

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1347

CA 10-00579

PRESENT: SMITH, J.P., FAHEY, LINDLEY, SCONIERS, AND GORSKI, JJ.

DOMINICK P. VITALE, JR., AS EXECUTOR OF THE ESTATE OF ANNAMAE L. VITALE, DECEASED, AND AS ASSIGNEE OF SALVATORE MATTINA, AND DOMINICK P. VITALE, INDIVIDUALLY AND AS ASSIGNEE OF SALVATORE MATTINA, PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

MIDROX INSURANCE COMPANY, DEFENDANT-RESPONDENT.

HOGAN WILLIG, AMHERST (ERIC B. GROSSMAN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

WALSH, ROBERTS & GRACE, BUFFALO (THOMAS E. ROBERTS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered December 3, 2009 in a breach of contract action. The order, insofar as appealed from, granted defendant an offset of \$25,000.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiffs commenced this action pursuant to Insurance Law § 3420 (a) (2) seeking, inter alia, to recover payment on a default judgment that they obtained against defendant's insured, Salvatore Mattina, in the underlying personal injury action. Plaintiffs contend that Supreme Court erred in denying in part their motion for partial summary judgment and in granting in part defendant's cross motion for summary judgment by reducing its liability by \$25,000, the amount of the settlement paid by Latina-Niagara Importing Co., Inc. (Latina), a codefendant in the underlying action. We reject that contention. Although we agree with plaintiffs that defendant was not entitled to such an offset based on Mattina's "equitable share of the damages" under CPLR article 14 inasmuch as Mattina defaulted in the underlying action (General Obligations Law § 15-108 [a]; see generally *Whalen v Kawasaki Motors Corp., U.S.A.*, 92 NY2d 288, 292), the court properly "allowed an offset pursuant to section 15-108 (a) in the amount of plaintiff[s'] settlement with [Latina]" (*Garcea v Battista*, 53 AD3d 1068, 1070).

Entered: November 19, 2010

Patricia L. Morgan
Clerk of the Court