

**100 Mile Fund, LLC v Rodriguez**

2019 NY Slip Op 34631(U)

June 10, 2019

Supreme Court, Westchester County

Docket Number: Index No. 55458/2017

Judge: Charles D. Wood

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER**

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**100 MILE FUND, LLC,**

Plaintiff,

**DECISION & ORDER**

Index No.: 55458/2017

Sequence Nos. 1&2

-against-

**CIRILO RODRIGUEZ, BRUCE R. ALTER, ESQ.,  
ALTER & BRESCIAS, LLP and GEORGE  
ECHEVARRIA, ESQ.,**

Defendants.

-----X  
**BRUCE R. ALTER, ESQ. and ALTER & BRESCIA, LLP,**

**Third-Party Plaintiffs,**

-against-

**GEORGE ECHEVARRIA, ESQ.,**

**Third-Party Defendant.**

-----X  
**WOOD, J.**

New York State Courts Electronic Filing (“NYSCEF”) Document Numbers 114-146,148, 150-166, were read in connection with moving defendant George Echevarria, Esq. (“Counsel”) motion dismissing the complaint, impose sanctions on plaintiff, 100 Mile Fund, LLC (“Lender”), and an award of reasonable attorney fees, costs and disbursements (Seq 1), and motion to dismiss the cross claims (Seq 2).

Counsel had represented 173 Cortlandt Street, LLC, a New York Limited Liability Company (“Borrower”), in connection with the closing of a loan in the principal amount of \$9,500,000, made to Borrower, and related entities, by Lender, pursuant to a loan agreement (“Loan”). Counsel has also acted as attorney to defendant Cirilo Rodriguez (“Rodriguez”), as guarantor in connection with the Loan.

As part of the closing of the Loan, Counsel rendered an opinion letter dated August 6, 2015 (“Opinion Letter”), representing that there were no judgments against Rodriguez. Subsequently, Lender learned that there was in fact a money judgment against Rodriguez, and others for \$1,785,000, in favor of ATS One Holdings Corp. entered by the Westchester County Clerk on February 20, 2015 (“ATS Judgment”).

It is alleged that Lender relying upon the Opinion Letter, issued a default on the Loan when Lender learned that there was the ATS Judgment pending against Rodriguez. This allegedly resulted in Rodriguez having to defend this action, and bearing other expenses. In fact, the Amended Verified Complaint paragraph 30 states that Borrowers’ (which included Rodriguez) failure to disclose the ATS Judgment and ATS collection efforts was in contravention of Section 3.1.4 of the Loan Agreement, and was an Event of Default pursuant to Section 10.1 of the Loan Agreement. Lender claims if it knew that Rodriguez had a \$1.4 million judgment against him and that the judgment creditor was actively pursuing collection, it never would have entered into the Loan.

Subsequently, Borrowers each filed bankruptcy petitions in the Bankruptcy Court of the Southern District of New York, and on March 18, 2016, Rodriguez personally filed a bankruptcy petition in the Bankruptcy Court for the Southern District of New York. Ultimately, the personal bankruptcy was dismissed by way of a Consent Order entered on March 8, 2017, whereby the case

was dismissed with prejudice, barring the filing of a bankruptcy petition by Rodriguez until September 6, 2018. On March 9, 2017, the Bankruptcy Court entered an Order Pursuant to 11 USC 105(a) and 363 authorizing and approving the Trustee's sale of the debtors' real properties to Lender. Lender closed on the sale on or about March 31, 2017. As for the corporate debtors, as of March 31, 2017, Lender was owed in excess of \$11.6 million under the Loan.

After the instant motions were filed, Lender and Counsel, and others entered into a Stipulation of Settlement dated March 10, 2019 ("Settlement"), in which it was agreed that this action would be discontinued with prejudice. Lender executed a Release dated March 26, 2019, releasing Counsel from any claims including any an all claim arising out of or in any way connected with this action. This Stipulation was so ordered by the court (Lefkowitz,J.), on May 13, 2019.

Now, based upon the foregoing, the motions are decided as follows:

It is well settled that pursuant to CPLR 3211(a)(7) "upon a motion to dismiss [for failure to state a cause of action], the sole criterion is whether the subject pleading states a cause of action, and if, from the four corners of the complaint, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, then the motion will fail. The court must afford the pleading a liberal construction, accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (Esposito v Noto, 90 AD3d 825 [2d Dept 2011]; (Sokol v Leader, 74 A.D.3d 1180 [2d Dept 2010]); (Bua v Purcell & Ingrao P.C., 99 AD3d 843, 845 [2d Dept 2012] ly to appeal denied, 20 NY3d 857 [2013]). This does not apply to legal conclusions or factual claims which were either inherently incredible or flatly contradicted by documentary evidence (West Branch Conservation Assn. v County of Rockland, 227 AD2d 547 [2d Dept 1996]). If the court considers

evidence submitted by a defendant in support of a motion to dismiss under CPLR 3211 (a)(7), a court may consider affidavits submitted by the plaintiff to remedy any defects in the complaint,” and if the court does so, “the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one” (Leon v Martinez, 84 NY2d 83, 88 [1994]; Uzzle v Nunzie Ct. Homeowners Ass'n, Inc., 70 AD3d 928, 930 [2d Dept 2010]); Greene v Doral Conference Ctr. Assoc., 18 AD3d 429, 430 [2d Dept 2005]). Affidavits and other evidentiary material may also be considered to “establish conclusively that plaintiff has no cause of action” (Simmons v Edelstein, 32 AD3d 464, 465 [2d Dept 2006]), or where a meritorious claim lies within inartful pleadings (Lucia v Goldman, 68 AD3d 1064, 1065 [2d Dept 2009]). More succinctly, under CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, but if the court considers evidentiary material, the criterion then becomes “whether the proponent of the pleading has a cause of action” (Sokol v Leader, 74 AD3d 1180, 1181-82 [2010]; Marist College v Chazen Env'tl. Serv. 84 AD3d 11181 [2d Dept 2011]). Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus (Dee v Rakower, 112 AD3d 204 [2d Dept 2013]).

Turning to Motion Seq 1, in his reply papers, Counsel notifies the court of the Settlement, which resulted in Rodriguez remaining as the sole party against whom Lender is seeking relief. In light of the Settlement, Counsel’s motion (Seq 1) to dismiss plaintiff’s complaint as against him is Granted.

As for Counsel’s motion (Seq 2), to dismiss the First, Second and Third Cross-Claims asserted by Rodriguez in his Answer to the Amended Verified Complaint, Counsel claims that the Settlement vitiates all of Rodriguez’ claims. Counsel argues that as Rodriguez’ claim against him is based upon Lender’s claim against him and the latter has been settled with prejudice then,

Rodriguez claim is null and void. In other words, the necessary predicate for Rodriguez to claim that the default was triggered by Lender's reliance upon the Opinion Letter has been extinguished by the Settlement and consequently all of Rodriguez's claims no longer have any force or validity. Counsel also argues that the Settlement bars Rodriguez from pursuing a contribution claim, and if there is a finding of liability against Rodriguez for defaulting on the Loan that he personally guaranteed and damages are imposed upon him, these consequences will be due solely to his conduct in breach of the Loan Agreement he had with Lender and will have absolutely nothing to do with the Opinion Letter.

The Settlement particularly notes that it does not pertain to the claims and defenses asserted by and between Lender and Rodriguez in the main action, which remains in existence and subject to this litigation, following entry of the Settlement.

By virtue of Counsel's Settlement with Lender, Counsel was relieved of liability to any other tortfeasors for contribution (General Obligations Law § 15-108[b]); (Grovenger v Lab. Procedures, Inc., 132 AD2d 289, 291 [3d Dept 1987]). Pursuant to General Obligations Law §15-108(b), a release made in good faith by the injured person to one tortfeasor relieves him [or her] from liability to any other person for contribution as provided in article fourteen of the CPLR. "The overall scheme and purpose of the section is to promote settlements in multiple-party tort cases by clearly defining the effect the settlement will have on collateral rights and liabilities in future litigation" (Lettiere v Martin Elevator Co., 62 AD2d 810, 814 (2d Dept 1978), *aff'd*, 48 NY2d 662 [1979]). The Second Department has found that in an action for legal malpractice, general release executed by plaintiffs in favor of third-party defendants relieved them from liability to third-party plaintiffs for

contribution, absent indication that release was not executed in good faith (Balkheimer v Spanton, 103 AD3d 603 (2d Dept 2013)).

Here, Lender executed a general release in favor of Counsel, which states in pertinent part:

For good and valuable consideration,...[Lenders as Releasors thereunder], ..release and discharge George W. Echevarria, Esq... including but not limited to any and all claims or counterclaims arising out of or in any way connection with the action filed in the Supreme Court, Westchester County, bearing Index Number 55458/2017 (*See Release ex A to Counsel's Affirmation*).

This Settlement constituted a release within the meaning of General Obligations Law § 15-108, since it was intended to release Counsel from the action and served to relieve it "from liability to any other person for contribution as provided in article fourteen of the civil practice law and rule. There is no indication in the record that the release was not executed in good faith (Balkheimer v Spanton, 103 AD3d 603, 603 (2d Dept 2013)). After settlement of a main action, a third-party complaint can stand only if it asserts a claim for indemnification, and not contribution (McHugh v Int'l Components Corp., 118 AD2d 762, 763 (2d Dept 1986)). Accordingly, the same holds true here, and Rodriguez may not recover on the cross claim for contribution (Boeke v Our Lady of Pompei Sch., 73 AD3d 825, 827 [2d Dept 2010]).

Accordingly, it is hereby

ORDERED, that defendant/third party defendant George Echevarria, Esq.'s motions to dismiss (Seqs 1 and 2) are Granted, the complaint is dismissed as to George Echevarria, Esq; the Third Party Action is dismissed; and the remainder of the action is continued, and the Clerk is directed to enter judgment accordingly; and it is hereby

ORDERED, that the remaining parties are directed to appear in the Settlement Conference Part, courtroom 1600 on July 9, 2019, at 9:15 am at the Westchester County Courthouse, 111 Dr. Martin Luther King Jr. Blvd., White Plains, New York 10601.

The arguments by the parties not explicitly addressed herein have been reviewed and deemed to be devoid of merit. This constitutes the Decision and Order of the Court.

The Clerk shall mark his records accordingly.

**Dated: June 10, 2019**  
**White Plains, New York**



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**HON. CHARLES D. WOOD**  
**Justice of the Supreme Court**

TO: All Parties by NYSCEF