

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF XXXXXXXXXXXXXXXXXXXX

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XXXXXXXXXXXXXXXXXXXXXXXXXX,

INDEX NO: XXXXXXXXXXXX

Plaintiff,

AFFIRMATION IN
SUPPORT OF MOTION

-against-

XXXXXXXXXXXX and XXXXXXXXXXXXXXX,

Defendants

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JEENA R. BELIL an attorney duly admitted to practice before the Courts of this State affirms the truth of the following under penalty of perjury as provided by the C.P.L.R.

1. I am associated with XXXXXXXXXXXX ESQS. and am one of the attorneys of record for defendant XXXXXXXXXXXXXXX herein. In such capacity I am fully familiar with the facts and circumstances recited herein through a review of the file maintained in this office in connection with the defense of this action.

2. This affirmation is submitted in support of the motion by defendant XXXXXXXXXXXX for an Order permitting her to amend her answer to include the defense that plaintiff is barred by the provisions of N.Y.G.O.L.15-108 from maintaining this action for summary judgment in his favor and further for an Order granting summary judgment in her favor and dismissing plaintiff's complaint. (The summons and complaint are annexed as Exh. A; the answer is annexed as Exh. B; the proposed amended answer is annexed as Exh. C)

3. This action arises out of a most unfortunate series of events culminating in an automobile accident which occurred on December XX, XXXX and which caused the death of one XXXXXXXXXXX. A copy of the police report describing the accident is annexed as Exhibit D.

4. As appears from the complaint in this action (Exh. A) the insurer of XXXXXXXXXXX settled a claim presented to it on behalf of the Estate of XXXXXXXXXXX for the sum of \$ XXX,000 in consideration of which the Estate issued a general release in favor of XXXXXXXXXXX (Complaint para. EIGHTH.)

5. XXXXXXXXXXX thereafter commenced this action wherein it seeks to recover from defendant XXXXXXXXXXX the sum of \$ XXX,000, the full amount of the settlement.¹

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Plaintiff's second cause of action seeking to recover for damages to its own vehicle is not at issue in this motion.

6. The summons and complaint in the case now at bar were duly served and an answer interposed denying the material allegations of plaintiff's complaint.

7. The attention of this court is drawn to paragraph Eleventh of plaintiffs' complaint: "That by virtue of all of the above, the defendant XXXXXXXXXXXXXXXX, whose sole negligence, carelessness and recklessness caused the wrongful death of XXXXXXXXXXXXXXXX, is obliged to **indemnify** (emphasis supplied) the plaintiff XXXXXXXX, for the full amount of the XXXXXXXXX thousand dollar (\$ XXX,000.00) settlement paid by the plaintiff to the estate of the deceased, XXXXXXXXXXXXXXXX. That allegation was denied by defendant.

8. As is more fully discussed in the accompanying memorandum of law, plaintiff does not have a cause of action based in indemnity. Further, plaintiff is apparently trying to circumvent the mandates of N.Y.G.O.L. sec 15-108(c), by calling an action for contribution one for indemnity.

9. This Court should recognize plaintiff's complaint for what it is: a barely concealed effort to circumvent the mandate of N.Y.G.O.L. 15-108 (c) by calling a cause of action for contribution one for indemnity.

10. Having recognized the claim for what it is, this court should permit defendant to amend her answer to plead N.Y.G.O.L. 15-108 (c) and thereupon grant defendant summary judgment in her favor based on that defense and further based on the fact that plaintiff does not have a claim for indemnity.

11. In sum, defendant is entitled to summary judgment in her favor and an Order dismissing the complaint.

WHEREFORE it is respectfully requested that the application be granted in all regards, that defendant be permitted to amend her answer to plead N.Y.G.O.L. 15-108, and that summary judgment be granted together with an Order dismissing the complaint.

Dated: XXXXXXXXX, N.Y.
XXXX XX, 199X

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