

STATE OF SOUTH CAROLINA)
)
COUNTY OF DORCHESTER)

TERESA JOLLY,)
)
Plaintiff,)
)
v.)
)
DELCARLOS MURRAY SHORES, JR.,)
ANNIE HUGHES SHORES, TRAVIS)
POWE AND ACTION RESOURCES, INC.)
)
Defendants.)
_____)

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT
CASE NO. 2018-CP-18-00021

ORDER
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SC Court of Appeals

THIS MATTER is before the Court on Plaintiff's Motion to Dismiss claims against Delcarlos Murray Shores, Jr., and Annie Hughes Shores (" the Shores"), amend the Summons and Complaint and, sever the crossclaims of the Defendant, Action Resources, Inc. ("ARI") against the Shores.

The Shores have filed a similar Motion requesting that the Court enter a dismissal with prejudice of the Plaintiff's claims against them and dismiss them from the Plaintiff's case.

The Defendants Powe and ARI oppose the Motions filed by the Plaintiff and the Shores. Defendants ARI and Powe have also filed their Motion to Rescind the Stipulation of Dismissal previously entered between the Plaintiff and the Shores.

All of the above Motions were scheduled for hearing on October 17, 2019. Present at the hearing were David Whittington representing the Plaintiff, Meg Horn representing the Shores, and Jack Riordan representing Defendants Powe and ARI.

FACTS AND PROCEDURAL HISTORY

This case arises from a motor vehicle collision that occurred on May 27, 2014, on Highway 178 in the County of Dorchester, State of South Carolina. The Plaintiff was a passenger in the vehicle driven by Defendant Delcarlos Shores. Defendant Annie Shores owned the vehicle in question. The collision occurred when the vehicle driven by Defendant Delcarlos Shores attempted to make a left turn as a tractor trailer driven by Defendant Powe was approaching from the opposite direction on Highway 178. A collision occurred between the two vehicles, which led to the death of the front seat passenger, Wesley Hughes, and serious personal injuries, including a brain injury and other physical injuries to the other passenger, Teresa Jolly.

The Plaintiff commenced this action through the filing of a Summons and Complaint which alleged, among other things, that Defendant Delcarlos Shores was negligent in his operation of the motor vehicle; Defendant Annie Shores was negligent in entrusting the motor vehicle to DelCarlos Shores; Defendant Powe was negligent in his operation of the tractor trailer; and Defendant ARI was vicariously liable for the negligent actions of Defendant Powe, and independently negligent in its failure to properly maintain the tractor trailer, entrust the tractor trailer to Defendant Powe and in failing to supervise Defendant Powe.

Plaintiff reached an agreement to settle the claims against the Shores Defendants. The Shores Defendants agreed to settle the case in exchange for a dismissal with prejudice of the Plaintiff's claims against the Shores Defendants. Plaintiff agreed to dismiss the Shores Defendants by way of a Stipulation of Dismissal.

Defendants ARI and Powe filed a motion to rescind the Stipulation of Dismissal on grounds that SCRCP 41 requires the signature of all parties on a Stipulation of Dismissal which dismisses a party from a lawsuit. Plaintiff and the Shores Defendants have now filed the Motions to Dismiss that are presently before the Court. Plaintiff's motion also requests that the

Plaintiff be permitted to amend the Summons and Complaint to sever the crossclaim filed by ARI against the Shores.

ANALYSIS

SCRCP 41 governs the dismissal of actions. The rule provides that a Plaintiff may dismiss a party from an action without an order of the court by filing and serving a Notice of Dismissal at any time before service by the adverse party of an answer or motion for summary judgment; or by filing a stipulation of dismissal signed by all parties who have appeared in the action.

Alternatively, a party may be dismissed by order of the Court and upon such terms and conditions as the court deems just and proper. See SCRCP 41(a)(2).

Defendants Powe and ARI object to the dismissal of the Shores Defendants on the grounds that the Shores should remain in the case for purposes of being placed on the verdict form at the time of trial, which Defendants ARI and Powe contend is proper based upon SC Code Ann. §15-38-15(D) and because ARI has asserted a crossclaim against the Shores.

In reviewing SCRCP 41 and SC Code Ann. §15-38-15, et. seq., there is nothing in the rule or the statute which prevents the Plaintiff from entering into a settlement agreement with one of several defendants during the pendency of an action. Rather, to the contrary, SCRCP 41 specifically recognizes the possibility that even a counterclaim filed by a Defendant will not in and of itself prevent the court from granting the Plaintiff's motion to dismiss that defendant. SCRCP 41(a)(2) specifically provides that "[I]f a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court." (emphasis added).

Similarly, SC Code Ann. §15-38-15 does not prevent a plaintiff from dismissing one of several defendants then continuing the case against the remaining defendants. In fact, the statute specifically recognizes the possibility that a settlement might take place during the pendency of the action, and confirms that the action will continue against the remaining defendants with the remaining defendants entitled to argue that the settled party is entirely at fault for causing the Plaintiffs damages and/or that the remaining defendants are entitled to a setoff for all amounts paid by the settling defendant. See SC Code Ann. 15-38-15 et seq.

South Carolina has strong public policy favoring the settlement of disputes. Chester v. S.C. Dep't of Pub. Safety, 388 SC 343, 346, 698 SE2d 559, 560 (2010). This public policy favoring settlement is part of the justification for providing that the settling tortfeasor, by virtue of this settlement with the Plaintiff, is not liable for contribution to any other tortfeasor. See SC Code Ann. §15-38-50(2)(2005 and Supp. 2016). See also Tiffany v Smith, 799 S.E. 2d 479 (2107); Fagnant v. Kmart Corp., 2013 WL 6901907 (DSC 2013) .

In light of the strong public policy favoring settlement and the recognition in SCRPC 41 (a) (2) that the plaintiff may settle claims with defendants and have them dismissed without the other party's consent, leads the Court to conclude that the Defendants Powe and ARIs' objection to the Plaintiff's Motion to Dismiss Plaintiff's claims against the Shores Defendants is without merit. To hold otherwise would fly in the face of South Carolina's strong public policy favoring the settlement of disputes, the South Carolina Supreme Court's decision in Tiffany, supra., and the "Plaintiff chooses" rule which permits the Plaintiff to choose who to sue and which defendants to dismiss or try the case against. For this reason, the court grants the Plaintiff and Shores Motions to Dismiss the Plaintiff's claims against the Shores Defendants.

Next, Plaintiff seeks an Order permitting Plaintiff to amend her Summons and Complaint to reflect the fact that the Plaintiff's claims against the Shores Defendants have been dismissed.

The Plaintiff's proposed Amended Complaint removes the Shores as Defendants and further removes any allegations relating to the Shores Defendants. A copy of the Plaintiff's proposed Amended Summons and Amended Complaint was submitted to the court as an Exhibit to the Memorandum in Support of the Motion to Amend.

The Shores Defendants join in the Plaintiff's Motion and seek an Order dismissing them as parties from this action based upon their settlement with the Plaintiff. Defendants Powe and ARI object to the Plaintiff's proposed amended pleadings on the grounds that the Shores Defendants are necessary parties to this action and should be included in the caption in order to be included on the verdict form, and further contend that the Shores Defendants should not be dismissed from the case because Defendant ARI has filed a crossclaim against the Shores Defendants for loss of use relating to the damaged tractor trailer.

SCRCP 15 governs amendments to pleadings. The rule provides that a party may amend its pleading only by leave of court or by written consent of the adverse party and leave shall be freely given when justice so requires and does not prejudice any other party. See SCRCP 15(a). Defendants Powe and ARI argue that they will be prejudiced if the Shores Defendants are dismissed from the present action because they will be prevented from including the Shores Defendants on the verdict form for fault allocation purposes.

The South Carolina Supreme Court recently addressed the Defendants argument in Tiffany v. Smith, 799 SE2d 479 (2017). In Tiffany v Smith, supra, the Supreme Court concluded that the requirement under the South Carolina Contribution Among Joint Tortfeasors Act for a fact finder to apportion fault between the Plaintiff and all "defendants" did not extend to a non-party with whom the Plaintiff had previously settled and that the non-party was not a necessary party to the motorist's action against the remaining defendants. In the discussion regarding recent amendments to the South Carolina Contribution Among Joint Tortfeasors Act, the court

acknowledged the changes to the Act were designed to insure a more fair apportionment of damages among joint tortfeasors, but also made clear that such was not the only underlying policy goal. Rather, the legislature struck a balance for all involved, plaintiffs and defendants, in a way that promotes and fosters settlements. *Id.* The Court noted that §15-38-15 (b) and (c) provide a detailed method for apportioning fault “among defendants” and codified prior common law rules relating to the defendant’s ability to raise the “empty chair defense” as well as the right to an offset for the amount of any settlement received prior to the verdict from other potential tortfeasors. *Id.* The court then noted the distinction in the use of the word “defendants” in subsections (b) and (c) and the phrase “potential tortfeasor” in subsection (d), along with the mandatory offset provision in subsection (e) as the reasoning behind why a non-party at the time of trial should not be on the verdict form. In a footnote, the court specifically rejected the argument that Section §15-38-15(c) created a stand alone cause of action for apportionment. See Smith v. Tiffany, *supra*, fn. 3.

The Court went on to address why the provisions of Rules 14 and 19 of the South Carolina Rules of Civil Procedure did not change the outcome. As the court noted, SCRPC 14 only addresses the ability to pursue third-party claims when the third-party claim is based upon a claim that the third-party defendant is liable to the named defendants for all, or a part, of the plaintiff’s claim. The Court also noted that SCRPC 19, if interpreted to permit joinder under these facts, would destroy the historical recognition in South Carolina of the “plaintiff chooses” rule which permits the plaintiff to elect which if any defendants to proceed to trial against and whether or not to join them as parties in a single action. As the court noted “we have also held that parties who are not subject to liability by virtue of settlement or statutory immunity are not properly added as party defendants.” *Id.* Chester, *supra*, 388 SC 346, 698 SC2d 560.

In a virtually identical set of circumstances, the Federal District Court in Fagnant v. Kmart Corp., 2013 WL 6901907 (DSC 2013) found that a party originally named by the plaintiff, who was later dismissed from the action after filing, could not be included on the verdict form based upon either SC Code Ann. §15-38-15 or SCRPC 19. The South Carolina Supreme Court had not issued its opinion in Tiffany, supra., thus Judge Harwell was required to interpret how the South Carolina courts would resolve the issues regarding the inclusion of a party, originally named as a defendant but then dismissed from the action, on the verdict form based on the defendant's contention that the party dismissed was a necessary party under SCRPC 19 and should be included on the verdict form based upon the language in SC Code Ann. §15-38-15. After analyzing the issues in a virtually identical way as the South Carolina Supreme Court later did in Tiffany, Judge Harwell concluded that neither SC Code Ann. §15-38-15 nor SCRPC 19 compelled the inclusion of a party previously dismissed from the action on the verdict form for fault allocation purposes. See also Machin v. Carus Corp., 799 SE2d 468 (2017) (holding that an employer who previously settled a Worker's Compensation Claim with a plaintiff could not be included for fault allocation purposes on the verdict form in a third-party action filed by the plaintiff against other tortfeasors).

Based upon the South Carolina Supreme Court decision in Tiffany v Smith, as well as the reasoning set out in Judge Harwell's opinion in Fagnant v. Kmart Corp., this court is compelled to reach the same conclusion, namely, that the Plaintiff's claims against the Shores Defendants should be dismissed and that the remaining Defendants are not permitted to include the settling Defendants on the verdict form or to compel their continued status as Defendants in the Plaintiff's case.

In light of the above, given that there will be no prejudice to the Defendants and that justice so requires, the Plaintiff's Motion to Amend the Summons and Complaint is granted and

the Plaintiff shall file and serve the Amended Summons and Amended Complaint on the remaining Defendants within 30 days of the filing of this Order.

Having resolved the issues of the dismissal of the Shores Defendants and the Plaintiff's Motion to Amend the Complaint, the Court also orders the severance of ARI's crossclaim from the existing litigation as permitted under SCRCP 42. The grounds for the Plaintiff's Motion to Sever is to prevent jury confusion arising from the various issues and claims in the case. The Defendant ARI objects to the severance of the crossclaim against the Shores Defendants for the same reasons it objects to the dismissal of the Shores Defendants from this action. Having concluded that it is proper for the Shores Defendants to be dismissed and that they should not be included on any verdict form as between the Plaintiff and the remaining Defendants, this court concludes that if it did not sever the crossclaim this would lead to jury confusion and undue prejudice to the Plaintiff and the Shores Defendants. Therefore, the court orders that the ARI claims shall be severed. ARI is hereby granted 30 days within which to file a separate action setting forth its claim against the Shores Defendants. To the extent a separate action is commenced by ARI through the filing of a Complaint the Court finds that said claim was originally filed timely and therefore there shall be no defense permitted which is based on the statute of limitations as to ARI's claim against the Shores defendants for loss of use relating to ARI's tractor trailer.

NOW, THEREFORE, IT IS HEREBY ORDERED that the Plaintiff's and the Shores Defendants' Motions to Dismiss the Shores Defendants from the Plaintiff's Complaint is granted; the court further orders that the Plaintiff, within 30 days of the filing of this Order, may amend the Summons and Complaint to remove the Shores Defendants and all allegations related to the Shores Defendants; and finally the Court further orders that the crossclaim filed by Defendant ARI against the Shores Defendants is hereby severed from the Plaintiff's claims

against Defendants Powe and ARI. ARI shall be given 30 days from the date of this Order within which to file a separate action against the Shores Defendants setting forth its claims for relief for loss of use of its tractor trailer in that action.

AND IT IS SO ORDERED.

Edgar W. Dickson, Presiding Judge
First Judicial Circuit

_____, 2019
_____, South Carolina



Dorchester Common Pleas

Case Caption: Teresa Jolly VS Delcarlos Murray Shores Jr , defendant, et al
Case Number: 2018CP1800021
Type: Order/Other

So Ordered

s/ Edgar W. Dickson #2153