

Goldshmidt v Gotlibovsky

2016 NY Slip Op 30045(U)

January 11, 2016

Supreme Court, New York County

Docket Number: 156674/15

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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ANNA GOLDSHMIDT and ELAN STRATT,

Plaintiffs,

Index No. 156674/15

-against-

DECISION/ORDER

VLADIMIR GOTLIBOVSKY,

Defendant.

-----X
VLADIMIR GOTLIBOVSKY,

Third-Party Plaintiff,

-against-

HLT NY WALDORF LLC d/b/a WALDORF ASTORIA
NEW YORK, WALDORF ASTORIA MANAGEMENT
LLC and ANBANG INSURANCE GROUP CO., LTD.,

Third-Party Defendants.

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HON. CYNTHIA S. KERN, J.S.C.

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

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Affirmation in Opposition	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiffs Anna Goldshmidt and Elan Stratt commenced the instant action against defendant Vladimir Gotlibovsky (“Gotlibovsky”) seeking to recover damages arising out of an incident that occurred at plaintiffs’ wedding at which defendant was a guest. Thereafter, Gotlibovsky commenced a third-party action against HLT NY Waldorf LLC d/b/a Waldorf Astoria New York, Waldorf Astoria Management LLC (hereinafter collectively referred to as the

“Waldorf Defendants”) and Anbang Insurance Group Co., Ltd. (“Anbang”). The Waldorf Defendants now move for an Order pursuant to CPLR § 3211(a)(7) dismissing the third-party complaint. The Waldorf Defendants’ motion is resolved as set forth below.

The relevant facts according to the complaint in the main action are as follows. On or about June 13, 2015, plaintiffs had their wedding reception at the Waldorf Astoria Hotel in Manhattan. Defendant Gotlibovsky was a guest at the wedding and was carrying a concealed firearm which discharged, injuring another guest at the wedding (the “incident”). The incident caused an obvious interruption and eventual cancellation of the wedding reception by the Waldorf Defendants.

Thereafter, plaintiffs commenced the instant action against Gotlibovsky asserting causes of action for negligence and negligent infliction of emotional distress and seeking damages, including punitive damages, the financial cost of the wedding and damages flowing therefrom. In or around September 2015, Gotlibovsky commenced a third-party action against the Waldorf Defendants and Anbang asserting causes of action for indemnification and contribution based on their cancellation of the wedding. The Waldorf Defendants now move to dismiss the third-party complaint on the ground that it fails to state a claim.

On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980). Moreover, “a complaint should not be dismissed on a pleading motion so long as, when plaintiff’s allegations are given the benefit of every possible inference, a cause of action exists.” *Rosen v. Raum*, 164 A.D.2d 809 (1st Dept. 1990). “Where a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to ‘whether it states in some recognizable form any cause of action known to our law.’” *Foley v. D’Agostino*, 21 A.D.2d 60,

64-65 (1st Dept 1977) (quoting *Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956)).

As an initial matter, that portion of the Waldorf Defendants' motion to dismiss the third-party complaint's claim for indemnification is granted. To establish a right to common law indemnification, "a party must show (1) that it has been held vicariously liable without proof of any negligence or actual supervision on its part; and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work." *Naughton v. City of New York*, 94 A.D.3d 1, 4 (1st Dept 2012). As plaintiffs seek to hold defendant/third-party plaintiff Gotlibovsky liable for his own negligence in the main action and not vicariously liable without proof of negligence, third-party plaintiff has no right to common law indemnification from the Waldorf Defendants. Thus, the third-party complaint's claim for indemnification must be dismissed.

The court next turns to that portion of the Waldorf Defendants' motion to dismiss the third-party complaint's claim for contribution. Under New York's contribution statute, "two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought." CPLR § 1401. *Board of Educ. of Hudson City School Dist. v. Sargent, Webster, Crenshaw & Folley*, 71 N.Y.2d 21, 26 (1987). The law is clear that where "the underlying claim seeks purely economic damages, a claim for common-law contribution is not available." *Children's Corner Learning Center v. A Miranda Contracting Corp.*, 64 A.D.3d 318, 323 (1st Dept 2009). "[T]he determining factor as to the availability of contribution is not the theory behind the underlying claim but the measure of damages sought." *Rockefeller University v. Tishman Construction Corp.*, 240 A.D.2d 341 (1st Dept 1997). If the damages sought are to be

placed in as good a position as one would have been but for the acts being sued upon, then the claim is for economic damages. *Children's Learning Center*, 64 A.D.3d at 324.

In the instant action, the court finds that Gotlibovsky only has a viable claim for contribution against the Waldorf Defendants based on plaintiffs' claim against Gotlibovsky for negligent infliction of emotional distress as that is a claim for personal injury and the damages flowing therefrom are not economic in nature. However, to the extent plaintiffs seek to recover in negligence against Gotlibovsky for the cost of the wedding and economic damages flowing from its cancellation, Gotlibovsky does not have a viable claim for contribution against the Waldorf Defendants as contribution may not be sought for economic damages. Indeed, said damages would help put plaintiffs in the same position they would have been in if Gotlibovsky's gun had not discharged and the wedding was not canceled. Contrary to Gotlibovsky's assertion, it is not relevant to this analysis that the claim being asserted in the underlying complaint is for negligence. The relevant inquiry is the measure of damages being sought.

Further, Gotlibovsky does not have a viable claim for contribution against the Waldorf Defendants based on plaintiffs' claim against Gotlibovsky for punitive damages as courts have held that punitive damages are not subject to contribution among tortfeasors. *See Felice v. Delporte*, 136 A.D.2d 913, 914 (4th Dept 1988) ("In entering judgment on the verdict, however, the trial court erred in adjudging that defendants were jointly and severally liable for the full amount of the punitive damage award. Such damages are in the nature of a penalty and contribution among tortfeasors is not permissible.") The cases cited by Gotlibovsky as support for his assertion that punitive damages are subject to contribution among tortfeasors are inapplicable here as they do not involve the apportionment of punitive damages but rather compensatory damages.

