SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. EDWARD W. MC CARTY, III

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY, as subrogee of CATHERINE BOSMANS, Administrator, d.b.n. of the ESTATE OF CARMELA BALL,

Plaintiff(s)

INDEX No.8599/1997

-against-

VICTORIA GAMPEL,

MOTION DATE:1/4/06
MOTION SEQ.#010

Defendant(s)

VICTORIA GAMPEL,

Third-Party Plaintiff(s),

-against-

MARGARET F. DIEKJOBST,

Third-Party Defendant(s).

The following papers read on this motion:

Notice of Motion/Order to Show Cause	x
Cross-Motion	
Answering Affidavit	x
Replying Affidavits	x

Motion by plaintiff for an order determining the final judgment amount following trial of this matter, is determined as set forth herein.

This action arises out of a motor vehicle accident which occurred on July 16, 1995. Plaintiff's decedent, Carmela Ball, was a passenger in a car driven by her sister, defendant/third party plaintiff Victoria Gampel. Gampel's vehicle collided with a vehicle

operated by third party defendant Diekjobst, as Gampel attempted to make a left turn. Gampel's vehicle overturned and Ball was seriously injured.

Ball and Gampel each received $10,000 from Diekjobst, the limit of Diekjobst's 10/20 insurance policy. Ball was insured by plaintiff New York Central Mutual Fire Insurance Company ("NYCM") at the time of the accident and as a result of an underinsured motorist arbitration, Ball was awarded $80,000 from NYCM, less the $10,000 she had received from Diekjobst's insurance policy.

Thereafter, NYCM, as Ball's subrogee, commenced this action against Gampel to recover the sum NYCM had paid to Ball. Gampel commenced a third party action against Diekjobst for contribution or indemnification. By order of Justice Davis of this Court, dated January 31, 2002, Gampel's motion for an order granting leave to serve an amended answer to assert an affirmative defense of GOL §15-108 was granted.

A trial of this matter was held before this Court on September 28 and 29, 2005, on the issue of liability only. Both sides stipulated that damages were in the amount of $70,000, i.e. the amount NYCM paid to Ball. The parties agreed that the issue of whether the $70,000 includes all interest or whether there is interest in addition to the $70,000 would be reserved for post-trial motions. The issues of the application of joint and several liability and set off pursuant to General Obligations Law §15-108 were also reserved for post-trial motions.

At the conclusion of the trial of this matter, the jury apportioned liability 65% to Gampel and 35% to Diekjobst.

Plaintiff now moves for an order determining the final amount of the judgment herein. Plaintiff seeks to hold Gampel liable for 100% of the judgment amount under the rule of joint and several liability. Plaintiff also argues that Gampel is not entitled to any set-off pursuant to General Obligations Law §15-108. Finally, plaintiff seeks interest from the time it paid the $70,000 to Ball.

Turning first to the issue of when interest begins to run, it is fundamental that a subrogee stands in the shoes of its subrogor. The insurer takes the insured's claim against the defendant, subject to all its disqualifications and limitations, and cannot acquire any greater rights than the insured had at time of payment. The rights of the subrogee insurance company are measured by, and limited to, the rights of the insured. (71 NY Jur2d Insurance §2176).

The only potential claim that NYCM's subrogor Carmela Ball had against defendant Gampel was a personal injury claim. Personal injury claims are specifically excepted from receiving interest from the accrual of the cause of action until verdict, even when the personal injury has a contract ground to rest on. (See, Siegel, New York Practice, §411.)

Plaintiff NYCM's attempt to cast its subrogation claim as a property loss, rather than

a personal injury claim, in an effort to accrue additional interest is disingenuous at best. The fact that plaintiff can produce no case law to support its point should speak for itself. Plaintiff's request for interest from the date it made payment to its subrogor is denied. Interest shall be calculated from the date of verdict. (*Love v State of New York*, 78 NY2d 540.)

With regard to the issue of joint and several liability, it is black letter law under the rule of joint and several liability that each defendant is responsible not only for the share of plaintiff's damages that she herself caused, but also for the shares attributable to any other culpable tortfeasor. While Article 16 of the CPLR modifies the rule of joint and several liability, it does not apply to any person held liable by reason of her use, operation or ownership of a motor vehicle. (CPLR 1602[6]). Article 16 of the CPLR is also inapplicable if a defendant is found to be 51% or more at fault. (CPLR 1601[1]). Thus, Article 16 of the CPLR is not applicable to this case in which defendant Gampel was found to be 65% liable for the motor vehicle accident. Therefore, defendant Gampel is subject to joint liability for the full amount of the damages herein.

However, the issue then becomes whether defendant Gampel is entitled to a set-off pursuant to the terms of General Obligations Law 15-108, which provides, in relevant part, that when a release is given to one of two or more persons liable for the same injury, it does not discharge any of the other tortfeasors from liability for the injury, but it reduces the claim of the releasor against the other tortfeasors to the extent of any amount stipulated by the release, or in the amount of the tortfeasor's equitable share of the damages under Article 14 of the CPLR, whichever is the greatest.

While defendant Gampel did plead General Obligations Law 15-108 as a defense in her amended answer, said defense is unavailable to her because her sister, plaintiff's subrogor, for whatever reason, never executed a release to Diekjobst when she received the $10,000 payment from Diekjobst's insurance carrier. Without a release, or acts equivalent to a release (see, Matter of New York City Asbestos Litigation [Brooklyn Nav. Shipyard Cases] 82 NY2d 342), a set-off pursuant to General Obligations Law 15-108 is unavailable.

Thus, defendant Gampel is liable for the full $70,000 in damages with interest from verdict.

Submit judgment on notice.

Date 1.26.06

EDWARD W. McCARTY III

J.S.C.