NY CLS CPLR R 4533-b

Current through 2025 released Chapters 1-207

New York

Consolidated Laws Service **>**

Civil Practice Law And Rules (Arts. 1 — 100) **>**

Article 45 Evidence (§§ 4501 — 4551)

R 4533-b. Proof of payment by joint tort-feasor

In an action for personal injury, injury to property or for wrongful death, and proof as to payment by or settlement with another joint tort-feasor, or one claimed to be a joint tort-feasor, offered by a defendant in mitigation of damages, shall be taken out of the hearing of the jury. The court shall deduct the proper amount, as determined pursuant to section 15-108 of the general obligations law, from the award made by the jury.

History

Add, L 1971, ch 244, § 1; amd, L 1974, ch 742, § 2, eff Sept 1, 1974.

Annotations

Notes to Decisions

At hearing pursuant to CLS CPLR § 4533-b to determine what portion of settlement payment by original tortfeasors was for original injuries and what portion was for aggravation injuries, following judgment against successive tortfeasors in medical malpractice action for aggravation of injuries caused by original tortfeasors, who were given release by plaintiffs, trier of fact will first determine amount paid to plaintiffs in settlement by original tortfeasors which may or may not be amount recited in release; next, trier will allocate amount between 2 plaintiffs, based upon reasonable intent of party; third, fact-finder should determine what portion, if any, his settlement

payment should be attributed to each plaintiff's aggravation damages, and in so doing, he will consider statement as to allocation, if any, between original and aggravated injuries contained in settlement documents and gravity of respective injuries and determine whether amount allocated by parties was arrived at in good faith; finally, if as to either plaintiff fact-finder allocates any portion of settlement payment to aggravation injuries, he should deduct that portion from damages awarded that plaintiff and direct that judgment be entered for difference. In medical malpractice action which resulted in judgment against successive tortfeasors, defendant hospital and defendant physician, for aggravation of injuries caused by original tortfeasors, who were given release by plaintiffs, further hearing pursuant to CLS CPLR § 4533-b must be held to determine what portion of settlement payment by original tortfeasors was for original injuries and what portion was for aggravation injuries, since any portion of settlement payment found to be attributable to aggravation injuries must be offset against plaintiffs' recovery against defendants, and it will be plaintiff's burden to prove what portion of settlement payment was for aggravation injuries. Hill v St. Clare's Hospital, 67 N.Y.2d 72, 499 N.Y.S.2d 904, 490 N.E.2d 823, 1986 N.Y. LEXIS 16606 (N.Y. 1986).

Where there has been payment by a joint tortfeasor, the court should subtract the amount of the payment from the award made by the jury. Mulligan v Wetchler, 39 A.D.2d 102, 332 N.Y.S.2d 68, 1972 N.Y. App. Div. LEXIS 4632 (N.Y. App. Div. 1st Dep't), app. dismissed, 30 N.Y.2d 951, 335 N.Y.S.2d 701, 287 N.E.2d 391, 1972 N.Y. LEXIS 1156 (N.Y. 1972).

In action for damages arising out of alleged breach of construction contract, CPLR 4533-b does not preclude introduction into evidence of agreement executed by plaintiff owner and defendant and third party plaintiff contractor pursuant to which defendant has admitted liability to plaintiff, fixed and liquidated in such amounts as may be recovered against third party defendant subcontractors, where plaintiff and defendant have fully disclosed existence and terms of agreement and have annexed copies of it to proposed amended pleadings. Lambert Houses Redevelopment Co. v HRH Equity Corp., 117 A.D.2d 227, 502 N.Y.S.2d 433, 1986 N.Y. App. Div. LEXIS 52477 (N.Y. App. Div. 1st Dep't 1986).

In personal injury action, joint tortfeasors' assertion of affirmative defenses of settlement, payment and release would not require hearing pursuant to CLS CPLR § 4533-b unless or until either one of tortfeasors were found liable to plaintiff, and unless amount of plaintiff's total damages were found to exceed sum already paid in settlement by original tortfeasor. Manginaro v Nassau County Medical Center, 123 A.D.2d 842, 507 N.Y.S.2d 455, 1986 N.Y. App. Div. LEXIS 60963 (N.Y. App. Div. 2d Dep't 1986).

Trial court erred in granting judgment for creditor at close of evidence where dispute existed as to whether debtor had acknowledged debt and thus extended limitations period, since issue of authenticity of debtor's signature on disputed acknowledgments presented jury question based on comparison of signatures and on testimony of debtor's bookkeeper that signatures were not genuine. Woll v Raffa, 124 A.D.2d 726, 508 N.Y.S.2d 474, 1986 N.Y. App. Div. LEXIS 62031 (N.Y. App. Div. 2d Dep't 1986).

In personal injury action in which plaintiffs alleged that their motorcycle was forced off road by defendant's car, defendant was entitled to new trial on liability where court refused to permit defense counsel to question motorcycle passenger as to his previous claim that motorcycle driver's negligence caused accident, since there was good faith basis for such inquiry (despite agreement by counsel that settlement between driver and passenger would not be alluded to) in view of inconsistencies in passenger's testimony and liability insurer's settlement of passenger's claim against driver; CLS CPLR § 4533-b (which restricts proof of settlement with joint tort-feasor to mitigate damages) was inapplicable, since passenger's statements were not being offered to mitigate damages but to impeach his credibility. Hayes v Henault, 131 A.D.2d 930, 516 N.Y.S.2d 798, 1987 N.Y. App. Div. LEXIS 48356 (N.Y. App. Div. 3d Dep't 1987).

In medical malpractice action, physician was not entitled to have judgment against him for $265,000 reduced by $250,000 settlement reached by other physicians and hospital where (1) settlement stated that $235,000 was in satisfaction of wrongful death claim and $15,000 was in satisfaction of claim for pain and suffering, (2) apportionment of settlement was made in good faith and amount of settlement for wrongful death claim was reasonable, and (3) $265,000

award against physician was for pain and suffering only. Arbutina v Bahuleyan, 159 A.D.2d 973, 552 N.Y.S.2d 766, 1990 N.Y. App. Div. LEXIS 3274 (N.Y. App. Div. 4th Dep't 1990).

Defendant was entitled to amend answer to assert CLS Gen Oblig § 15-108 as affirmative defense where proposed amendment closely followed settlement with other defendants and plaintiff's purported oral amendment of complaint, even late pleading of statute would not have prejudiced or surprised plaintiff because plaintiff's negotiation of settlement invoked statute, and statute was not subject to proof at trial but had to be applied outside presence of jury under CLS CPLR § 4533-b. Whalen v Kawasaki Motors Corp., U.S.A., 242 A.D.2d 919, 662 N.Y.S.2d 339, 1997 N.Y. App. Div. LEXIS 10494 (N.Y. App. Div. 4th Dep't 1997), aff'd in part, modified, 92 N.Y.2d 288, 680 N.Y.S.2d 435, 703 N.E.2d 246, 1998 N.Y. LEXIS 3212 (N.Y. 1998).

Court erred in failing to reduce damage award by $50,000, amount of settlement received by plaintiff from joint tortfeasor, where court had signed order authorizing that settlement, defendants thereafter amended their answers to assert affirmative defense under CLS Gen Oblig § 15-108, and at trial, defendants advised court that they did not seek reduction in amount of released tortfeasor's equitable share of damages, but rather sought setoff against any verdict received by plaintiff to extent of $50,000 settlement. Rappold v Wagner, 244 A.D.2d 855, 665 N.Y.S.2d 225, 1997 N.Y. App. Div. LEXIS 12172 (N.Y. App. Div. 4th Dep't 1997).

Plaintiffs in personal injury action arising from motor vehicle accident were not required to exhaust collateral resources, such as insurance, before bringing action against owner and driver of second vehicle involved in accident. Greenberg v Parbury, 251 A.D.2d 454, 673 N.Y.S.2d 333, 1998 N.Y. App. Div. LEXIS 6873 (N.Y. App. Div. 2d Dep't 1998).

Award of damages in medical malpractice action would be reduced by amount paid to plaintiffs by settling joint tortfeasors. Baumgarten v Slavin, 255 A.D.2d 538, 680 N.Y.S.2d 658, 1998 N.Y. App. Div. LEXIS 12942 (N.Y. App. Div. 2d Dep't 1998).

Statute, which provides that in an action for personal injury or injury to property, any proof as to payment by a joint tortfeasor offered by a defendant in mitigation of damages shall be taken out

of hearing of jury and that court shall deduct the amount of such payment from award made by jury, applies to both a remaining joint tortfeasor and a successive tortfeasor. Purpose of statute, which provides that in an action for personal injury or injury to property, any proof as to payment by joint tort-feasor offered by a defendant in mitigation of damages shall be taken out of the hearing of the jury and that court shall deduct the amount of such payment from the award made by jury, is to modify rule under which payment by one of several tort-feasors was permitted to be proved in presence of jury. Abernethy v Azzoni, 78 Misc. 2d 832, 358 N.Y.S.2d 264, 1974 N.Y. Misc. LEXIS 1505 (N.Y. Sup. Ct. 1974).

Statute governing proof of payment by joint tortfeasor under which court is to make appropriate deduction, after verdict, of payment by or settlement with another joint tortfeasor, without disclosing to jury fact or amount of settlement or payment, is applicable to action for injury to property, including action for fraud. Primoff v Duell, 85 Misc. 2d 1047, 381 N.Y.S.2d 947, 1976 N.Y. Misc. LEXIS 2112 (N.Y. Sup. Ct. 1976).

In a personal injury action in which one defendant settles with the plaintiff prior to the jury verdict, if it is determined that the settlor was not subject to liability, that his equitable share of the damages was zero and that the payments made in settlement were made as a pure volunteer, the amount stipulated in the release or the amount paid for the release will nonetheless be deducted from the verdict rendered against the actual wrongdoers, since the question of common liability of joint tortfeasors for purposes of subdivision (a) of section 15-108 of the General Obligations Law and CPLR 4533-b must be determined as of the time the cause of action accrues and not at the time when the relative culpabilities of the parties are subsequently determined by a jury. Accordingly, in a personal injury action in which certain defendants settled out of the action for $150,000 prior to the time the jury rendered a verdict of $775,000, apportioned liability completely between the remaining defendants and exonerated the settlors of any liability, plaintiff’s verdict against the remaining tortfeasors should be reduced by $150,000. Purcell v Doherty, 102 Misc. 2d 1049, 424 N.Y.S.2d 991, 1980 N.Y. Misc. LEXIS

2056 (N.Y. Sup. Ct. 1980), aff'd, 80 A.D.2d 755, 437 N.Y.S.2d 993, 1981 N.Y. App. Div. LEXIS 17005 (N.Y. App. Div. 1st Dep't 1981).

In an action by a pedestrian and his wife against a state for injuries sustained when the pedestrian was struck from the rear by a motorist while he was returning to his car parked on the median of an interstate expressway after they had visited a state fair, the settlement proceeds paid to the plaintiffs by released tortfeasors would be apportioned between the spouses in the same proportion of the damages sustained by them. The relative shares of culpability of the state and the released motorist-tortfeasor, would be found to be 80 percent and 20 percent respectively, inasmuch as the amount of the settlement between the motorist and the plaintiffs exceeded the motorist’s equitable share. Merrill v State, 110 Misc. 2d 260, 442 N.Y.S.2d 352, 1981 N.Y. Misc. LEXIS 3074 (N.Y. Ct. Cl. 1981), aff'd, 89 A.D.2d 802, 453 N.Y.S.2d 383, 1982 N.Y. App. Div. LEXIS 17924 (N.Y. App. Div. 4th Dep't 1982), aff'd, 89 A.D.2d 802, 453 N.Y.S.2d 384, 1982 N.Y. App. Div. LEXIS 17923 (N.Y. App. Div. 4th Dep't 1982).

Pursuant to CPLR § 4533-b and Gen Oblig Law § 15-108, an injured fireman’s judgment against the state, which was found to be 75 percent liable for his injuries, would be reduced from 75 percent of the total damages to the total damages minus the amount received from the county determined to be 25 percent liable, where the county had settled for an amount greater than what was determined to be its equitable share. Tabone v State, 116 Misc. 2d 864, 456 N.Y.S.2d 950, 1982 N.Y. Misc. LEXIS 3972 (N.Y. Ct. Cl. 1982).

In a wrongful death action against the State, in which the State was 20 percent liable due to its negligence in permitting a dangerous condition to exist at the median immediately adjoining a State roadway, the claimant’s recoverable damages would be reduced by the driver’s equitable share of fault, since the award was subject to such reduction, pursuant to CPLR § 4533-b, by the greater of any settlement entered into with a joint tortfeasor or the party’s equitable share of damages, and the latter amount was higher than the settlement accepted by the claimant from the driver. Penzell v State, 120 Misc. 2d 600, 466 N.Y.S.2d 562, 1983 N.Y. Misc. LEXIS 3770 (N.Y. Ct. Cl. 1983).

Where the consideration for the release of a joint tortfeasor was waiver of a workers' compensation carrier's lien, the amount of such lien would be reduced by a sum representing plaintiff's reasonable legal fees in maintaining the action, pursuant to Work Comp Law § 29(1), before the total judgment obtained by plaintiff against the non-settling defendants would be reduced by either the amount stipulated by the release or by the amount of the released tortfeasor's equitable share of the damages, under Gen Oblig Law § 15-108(a) and CPLR § 4533-b. Reinitz v ARC Electrical Constr. Co., 121 Misc. 2d 966, 470 N.Y.S.2d 90, 1983 N.Y. Misc. LEXIS 4049 (N.Y. Sup. Ct. 1983), modified, 104 A.D.2d 247, 483 N.Y.S.2d 821, 1984 N.Y. App. Div. LEXIS 20626 (N.Y. App. Div. 3d Dep't 1984).

Defense counsel's inquiry into the injured parties' out of court settlement with the driver was improper because it attempted to establish liability or to mitigate damages; the injured parties were denied a fair trial since the jury could have found otherwise had the settlement not been disclosed. Andresen v Kirschner, 190 Misc. 2d 779, 742 N.Y.S.2d 474, 2001 N.Y. Misc. LEXIS 1247 (N.Y. Sup. Ct. 2001), rev'd, 297 A.D.2d 235, 746 N.Y.S.2d 258, 2002 N.Y. App. Div. LEXIS 7945 (N.Y. App. Div. 1st Dep't 2002).

Transit authority was entitled to a hearing to determine what portion of damages paid to the injured person and spouse were attributable to injuries caused by a separate tortfeasor responsible for the injured person and spouse's prior injuries and what portion was attributable solely to injuries the injured person received when the transit authority's train derailed as the transit authority was entitled to have offset from the damages it was ordered to pay the settlement amount the separate tortfeasors paid and which was attributable solely to their conduct. Mavashev v N.Y. City Transit Auth., 300 A.D.2d 552, 751 N.Y.S.2d 602, 2002 N.Y. App. Div. LEXIS 12723 (N.Y. App. Div. 2d Dep't 2002).

Research References & Practice Aids

Cross References:

Release or covenant not to sue, CLS Gen Oblig § 15-108.

Jurisprudences:

36 NY Jur 2d Damages §§ 129–132.

58A NY Jur 2d Evidence and Witnesses § 942. .

5 Am Jur Trials 921., Showing Pain and Suffering.

Law Reviews:

Civil jury trial: your proof. 42 NYSB J 52.

Treatises

Matthew Bender's New York Civil Practice:

Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 4533-a, Proof of Payment by Joint Tort-feasor.

3 Rohan, New York Civil Practice: EPTL ¶5-4.2.

Matthew Bender's New York CPLR Manual:

CPLR Manual § 10.05. Effect of settlement.

Matthew Bender's New York AnswerGuides:

LexisNexis AnswerGuide New York Civil Litigation § 10.10. Offering Proof of Payment by Joint Tortfeasor in Mitigation of Damages.

Matthew Bender's New York Evidence:

3 Bender's New York Evidence § 153.07. Offers of Compromise or to Pay Expenses.

Annotations:

Validity and effect of agreement with one cotortfeasor setting aside his maximum liability and providing for reduction or extinguishment thereof relative to recovery against nonagreeing cotortfeasor. 65 ALR3d 602.

Applicability of res ipsa loquitur in case of multiple, nonmedical defendants—modern status. 59 A.L.R.4th 201.

Hierarchy Notes:

NY CLS CPLR, Art. 45

End of Document