St. John's Law Review

Volume 46, October 1971, Number 1 Article 40

Settlement: Release Reserving Rights Against Car Owner Construed as Covenant Not To Sue Driver

St. John's Law Review

SETTLEMENT

Settlement: Release reserving rights against car owner construed as covenant not to sue driver.

When a party releases one joint tort-feasor[269] or a co-obligor[270] but reserves his rights against other tort-feasors or co-obligors, the agreement is construed as a covenant not to sue and not a general release. Whether a release of an automobile driver which reserves all rights against the owner of the car should be construed similarly as a covenant not to sue was the issue in *Plath v. Justus*.[271]

In *Plath*, plaintiff instituted a wrongful death action under section 388 of the Vehicle and Traffic Law, against an automobile owner. Plaintiff had released the driver expressly but reserved all rights against all other persons. Defendant moved to dismiss the complaint upon the basis of said release. The Supreme Court, Rensselaer County, denied the motion, upon the ground that the alleged release was in fact a covenant not to sue which was not intended by the parties to release the defendant. Defendant appealed, and the Appellate Division, Third Department, affirmed.[272] Upon appeal, the Court of Appeals affirmed, upon the ground that such instruments should be construed in accordance with the intention of the parties.[273] The court believed that an injured party should be permitted to settle a portion of his claim with one of the wrongdoers while expressly reserving his rights against other wrongdoers.[274] Possible double recovery was not deemed a problem, for the amount of a settlement can be deducted from the later recovery.[275] There was no discussion of a possible third party action, in which the owner would recover over against the driver.

Intention of the parties should be decisive in interpreting an agreement. Hence, the *Plath* decision is just, for it is consistent with the intention of the parties. As Dean Prosser stated,

> [a] plaintiff should never be compelled to surrender his cause of action against any wrongdoer unless he has intentionally done so,

---

269 Lucia v. Curran, 2 N.Y.2d 157, 139 N.E.2d 133, 157 N.Y.S.2d 948 (1956).

270 N.Y. GEN. OBLIGATIONS LAW §§ 15-101 to 15-109 (1964).

271 28 N.Y.2d 16, 268 N.E.2d 117, 319 N.Y.S.2d 433 (1971), *aff'g* 33 App. Div. 2d 833, 306 N.Y.S.2d 80 (3d Dep't 1969).

272 33 App. Div. 2d at 834, 306 N.Y.S.2d at 81, *citing* Derby v. Prewitt, 12 N.Y.2d 100, 187 N.E.2d 556, 236 N.Y.S.2d 953 (1962).

273 28 N.Y.2d at 22, 268 N.E.2d 120, 319 N.Y.S.2d at 437; *accord*, Boucher v. Thomsen, 328 Mich. 312, 43 N.W.2d 866 (1950).

274 *Id.* at 23, 268 N.E.2d at 120, 319 N.Y.S.2d at 438.

275 *Id.*

> or unless he has received such full compensation that he is no longer entitled to maintain it.[276]

When an aggrieved party expressly reserves his rights against other parties while releasing still others, it is clear that he neither intends to relinquish his claims against them nor considers himself fully compensated. Such an agreement is properly interpreted as a covenant not to sue, not a general release.

---

276 W. PROSSER, TORTS § 46, at 272 (3d ed. 1964). *See* 2 S. WILLISTON, CONTRACTS § 338A, at 722-23 (3d ed. 1957).