only on the theory of an assumption of such an obligation by Twentieth Century or on the theory of an assignment from Swarttz and National. We see no merit whatever as to the first theory, for, whatever the law may be elsewhere (see Restatement, Contracts, § 164), it is well settled in this State that the assignee of rights under a bilateral contract does not become bound to perform the duties under that contract unless he expressly assumes to do so (*Langel v. Betz*, 250 N.Y. 159, 164; *Matter of Kaufman [Iselin & Co.]*, 272 App. Div. 578, 581; *Smith v. Morin Bros.*, 233 App. Div. 562, 564; *Anderson v. New York & H. R. R. Co.*, 132 App. Div. 183, 187, 188; *New York Phonograph Co. v. Davega*, 127 App. Div. 222, 234; 2 Williston on Contracts, § 418A), which is not this case.

As to the second ground pressed on us by plaintiffs, we conclude that Swarttz and National intended a present assignment to plaintiffs of a portion of the funds to become due to the former from Twentieth Century, and that such funds would ordinarily be assignable. (*Matter of Gruner*, 295 N.Y. 510, 517, 518.) All that was left for the future was the formality of a "Notice" to Twentieth Century of the assignment. Such notice to the obligor is not required for an effective assignment, except to defeat a subsequent bona fide payment by the obligor (*Williams v. Ingersoll*, 89 N.Y. 508, 522; *State Factors Corp. v. Sales Factors Corp.*, 257 App. Div. 101, 103).

The funds accruing to National under its contract with Twentieth Century, however, may be made nonassignable if that agreement in appropriate language so provides. We all agree with the Appellate Division that said contract does so provide and that *Allhusen v. Caristo Constr. Corp.* (303 N.Y. 446) is controlling here.

A prohibition against assignment, however, may be waived (*Devlin v. Mayor of City of N. Y.*, 63 N.Y. 8, 14; *Brewster v. City of Hornellsville*, 35 App. Div. 161, 166; *Hackett v. Campbell*, 10 App. Div. 523, 526, affd. 159 N.Y. 537; see, also, *Woollard v. Schaffer Stores Co.*, 272 N.Y. 304; *Gillette Bros. v. Aristocrat Restaurant*, 239 N.Y. 87, 89, 90; *Murray v. Harway*, 56 N.Y. 337, 342, 343; *Ireland v. Nichols*, 46 N.Y. 413, 416). The very wording of the clause that Twentieth Century "shall not be required to" recognize assignments made without consent and "shall have the right to withhold" payments indicates that the parties contemplated that Twentieth Century might recognize such assignments and thereby waive the anti-assignment clause. Waiver is "the intentional relinquishment of a known right" (*Werking v. Amity Estates*, 2 N Y 2d 43, 52). As we stated in *Alsens Amer. Portland Cement Works v. Degnon Contr. Co.* (222 N.Y. 34, 37): "It is essentially a matter of intention. * * *

Commonly, it is sought to be proved by various species of proofs and evidence, by declarations, by acts and by non-feasance, permitting differing inferences and which do not directly, unmistakably or unequivocally establish it. Then it is for the jury to determine from the facts as proved or found by them whether or not the intention existed." (See *Devlin v. Mayor of City of N. Y.*, *supra*; *Brewster v. City of Hornellsville*, *supra*.)

As to this issue of waiver, it appears from the papers that National's contract with Twentieth Century forbidding assignments was made in 1951, more than two years prior to the assignments in question; that Twentieth Century examined all the contracts here involved prior to accepting the picture from National in 1953, and consequently knew of the assignments to plaintiffs which it now alleges are a breach of its agreement with National; that, having examined these contracts, Twentieth Century was required by its agreement with National to notify National within 60 days if they were to be treated as a breach of the agreement; that Twentieth Century failed to so notify National; that Twentieth Century accepted the picture and exercised the rights created by the very contract which made the assignments to plaintiffs without notifying either plaintiffs or National of any intention to consider them void; that shortly after the picture was released, and after Chemical Bank refused to act as distributing agent, plaintiffs' attorney spoke about the assignments to Twentieth Century's attorney, who not only evinced no objection at the time, but stated that Twentieth Century would withhold distribution of moneys to National.

While of course not decisive, these facts have an important bearing on the issue of waiver.

Rule 113 of the Rules of Civil Practice provides that when an answer is served with a defense, sufficient as a matter of law, founded upon facts established prima facie by documentary evidence, "the complaint *may* be dismissed on motion *unless* the plaintiff * * * shall show such facts *as may be deemed by the judge hearing the motion, sufficient to raise an issue with respect to the* verity and *conclusiveness* of such documentary evidence". The Judge who heard this motion at Special Term concluded that the question of waiver raised a triable issue; so did two Justices of the Appellate Division; and so do we. To hold that there is a triable issue as to waiver does not, as our dissenting brethren claim, frustrate the plain purpose of the anti-assignment clause, except as the waiver of any contractual provision, clearly recognized by law, frustrates such provision; indeed, to hold as a matter of law that there was no waiver here would sharply depart from our established summary judgment procedure.

To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Di Menna & Sons v. City of New York*, 301 N.Y. 118). This drastic remedy should not be granted where there is any doubt as to the existence of such issues (*Braun v. Carey*, 280 App. Div. 1019), or where the issue is "arguable" (*Barrett v. Jacobs*, 255 N.Y. 520, 522); "issue-finding, rather than issue-determination, is the key to the procedure" (*Esteve v. Avad*, 271 App. Div. 725, 727). In *Gravenhorst v. Zimmerman* (236 N.Y. 22, 38-39) Chief Judge HISCOCK, writing for this court, observed that one person may argue that as matter of law the assignor abandoned and lost the benefit of his rescission, whereas another might think that was a question of fact, and concluded: "It never could have been,

or in justice ought to have been, the intention of those who framed our Practice Act and rules thereunder that the decision of such a serious question as this should be flung off on a motion for summary judgment. Whatever the final judgment may be the defendants were entitled to have the issue deliberately tried and their right to be heard in the usual manner of a trial protected."

Inasmuch as it is our opinion, upon this record, that a triable issue is presented as to the alleged waiver of the anti-assignment clause, the judgment appealed from should be reversed and the order of Special Term reinstated, with costs.

FULD, J. (dissenting).

Save for the issue of waiver, we are all agreed that defendant Twentieth Century-Fox would be entitled to summary judgment dismissing the complaint. On that question, too, I am persuaded, as was the Appellate Division, that no triable issue of fact is presented.

Plaintiffs are a few of a large number of artists and investors embroiled in a controversy with National Pictures Corporation and Berman Swarttz Productions over the distribution of profits from a motion picture released in 1954 and still being exhibited. The controversy is extensive and the disputants numerous. Some 17 other claimants, not parties to this action, have instituted suit in California and, according to the averment of the complaint in that California action, have assigned to the present plaintiffs different percentile shares of the profits than the latter now claim in the complaint before us. At any rate, in view of the inability of the parties to agree on their respective shares and in view of the consequent difficulty of distributing the profits as they are accumulated, at least one bank, the Chemical Bank and Trust Company, has refused to act as distributing agent. Plaintiffs now seek to foist this burden on Twentieth Century-Fox, the firm which distributed the film pursuant to a contract with National, on the theory that National assigned to the plaintiffs part of the payments due to it, in the proportions they claim.

I have no doubt, and, indeed, no one disputes, that it was to prevent entanglement in this very sort of controversy that Twentieth Century-Fox insisted, and explicitly provided in its contract with National, that it would not be "required to recognize or accept any assignments"; that payments would be made only to National and to "no other person"; that no right under the contract would "devolve * * * upon any * * * other person through or as representative of either party"; and that "*neither party*" *would assign* the agreement or any part of it "or any rights or monies payable" under it "*without the prior written consent of the other*". Nevertheless, despite the admitted absence of such consent — though the plaintiffs had ample opportunity to obtain it — and, despite the fact that the plain and only purpose of the anti-assignment provisions would thereby be completely frustrated, plaintiffs urge that Twentieth Century-Fox must submit to the inconvenience, the expense and the uncertainty of a trial solely because it made no protest when it examined the contracts between plaintiffs and National or when it was told by plaintiffs' attorney of the assignments.

Allegations such as these, and they are the only ones made by plaintiffs, do not support the conclusion that a triable issue of fact is presented. That there was no "protest" from the

attorneys for Twentieth Century-Fox means nothing. Inquiry, to be meaningful, must go deeper: did that failure reasonably reflect an "intentional relinquishment of a known right"? If it did not, then, there is no basis for either inference or finding of waiver. (*Werking v. Amity Estates*, 2 N Y 2d 43, 52; *Alsens Amer. Portland Cement Works v. Degnon Contr. Co.*, 222 N.Y. 34, 37.)

Courts are properly hesitant about frustrating contract provisions which prohibit assignment and, accordingly, the rule is settled that "an estoppel or waiver must be established by the person claiming it by a preponderance of evidence, and neither an estoppel nor a waiver * * * can be inferred from mere silence or inaction." (*Gibson Elec. Co. v. Liverpool & London & Globe Ins. Co.*, 159 N.Y. 418, 426-427; see, also, *Truglio v. Zurich Gen. Acc. & Liability Ins. Co.*, 247 N.Y. 423, 427.) And, more to the point, the affirmative acts required to defeat a nonassignment clause by a finding of waiver have invariably been such as are unquestionably inconsistent with anything but recognition of the assignment — as, for instance, making payment to the assignee (see *Hackett v. Campbell*, 159 N.Y. 537, affg. 10 App. Div. 523, 526; *Devlin v. Mayor of City of N. Y.*, 63 N.Y. 8, 14) allowing the assignee to complete the job (see *Brewster v. City of Hornellsville*, 35 App. Div. 161, 166) or, in the case of a lease, receiving rents knowing that the assignee is in possession. (See *Woollard v. Schaffer Stores Co.*, 272 N.Y. 304, 312-313; *Gillette Bros. v. Aristocrat Restaurant*, 239 N.Y. 87, 89-90.)

Indeed, on facts far stronger than those asserted by plaintiffs, the courts have held, *as a matter of law*, that there was no waiver of the anti-assignment clause. (See, e.g., *Allhusen v. Caristo Constr. Corp.*, 5 Misc 2d 749-750 [per BOTEIN, J.], affd. 278 App. Div. 817, affd. 303 N.Y. 446; *Concrete Form Co. v. Grange Constr. Co.*, 320 Pa. 205; *Joint School Dist. v. Marathon County Bank*, 187 Wis. 416.)

In the *Allhusen* case (*supra*, 303 N.Y. 446), for instance, a contractor, the defendant, hired a subcontractor to do some painting work, their contract providing that there was to be no assignment without the contractor's written consent. The subcontractor, nevertheless, made an assignment of amounts due to it as security for a loan, the assignee, a bank, being unaware of the provision against assignment. When the subcontractor later sought to secure a further loan, the bank discussed the assignment with the contractor's general manager. No protest was voiced and no word uttered about the invalidity of an assignment, and, on the strength of that conversation, the bank declared, it made additional loans secured by further assignments. The subcontractor thereafter became insolvent and the contractor, relying on the anti-assignment clause, refused to honor the assignments made to the bank. In the suit thereafter brought by the bank's successor, Special Term granted the contractor's motion for summary judgment dismissing the complaint. The court stressed the fact that there had been no written consent to the assignment and ruled, as a matter of law, that no waiver could be inferred from the circumstance that the contractor had failed to object to the assignment when he had been advised of it. The Appellate Division affirmed (278 App. Div. 817) and so did we (303 N.Y. 446), although by the time the appeal reached us, the plaintiff, recognizing its weakness, had abandoned the argument of waiver.

The rightness of that result is reinforced and confirmed by cases decided in other jurisdictions. On facts even stronger than those in the *Allhusen* case, the highest courts of both Pennsylvania and Wisconsin have unanimously held, as a matter of law, that there was no waiver. (See *Concrete Form Co. v. Grange Constr. Co.*, *supra*, 320 Pa. 205; *Joint School Dist. v. Marathon County Bank*, *supra*, 187 Wis. 416.) In the Pennsylvania case, which is particularly illuminating, an agreement between a contractor and a subcontractor provided that the latter would not "assign any payments thereunder except by and in accordance with the consent of [the] contractor." Without obtaining the requisite consent, the subcontractor executed an assignment of some of the moneys due it to a bank and the latter immediately notified the contractor by letter of the assignment, requesting an "acknowledgment". The contractor, acknowledging receipt of the letter "concerning an assignment" confirmed the existence of the account, but said nothing about the anti-assignment clause. In reversing the trial court, which had held that the contractor's acknowledgment of the assignment constituted a waiver of the nonassignment provision, the Supreme Court decided that "as a matter of law", there was no waiver (320 Pa. 208-209): "This letter [acknowledging the assignment] did not constitute an unequivocal assent to the assignment. * * * There was no express consent; nor is there sufficient warrant for any implication of the necessary assent. The original contract expressly forbade assignment. By that provision defendant undoubtedly sought to provide against the introduction of one or more third parties * * *. Defendant wished to deal with its subcontractor and with it alone. *Any waiver of that provision or consent to its violation would have to be clear, distinct and unequivocal. Such is not the present case. The court below should have ruled as a matter of law that defendant did not consent to the assignment and could not, therefore, be held liable*." (Emphasis supplied.)

Turning to the case before us, it is readily apparent that Twentieth Century-Fox also sought "to provide against the introduction of * * * third parties," that it wished, as it stated, to deal with National, and National alone, and that there is no "clear, distinct and unequivocal" evidence of waiver. The Appellate Division was, therefore, eminently correct in holding that there was no basis for any claim of waiver. Let us dwell for a moment on the facts relied upon to spell out waiver. The papers which Twentieth Century-Fox examined, far from making any reference to assignment, actually directed attention to the very agreement between National and Twentieth Century-Fox which, in explicit terms, prohibited assignments.[1] Moreover, that agreement, with all of its anti-assignment provisions, was actually attached to the contract which Berman Swarttz negotiated with National upon plaintiffs' instructions. And, in addition to that, the Swarttz-National agreement itself provided that it should not be construed as giving any right, legal or equitable, to third persons. In short, therefore, the papers examined, instead of informing Twentieth Century-Fox, as plaintiffs allege, that unless it protested it would be relinquishing the anti-assignment provisions, really reaffirmed the vitality of those provisions. Surely, then, Twentieth Century-Fox's "failure to protest" may not be regarded as evidence of an intention to waive. As earlier indicated, such an intent may only be predicated on action taken on the strength of known facts, and acts, to justify an inference of waiver, must be of an affirmative character, not mere silence or inaction. (See, e.g., *Gibson Elec. Co. v. Liverpool & London & Globe Ins. Co.*, *supra*, 159 N.Y. 418, 427; *Allhusen v. Caristo Constr. Corp.*, *supra*, 5 Misc

2d 749, affd. 278 App. Div. 817, affd. 303 N.Y. 446; *Emerson Radio & Phonograph Corp. v. Standard Appliances*, 201 Misc. 821, 827.)

Nor may any inference of waiver be said to flow from the fact that no objection was raised when, some time later, plaintiffs' attorney, in a conversation with counsel for Twentieth Century-Fox, advised him of the assignments. This is the same sort of inaction that has been held insufficient to establish waiver in precisely this type of case. (See *Allhusen v. Caristo Constr. Co.*, *supra*, 5 Misc 2d 749, affd. 278 App. Div. 817, affd. 303 N.Y. 446; *Concrete Form Co. v. Grange Constr. Co.*, *supra*, 320 Pa. 205; *Joint School Dist. v. Marathon County Bank*, *supra*, 187 Wis. 416.) It is nowhere alleged that Twentieth Century-Fox or anyone on its behalf expressly waived the nonassignment provisions and, if plaintiffs wanted them waived, their attorney should have requested the requisite consent in writing. Having failed to obtain such consent, plaintiffs should not be permitted to involve Twentieth Century-Fox in a troublesome and expensive trial by simply alleging a waiver, without support (as I have demonstrated) of any fact sufficient in law to substantiate the allegation. To hold otherwise not only frustrates the plain purpose of the anti-assignment provisions but amounts to a decided departure from our wise and established summary judgment procedure.

I would affirm the Appellate Division determination granting summary judgment.

Judgment of the Appellate Division reversed and the order of Special Term reinstated, with costs in this court and in the Appellate Division.

[1] Thus, plaintiffs had expressly authorized Berman Swarttz to arrange for the production of the film "pursuant to" and "under" the contract containing the nonassignment clauses.