Cole v Loduca
2019 NY Slip Op 30838(U)
March 28, 2019
Supreme Court, Suffolk County
Docket Number: 15-1129
Judge: William G. Ford
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SHORT FORM ORDER

INDEX No. 15-1129
CAL. No. 17-02303OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

Hon. WILLIAM G. FORD
Justice of the Supreme Court

MOTION DATE 5-10-18 (003)
MOTION DATE 5-10-18 (004)
MOTION DATE 7-16-18 (005)
ADJ. DATE 8-23-18
Mot. Seq. # 003 - MotD # 005 - MD
 # 004 - MD

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PHILIP COLE,

Plaintiff,

- against-

JAMES M. LODUCA, MRC RECOVERY, INC., AMERICAN HONDA FINANCE CORPORATION d/b/a HONDA FINANCIAL SERVICES, HUNTINGTON HONDA, HVT, INC., & CONSOLIDATED ASSET RECOVERY SYSTEM, INC.,

Defendants.

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Upon the following papers numbered 1 to 25 read on the motion to amend the pleadings and the motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1 - 9 : Notice of Cross Motion and supporting papers 10 - 13 ; Answering Affidavits and supporting papers 14 - 20 ; Replying Affidavits and supporting papers 21 - 25 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that pending motions (003, 004 and 005) are combined herein for disposition; and it is further

ORDERED that motion (003) by defendant/third-party defendant MRC Recovery, Inc. pursuant to CPLR 3025(b) for leave to serve an amended answer to the complaint and to the third-party complaint to add an affirmative defense, and pursuant to CPLR 3124 to compel plaintiff to provide a copy of the release issued to defendants/third-party plaintiffs American Honda Finance Corp. d/b/a Honda Financial Services, HVT, Inc. and Consolidated Asset Recovery System, Inc., is decided as set forth herein; and it is further

ORDERED that the motion (004) by defendant MRC Recovery, Inc. for summary judgment is denied as untimely; and it is further

ORDERED that the cross motion (005) by plaintiff for summary judgment against defendant MRC Recovery, Inc. is denied as untimely.

Plaintiff commenced the this action on January 22, 2015, seeking damages as a result of being assaulted on February 6, 2014 by defendant James N. LoDuca ("LoDuca"), who was attempting to repossess his leased vehicle. On July 21, 2015, LoDuca pled guilty to assault in the third degree, and during his allocution admitted to striking plaintiff in the back of his head with a flashlight with the intent to injure him. Thereafter, plaintiff moved for and was granted summary judgment against LoDuca as his admission in the criminal case established his liability in the instant case. In April 2018, plaintiff settled the action with defendants American Honda Finance Corp. d/b/a Honda Financial Services, Huntington Honda, Inc., HVT, Inc. (collectively referred to as the "Honda defendants"), and Consolidated Asset Recovery System, Inc. ("CARS"), and, by Stipulation of Partial Discontinuance (the "Stipulation") dated May 27, 2018, discontinued the action, with prejudice, against them.

Defendant MRC Recovery, Inc. ("MRC"), LoDuca's employer, now moves to amend its answers to the complaint and to the third-party complaint to add § 15-108 of the General Obligations Law ("GOL") as an affirmative defense. MRC also moves for summary judgment dismissing the complaint, the third-party complaint and all cross claims asserted against it, arguing that it cannot be held liable to plaintiff or codefendants under any legal theory as LoDuca was acting outside the scope of this employment when he committed the assault.

The court will first address the motion for summary judgment. MRC's counsel concedes that the motion made on April 13, 2018 is untimely, but argues that good cause for the delay has been demonstrated. Specifically, counsel claims that at the conference in the CCP held on March 5, 2018, plaintiff's counsel reported that a settlement had been reached, thereby obviating the need to file a motion for summary judgment.

In opposition, plaintiff's counsel affirms that at the CCP conference he reported that a settlement had been reached with the Honda defendants, but denies that he represented to the court or to MRC's counsel that plaintiff was settling with MRC or LoDuca. Plaintiff's counsel further affirms that neither MRC nor LoDuca made an offer to settle the case, and neither were part of the settlement discussions with counsel for the Honda defendants. Thus, plaintiff maintains, the motion should be denied as MRC has not set forth a reasonable excuse for the delay in moving for summary judgment. In the event the motion is not denied as untimely, plaintiff requests that his cross motion for summary judgment be considered.

In reply, MRC states it discovered that plaintiff's action was not discontinued against it on April 12, and the next day the instant motion for summary judgment was filed. It is argued that the delay of less than 30 days was occasioned by a misunderstanding, misinterpretation or failure to properly hear a representation to the court regarding settlement, thus, MRC maintains it has established good cause for the late filing.

CPLR 3212(a) provides that, unless the court fixes a deadline for filing a summary judgment motion, such motion shall be made no later than 120 days after the filing of the note of issue, except with leave of court on "good cause" shown. Filing a motion for summary judgment beyond the time limit makes the motion untimely as a matter of law, especially when the proponent of said motion has neither sought leave to file late nor proffered an excuse demonstrating good cause for the lateness (*see* ***Miceli v State Farm Mut. Auto. Ins. Co.***, 3 NY3d 725, 786 NYS2d 379 [2004]; ***Brill v City of New York***, 2 NY3d 648, 791 NYS2d 261 [2004]; ***Johnson v Town of Fishkill***, 262 AD2d 532, 692 NYS2d 431 [2d Dept 1999]; ***Haqq v Synergy Gas***, 256 AD2d 442, 68 NYS2d 76 [2d Dept 1998]; ***Shmulevich v Gabbidon***, 253 AD2d 756, 677 NYS2d 495 [2d Dept 1988]). Here, the note of issue was filed on November 15, 2017. Therefore, any motion for summary judgment had to made by March 24, 2018.

MCR's explanation that the delay was due to a misunderstanding or misinterpretation regarding the settlement is insufficient to constitute good cause for the delay (*see* ***Miceli v State Farm Mut. Auto. Ins. Co.***, *supra*; ***Brill v City of New York***, *supra*; ***State Farm Fire & Cas. v Parking Sys. Valet Serv.***, 48 AD3d 550, 849 NYS2d 891 [2d Dept 2008]). Additionally, the explanation is disingenuous as in its motion to amend, MCR's counsel states that on March 5, 2018, he learned that an apparent settlement agreement had been reached between plaintiffs and the Honda defendants, and that it was not provided with a copy of the stipulation of discontinuance until April 12, 2018. Moreover, MCR has not offered an explanation as to what occurred between March 5 and March 24 to lull it into not making a timely motion. At the very least, MCR should have sought permission from the court to extend the deadline during this time as the anticipated stipulation of settlement or discontinuance had not been received. Therefore, the untimely motion for summary judgment must be denied, as the court is without authority to consider it on the merits (*see* ***Miceli v State Farm Mut. Auto. Ins. Co.***, *supra*; ***Brill v City of New York***, *supra*; ***First Union Auto Finance v Donat***, 16 AD3d 372, 791 NYS2d 596 [2d Dept 2005]). As the cross motion is also untimely, made without leave on good cause shown and not responsive to a timely motion for summary judgment, it too must be denied (*see* ***Sheng Hai Tong v K and K 7619, Inc.***, 144 AD23d 887, 41 NYS3d 266 [2d Dept 2016]; ***Giambona v Hines***, 104 AD3d 811, 961 NYS2d 303 [2d Dept 2013]; ***First Union Auto Finance v Donat***, *supra*).

With regard to the motion to amend, in the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient

or patently devoid of merit (*see* ***Edenwald Contr. Co. v City of New York***, 60 NY2d 957, 471 NYS2d 55 [1983]; ***Lui v Town of East Hampton***, 117 AD3d 689, 985 NYS2d 611 [2d Dept 2014]). Under this liberal pleading practice, a party may amend its pleadings to raise GOL § 15–108 as an affirmative defense at any time, even after trial, provided that the late amendment does not prejudice another party (*see* CPLR 3025 [b]; ***Whalen v Kawasaki Motors Corp.***, 92 NY2d 288, 293, 680 NYS2d 435 [1998]; ***Hill v St. Clare's Hosp.***, 67 NY2d 67, 499 NYS2d 904 [1986]).

GOL § 15–108 (a) provides, "[w]hen a release ... is given to one or more persons...claimed to be liable in tort for the same injury...it... reduces the claim of the releasor against the other tortfeasors to the extent of the amount stipulated by the release...or in the amount of the consideration paid for it, or in the amount of the released tortfeasor's equitable share of the damages under article fourteen of the civil practice law and rules, whichever is greatest." GOL § 15-108(b) provides that "[a] release given in good faith by the injured person to one tortfeasor as provided in subdivision (a) relieves him from liability to any other person for contribution as provided in article fourteen of the civil practice law and rules." A tortfeasor seeking the protections of this statute must plead it as an affirmative defense (*see* CPLR 3018[b]; ***Whalen v Kawasaki Motors Corp.***, 92 NY2d 288, 680 NYS2d 435 [1998]; ***Hill v St. Clare's Hosp.***, 67 NY2d 67, 499 NYS2d 904 [1986]).

The branches of the motion by MCR for leave to amend its answers to the complaint and to the third-party complaint by adding the GOL as an affirmative defense are unopposed. Thus, no prejudice or surprise to an opposing party has been demonstrated. Moreover, although MCR did not plead GOL § 15-108 as a defense in its original answer, it was not until after the note of issue was filed that the settlement occurred, and the instant motion was made within a month thereafter. The motion is also not late (*see* ***Whalen v Kawasaki Motors Corp.***, *supra*).

The Stipulation constitutes a release within the meaning of GOL § 15-108 (*see* ***Boeke v Our Lady of Pompei Sch.***, 73 AD3d 825, 901 NYS2d 336 [2d Dept 2010]; ***Tereshchenko v Lynn***, 36 AD3d 684, 828 NYS2d 185 [2d Dept 2007]). As plaintiff has settled with the Honda defendants and CARS, any verdict in favor of plaintiff against the remaining non-settling defendants, MRC and LoDuca, will be reduced in the amount of the settling defendants' equitable share of the damages, if any (*see* GOL 15-108[a]; ***Boeke v Our Lady of Pompei Sch.***, *supra*; ***Tereshchenko v Lynn***, *supra*; ***Utter v South Brookhaven Obstetric and Gynecological Assocs., P.C.***, 135 AD2d 811, 522 NYS2d 915 [2d Dept 1987]). Therefore, the branch of the motion seeking to add the statute as an affirmative defense to MCR's answer to the complaint is granted.

However, patently devoid of merit is the proposed amendment to the third-party answer to add GOL § 15-108(b). The Stipulation serves to relieve the Honda defendants and CARS from liability to MCR and LoDuca for contribution (*see* GOL § 15-108 (b); ***Ziviello v Boyle***, 90 AD3d 916, 935 NYS2d 89 [2d Dept 2011]; ***Boeke v Our Lady of Pompei Sch.***, *supra*; ***Tereshchenko v Lynn***, *supra*; ***Weinstock v Jenkin Contr. Co., Inc.***, 134 AD2d 254, 520 NYS2d 589 [2d Dept 1987]). Plaintiff has not settled with MCR; thus, this section in the statute does not apply it. Therefore, the branch of the motion to amend the third-party answer is denied.

The branch of MRC's motion to compel is unopposed, and, thus, granted. Plaintiff, if he has not already done so, is directed to provide a copy of the release(s) issued to the Honda defendants and CARS forthwith.

Accordingly, the motion and cross motion for summary judgment are denied. The motion to amend the pleadings and to compel disclosure is granted only to the extent of permitting MRC to add GOL § 15-108(a) to its answer to the complaint, and directing plaintiff to provide the release; and it is further

ORDERED that if applicable, within 30 days of the entry of this decision and order, that defendant MRC Recovery is also hereby directed to give notice to the Suffolk County Clerk as required by CPLR 8019(c) with a copy of this decision and order and pay any fees should any be required.

ORDERED defendant MRC Recovery serve a copy of this decision and order with a notice of entry on plaintiff and other defendants.

Dated: March 28, 2019
Riverhead, New York

WILLIAM G. FORD J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION