Dennis v Union-Endicott Cent. Sch. Dist.
2013 NY Slip Op 33858(U)
March 26, 2013
Supreme Court, Broome County
Docket Number: 2012-1273
Judge: Molly Reynolds Fitzgerald
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At a Motion Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District, at the Broome County Courthouse, Binghamton, New York on the 20th day of March, 2013.

PRESENT: HON. MOLLY REYNOLDS FITZGERALD
JUSTICE PRESIDING

STATE OF NEW YORK
SUPREME COURT : COUNTY OF BROOME

TAMMY DENNIS, as Natural Parent and Guardian of Richard G. Hernandez, Infant,

Plaintiff,

-vs-

DECISION AND ORDER

UNION-ENDICOTT CENTRAL SCHOOL DISTRICT, GEORGE F. JOHNSON ELEMENTARY, and MARY BRICKER,

Index No.: 2012-1273
RJI No.: 2012-1417-M

Defendants.

On October 26, 2011, Mary Bricker, mother of first grader Lauren Bricker, sent in cookies to her daughter's 1st grade classroom at George F. Johnson Elementary School. The classroom teacher, Mrs. Lowe, allowed the cookies to be served to the students. One of the students, Plaintiff Richard Hernandez, had an allergic reaction while eating one of the cookies and had to be taken to the hospital. Richard is allergic to peanuts. The school knew about his allergy and had posted a notice on the classroom door and sent an email to the parents of his classmates informing them of it.

As a result of this incident, Tammy Dennis, Richard's mother, sued both Ms. Bricker

and the Union Endicott School District on behalf of her son.

On October 8, 2012, plaintiff filed a motion seeking approval of an infant settlement with Ms. Bricker. In response, defendant Union Endicott, filed a cross-motion seeking permission from the court to serve an amended answer which would include an affirmative defense under General Obligations Law §15-108, to continue its present indemnification claims against Ms. Bricker or convert said claims to a third party action, and to compel her to respond to its discovery demands. Ms. Bricker cross-moved for dismissal of the action under CPLR §3211. Plaintiff was served with the respective defense motions, but has not filed any papers in response.

By way of a November 8, 2012 order, the court approved the infant settlement with respect to Ms. Bricker, and specifically dismissed only plaintiff's claims against her.

LAW

It is undisputed that plaintiff has validly released all claims against Mary Bricker. As such, under GOL §15-108, any claims for contribution have been extinguished. However, this bar does not extend to claims for indemnity, *McDermott v City of New York,* 50 NY2d 211, 220 (1980). Claims for indemnity differ from those for contribution. Contribution involves an apportionment of responsibility (and damages) amongst tort-feasors, each of whom owe an independent duty to plaintiff. It is then up to the finder of fact to determine the degree of responsibility each wrongdoer must bear for causing the injury. Conversely, indemnity involves an attempt to shift the entire loss from one who is compelled to pay - regardless of his own fault - to the actual wrongdoer, *County of Westchester v Welton Becket Assoc.*, 102 AD2d 34,46 (1984). Unlike contribution, which is a creature of statute, indemnity springs from contract, either express or implied, *McDermott* at 216. Here, where

there is no express contract between the defendants, the claim is for implied indemnification. Implied indemnification has its roots in equity and is based upon fairness. It permits shifting the entire loss from one defendant to another because failure to do so would result in the unjust enrichment of one party at the expense of the other, *McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374-375 (2011).

Both parties agree that an implied right of indemnification exists where a non-negligent party is being held vicariously liable for the wrongdoing of another (i.e., the employer of a negligent employee, the registered but non-operating owner of an automobile driven by a negligent driver), *State of New York Facilities Dev. Corp. v Kallman & McKinnell*, 121 AD2d 805, 806 (1986). It is also undisputed that here, in the case at bar, there is no relationship between the defendants which supports any theory of vicarious liability. However, defendant Union Endicott correctly points out that the courts have not strictly limited application of the doctrine to situations involving vicarious liability, but in others - notably products liability litigation - as well. Union Endicott argues that it *may* be applicable here, and certainly that at this point in the action - with discovery not yet complete - it is too early to rule it out.

This court disagrees. The threshold determination concerning the viability of a claim for implied indemnification is the existence of a separate duty owed the indemnitee by the indemnitor, *Raquet v Braun,* 90 NY2d 177,183 (1997). This duty cannot be established where any liability attributed to the indemnitee would be based on its own wrongdoing, *Salisbury v Wal-Mart Stores, Inc.,* 255 AD2d 95,97 (1999).

Here, there is no relationship between defendant Bricker and defendant Union

Endicott that supports any theory of vicarious liability. Plaintiff has alleged separate claims of negligence against each defendant.

Defendant Union Endicott's argument that this motion is premature because the negligence "could have been caused solely by Mrs. Bricker"- a claim they intend to prove at trial - misses the distinction between indemnity and contribution. If in fact the jury finds that Union Endicott was not negligent, the district will not owe plaintiff any damages - it will not be held responsible for damages which occurred as a result of Ms. Bricker's actions. There will be no inequity to address, and without this inequity, there can be no duty.

In essence, this is a simple case of a plaintiff suing two defendants, for separate acts of negligence, which caused an injury. In this case one of those defendants has chosen to settle the matter, and in so doing, purchased her freedom from litigation. General Obligation Law allows Ms. Bricker to do just that. Forcing her to remain a part of this litigation because of supposed indemnification claims would invert the equitable foundations on which implied indemnity is based.

Finally, the court notes that Ms. Bricker[1] has no objection to Union Endicott's request to serve an Amended Answer, and so that part of Union Endicott's motion is granted.

Dated: March 26 2013

HON. MOLLY REYNOLDS FITZGERALD
SUPREME COURT JUSTICE

cc: Ronald R. Benjamin, Esq.
John M. Monahan, Esq.
James P. O'Brien, Esq.

[1]Since plaintiffs did not file any papers in response, their assent is assumed.