

7-27-99

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

DC

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 ON THIRD-PARTY
DEFENDANT THEODORE R.
MITCHELL'S MOTION TO AMEND
COUNTERCLAIM AND
THIRD-PARTY COMPLAINT**

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 Plaintiff/Defendant Theodore R. Mitchell's motion to amend counterclaim and third-party complaint. Jeanne H. Rayphand, Esq. appeared on behalf of Third-Party Plaintiff/Defendant Theodore R. Mitchell. Eric S. Smith appeared on behalf of Third-Party Defendant Elm's Inc. 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.

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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 July 1, 1999, Third-Party Plaintiff/Defendant Mitchell filed the instant motion to amend his counterclaims against Mogambo and Century and his third-party complaint against Third-Party Defendant Elm's Inc.^{1/}

III. ISSUES

1. Whether Mitchell is barred from amending his third-party complaint against Elm's Inc. to add a cause of action for contribution?

IV. ANALYSIS

A. Prior conviction

Elm's contends that Mitchell's conviction for assault and battery of Plaintiff bars his claim for contribution as against Elm's.

Section 4302(c) of the CNMI's Contribution Among Tortfeasors Act ("CATA") provides:

^{1/}Counsel for Mogambo/Century admitted at oral argument that no opposition had been filed in response to Mitchell's motion to amend his counterclaim.

1 "There is no right of contribution in favor of any tortfeasor who has intentionally, wilfully,
2 or wantonly caused or contributed to the injury or the wrongful death. "

3 7 CMC § 4302(c). Since Mitchell intentionally, wilfully and/or wantonly caused Plaintiff's injuries,
4 Elm's contends that Mitchell is barred from pursuing a contribution claim against Elm's. However,
5 as Mitchell points out, under Com.R.Evid.803(22), Mitchell's conviction is inadmissible as hearsay
6 because assault and battery is not a crime punishable by death or imprisonment in excess of one year.
7 6 CMC §1202; Com.R.Evid.803(22). Moreover, it has been traditionally held that evidence of a
8 criminal conviction is inadmissible in a subsequent civil case arising out of the same circumstances giving
9 rise to the civil cause of action. Eagan v. Calhoun, 698 A.2d 1097, 1104 (Md. 1997); Estate of Wallace
10 v. Fisher, 567 So.2d 505, 507-508 (Fla.App. 1990); Cone v. Goble, 103 P.2d 598, 603 (Cal.App. 1940);
11 18 A.L.R.2d 1287. Therefore, the Court shall adhere to the traditional rule and find that Mitchell's prior
12 conviction will not bar his claim for contribution since such evidence would be inadmissible at trial to
13 prove the case in chief that the assault and battery had in fact been committed.

14 B. Release

15 Elm's contends that Mitchell's contribution claim is barred under the CATA because Elm's'
16 liability was not extinguished under the Release and Covenant Not to Sue entered into by Plaintiff and
17 Mitchell.

18 Section 4302(d) of the CATA provides, in pertinent part, that:

19 "A tortfeasor who enters into a settlement with a claimant is not entitled to recover
20 contribution from another tortfeasor whose liability for the injury or wrongful death is not
21 extinguished by the settlement"

22 7 CMC § 4302(d). Here, the Plaintiff-Mitchell Release makes no mention of Elm's nor does it
23 extinguish directly or indirectly any liability Elm's may have to Plaintiff. Therefore, the Court finds
24 that Mitchell is barred from pursuing a contribution claim against Elm's.^{2/}

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27 ^{2/}However, should it be determined a later date that the Plaintiff-Mitchell Release was not entered into
28 in good faith, then the contribution bar would presumably be inoperative.

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V. CONCLUSION

For all the reasons stated above, Third-Party Plaintiff/Defendant Mitchell's motion to amend counterclaim is **GRANTED**. However, Mitchell's motion to amend his third-party complaint is **DENIED**.

So ORDERED this 27 day of July, 1999.


TIMOTHY H. BELLAS, Associate Judge