

7-26-99

IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

JAMES H. GRIZZARD,

Plaintiff,

v.

MOGAMBO, INC., et al.

Defendants.

Civil Action No. 95-657

MOGAMBO, INC. and CENTURY
INSURANCE COMPANY, LTD.,

Third-Party Plaintiffs,

v.

THEODORE R. MITCHELL,

Third-Party Defendant.

**ORDER DENYING
ELM'S INC.'S MOTION FOR
SUMMARY JUDGMENT**

THEODORE R. MITCHELL,

Third-Party Plaintiff,

v.

ELM'S, INC.,

Third-Party Defendant.

I. PROCEDURAL BACKGROUND

This matter came before the Court on Third-Party Defendant Elm's Inc.'s motion for summary judgment. Eric S. Smith, Esq. appeared on behalf of Elm's Inc. Jeanne H. Rayphand, Esq. appeared on behalf of Third-Party Plaintiff Theodore R. Mitchell. The Court, having reviewed the memoranda, declarations, and exhibits, having heard and considered the arguments of counsel, and being fully informed of the premises, now renders its written decision.

FOR PUBLICATION

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II. FACTS

On the evening of August 9, 1993, Plaintiff James Grizzard (“Plaintiff”) and Theodore R. Mitchell (“Mitchell”) were customers in the Cafe Mogambo, a restaurant and bar operated by Mogambo, Inc. (“Mogambo”) on Saipan. At some point during the evening, Mitchell pushed Plaintiff causing him to lose his balance and fall backward where his head struck a cigarette machine owned by Elm’s Inc..

On July 14, 1995, Plaintiff, Plaintiff’s wife, and Mitchell ‘executed a mutual release and covenant not to sue whereby Mitchell was released from liability for the injuries sustained by Plaintiff in the incident at Cafe Mogambo. Two weeks later, Plaintiff filed suit against Mogambo and Century Insurance (“Century”), its insurance carrier.

On August 4, 1995, Mogambo and Century filed a third-party complaint against Mitchell for assault and battery, negligence, contribution and indemnity. A little over three weeks later, Mitchell filed a third-party complaint against Elm’s Inc. for indemnity.

On June 21, 1999, Third-Party Defendant Elm’s Inc. filed the instant motion for summary judgment contending that Mitchell’s indemnity claim is barred since he actively participated in the incident and that Mitchell’s actions were the sole proximate cause of Plaintiff’s injuries.

III. ISSUES

1. Whether Mitchell’s third-party indemnity claim is barred?
2. Whether Mitchell’s actions were the sole proximate cause of Plaintiff’s injuries?

IV. ANALYSIS

A. Summary judgment standard

The standard for summary judgment is set forth in Rule 56 of the Commonwealth Rules of Civil Procedure. Rule 56(a) provides:

A party seeking to recover upon a claim may move with or without supporting affidavits for a summary judgment in the party’s favor upon all or any part thereof.

Corn. R. Civ. P. 56(a). Rule 56(c) continues:

Th judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

1 genuine issue as to any material fact and that the moving party is entitled to judgment as a matter
2 of law.

3 Corn. R. Civ. p. 56(c). Once a movant for summary judgment has shown that no genuine issue of
4 material fact exists, the burden shifts to the opponent to show that such an issue does exist. Riley v.
5 Public School Sys., 4 N.M.I. 85, 89 (1994).

6 B. Indemnity

7 Elm's contends that Mitchell cannot bring a third-party claim for indemnity against Elm's because
8 Mitchell actively participated in the wrongful act.

9 The principle of implied equitable indemnity is designed to prohibit one from profiting by his own
10 wrong at the expense of one who is either free from fault or negligent to a lesser degree. Hydro-Air
11 Equipment, Inc. v. Hvatt Corporation, 852 F.2d 403, 406 (9th Cir. 1988); Restatement (Second) of Torts
12 § 886B, Comment c (1979). In evaluating a claim for implied indemnity, the court must carefully
13 examine the conduct of each party on a case-by-case basis, with the ultimate goal of doing what is fair
14 and just, Aetna Casualty & Surety Co. v. Jeppesen & Co., 440 F.Supp. 394, 399 (D.Nev.1977).
15 However, it is generally held that indemnity is not available in cases where the party seeking indemnity
16 either committed an intentional tort or participated in an actively negligent manner which brought about
17 the injury or loss. See Neuman v. City of Chicago, 443 N.E.2d 626, 629 (Ill.App. 1982)(an intentional
18 tortfeasor is without standing to invoke equitable indemnity); McIntyre's Mini Computer Sales Group,
19 Inc. v. Creative Synergy Corp., 644 F.Supp. 580, 588 (E.D.Mich. 1986)(equitable indemnity unavailable
20 for actively negligent tortfeasor).

21 Here, the Court finds summary judgment premature since a trier of fact has yet to find that
22 Mitchell is a tortfeasor, let alone an intentional or actively negligent one. Gordon v. Lee, 178 A. 353,355
23 (Me. 1935)(a person who commits a tort is a tortfeasor). Therefore, Elm's motion for summary judgment
24 is denied as to this issue.^{1/}

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26 ^{1/}Counsel for Elm's is reminded that the Commonwealth Law Library does not have the California
27 Reporter. Therefore, future memoranda citing to California state appellate decisions must include either
28 a parallel cite to the Pacific Reporter or a photostatic copy of the reported case. Com.R.Civ.P.83.2(e).

1 C. Proximate cause

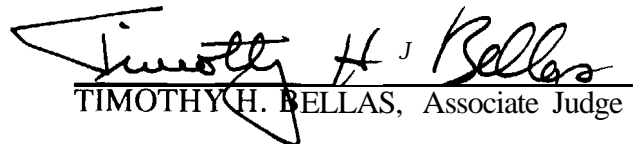
2 Elm's contends that summary judgment is proper since it was Mitchell's action in pushing Plaintiff
3 that proximately caused Plaintiffs injuries.

4 To prevail in an action for negligence, a plaintiff must demonstrate that the defendant's failure to
5 conform to the applicable standard of care was the proximate cause and the cause in fact of plaintiffs
6 injury. Gower v. Commonwealth, 3 CR 2 11, 22 1 (D.N.M.I. 1987). However, the ultimate determination
7 of whether a particular negligent act is the proximate cause of a resulting injury is a question of fact for
8 the jury. Doggett v. United States, 875 F.2d 684, 692 (9th Cir. 1989). Therefore, summary judgment is
9 denied as to this issue.

10 V. CONCLUSION

11 For all the reasons stated above, Third-party Defendant Elm's Inc.'s motion for summary
12 judgment is **DENIED**.

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14 So ORDERED this 26 day of July, 1999.

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17 TIMOTHY H. BELLAS, Associate Judge

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