

Giglio v NTIMP, Inc.

2009 NY Slip Op 32855(U)

November 30, 2009

Supreme Court, Suffolk County

Docket Number: 07-6534

Judge: Jeffrey Arlen Spinner

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 7-16-09 (#001 & #003)
MOTION DATE 7-18-09 (#002)
MOTION DATE 7-9-09 (#004)
MOTION DATE 9-23-09 (#006)
ADJ. DATE 9-9-09 (#001, #002, #003, #004)
ADJ. DATE 9-23-09 (#006)
Mot. Seq. # 001 - MotD # 002 - XMD
003 - XMG # 004 - MG
006 - MD

-----X
SUSANNE GIGLIO, individually and as :
Administratrix of the Estate of ROBERT A. :
GIGLIO, JR., and ROBERT A. GIGLIO, SR. :
 :
Plaintiff, :
 :
- against - :
NTIMP, INC., d/b/a NAPPER TANDY'S PUB, :
and KATHLEEN P. D'AGOSTINO, :
 :
Defendants. :
-----X

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-----X
NTIMP, INC., d/b/a NAPPER TANDY'S PUB, :
 :
Third-Party Plaintiff, :
 :
-against- :
 :
DAWN MCNEIL, as Administratrix of the Estate :
of SHAWN P. GIGLIO, :
 :
Third-Party Defendant. :
-----X

DAVID J. SOBEL, P.C.
Attorneys for Third-Party Defendant Dawn McNeil,
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Upon the following papers numbered 1 to 36 read on these motions for summary judgment, motion to compel, dismiss a counterclaim, amend pleadings, and to dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1 - 4; 5 - 8; Notice of Cross Motion and supporting papers 9 - 11; 12 - 15; 16 - 19; Answering Affidavits and supporting papers 20 - 22; 23 - 25; 26 - 27; Replying Affidavits and supporting papers 28 - 30; 31 - 33; 34 - 36; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

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ORDERED that the motion (001) by defendant, NTIMP, Inc., d/b/a Napper Tandy's Pub, for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing the fourth cause of action by plaintiff, Robert A. Giglio, Sr., and entering a default judgment against plaintiff Robert A. Giglio, Sr. on the counterclaim, is granted to the extent that the fourth cause of action is dismissed and is otherwise denied; and it is further

ORDERED that the motion (002) by defendant, NTIMP, Inc., d/b/a Napper Tandy's Pub, for an order pursuant to CPLR 3124, compelling co-defendant, Kathleen P. D'Agostino to respond to discovery demands dated February 11, 2008, is denied inasmuch as the action was discontinued as against defendant D'Agostino by stipulation dated April 7, 2008 and filed with the Clerk of the Court on April 29, 2008; and it is further

ORDERED that the cross motion (003) by plaintiff, Susanne Giglio, Individually and as Administratrix of the Estate of Robert Giglio, Jr., for an order dismissing the counterclaim, incorrectly designated as a cross claim, over and against Robert A. Giglio, Sr. is granted; and it is further

ORDERED that the motion (004) by plaintiff, Susanne Giglio, Individually, and as Administratrix of the Estate of Robert Giglio, Jr., for an order pursuant to CPLR 3214, granting leave to amend the complaint to add a demand for exemplary damages is granted; and it is further

ORDERED that the motion (006) by third-party defendant, Dawn McNeil, as Administratrix of the Estate of Shawn P. Giglio, for an order pursuant to CPLR 3211 dismissing the third-party complaint is denied; and it is further

ORDERED that plaintiff is directed to serve and file a supplemental summons and amended complaint within twenty days of service of this order's notice of entry.

In this negligence action, plaintiff, Susanne Giglio, Individually and as Administratrix of the Estate of Robert A. Giglio, Jr., and plaintiff, Robert A. Giglio, Sr., allege that defendant, NTIMP, Inc., d/b/a Napper Tandy's Pub (hereinafter Napper Tandy) violated New York General Obligations Law ("GOL") §11-101, also known as the Dram Shop Act, by illegally serving alcohol in its premises to non-party Shawn P. Giglio, an allegedly visibly intoxicated person, who then drove the vehicle owned by defendant, Kathleen P. D'Agostino, wherein decedent, Robert A. Giglio, Jr. (hereinafter referred to as "Robert, Jr.") was a passenger. Plaintiffs allege that the illegal service of alcohol to Shawn caused a one-vehicle accident, causing his death and the death of their son, Robert, Jr. Plaintiffs further allege that Napper Tandy violated GOL §11-100 by illegally procuring alcohol for decedent Robert, Jr., who was under the age of 21. Plaintiffs allege that due to the illegal service of alcohol to Robert, Jr., he was mentally incompetent to determine whether to enter the vehicle operated by decedent Shawn Giglio.

Defendant Napper Tandy moves for summary judgment dismissing the allegations by plaintiff Robert A. Giglio, Sr. and for a default judgment on the counterclaim against Robert A. Giglio, Sr. Defendant Napper Tandy also moves to compel defendant, Kathleen D'Agostino, to respond to discovery demands. Plaintiffs move to dismiss the counterclaim by Napper Tandy over against plaintiff Robert A. Giglio, Sr. and in a separate motion, seek to amend the pleadings. Third-party defendant,

Dawn McNeil, as Administratrix of the Estate of Shawn P. Giglio, moves to dismiss the third-party complaint as against her.

New York General Obligations Law ("GOL"), § 11-101, subd. 1 provides:

Any person who shall be injured in person, property, means of support, or otherwise by any intoxicated person, or by reason of the intoxication of any person, whether resulting in his death or not, shall have a right of action against any person who shall, by unlawful selling * * * liquor [to] such intoxicated person, have caused or contributed to such intoxication". The statute, as its predecessors, further provides for compensatory and punitive damages and authorizes a parent to maintain an action.

New York GOL §11-101(4) further provides the following: "In any case where parents shall be entitled to such damages, either the father or mother may sue alone therefor, but recovery by one of such parties shall be a bar to a suit brought by the other."

Procedurally, the motion (005) by defendant, Napper Tandy for an order granting a default judgment against third-party defendant, Dawn McNeil, as Administratrix of the Estate of Shawn P. Giglio was withdrawn pursuant to a letter by counsel on September 8, 2009. In addition, the Court notes that plaintiffs discontinued the action as against defendant, Kathleen D'Agostino, by stipulation, dated April 7, 2008, and filed with the Clerk of the Court on April 29, 2008. Accordingly, the motion by defendant Napper Tandy for an order compelling defendant D'Agostino to comply with discovery demands is denied as moot.

Turning to the motion by defendant, Napper Tandy to dismiss the fourth cause of action alleging a violation of the Dram Shop Act asserted by plaintiff, Robert A. Giglio, Sr., defendant submits, *inter alia*, the pleadings, the bill of particulars, a copy of the Suffolk County Surrogate's Court Letters of Administration, and a copy of Mr. Giglio's deposition transcript. The record reveals that the Suffolk County Surrogate's Court appointed Susanne Giglio with Letters of Administration of the Estate of Robert A. Giglio, Jr., by decree dated January 29, 2007.

Robert A. Giglio, Sr. testified that although he was present at Napper Tandy's during the evening of the accident with his brother, Shawn and son, Robert, Jr., he was spending most of his time with a waitress whom he was dating. He was not aware whether either Shawn or Robert, Jr. was visibly intoxicated. He stated that he and plaintiff, Susanne Giglio were divorced. He further testified that Robert, Jr. was a senior in high school and lived with him in a rented house, which he shared with Robert, Jr.'s aunt and her family. However, Robert, Jr. did not pay rent and only contributed money to his aunt toward food with his part time salary earned at Waldbaum's. Plaintiff stated that he did not buy drinks for either Shawn or Robert, Jr., but that he paid only his portion of the tab at the end of the evening.

Napper Tandy's motion to dismiss all Dram Shop Act claims in the fourth cause of action by

plaintiff, Robert A. Giglio, Sr., is granted inasmuch as plaintiff conceded that Robert, Jr. merely contributed to the purchase of food at home. Thus, there is no evidence that Robert, Jr., who was 18 years old at the time of the accident, supported plaintiff or that plaintiff anticipated his support in the future (*see, Marsico v Southland Corp.*, 148 AD2d 503, 539 NYS2d 378 [1989]). In any event, GOL §11-101(4) bars Robert Giglio, Sr. from asserting such a cause of action once plaintiff, Susanne Giglio commenced the action and sued individually for the same recovery.

The Court next turns to plaintiff's motion to dismiss the counterclaim by Napper Tandy against Robert Giglio, Sr. for contribution. It is well established that a counterclaim may be dismissed pursuant to CPLR 3215(c), where a reply was not timely interposed by the plaintiff and the defendant failed to institute proceedings within one year to obtain a default judgment. Here, the record reveals that the answer with counterclaim was served by mail on May 2, 2007. Pursuant to CPLR 3012(a), Giglio's time to serve a reply expired on May 27, 2007, allowing for twenty days to reply plus five days for mailing. Napper Tandy's motion for a default judgment was untimely served on June 5, 2008, inasmuch as CPLR 3215 requires that the motion be made within one year after the default, which occurred on May 27, 2007. Accordingly, the motion to dismiss the counterclaim as abandoned is granted. As a result, Napper Tandy's motion for a default judgment on the counterclaim is denied.

Turning to the motion by plaintiff Susanne Giglio for leave to amend the complaint to add punitive damages, plaintiff contends that the Dram Shop Act provides for exemplary damages and defendant is not prejudice by the amendment. In opposition, defendant contends that no evidence has been presented to justify exemplary damages. It is well settled that motions to amend pleadings and bills of particulars shall be freely given upon such terms as may be just with the decision to allow or disallow the amendment committed to the court's discretion (CPLR 3025 [b]; *Barnes v County of Nassau*, 108 AD2d 50, 487 NYS2d 827 [2d Dept 1985]). Here, there are sufficient facts to sustain the plaintiff's claim for punitive damages (*McNeill v Rugby Joe's, Inc.*, 298 AD2d 369, 751 NYS2d 241 [2d Dept 2002]). In addition, there is no showing by defendant of prejudice or surprise. Accordingly, the plaintiff's motion to amend the ad damnum clause to add exemplary damages is granted. Plaintiff is directed to serve and file the supplemental summons and amended complaint upon defendant within twenty days of service of this order's notice of entry.

Turning to the motion by third-party defendant, Dawn McNeil, as Administratrix of the Estate of Shawn P. Giglio, to dismiss the third-party complaint, McNeil argues that a release was executed by plaintiff which settled all claims as against defendant Kathleen D'Agostino and the estate of Shawn P. Giglio on the wrongful death claim, and that such settlement insulates said estate from any further law suits. McNeil contends that GOL §15-108(b) provides that a release given in good faith by the injured person to one tortfeasor * * * relieves the estate from any liability to any other person for contribution * * *

In opposition, defendant/third-party plaintiff, Napper Tandy claims that it has the right to sue the estate of Shawn Giglio since the estate paid no consideration for the release with plaintiff, as required by GOL §15-108(d). In addition, the Surrogate's Court acknowledged only a settlement with defendant, Kathleen D'Agostino and her insurance company for the wrongful death cause of action.

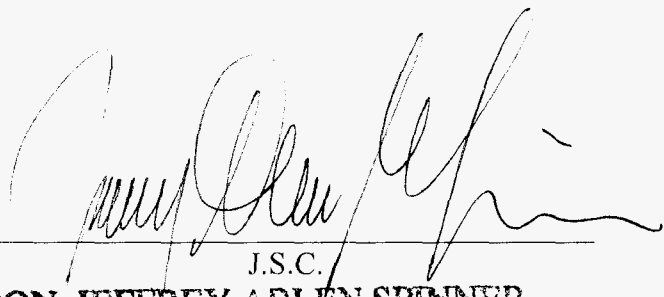
General Obligations Law §15-108(d) provides:

A release or covenant not to sue between a plaintiff or a claimant and a person who is liable in tort shall be deemed a release or covenant for the purposes of this section, only if ... (1) the plaintiff or claimant receives, as part of the agreement, monetary consideration greater than one dollar.

Therefore, the General Obligations Law §15-108 is inapplicable under these circumstances. In any event, it is well settled that the vendor of alcohol and an intoxicated tortfeasor may seek contribution from each other (*see e.g., Cresswell v Warden*, 164 AD2d 855, 856-857, 559 NYS2d 361 [2d Dept 1990]; CPLR 1401) where they are subject to liability for damages for the same personal injury, injury to property or wrongful death. Although a vendor who violates the Dram Shop Act is not entitled to contribution from "the deceased vendee's estate in an action by the vendee's dependents" (*Coughlin v Barker Avenue Assocs.*, 202 AD2d 622, 609 NYS2d 646 [2d Dept 1994]), here, no dependants of Shawn P. Giglio have commenced an action pursuant to the Dram Shop Act. Accordingly, the motion to dismiss the third-party action is denied.

In sum, Napper Tandy's motion to dismiss the fourth cause of action and for a default judgment on the counterclaim over against Robert A. Giglio, Sr. is granted to the extent that the fourth cause of action is dismissed, and is otherwise denied; the motion by Napper Tandy to compel discovery from defendant, D'Agostino, is denied; the cross motion and motion by plaintiff Susanne Giglio, for an order granting leave to serve an amended complaint dismissing the counterclaim over and against Robert Giglio, Sr., are granted; and the motion by third-party defendant Dawn McNeil to dismiss the third-party complaint is denied.

Dated: NOV 30 2009



J.S.C.

HON. JEFFREY ARLEN SPINNER

 FINAL DISPOSITION X NON-FINAL DISPOSITION