

Atlantic Plastic & Hand Surgery, PA v Chelli & Bush
2018 NY Slip Op 33472(U)
December 12, 2018
Supreme Court, Richmond County
Docket Number: 150669/2015
Judge: Jr., Orlando Marrazzo
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND
ATLANTIC PLASTIC & HAND SURGERY, PA &
MICHAEL RISKIN, M.D.,**

DECISION/ORDER

DCM PART 21

HON. ORLANDO MARRAZZO, JR.

Index No.: 150669/2015
Motion No. 4

Plaintiff(s),

-against-

CHELLI & BUSH,

Defendant(s)

**ATLANTIC PLASTIC & HAND SURGERY, PA &
MICHAEL RISKIN, M.D.,**

Plaintiff(s),

-against-

THOMAS LOMBARDO,

Defendant(s).

THOMAS LOMBARDO,

Third-Party Plaintiff

-against-

CHELLI & BUSH,

Third-Party Defendant

The following numbered 1 to 3 were fully submitted on 13th day of November
2018

Papers

Numbered

Defendant's Motion to dismiss, with Supporting Papers and Exhibits, dated, August 31, 2018.....	1
Affirmation in Opposition, with Supporting Papers and Exhibits, dated, October 4, 2018	2
<u>Reply, dated, November 6, 2018.....</u>	<u>3</u>

Third-party defendant Chelli & Bush moves in pursuant to CPLR Section 2114 (b) for an order dismissing defendant and third-party plaintiff Thomas Lombardo's third-party complaint against them. As is set forth below, Chelli & Bush's motion is granted and Thomas Lombardo's complaint against them is dismissed.

The court notes that the third-party complaint fails to state a cause of action for the two claims asserted therein, common law indemnification and common law contribution, as:

Both causes of action are premised on the assertion that the firm should have but failed to remit to the plaintiff Atlantic Plastic & Hand Surgery, PA and Michael Risin, M.D. ("Plaintiffs"), a portion of the settlement proceeds of the personal injury action that the firm prosecuted as Lombardo's counsel. However, Lombardo cannot establish the legal predicates under New York law for asserting a common law contribution claim, as this court by decision and order dated July 31, 2018 held that the firm had no duty to remit to plaintiff any portion of the settlement proceeds of

the referenced personal injury action; and Lombardo cannot establish the legal predicate under New York law for asserting a common law indemnification claim.

It is well settled, that common law contribution is available only where the party from whom contribution is sought allegedly breached some duty to the party who is pursuing the party requesting contribution (*County of Westchester v Becket Assoc.*, 102 AD2d 34 [App. Div. 2nd Dept. 1984]; *Fladerer v Needleman*, 30 AD2d 378 [App. Div. 3rd Dept. 1968].)

This court by decision and order dated July 31, 2018 held that the firm had no duty to remit to plaintiffs any of the proceeds of the referenced personal injury action. This decision is law of this case. As such, Lombardo cannot prove an essential element of any contribution claim against the firm. Therefore, Lombardo failed to establish that the firm had or breached any duty to plaintiffs. Therefore, Lombardo's contribution cause of action against the firm is dismissed.

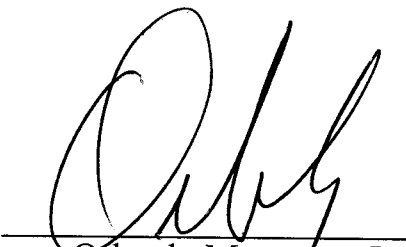
Under New York law, the common law indemnification claim is only available where the party seeking indemnification is free of fault, that their liability is vicarious based upon the active wrongdoing of the party from whom indemnification is sought (*Great American Insurance Co., v Bearcat Financial Services, Inc.* 90 AD2d 533 [App. Div 1st Dept. 2011]; *Garrett v Holiday Inns*, 58 NY2d 253 [1983]; *Mikelatus v Theofilaktidis*, 105 AD3d 822 [App. Div. 2nd Dept. 2013].)

Here, Lombardo's liability to plaintiff is not vicarious, based upon conduct of the firm. Rather the medical bills that are the subject of plaintiff's claims against Lombardo are for surgery and other medical treatment that Lombardo received. Lombardo is the obligor of said bills, not the firm. Therefore, Lombardo's indemnification cause of action against the firm is dismissed.

Accordingly, the third-party defendant Chelli & Bush's motion to dismiss the third-party complaint against them is granted and the third-party complaint is dismissed in its entirety.

This constitutes the decision and order of the court.

Dated: December 12, 2018
Staten Island, New York


Orlando Marrazzo, Jr.,
Justice, Supreme Court