

DaimlerChrysler Ins. Co. v Roubeni

2008 NY Slip Op 31342(U)

May 7, 2008

Supreme Court, New York County

Docket Number: 0103612/2006

Judge: Walter Tolub

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: _____

PART _____

WALTER B. TOLUB
Justice

Index Number : 103612/2006
DAIMLER CHRYSLER INS. CO.
vs
ROUBENI, ALFRED
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

MAY 12 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 5/7/08

WALTER B. TOLUB

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----x

DAIMLERCHRYSLER INSURANCE COMPANY, a
foreign corporation as subrogee of DCFS
Trust, a foreign corporation,

Plaintiff,

-against-

ALFRED ROUBENI,

Defendant.

WALTER B. TOLUB, J.:

Index No.103612/06
Mtn Seq.001

FILED
MAY 12 2003
COUNTY CLERK'S OFFICE
NEW YORK

This is a motion by the Plaintiff for summary judgment on the ground that there exists no material issue of fact for trial as to the Plaintiff's entitlement for indemnification. Defendant cross-moves for summary judgment dismissing the action in its entirety.

Facts

The facts are, in large part, uncontested. Defendant Roubeni leased a 2003 Mercedes-Benz E500 (the "Vehicle") from Rallye Motors under a 39 month lease (the "Lease"). On page 3 of the Lease was a paragraph whereby Rallye motors assigned all of its rights under the Lease, and all of its rights and interest in the Vehicle, to DCFS. The assignment paragraph states:

By signing below, the Lessor (or if DCFS Trust is Lessor, through its attorney-in-fact) accepts the terms and conditions of this Lease. If Lessor is not DCFS Trust, Lessor assigns all right, title and interest in this Lease vehicle and Guaranty to DCFS

Trust.

(Plaintiff's Ex. A, p. 3 of Lease; see also para. 21 of Lease).

The Lease also contained an indemnification clause under which the Lessee agrees to indemnify DCFS:

If you are subjected to any claims, losses, injuries, expenses or costs related to the use, maintenance, or condition of the vehicle, I will pay all of your resulting costs and expenses, including attorneys' fees.

(Plaintiff's Ex. A, para. 23 of Lease).

Additionally, the Lease required Roubeni to obtain an automobile insurance policy, with bodily injury limits of at least \$100,000 per person and \$300,000 per accident, and to name DCFS as an additional insured on that policy. (Plaintiff's Ex. A, para 16 of Lease).

DCFS was also named an additional insured under an excess insurance policy issued by DaimlerChrysler Insurance Company ("DCIC"). Under the DCIC policy, DCFS was insured against potential injury liability, in excess of DCFS's coverage under the Roubeni policy, arising from the operation of the Vehicle. The DCIC policy also provided that, in the event of payment under the policy, DCIC would be subrogated to all of its insured's rights of recovery.

DCFS and Roubeni were sued for personal injuries which resulted from Roubeni's operation of the Vehicle during the terms of the DCIC policy in an action captioned Heather Hogan v. Alfred

Roubeni and DCFS Trust, Index no. 107127/04 ("Hogan Action"). In that action, Ms. Hogan sought recovery for personal injuries she sustained on March 4, 2004 resulting from Roubeni's use of the Vehicle. DCFS's liability was predicated solely on its ownership of the Vehicle. The suit was settled on the record, in court, for \$790,000. Roubeni's insurer paid \$100,000. Pursuant to the DCIC policy, DCIC paid the remaining \$690,000 of the settlement and DCIF's defense costs.

The settlement agreement also included an allocution in which Defendant Roubeni personally acknowledged the reasonableness of the settlement and that he understood that, the now Plaintiff, reserved the right to sue him for indemnification. (Plaintiff's Ex. D, Settlement Transcript).

DCIC brings this action as subrogee, to recover money paid to defend and settle the personal injury lawsuit against DCFS and Roubeni. Plaintiff seeks summary judgment on its claims for contractual indemnification and common law indemnification. Defendant cross moves for summary judgment claiming that Plaintiff is not entitled to indemnification under any legal theory and that therefore this action should be dismissed.

Discussion

Contractual Indemnification

Indemnification clauses in contracts dealing with motor vehicles are enforceable to the extent that the lessor's

liability exceeds the amount of primary insurance the lessee was required to provide. (ELRAC, Inc. v. Ward, 96 NY2d 58 [2001]; ELRAC, Inc. v. Masara, 280 Ad2d 449 [1st Dept 2001]; Tokio Marine & Fire Ins. Co. v. Borgia, 11 AD3d 603 [2d Dept 2004]). A lessor of a motor vehicle can obtain contractual indemnification from the lessee where the agreement obligates the lessee to indemnify the lessor with respect to all claims arising out of the lessee's use of the vehicle, and the lessee is involved in an accident giving rise to such a claim while operating the leased vehicle. (ELRAC, Inc. v. Masara, 280 Ad2d 449 [2nd Dept 2001]). In contractual indemnification the one seeking indemnity need only establish that it was free from any negligence and was held liable solely pursuant to a statute. (Correia v. Professional Data Management, Inc., 259 AD2d 60, 65 [1st Dept 1999]).

Here, the Plaintiff's were held liable to Ms. Hogan pursuant to VTL §388 and the provisions in the agreements between the parties. The indemnification provision in the Lease required Roubeni to indemnify DCFS in the event of any claims, costs and expenses arising from his use of the Vehicle. As the lessor's assignee¹, DCFS is entitled to exercise its contractual right to indemnification and, by operation of the DCIC policy, the subrogation clause and indemnification under the Lease is payable

¹ Although Defendant disputes that the Lease was properly assign, the Lease clearly states that it was. (See quote from Lease in Fact portion of this decision *supra*).

to DCIC.

It is undisputed that Roubeni leased the Vehicle, that the leased Vehicle was involved in an accident and that a third-party sustained damages as a result of the accident. It follows that Plaintiff is entitled to summary judgment on its cause of action for contractual indemnification.

Common-Law Indemnification

"[I]n the case of common-law indemnification, the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident for which the indemnitee was held liable to the injured party by virtue of some obligation imposed by law. . ." (Correia v. Professional Data Management, Inc., 259 AD2d 60, 65 [1st Dept 1999] citing McDermott v. City of New York, 50 NY2d 211 [1980]).

Here, there has been no finding or admission of negligence by Roubeni in the underlying personal injury action or otherwise. It follows that Plaintiff's motion for summary judgment for common law indemnification is denied.

The fact that summary judgment is granted on the contractual indemnity claim and not on the common law claim between the same two parties is not at all inconsistent. Contractual indemnification differs from common law indemnification in that

the Lessor under a contract must show that it was free from negligence and was held liable solely by virtue of statutory liability. By distinction, to prevail on a common law indemnification claim, a person seeking indemnity must show the additional element of the Lessor's negligence. (See generally, Correia, 259 AD2d 60 [1st Dept 1999]). Accordingly it is;

ORDERED that Plaintiff's motion for summary judgment is granted as to the contractual indemnification claim only; and it is further

ORDERED that Plaintiff's motion and Defendant's cross-motion for summary judgment for common law indemnification are denied; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

Counsel for the parties are directed to appear for a hearing to determine the amounts owed by the Defendant to the Plaintiff on Monday June 23, 2008 at 9:30 AM in room 335 at 60 Centre Street.

This memorandum opinion constitutes the decision and order of the Court.

Dated:

5/7/08

FILED
MAY 12 2008
COUNTY CLERK'S OFFICE
NEW YORK 6

HON. WALTER B. TOLUB, J.S.C.