

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DUANE A. HART IA Part 18
Justice

	x	Index Number <u>24002</u> 2002
JAMES CORREDINE, et al.		
- against -		Motion Date <u>May 26,</u> 2004
VW CREDIT, INC., et al.		Motion Cal. Numbers <u>6 & 7</u>
	x	

The following papers numbered 1 to 21 read on these separate motions by the plaintiff and defendant Volkswagen Credit (Volkswagen), for summary judgment in their favor.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1-7
Answering Affidavits - Exhibits.....	8-14
Reply Affidavits.....	15-21

Upon the foregoing papers it is ordered that the motions are determined as follows:

This is a negligence action to recover damages for serious personal injuries sustained by plaintiff James Corredine, on August 3, 2001, while operating a motor vehicle on the Long Island Expressway. As a result of the accident, the plaintiff was rendered a triplegic.

The accident occurred when the vehicle owned by defendant Volkswagen and operated by Richard Flanagan, the vehicle lessee, struck the plaintiff's stopped vehicle in the rear. The plaintiff's vehicle was then propelled into two vehicles which were stopped in front of it. At the time of the accident, defendant Flanagan was the lessee of the Volkswagen vehicle pursuant to a 39-month vehicle lease agreement, dated July 10, 2000. The complaint seeks damages against defendant Flanagan as the negligent operator of the offending vehicle and against defendant Volkswagen for its vicarious liability as title owner of the offending vehicle pursuant to VTL §§ 128 and 388.

The plaintiff moves for summary judgment against both defendants on the issue of liability. In a separate motion, defendant Volkswagen seeks dismissal of the plaintiff's claims against it as well as summary judgment in its favor and against defendant Flanagan on its cross claims for contractual and common-law indemnification.

Defendant Volkswagen contends that it is entitled to dismissal of the claims against it on the ground that it is not the owner of the offending vehicle as defined by VTL §§ 128 and 388, and thus is not subject to vicarious liability for injuries caused by permissive users of the leased vehicle. Defendant Volkswagen argues that it is not the owner of the subject vehicle because the lease agreement between it and defendant Flanagan transferred all indicia of ownership to defendant Flanagan and that its interest in the vehicle is merely a security interest. In opposition to Volkswagen's motion to dismiss the complaint against it, the plaintiff states that Volkswagen's claim that it is not an owner of the offending vehicle is belied by the terms of the lease agreement and, further, has no basis in law.

The lease agreement between defendants Volkswagen and Flanagan refers to the respective defendants as "lessor" and "lessee." The introductory paragraph of the agreement states, in relevant part, the following:

"You (the "lessee" and "co-lessee," if applicable) agree to lease from lessor the following vehicle. If more than one lessee executes this lease, each lessee will be individually liable for the entire amount owing under this lease. Lessor will assign the lease and leased vehicle to Volkswagen Credit, a division of VW Credit, Inc. or its assignee (the "Holder")."

Paragraph 25 of the lease agreement is a Purchase Order. It provides:

"You understand that this is a true lease and you have no equity or other ownership rights in the vehicle or its accessories or replacement parts other than the purchase option, assignable to the lessee only."

Paragraph 32 of the lease agreement refers to Ownership and Assignment. It provides:

"You understand that this lease will be assigned to Holder or its assignor as disclosed on the face of the lease. Holder shall be sole owner of the vehicle and its accessories, whether original or affixed subsequent to

the commencement of the lease, and the certificate of title must be in the name of Holder. Holder shall be permitted to assign this lease but You may not do so without prior written approval of Holder. You may not assign, sell, give a security interest in, sublease or arrange an assumption of Your interests or rights under this lease or in the vehicle without Holder's prior written permission." (emphasis added).

Vehicle and Traffic Law § 388 provides, in relevant part, the following:

"1. Every owner of a vehicle used or operated in this state shall be liable and responsible for death or injury to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owners...

3. As used in this section, "owner" shall be as defined in section one hundred twenty-eight of this chapter and their liability under this section shall be joint and several. If a vehicle be sold under a contract of sale which reserves a security interest in the vehicle in favor of the vendor, such vendor or his assignee shall not, after delivery of such vehicle, be deemed an owner within the provisions of this section, but the vendee, or this assignee, receiving possession thereof, shall be deemed such owner notwithstanding the terms of such contract, until the vendor or his assignee shall retake possession of such vehicle. A secured party in whose favor there is a security interest in any vehicle out of his possession, shall not be deemed an owner within the provisions of this section."

Pursuant to Vehicle and Traffic Law § 128, an owner is defined as:

"A person, other than a lien holder, having the property in or title to a vehicle or vessel subject to a security interest in another person and also includes any lessee or bailee of a motor vehicle or vessel having the exclusive use thereof, under a lease or otherwise for a period greater than thirty days."

Volkswagen did not make a prima facie showing of entitlement to judgment in its favor. (Zuckerman v City of New York,

49 NY2d 557 [1980].) Contrary to Volkswagen's contention, the terms of the subject agreement demonstrate that the agreement is a lease and not a security agreement. Moreover, the evidence presented clearly establishes that Volkswagen is the titleholder of the subject vehicle. As titleholder of the offending vehicle, Volkswagen Credit is an owner within the meaning of the Vehicle & Traffic Law and may be held liable for the plaintiff's injuries as a matter of law. (Litvak v Fabi, 8 AD3d 631 [2004]; Ryan v Sobolevsky, 4 AD3d 222 [2004]; Sullivan v Spandau, 186 AD2d 64 [1992].) Thus, Volkswagen Credit's motion to dismiss the complaint against it on the ground that it is not an owner of the vehicle is denied.

The plaintiff has demonstrated an entitlement to summary judgment on the issue of liability. The evidence submitted by the plaintiff in support of summary judgment on the issue of liability, including a copy of defendant Flanagan's deposition testimony, demonstrates that Flanagan observed the plaintiff's stopped vehicle prior to the rear-end collision with it. When Flanagan first observed the plaintiff's vehicle, it was three to five car lengths ahead of him. Flanagan admitted that he observed that the plaintiff's brake lights were illuminated, but was unable to state how long before the impact he made this observation. Defendant Flanagan was also unable to state what distance separated the front of his vehicle from the rear of the plaintiff's vehicle when Flanagan first applied his brakes. Nor was defendant Flanagan able to estimate his rate of speed at the time of impact. Photographs of the subject vehicles taken after the accident depict extensive damage to both vehicles. The plaintiff's vehicle appears unsalvageable. "It is well settled that a rear-end collision with a stopped vehicle establishes a prima facie case of liability against the moving vehicle and a duty of explanation on its driver." (Krakowska v Nikson, 298 AD2d 561 [2002].) In the absence of a reasonable explanation, defendant Flanagan's failure to maintain a reasonably safe distance between his vehicle and the plaintiff's vehicle and to be aware of readily observable traffic conditions constituted negligence as a matter of law which caused the accident. (VTL § 1129[a]; Silberman v Surrey Cadillac Limousine Serv., 109 AD2d 833 [1985].) Accordingly, the plaintiff is granted summary judgment on the issue of liability against defendant Flanagan as the operator of the offending vehicle and against defendant Volkswagen on vicarious liability grounds. (See, Rebecchi v Whitmore, 172 AD2d 600 [1991].)

Finally, defendant Volkswagen seeks summary judgment on its cross-claim for indemnification against defendant Flanagan.

Paragraph 33 of the defendants' lease agreement states that defendant Flanagan "agree[s] to reimburse and hold Holder

[Volkswagen] and its assignees...harmless for all losses, damages, injuries, claims, demands and expenses arising out of the condition, maintenance, use or operation of the vehicle." Paragraph 36 of the lease agreement provides that "the terms of the lease may only be changed in writing." Defendant Flanagan does not dispute the validity of the indemnification clause. Nor does he claim that there has been any modification to the clause. Thus, the court finds that defendant Flanagan is obligated to indemnify Volkswagen pursuant to both the contract and common law for all damages Volkswagen incurs as a result of the subject accident. (See, Jensen v Chevron Corp., 160 AD2d 767 [1990]; Hertz Corp. v Dahill Moving Co., 79 AD2d 589 [1980]). Accordingly, that branch of Volkswagen's motion which seeks summary judgment on the cross claim for indemnification is granted.

Dated: October 7, 2004

J.S.C.