

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DARLENE HOOD, RICHARD E. HOOD, : CIVIL ACTION
and FIRST GENERAL SERVICES OF :
THE COLONIES, INC. :
 :
 :
v. :
 :
SHEAK & KORZUN, P.C., MARK :
SELLERS, J. CHARLES SHEAK and :
RELIANCE INSURANCE COMPANY : NO. 95-5378

Norma L. Shapiro, J.

September 18, 1997

MEMORANDUM and ORDER

A jury found in favor of Defendant Reliance Insurance Company ("Reliance") on its counter-claim against Plaintiff Richard E. Hood ("Hood") for an alleged breach of an indemnity agreement. Hood filed a Motion to Alter, Amend and/or Vacate Judgment or Grant a New Trial, because Reliance had previously settled with the other indemnitors. Hood's motion will be denied.

FACTS

This action arises out of a judgment Reliance obtained against Hood in New Jersey state court in May, 1994. In July, 1994, Reliance had its attorneys, Sheak & Korzun, P.C., transfer that judgment to Bucks County Court of Common Pleas. Reliance, and its attorneys, obtained a writ of execution for any money deposited in Hood's Meridian Bank account in partial satisfaction of the New Jersey judgment. But the writ served on Meridian Bank stated an account number for an account solely in the name of

Darlene Hood. Meridian Bank accordingly seized the funds in her account.

Plaintiffs contended that the New Jersey and Pennsylvania court orders enabling execution against Darlene Hood were obtained by fraud or misrepresentation because defendants knew that Darlene Hood was not a party to the New Jersey action. Their federal claims against defendants alleged violations of their civil rights under 42 U.S.C. § 1983, and violation of the Consumer Credit Protection Act, 15 U.S.C. § 1681 et seq.; they asserted supplemental claims of abuse and malicious use of process, defamation, false light and invasion of privacy, conversion, trespass to chattels, negligence and loss of consortium. All claims were dismissed as a sanction for Hood's refusal to comply with discovery.

Reliance filed a counter-claim against Hood under an indemnification agreement signed by Hood and five other individuals and companies in October 1979 in exchange for the undertaking of Reliance to execute various bonds on behalf of R.A. Steelman Company, Inc. ("Steeleman"). They all agreed to be jointly and severally liable to Reliance for any losses or damages it suffered on the bonds issued for Steelman.

Reliance executed bonds on behalf of Steelman in reliance on the signed indemnification agreement. Steelman became insolvent in the early 1980s and was unable to pay its creditors. Reliance paid almost \$222,264.43 under the Steelman bonds. Reliance sought repayment from all six indemnitors, including Hood, in an

action filed in New Jersey state court. Hood was never served. The other five indemnitors, who were served, settled that action by payment of \$35,00 in 1985.

When Hood brought this action against Reliance, Reliance counter-claimed against Hood for breach of his indemnification agreement. The jury returned a verdict in favor of Reliance and against Hood in the amount of \$325,400.85. This verdict covered the Reliance loss under the Steelman bonds as well as legal expenses and miscellaneous contractual costs incurred as provided for by the indemnification agreement.

Hood has moved for a new trial or to set aside the verdict because Reliance had instituted and settled the former action against the other five indemnitors. Hood argues that their settlement discharged his obligation as well, so the jury verdict should be set aside.

DISCUSSION

Under Federal Rule of Civil Procedure 59(a), a district court may grant a new trial "in an action where there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Fed. R. Civ. P. 59 (a). Similarly, a party may move for an alteration or amendment of a judgment. See Fed. R. Civ. P. 59(e). Rule 59(a) was intentionally left open-ended to give trial courts a large amount of discretion in deciding whether or not to grant a new trial. See, e.g., Wilhelm v. Blue

Bell, Inc., 773 F.2d 1429, 1433 (4th Cir. 1985), cert. denied, 475 U.S. 1016.

This court entered judgment against Hood for \$325,400.85, on April 3, 1997, but vacated that judgment order on May 5, 1997, to afford counsel the opportunity to brief the consequences of the settlement. No judgment has been entered in this case, so Hood's motion to amend or alter the judgment pursuant to Rules 59(e) and 60 is moot. The court must decide whether to enter judgment on the verdict or set it aside as a matter of law.

Hood argues that the settlement between Reliance and the other five indemnitors discharged him of all liability under the indemnity agreement.

This court must apply Pennsylvania choice of law provisions to determine which state's law applies. Pennsylvania has adopted a combination of the "substantial relationship" and "governmental interest" tests. See Compagnie des Bauxites v. Argonaut-Midwest Ins. Co., 880 F.2d 685, 688 (3d Cir. 1989); Griffith v. United Air Lines, Inc., 203 A.2d 796, 806-07 (1964). New Jersey law applies to the issue of whether the settlement discharged Hood's liability: the indemnity agreement was drafted and signed in New Jersey; the bonds Reliance issued to Steelman, that were guaranteed by the indemnitors, were issued in New Jersey; the other indemnitors settled an action filed in New Jersey. New Jersey clearly has the most contacts with this controversy and

the greatest interest in its resolution. See Reliance's Brief in Opposition to Post Trial Motion of Richard Hood [hereinafter "Reliance's Brief"] at 2.

Hood cited tort law cases primarily to support his argument that the settlement discharged him of any liability, but the Reliance claim is for breach of an indemnity contract. Contract law governs the parties' dispute.

A New Jersey statute specifically authorizes individual compromises by joint debtors. See N.J. Stat. Ann. § 2A:55-6. It could be argued that the statute authorizing individual compromises between a joint debtor and his creditor implicitly requires the discharge of a remaining joint debtor, at least on a pro rata basis. But Hood and the other indemnitors agreed to be "jointly and severally" liable under the indemnity agreement, not merely "jointly" liable, so the statute would not apply. See Indemnity Agreement at 1, attached to Reliance's Brief as Exhibit A.

The New Jersey Supreme Court has not addressed whether co-promisors jointly and severally liable are discharged of their contractual obligations when one co-promisor pays less than the entire indebtedness to the obligee. This court must predict how it would decide.

In the absence of a ruling by a state supreme court, inferior state courts provide guidance, and this court must "give

due consideration to the decisional law of inferior state courts." See Dillinger v. Caterpillar, Inc., 959 F.2d 430, 435 n. 11 (3d Cir. 1992). "A decision of 'an intermediate appellate state court ... is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.'" Id. (quoting West v. American Telephone & Tel. Co., 311 U.S. 223, 237 (1940)).

In Thomas v. Gardner, 455 A.2d 533 (N.J. Super. Ct. App. Div. 1983), First National State Bank ("First National") was owed \$74,142.45 on a promissory note signed by Barry and Norma Gardner (the "Gardners"), Fred Gardner ("Fred") and Irving and Barbara Weber (the "Webers"). First National accepted a twenty-year note from the Webers for one-third the debt. Later, Fred executed a twenty-year note and second mortgage to First National for another one-third the debt. First National then proceeded against the Gardners for the entire \$74,142.45. See id. at 534-35.

The Gardners argued that First National's acceptance of the twenty-year notes from Fred and the Webers discharged the Gardners from two-thirds of their joint liability to First National. They argued that N.J. Stat. Ann. § 2A:55-6 discharged their liability by the two-thirds guaranteed by the other debtors, but the Superior Court held the statutory provision

"limited to compromises of joint indebtedness," and not applicable to joint and several debtors, id. at 535-36, and any settlement between the creditor and one co-debtor did not discharge the obligations of other co-debtors jointly and severally liable. See Id.

The Thomas court rejected the argument that the joint and several debtor's liability should be discharged, even on a pro rata basis, by a settlement with a co-debtor; "[a] joint and several debtor is not discharged pro rata upon an agreement by the creditor to compromise with a fellow joint and several debtor." Id. at 536; see also Restatement 2d of Contracts § 294 (1)(b) ("[C]o-promisors who are bound by joint and several duties or by several duties are not discharged" when one co-promisor settles with the obligee.).¹ There is no reason to believe that the New Jersey Supreme Court "would decide otherwise," West, 311 U.S. at 237; the Thomas court's reasoning is persuasive.

Hood's remedy, in the event that he pays more than his one-sixth share of the \$325,400.85 verdict, is to seek contribution from the other five indemnitors. See, e.g., New Amsterdam Cas. Co. v. Popovich, 113 A.2d 666, 671 (N.J. 1955) (when a party to a contract has paid the damages, he may seek contribution from

¹ New Jersey courts frequently look to the Restatement 2d of Contracts for guidance and authority. See, e.g., Wanaque Borough Sewerage Auth. v. Township of West Milford, 677 A.2d 747, 752 (N.J. 1996); Kutzkin v. Pirnie, 591 A.2d 932, 939-40 (N.J. 1991); Bonco Petrol, Inc. v. Epstein, 560 A.2d 655, 660-61 (N.J. 1989).

other breaching parties).

Even if tort law principles applied, New Jersey tort law does not discharge the liability of all joint tort-feasors if one tort-feasor settles. Under the New Jersey Joint Tort-feasor Contribution Act (the "Act"), see N.J. Stat. Ann. § 2A:53A-1, et seq., a joint tort-feasor has a right of contribution against other tort-feasors; if a plaintiff settles with one joint tort-feasor and then recovers a judgment against another joint tort-feasor, the judgment is reduced on a pro rata basis. See, e.g., Hoeller v. Coleman, 180 A.2d 333 (N.J. Super. Ct. App. Div.), cert. denied, 184 A.2d 868 (N.J. 1962).

The purpose of the Act is to "achieve a sharing of the common responsibility according to equity and natural justice. This allows actions among joint tort-feasors to assure that no person pays in excess of his pro rata share of the total damage." Frueh v. Kupper, 148 A.2d 743, 747 (N.J. Super. Ct. Law Div. 1959). But the Act is limited to tort-feasors and does not apply to settlement of claims against one or more parties to a contract.

New Jersey courts have rejected the common law rule releasing all joint tort-feasors upon the release of any one of them. See, e.g., Rossum v. Jones, 235 A.2d 206, 210 (N.J. Super. App. Div. 1967). The release of one joint tort-feasor does not release any others unless the release specifically intends to do

so. See Daily v. Somberg, 146 A.2d 676, 683 (N.J. 1958), implicitly overruled on other grounds, Mellk v. Sarahson, 229 A.2d 625 (N.J. 1967).

Hood relies on Judson v. Peoples Bank & Trust Co., 110 A.2d 24 (N.J. 1954). See Hood's Brief in Support of Post Trial Motions, at 2-3. In Judson, Justice Brennan, speaking for the New Jersey Supreme Court, stated that, if the release given to one of the tort-feasors expressly reserved the right to proceed against the remaining defendants, the settlement would not discharge the liability of the remaining tort-feasors. See id. at 33. The issue turned on whether the plaintiff had reserved the right to proceed against the others.

The Judson settlement agreement stated that the plaintiff's claims against the settling defendant were dismissed "with prejudice." At the same time, the plaintiff's claims against the non-settling defendants were dismissed "without prejudice." Id. The court held that "without prejudice" was an "express reservation" of the right to proceed against the remaining defendants. See id.

The settlement agreement between Reliance and the other five indemnitors contained the same language as that in Judson. Reliance's claim against the settling indemnitors was dismissed "with prejudice," and its claim against Hood was dismissed "without prejudice." See Stipulation of Settlement at 3,

attached to Reliance's Brief as Exhibit B. Even if the issues were governed by New Jersey tort law, because Reliance reserved the right in the settlement agreement to proceed against Hood, Reliance has the right to do so. See Judson, 110 A.2d at 33.

The Judson court also considered the amount of the settlement in deciding whether the settlement was intended to release non-settling defendants. That settlement was for \$2,500; plaintiff's damages were approximately \$315,000. See id. The \$35,000 settlement between Reliance and the other five indemnitors was likewise only a small percentage of Reliance's damages of \$222,264.43 (excluding related legal fees and miscellaneous costs). It is clear that Reliance did not intend the settlement to completely release Hood, the non-settling indemnitor; Reliance must only credit Hood with the amount already received in partial satisfaction of the liability.

CONCLUSION

The settlement between Reliance and the other five indemnitors did not discharge Hood's liability for breach of the indemnity agreement. As a joint and several indemnitor, Hood is liable for the balance due Reliance, notwithstanding the settlement entered into by the other indemnitors. Accordingly, Hood's motion will be denied.

An appropriate order follows.

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SELLERS, J. CHARLES SHEAK and :
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JUDGMENT ORDER

AND NOW, this 18th day of September, 1997, upon consideration of cross-claim defendant Hood's Motion to Alter, Amend and/or Vacate Judgment or Grant a New Trial, and cross-claim plaintiff Reliance's response thereto, it is **ORDERED** that:

The motion is **DENIED**, and

Judgment is **ENTERED** against Richard E. Hood in the amount of **\$290,004.89** (\$325,004.89, minus \$35,000 already recovered in settlement from the other indemnitors).

Norma L. Shapiro, J.