

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

JAMES H. GRIZZARD,

Plaintiff,

v.

MOGAMBO, INC., et al.

Defendants.

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

Third-Party Plaintiffs,

v.

THEODORE R. MITCHELL,

Third-Party Defendant.

THEODORE R. MITCHELL,

Third-Party Plaintiff,

v.

ELM'S, INC.,

Third-Party Defendant.

Civil Action No. 95-657

**ORDER DENYING
THIRD-PARTY DEFENDANT
THEODORE R. MITCHELL'S
MOTION TO DISMISS**

I. PROCEDURAL BACKGROUND

This matter came before the Court on Third-Party Defendant Theodore R. Mitchell's motion to dismiss the third-party complaint of Mogambo, Inc. and Century Insurance. Steven P. Pixley, Esq. appeared on behalf of Third-Party Plaintiffs Mogambo, Inc. and Century Insurance. Jeanne H. Rayphand, Esq. appeared on behalf of Third-Party Defendant 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,

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FOR PUBLICATION

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 22, 1999, Third-Party Defendant Mitchell filed the instant motion to dismiss the **third-** party complaint of Mogambo and Century contending that Mitchell has been discharged from liability for contribution under the Plaintiff-Mitchell release and that **Mogambo/Century** cannot make a claim for indemnity since Mogambo participated in the act which caused Plaintiff’s injuries.

III. ISSUES

1. Whether **Mogambo/Century** is entitled to contribution from Mitchell?
2. Whether **Mogambo/Century** is entitled to indemnification from Mitchell?

IV. ANALYSIS

A. Contribution

Mitchell contends that he is not liable for contribution to **Mogambo/Century** under Commonwealth law because Plaintiff released Mitchell from all liability resulting from the Mogambo incident.

As noted in his moving papers, the issue of whether Mitchell is liable to **Mogambo/Century** for contribution involves an analysis of **CNMI's** Contribution Among Tortfeasors Act ("CATA"), codified at 7 CMC §4301 - 4306.^{1/} The CATA provides, in pertinent part, that:

"When a release or a covenant not to sue . . . is given in *goodfaith* to one of two or more persons liable in tort for the same injury . . . :

(b) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor."

7 CMC § 4305(b)(emphasis added). Thus, if the Plaintiff-Mitchell **release** was given in good faith then Mitchell would not be liable for contribution. See Tech-Bilt, Inc. v. Woodward-Clyde & Assocaites, 698 P.2d 159 (Cal. 1985)(determination of good faith settlement between one of several tortfeasors and plaintiff bars claims by non-settling tortfeasors against settling tortfeasor for contribution). However, since the Court has yet to ascertain whether the release was in fact given in good faith, the Court finds that dismissal of the contribution claim to be premature at this time."

B. Indemnity

Mitchell contends that **Mogambo/Century** cannot bring a third-party claim for indemnity against Mitchell because Mogambo and Mitchell are joint tortfeasors.

The principle of implied equitable indemnity is designed to prohibit one from profiting by his own wrong at the expense of one who is either free from fault or negligent to a lesser degree. Hydro-Air Equipment, Inc. v. Hyatt Corporation, 852 F.2d 403,406 (9th Cir. 1988); Restatement (Second) of Torts § 886B, Comment c (1979). In evaluating a claim for implied indemnity, the court must carefully examine the conduct of each party on a case-by-case basis, with the ultimate goal of doing what is fair and just. Aetna Casualty & Surety Co. v. Jeppesen & Co., 440 F.Supp. 394, 399 (D.Nev.1977). However, it is generally held that indemnity is not available in cases where the party seeking indemnity

^{1/}The CNMI's Contribution Among Tortfeasors Act is modeled on the 1955 revision to the Uniform Contribution Among Tortfeasors Act. 12 U.L.A. 194-290.

^{2/}The Court notes that neither the Commonwealth's contribution act nor the uniform act define when a determination of good faith is to be made. However, it has been held that such an adjudication should ordinarily take **place** in advance of the trial on the primary tort suit. See Vertecs Corporation v. Fiberchem, Inc., 669 P.2d 958, 960 (Alaska 1983).

participated in an actively negligent manner which brought about the injury or loss.& McIntyre's Mini Computer Sales Groun. Inc. v. Creative Synergy Corn., 644 F.Supp. 580,588 (E.D.Mich. 1986)(equitable indemnity unavailable for actively negligent tortfeasor).

Here, the Court finds the motion to dismiss premature since a trier of fact has yet to find that Mogambo is a tortfeasor, let alone an actively negligent one. Gordon v. Lee, 178 A. 353, 355 (Me. 1935)(a person who commits a tort is a tortfeasor). Therefore, Mitchell's motion to dismiss is denied as to this issue.?'

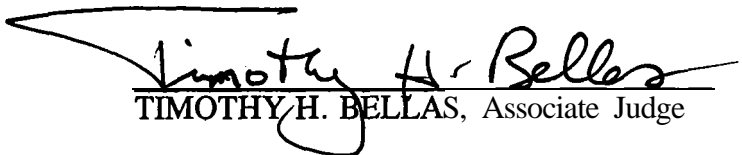
C. Assault and battery and negligence

Although Mitchell seeks to dismiss Mogambo/Century's third-party complaint in its entirety, his moving papers focus only on Mogambo/Century's causes of action for contribution and indemnity. Mitchell makes no argument in his moving papers to dismiss Mogambo/Century's causes of action for assault and battery and negligence.^{4/} Therefore, the Court will not rule on the motion to dismiss as to the causes of action for assault and battery and negligence.

V. CONCLUSION

For all the reasons stated above, Third-party Defendant Mitchell's motion to dismiss the causes of action for contribution and indemnity is **DENIED**.

So ORDERED this 27 day of July, 1999.


TIMOTHY H. BELLAS, Associate Judge

^{3/}Counsel for Mitchell is reminded that the Commonwealth Law Library does not have the California Reporter. Therefore, future memoranda citing to California state appellate decisions must include either a parallel cite to the Pacific Reporter or a photostatic copy of the reported case. Com.R.Civ.P.83.2(e).

^{4/}Only in his reply brief does Mitchell contend that Mogambo/Century lack standing to assert claims for assault and battery and negligence.