

Smiley v 31 S. St. LLC
2020 NY Slip Op 35169(U)
August 5, 2020
Supreme Court, Westchester County
Docket Number: Index No. 55249/2019
Judge: William J. Giacomo
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
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
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.

LEROY SMILEY,

Plaintiff,

– against –

Index No. 55249/2019

31 SOUTH STREET LLC, EL CASTILLO RESTAURANT
& GRILL, MARIA MARMOLEJOS AND STALYN
MARMOLEJOS,

Defendants.

Motion Seq. 2 & 3

----- x
31 SOUTH STREET, LLC,

Third Party Plaintiff,

DECISION & ORDER

– against –

GABRIEL MATIAS and AMARELIS MATIAS,
Third Party Defendants.

----- x
EL CASTILLO RESTAURANT & GRILL CORP. d/b/a EL
CASTILLO RESTAURANT AND GRILL and MARIA
MARMOLEJOS,

Second Third-Party Plaintiffs,

– against –

GABRIEL MATIAS and AMARELIS MATIAS,

Second Third-Party Defendants.

In an action to recover damages for personal injuries the third-party defendants/second third-party defendants move, pursuant to CPLR 3211(a)(5) and 3212, to dismiss the third-party complaint (motion sequence #2) and the second third-party complaint (motion sequence #3):

Smiley v. 31 South Street, LLC, Index No. 55249/2019

Papers Considered

1. Notice of Motion/Affirmation of Gerard Ferrara, Esq./Exhibits A-E;
2. Affirmation of Jeffrey J. Cunningham, Esq. in Opposition;
3. Reply Affirmation of Gerard Ferrara, Esq.
4. Notice of Motion/Affirmation of Gerard Ferrara, Esq./Exhibits A-G.

Factual and Procedural Background

Plaintiff Leroy Smiley commenced this Dram Shop action for personal injuries allegedly sustained on November 25-26, 2017. Plaintiff was a pedestrian struck by a motor vehicle which he alleges was operated by an intoxicated person. The complaint alleges that Gabriel Matias and Roberto Martinez were served alcohol at El Castillo Restaurant & Grill located at 31 South Street, Mt. Vernon, New York. The complaint asserts that the defendants Maria Marmolejos and Stalyn Marmolejos are the owners of El Castillo Restaurant and that 31 South Street LLC is the owner of the property.

The defendant 31 South Street commenced a third-party action against Gabriel Matias and Amarelis Matias, the operator and owner of the vehicle, seeking common law indemnification and contribution.

El Castillo and Maria Marmolejos commenced a second third-party action against the Matiases seeking common law indemnification and contribution.

The Matiases move, by separate motions, to dismiss the third-party action and the second third-party action. They move pursuant to CPLR 3211(a)(5), arguing that the third-party actions must be dismissed against them based upon a release, and pursuant to CPLR 3212 for summary judgment.

The Matiases argue that plaintiff commenced a previous personal injury action against them in Westchester Supreme Court, Index No. 70767/2017, seeking damages for the motor vehicle accident that occurred on November 25, 2017. In settlement and full satisfaction of the claim, plaintiff executed a release for \$50,000. The Matiases argue that third party actions cannot be maintained against them, pursuant to General Obligations Law 15-108, because they executed a release in good faith relieving them of any further claims for the accident.

In opposition, 31 South Street argues that it has a valid indemnification claim. If 31 South Street, the owner of the property, is liable to plaintiff it would be solely upon the negligence of Garbial Matias and no negligence on its part.

El Castillo and Marmolejos have not opposed the motion.

Discussion

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*see Winegrad v N.Y. Univ. Med.*

Smiley v. 31 South Street, LLC, Index No. 55249/2019

Ctr., 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d at 853).

The Matiases acknowledge that Gen. Obligations Law 15-108 does not bar indemnity claims, however, they argue that the third-party actions must still be dismissed. The Matiases argue that while the third-party actions seek contribution and indemnification, indemnification would not be proper and therefore, the third-party claims are only in effect seeking contribution and is barred by the general release.

Pursuant to General Obligations Law 15-108(b), a settling tortfeasor cannot be liable for a contribution claim. However, because indemnification involves shifting the entire loss to another, indemnification claims are not barred by 15-108 (see *Rosado v Proctor & Schwartz, Inc.*, 66 NY2d 21, 24 [1985]).

"Basically, in contribution the loss is distributed among tort-feasors, by requiring joint tort-feasors to pay a proportionate share of the loss to one who has discharged their joint liability, while in indemnity the party held legally liable shifts the entire loss to another" (*Rosado v Proctor & Schwartz, Inc.*, 66 NY2d at 23-24).

The Dram Shop act, codified in the General Obligations law, provides:

Any person who shall be injured in person, property, means of support, or otherwise by any intoxicated person, or by reason of the intoxication of any person ... shall have a right of action against any person who shall, by unlawful selling to or unlawfully assisting in procuring liquor for such intoxicated person, have caused or contributed to such intoxication; and in any such action such person shall have a right to recover actual and exemplary damages (Gen Oblig § 11-101).

"To establish a cause of action under the Dram Shop Act, a plaintiff is required to prove that the defendant sold alcohol to a person who was visibly intoxicated and that the sale of that alcohol bore some reasonable or practical connection to the resulting damages" (*Flynn v Bulldogs Run Corp.*, 171 AD3d 1136, 1137 [2d Dept 2019] quoting *Pinilla v City of New York*, 136 AD3d 774, 776-777 [2016]).

Here, if the third-party plaintiff, 31 South Street, or the second third party plaintiffs, El Castillo Restaurant & Grill Corp. and Marmolejos, are liable to the plaintiff it would be based upon their own violation of Gen. Oblig 11-101. Thus, although the third party complaint and the second third party complaint assert causes of action for common law indemnification, under the circumstances herein, those causes of action are, in actuality, causes of action only for contribution (see *Giglio v NTIMP, Inc.*, 86 AD3d 301, 312 [2d Dept 2011]).

Smiley v. 31 South Street, LLC, Index No. 55249/2019

While the third party and second third party plaintiffs would be entitled to seek contribution from the Matiases, the Matiases have settled with the plaintiff and executed a release. Therefore, pursuant to Gen. Oblig. 15-108, any contribution claims are barred against them.

However, the Court notes that, pursuant to General Obligations Law § 15-108(a), when a plaintiff settles an action with one tortfeasor, the recovery against the remaining tortfeasors shall be reduced by the amount of the settlement or by the settling tortfeasor's equitable share of the damages, whichever is greater (see *Boeke v Our Lady of Pompei Sch.*, 73 AD3d 825, 827 [2d Dept 2010]).

Accordingly, it is

ORDERED that the motion of the third-party defendants to dismiss the third-party complaint pursuant to CPLR 3211(a)(5) is **GRANTED** and the third-party complaint is **DISMISSED** (motion sequence #2); and it is further

ORDERED that the motion of the second third-party defendants to dismiss the second third party complaint pursuant to CPLR 3211(a)(5) is **GRANTED** and the second third-party complaint is **DISMISSED** (motion sequence #3).

Counsel for all remaining parties are directed to appear in the **Compliance Part, room 800**, for further proceedings at a date and time to be provided.

Dated: White Plains, New York
August 5, 2020



HON. WILLIAM J. GIACOMO, J.S.C.