

**Legitime v Noisy**

2017 NY Slip Op 32786(U)

December 13, 2017

Supreme Court, Queens County

Docket Number: 704845/17

Judge: Janice A. Taylor

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15  
Justice

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PIERRE LEGITIME and MARIE LEGITIME,

Index No.:704845/17

Plaintiff(s),

Motion Date:8/3/17

- and -

Motion Cal. No.: 82

Motion Seq. No: 1

DOMINIQUE NOISY and LIONEL S. LEWIS,

Defendant(s).  
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The following papers numbered 1 - 16 read on this motion by the defendants for an order dismissing the complaint against them; and a cross-motion by plaintiffs for an order granting a default judgment against the defendants.

	<u>Papers</u> <u>Numbered</u>
Notice of Motion-Affirmation-Exhibits-Service.....	1 - 4
Notice of Cross-Motion-Affirmation-Exhibits-Service..	5 - 8
Affirmation in Opposition-Exhibits-Service.....	9 - 11
Affirmation in Opposition-Service.....	12 - 13
Reply Affirmation-Exhibits-Service.....	14 - 16

Upon the foregoing papers it is **ORDERED** that the motion and cross-motion are considered together and decided as follows:

This is an action seeking contribution. It is uncontested that at some point prior to October 21, 2010, plaintiff Marie Legitime and defendant Dominique Noisy ("Noisy") were owners of a corporation called The Little Children's Garden, Inc., that on October 21, 2010, The Little Children's Garden, Inc. executed a loan with the New York Business Development Corporation ("NYBDC") for the sum of \$125,000.00 and that this loan was guaranteed by plaintiffs Marie Legitime and Pierre Legitime ("the Legitime plaintiffs") and defendants Noisy and Lionel S. Lewis ("Lewis"). On or about January 22, 2014, NYBDC commenced an action against Marie Legitime, Pierre Legitime, Dominique Noisy and Lionel S. Lewis. By assignment dated December 17, 2013, Dominique Noisy

transferred her shares of The Little Children's Garden, Inc. for the sum of \$10.00. Upon the assignment, Marie Legitime signed a release which states the following:

It is FURTHER RESOLVED that THE LITTLE CHILDREN'S GARDEN, INC. ("Releasor"), in consideration of the sum of Ten Dollars (\$10.00), received from DOMINIQUE NOISY ("Releasee"), the adequacy and receipt whereof is hereby acknowledged by Releasor, hereby releases and discharges the Releasee, the Releasee's executors, administrators, heirs, successors and assigns (hereinafter collectively referred to as "Releasees") from all manners of action, causes of action, suits, debts, sums of money, accounts, bonds, bills, covenants, contracts, controversies, promises, agreements, trespasses, variances, judgment, damages, executions, claims, demands whatsoever, in law, equity and/or admiralty, which said Releasees, the Releasor, his/her executors, administrators, successors and assigns have, ever had or may have in the future, by reason of any matter, cause or thing whatsoever from the beginning of time to the date hereof. The words "Releasor" and "Releasee" include the singular and the plural wherever construction of this instrument dictates.

On or about January 22, 2014, NYBDC commenced an action ("the related action") for breach of contract and alleged that the parties breached their obligation to repay the loan. On December 24, 2014, NYBDC and Marie Legitime, Pierre Legitime, as defendants entered into a stipulation wherein NYBDC agreed to discontinue the action against the Legitimes in consideration of a settlement in the amount of \$115,000.00. On or about April 8, 2017, the Legitime plaintiffs commenced this action and seek contribution from the defendants for the amount paid to settle the related action.

#### Plaintiffs' Cross-Motion

This court will first consider plaintiffs' cross-motion. This action was commenced on April 8, 2017 by the electronic filing of a summons and complaint. According to the affidavits of service filed with this court's electronic filing system, the defendants Dominique Noisy ("Noisy") and Lionel S. Lewis ("Lewis") were served with the pleadings, pursuant to CPLR §308(2), on April 25, 2017 and April 24, 2017, respectively by delivery to people of suitable age and discretion. Proof of service was electronically filed on May 5, 2017.

Plaintiffs now cross-move for an order issuing a default judgment against the defendants. In support of the cross-motion, the cross-movants submit the affidavit of plaintiff Pierre Legitime wherein he states that the defendants have neither answered nor appeared in this action. However, it is clear that, on June 14, 2017, the defendants filed a motion, pursuant to CPLR §3211, to dismiss the complaint. It is also clear that a pre-answer motion to dismiss constitutes an appearance.

Moreover, pursuant to CPLR §308(2), service of pleadings is not complete until ten days after proof of service has been filed. As plaintiffs filed their proof on May 5, 2017, service was complete on May 15, 2017. Pursuant to CPLR §320, defendants have thirty days to answer or appear in an action. Thus, the defendants had until June 14, 2017 to appear. Consequently, this court rules that the defendants have timely appeared in this action and the instant cross-motion is hereby denied.

#### Defendants' Motion

Defendants now move, pursuant to CPLR §3211(a)(1), (5), for an order dismissing the complaint against them. In order to prevail on a motion made pursuant to CPLR §3211(a)(1), a movant must demonstrate that there exists documentary evidence which resolves all of the factual issues alleged in the complaint and conclusively disposes of the plaintiffs' claim (see, *Kopelwitz and Co. v. Mann, et al.*, 2011 NY Slip Op. 3037 [2d Dept. 2011]; *Fontanetta v. John Doe 1, et al.*, 73 Ad3d 78 [2d Dept. 2010]). Additionally, a motion made pursuant to CPLR §3211(a)(7) can only be granted if, from the pleadings' four corners, factual allegations are not discerned which manifest any cause of action cognizable at law. In furtherance of this task, the court liberally construes the complaint, accepts as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion, and accords the plaintiff the benefit of every possible favorable inference (See, *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 [2002]). New York courts have ruled that, in deciding a motion made pursuant to CPLR §3211(a)(7), a court will decide whether a complaint makes out any cognizable cause of action, not whether a plaintiff will ultimately win on the merits of the allegations contained therein (see, *Stukuls v. State of New York*, 42 NY2d 272 [1977]; *Jacobs v. Macy's East*, 262 AD2d 607 [2d Dept. 1999]).

In support of the instant motion, the defendants submit, *inter alia*, a copy of the guaranty executed by the parties, a copy of the assignment of shares of The Little Children Garden, Inc. from defendant Noisy to plaintiff Marie Legitime, a copy of the release executed by plaintiff Marie Legitime, the complaint in the related action, a copy of the stipulation discontinuing the related action against Marie Legitime and Pierre Legitime and a copy of the complaint in this action.

As previously stated, upon the transfer of shares from defendant Noisy, plaintiff Marie Legitime, executed a General Release which prohibits plaintiff Marie Legitime from all causes of action that the parties may have on the date of the relief or which may incur in the future. As it is clear that this cause of action for contribution is a cause of action between plaintiff Marie Legitime and defendant Dominique Noisy, it is barred by the General Release. Thus, pursuant to CPLR §3211(a)(1), plaintiff Marie Legitime's causes of action against defendant Noisy must be dismissed by this court.

Additionally, pursuant to General Obligations Law §15-108(c), a party who has obtained his own release from liability, shall have no cause of action for contribution. New York courts have stated that, where a party settles an action prior to the adjudication of damages, that party is prevented from seeking contribution (see, *Gonzalez v. Armac Industries*, 21 NY2d 1 [1993]; *Lettiere v. Martin Elevator Co.*, 62 AD2d 810 [2d Dept. 1978]). In the instant action, it is uncontested that the Legitime plaintiffs voluntarily settled the prior action and obtained a release from liability. Consequently, the Legitime plaintiffs have waived their entitlement to seek contribution from the defendants in this action. Thus, this court rules that plaintiffs' complaint fails to state a cognizable cause of action against the defendants. Accordingly, pursuant to CPLR §3211(a)(7), the instant complaint is dismissed in its entirety.

Dated: December 13, 2017

  
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JANICE A. TAYLOR, J.S.C.

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