

Kennedy v West
2024 NY Slip Op 35283(U)
March 11, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 611782/2018
Judge: Joseph A. Santorelli
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SHORT FORM ORDER

INDEX No. 611782/2018

CAL No. _____

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY**PRESENT:**Hon. JOSEPH A. SANTORELLI
Justice of the Supreme CourtMOTION DATE 2-8-2024SUBMIT DATE 2-8-2024

Mot. Seq. # 015 - MG

-----X
CLAIRE KENNEDY and THOMAS L.
KENNEDY,

Plaintiffs,

- against -

STEVEN F. WEST, D.O., CHRISTOPHER
SHACKLES, M.D., and MOHAMED
MANSOUR, M.D.,

Defendants.

-----X
STEVEN F. WEST, D.O.,

Third- Party Plaintiff,

- against -

JOHANNES VULTO, THE VILLAGE
CHEESE SHOP AND CLAIRE M.
KENNEDY, as Real Party in Interest
And Indemnitor Of Vulto Creamery, L.L.C.,

Third- Party Defendants,

-----X
MOHAMED MANSOUR, M.D.

Second Third- Party Plaintiff,

- against -

ALEXANDER BRACEY, M.D.,

Second Third- Party Defendant.
-----X**CARMAN CALLAHAN & INGHAM, LLP***Attorney for Plaintiffs*266 Main Street
Farmingdale, NY 11735**LETITIA JAMES, ESQ.****STATE OF NEW YORK ATTORNEY GENERAL***Attorney for Defendants- BRACEY and*

SHACKLES

28 Liberty Street
New York, NY 10005**BARBIERO, BISCH, O'CONNOR &
COMMANDER LLP***Attorney for Defendant- WEST*320 Carleton Avenue, Suite 7500
Central Islip, NY. 11722**WAGNER, DOMAN, LETO, & DiLEO, P.C.***Attorney for Defendant- MANSOUR*227 Mineola Boulevard
Mineola, NY 11501**MARSHALL DENNEHEY WARNER
COLEMAN & GOGGIN***Attorney for Third Party Defendant- VILLAGE
CHEESE*175 Pinelawn Road, Suite 250
Melville, NY 11747

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Upon the following papers read on defendant Christopher Shackles, M.D.'s ["Shackles"] motion to discontinue the action as against him with prejudice, and amend the caption to remove him from the case, e-filed in the NYSCEF system as documents 551-561, and opposition papers filed as documents 563-564, and reply papers filed as document 565 [mot seq. #015];

Defendant's motion is hereby decided as follows:

On March 7, 2022, plaintiffs executed a stipulation of discontinuance discontinuing the plaintiffs' claims against Shackles only, with prejudice [document #490]. This stipulation was executed by counsel for plaintiffs and counsel for defendant Shackles. Defendant Shackles now moves to dismiss both plaintiffs' complaint and the cross-claim brought by defendant The Village Cheese Shop ["VCS"] as against him, arguing that since plaintiffs signed a release in favor of Shackles, the complaint and cross-claims should be dismissed as against him.

Defendant VCS opposes Shackles' motion inasmuch as it may affect the cross-claims contained in its' answer against defendant Shackles. No other defendant has interposed cross-claims against defendant Shackles, nor has any other defendant opposed defendant Shackles' motion to be dismissed from the case.

Counsel for Shackles correctly asserts that "[T]he remaining Defendants in the main action would not be prejudiced by discontinuance of the action as against the Defendant Christopher Shackles, M.D., only, as no Cross-Claims have been asserted by either of them against him. Review of the Answers served on behalf of the Defendants Steven F. West, D.O. and Mohammed Mansour, M.D., evidences the lack of prejudice that would result from granting the relief requested herein". While it is true that neither defendant West nor defendant Mansour have interposed cross-claims against defendant Shackles, third party defendant VCS, who opposes Shackles' motion, has interposed a third party cross-claim against defendant Shackles, and at this point is unwilling to stipulate to discontinue its cross-claim.

In its answer dated February 11, 2022 [document #558], defendant VCS interposed a cross-claim against defendant/third party defendants, including, *inter alia*, Shackles, alleging as follows:

51. If plaintiff and third-party plaintiff sustained damages in the manner alleged in the Verified Complaint and Verified Third-Party Complaint, all of which is denied by third-party defendant TVCS, such damages were caused in whole or in part by the negligence, carelessness, culpable conduct and/or breach of duty of the defendants/third-party co-defendants, Christopher Shackles, M.D., Mohamed Mansour, M.D., Johannes Vulto, Claire M. Kennedy, as Real Party in Interest and Indemnitor of Vulto Creamery, LLC., and of third parties who are not a party to this action, with no negligence, carelessness, culpable conduct and/or breach of duty on the part of third-party defendant TVCS contributing thereto.

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52. By reason of the foregoing, third-party defendant TVCS is entitled to full common law indemnity and/or contribution from, and to judgment over and against defendants/third-party co-defendants, Christopher Shackles, M.D., Mohamed Mansour, M.D., Johannes Vulto, Claire M. Kennedy, as Real Party in Interest and Indemnitor of Vulto Creamery, LLC., for all or any part of any verdict or judgment which any party to this action may recover against third-party defendant TVCS, all determined in accordance with the relative culpability of each party liable herein.

“While the authority of a court to grant or to deny an application made to it pursuant to CPLR 3217[b] by a party seeking voluntarily to discontinue litigation is within its sound discretion, ordinarily a party cannot be compelled to litigate and, absent special circumstances, discontinuance should be granted (*Tucker v. Tucker*, 55 N.Y.2d 378, 383, 449 N.Y.S.2d 683, 434 N.E.2d 1050)”. *Zayas v Schenker*, 217 AD3d 738, 739-40 [2d Dept 2023]).

In *Seff v. Meltzer, Lippe, Goldstein & Schlissel, P.C.*, 55 AD3d 592, 593-594 [2d Dept. 2008], the defendants moved, among other things, for summary judgment dismissing the complaint on the grounds that the plaintiff executed a release. The Court held that the defendants demonstrated their prima facie entitlement to judgment as a matter of law by presenting evidence that the plaintiffs executed general releases in their favor, which barred the action against them (*Id.*, see also CPLR 3211 [a] [5]). “A release will not be treated lightly, and will be set aside by a court only for duress, illegality, fraud, or mutual mistake” (*Shklovskiy v Khan*, 273 AD2d 371, 372, 709 NYS2d 208 [2000]; see *Mangini v McClurg*, 24 NY2d 556, 563, 249 NE2d 386, 301 NYS2d 508 [1969]; *Haynes v Garez*, 304 AD2d 714, 715, 758 NYS2d 391 [2003]). In opposition, the plaintiffs must raise a triable issue of fact (see *Friends of Avalon Preparatory School v Ehrenfeld*, 6 AD3d 658, 659, 775 NYS2d 560 [2004]).

Defendant Shackles is entitled to a dismissal of the plaintiffs’ direct claims against him.

General Obligations Law § 15-108 states:

- (a) Effect of release of or covenant not to sue tortfeasors. When a release or a covenant not to sue or not to enforce a judgment is given to one of two or more persons liable or claimed to be liable in tort for the same injury, or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms expressly so provide, but it reduces the claim of the releasor against the other tortfeasors to the extent of any amount stipulated by the release or the covenant, 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 the greatest.
- (b) Release of tortfeasor. A release given in good faith by the injured person to one tortfeasor as provided in subdivision (a) relieves him from liability to

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any other person for contribution as provided in article fourteen of the civil practice law and rules.

“After settlement of a first-party action, a third-party complaint can stand only if it asserts a claim for indemnification, and not contribution (see, General Obligations Law § 15–108; **McDermott v. City of New York**, 50 N.Y.2d 211, 220, 428 N.Y.S.2d 643 [1980]; **Riviello v. Waldron**, 47 N.Y.2d 297, 306–307, 418 N.Y.S.2d 300, [1979]”. **McHugh v Intl. Components Corp.**, 118 AD2d 762, 763 [2d Dept 1986].

The Court in **McDermott, Id.**, at 219-220, discussed the distinction between a claim for contribution and a claim for indemnification as it related to a joint tort-feasor settlement:

[A]s this court has previously noted, “[e]ven upon a cursory reading of the statute, it becomes evident that [General Obligations Law] section 15-108 is meant to be read in conjunction with the contribution rights set forth in article 14” of the CPLR (**Riviello v Waldron**, 47 NY2d 297, 306; see **Rock v Reed-Prentice Div. of Package Mach. Co.**, 39 NY2d 34, 38-39). Section 15-108 was generally designed to foster settlements in multiple party tort cases by prescribing the effects of the settlement and altering rules of law which were not conducive to the negotiating process (**Rock v Reed-Prentice Div. of Package Mach. Co.**, supra, at pp 40- 41). [T]hus, subdivision (a) defines the rights of the plaintiff who settles with one joint tort-feasor, allowing plaintiff to pursue his claim against other joint tort-feasors, with certain limitations. *Subdivision (b) deals with the released tort-feasor, and precludes a claim for contribution from being asserted against him.* By the same token, subdivision (c) prohibits the released party from obtaining contribution from the remaining tort-feasors. (emphasis added).

The effect of the statute is to permit a joint tort-feasor to buy his peace by terminating, completely, his rights and liabilities in the action. It is obvious that this statutory scheme can find application only where the tort-feasors share, in some degree, responsibility for the wrong. . . . By contrast, where indemnity is at issue, one party is alleging that the other party should bear complete responsibility for the tort. Should the party seeking indemnity negotiate a settlement, this in itself would have no consequences upon the indemnity claim. Irrespective of the amount of the settlement, the indemnitor is either totally responsible or not.

The cross-claim by VCS against Shackler sounds in contribution, rather than indemnity. Indemnity arises out of a contract, which may be express or implied in the law. (See **Rosado v. Proctor & Schwartz**, 66 N.Y.2d 21 [1985]. Mere use of the term “indemnification” is insufficient to evade the bar of subdivision (b) of section 15–108 of the General Obligations Law (**Siffin v. Rambuski**, 87 A.D.2d 979 (4th. Dept. 1982). “A proper basis for the claim must be stated. If there is actual wrongdoing by the person seeking to assert an indemnification claim, that claim is not viable.” **Westchester County v Welton Becket Assoc.**, 102 AD2d 34, 47 [2d. Dept 1984], affd, 66 N.Y.2d 642

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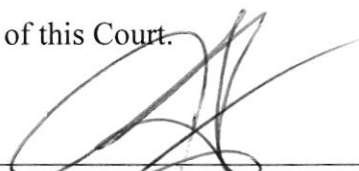
[1985]. (See also *Westchester County v Welton Becket Assoc.*, 102 AD2d 34, 48-49 [2d Dept 1984], affd, 66 N.Y.2d 642 [1985] “[I]n short, the (third party defendants are entitled to withdraw from the litigation because any claim for contribution would be barred by paragraph (b) of section 15-108 of the General Obligations Law and there is no viable claim for indemnification against them.”)

Defendant Shackles has demonstrated his prima facie entitlement to judgment as a matter of law that the release given by the plaintiffs to Shackles also bars the cross-claim of VCS against Shackles for contribution. The cross-claim by VCS against defendant Shackles for contribution is dismissed.

It is hereby **ORDERED**, that the motion by defendant Shackles for a dismissal of both the plaintiffs’ claims and the cross-claim asserted by defendant VCS is granted in its entirety, and the caption shall be amended to reflect same.

The foregoing constitutes the decision and Order of this Court.

Dated: March 11, 2024



HON. JOSEPH A. SANTORELLI
J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION