

George S. Kaufman Charitable Found. v Kearns

2022 NY Slip Op 31595(U)

May 16, 2022

Supreme Court, New York County

Docket Number: Index No. 155065/2020

Judge: Joel M. Cohen

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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THE GEORGE S. KAUFMAN CHARITABLE
FOUNDATION, BY ITS TRUSTEE, BESSEMER TRUST
COMPANY, N.A., THE GEORGE S. KAUFMAN
DISPOSITIVE TRUST, BY ITS TRUSTEE, BESSEMER
TRUST COMPANY, N.A., BESSEMER TRUST
COMPANY, N.A. AS PRELIMINARY EXECUTOR OF THE
ESTATE OF GEORGE S. KAUFMAN,

Plaintiffs,

- v -

THOMAS D. KEARNS, OLSHAN FROME WOLOSKY LLP,
DAVID LEE, STAPPER & VAN DOREN, GOLDWEBER
EPSTEIN LLP, GSK NEW VENTURES ASTORIA LLC,

Defendants.

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THOMAS KEARNS, OLSHAN FROME WOLOSKY LLP

Third-Party Plaintiffs,

- v -

HAHN & HESSEN LLP, RHONA KISCH

Third-Party Defendants.

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INDEX NO. 155065/2020
MOTION DATE 01/06/2022
MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595823/2020

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 98, 99, 100, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 121, 122

were read on this motion to DISMISS.

Upon the foregoing documents, it is

ORDERED that the Third-Party Defendants' motion to dismiss the Third-Party

Complaint is **GRANTED**.

The Third-Party Plaintiffs' claim for contribution "is statutorily barred" by New York General Obligations Law ("GOL") § 15-108 because the Release Agreement, executed by Plaintiffs in the main action, released the Third-Party Defendants of all claims "related to or involving, in any way, the Post-Mortem Advice or Third-Party Action" (NYSCEF 80 [Release Agreement]; *Williams v New York City Health and Hosps. Corp.*, 262 AD2d 231, 232 [1st Dept 1999] [holding "[t]o the extent that the third-party action is seeking contribution, it is statutorily barred"]; *Balkheimer v Spanton*, 103 AD3d 603, 603 [2d Dept 2013] [dismissing third-party claim for contribution because "the plaintiffs executed a general release in favor of the third-party defendants" and "[t]here is no indication in the record that the release was not executed in good faith"]).

GOL § 15-108 [a] provides that "a release given to one of two or more persons liable or claimed to be liable in tort for the same injury" reduces the claim of the releasor against the other tortfeasors in the amount stipulated by the release, the consideration paid for it, or the released tortfeasor's equitable share of the damages, whichever is greatest. And under GOL § 15-108 [b], "[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." "The general purpose of section 15-108 of the General Obligations Law is to encourage settlements," with sub-section [b], in particular, "permit[ting] a defendant to settle with plaintiff without fear of being brought back into the action by another defendant seeking contribution" (*Rock v Reed-Prentice Div. of Package Mach. Co.*, 39 NY2d 34, 40-41 [1976]).

A release agreement falls within the ambit of the statute, and thus bars contribution claims, if (1) the plaintiff receives, as part of the agreement, "monetary consideration greater than one dollar"; (2) the release "completely or substantially terminates the dispute between the

plaintiff . . . and the person who was claimed to be liable”; and (3) the release “is provided prior to entry of judgment” (GOL § 15-108 [d]).

Here, the Release Agreement, on its face, satisfies these conditions. Plaintiffs received, as part of the Release Agreement, monetary consideration greater than one dollar (*i.e.*, \$10), along with “other good and valuable consideration” (NYSCEF 80 ¶ 2). The Release Agreement also “completely or substantially terminates the dispute between” Plaintiffs and their counsel, the Third-Party Defendants (*id.* ¶ 3 [releasing “any and all claims . . . related to or involving, in any way, the Post-Mortem Advice and/or Third Party Action”]). And the Release Agreement was “provided prior to entry of judgment” (*id.* at 3-4).

The Third-Party Plaintiffs contend that discovery is needed to determine whether the Release was “given in good faith by the injured [party],” as required under GOL § 15-108 [b], but the record here does not raise “a genuine question of bad faith” (*compare with Rotter v Leahy*, 93 F Supp 2d 487, 495 [SD NY 2000]). Although Third-Party Defendants represent Plaintiffs as counsel in the main action, the Release Agreement states that they “each sought and obtained advice from their respective, independent counsel before entering into th[e] Agreement” (*id.* ¶ E). The affidavit submitted by Bessemer Trust on this motion, moreover, confirms that it “considered carefully the allegations in the contribution claim and consulted about them with outside counsel that is not otherwise involved in this litigation” before agreeing to the Release (NYSCEF 79 ¶ 2 [Orlowski Aff.]; *see also id.* ¶ 4 [“Bessemer Trust executed the Release Agreement freely, voluntarily and with full knowledge and understanding of the facts, circumstances and consequences of doing so.”])).

And contrary to the Third-Party Plaintiffs’ suggestion, neither the timing of the Release nor the amount of the settlement casts doubt on the Releasor’s good faith (*In re Refco Inc. Sec.*

Litig., 07-MD-1902 JSR, 2012 WL 4053939, at *9 [SD NY Aug. 8, 2012] [“New York courts have seen nothing suspicious about releases that are entered into only after a third-party complaint is filed” since “it is perfectly plausible that a plaintiff might not be considering whether to release a possible party until a later point in the case—and it is only after the third-party gets sued that the parties find it important to consider a release”], *report and recommendation adopted sub nom. In re Refco Sec. Litig.*, 07 MDL 1902 JSR, 2012 WL 4009175 [SD NY Sept. 12, 2012]; *Ades v Deloitte & Touche*, 1993 WL 362364, *18 [SD NY Sept. 17, 1993] [“A release even for nominal damages will not be evidence of collusion or bad faith if the record otherwise supports allegations of good faith”]).

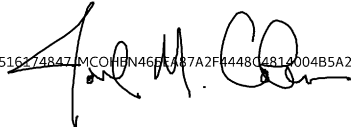
The authorities on which the Third-Party Plaintiffs rely, as part of their argument about good faith, are inapposite. In *Rotter v Leahy*, the record suggested “a possible finding of collusion between [the parties to the release agreement] to support a claim of bad faith” because, “the day after the Release was signed,” the releasee undermined a related arbitration and the releasor failed to provide an affidavit denying wrongdoing (93 F Supp 2d at 496). Other cited cases also miss the mark. *Lieberman v Green*, 139 AD3d 815 [2d Dept 2016], for example, does not address GOL § 15-108 or claims for contribution. And in *Kennedy v Basil*, a federal magistrate judge found “issues of fact” about good faith based, in part, on the familial relationship between the releasor and releasee and concerns that the release “would increase the liability of another tortfeasor” (*Kennedy v Basil*, 18-CV-2501(ALC)(KNF), 2019 WL 2348123, at *2 [SD NY June 3, 2019]). The record here, by contrast, raises no analogous concerns about improper collusion or the Third-Party Plaintiffs’ liability. Moreover, the releasor, Bessemer Trust (in its fiduciary capacities), submitted an affidavit confirming that it consulted with independent counsel before executing the Release Agreement.

The upshot of the Release Agreement is to leave intact the claims and defenses of each party in the main action. It does not enlarge the Third-Party Plaintiffs’ exposure in the main action, because they can still argue to the fact-finder that the Estate’s lawyers, or others, were responsible for causing some or all of the alleged harm to the Estate in that action. It may limit the Estate’s opportunity for recovery, insofar as the fact-finder allocates some portion of liability to a released party, because the Estate could not make itself whole by recovering from such party (NYSCEF 122 at 19-20 [oral arg. tr.]).¹ But that is the risk the Estate has signed onto, based on the determination it has made, with the benefit of independent counsel, that any potential claim against its lawyers is basically worthless (*id.* at 16, 46). And, absent some evidence to suspect improper collusion or other risk of prejudice to the Third-Party Plaintiffs not shown here, the Court will not second-guess that determination.

Accordingly, it is

ORDERED that the Third-Party Defendants’ motion to dismiss the Third-Party Complaint is granted, the Third-Party Complaint is dismissed in its entirety, and the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

<p><u>5/16/2022</u> DATE</p>	 <small>20220516274847JMC04FN46F4487A2F4448C4814004B5A272A177</small> <hr/> JOEL M. COHEN, J.S.C.																				
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¹ THE COURT: “If a jury, or whoever, finds that Hahn was X percent liable or responsible for the loss, that loss is then going to be left with . . . the estate.”
 THIRD-PARTY DEFENDANTS’ COUNSEL: “Right.”