

<b>American Guar. &amp; Liab. Ins. Co. v Hertz Corp.</b>
2007 NY Slip Op 31400(U)
May 25, 2007
Supreme Court, New York County
Docket Number: 0602292/2003
Judge: Jane S. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

JANE S. SOLOMON

Index Number : 602292/2003

PART 55

AMERICAN GUARANTEE &

vs

HERTZ

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE 12/11/06

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

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

1-3

Answering Affidavits — Exhibits \_\_\_\_\_

4-5

Replying Affidavits \_\_\_\_\_

6-7

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the aforesaid memorandum decision, order, judgment and declaration.

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

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 5/28/07

*Jane S. Solomon*  
JANE S. SOLOMON, C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 55

AMERICAN GUARANTEE AND LIABILITY  
INSURANCE COMPANY,

INDEX NO. 602292/03

Plaintiff,

DECISION, ORDER,  
DECLARATION AND  
JUDGMENT

-against-

THE HERTZ CORPORATION and MALKIE  
ASHKENAZI,

Defendants.

JANE S. SOLOMON, J.

Plaintiff American Guarantee and Liability Company ("American Guarantee") moves for summary judgment in this action for declaratory judgment involving an insurance policy that provided coverage for automobiles rented by defendant The Hertz Corporation ("Hertz") to the public, and to dismiss Hertz's counter-claim. Hertz cross-moves for summary judgment in its favor. For the reasons below, the motion is granted, and the cross-motion is denied.

Zalman Ashkenazi, a resident of Brooklyn, New York, rented a car from a Hertz office in Mexico. On March 10, 1999, he was involved in an accident in Mexico while driving the rented car. His wife, defendant Malkie Ashkenazi ("Malkie"), was a passenger in the car and she sustained serious injuries in the accident. She sued Hertz in the Supreme Court, Kings County in June 2001 (the "Malkie Action"), on the grounds that it owned the

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car and was responsible for her injuries. Hertz hired counsel to defend it against the lawsuit. In the course of litigating Malkie's claim, Hertz demanded a bill of particulars. Malkie's bill of particulars was served on Hertz's counsel on December 10, 2001. Three years later, Hertz won summary judgment dismissing the action. It incurred \$90,983.12 in defense costs and attorney's fees.

American Guarantee issued a policy of liability insurance covering Hertz for the period from March 31, 1998 to March 31, 1999. The policy provides coverage for personal injury claims arising outside the United States. It does not include a choice of law provision. There is a \$100,000 deductible for accidents occurring in Mexico. The policy was issued from American Guarantee's office located at One Liberty Plaza, New York, New York. Hertz procured the policy through its insurance broker, AON Risk Services, also located in Manhattan. Hertz is a Delaware corporation with its principal place of business in New Jersey, but it maintains a significant business presence in the State of New York.

Hertz notified American Guarantee of the Malkie Action, and the underlying occurrence, on November 22, 2002. American Guarantee denied coverage due to late notice by a letter dated December 10, 2002.

In this action, American Guarantee seeks a declaration

\* 4 ]  
that Hertz is not entitled to coverage under the policy for the Malkie claim, and that American Guarantee has no duty to pay any costs or expenses incurred by Hertz in the Malkie Action. Malkie was joined as a necessary party, but the action was discontinued as against her by stipulation. Hertz cross-claimed for a declaration that it is entitled to coverage for the Malkie claim and to recover its defense costs.

#### DISCUSSION

Under New York law, an insured's contractual duty to give prompt notice of an occurrence or lawsuit is a condition precedent to coverage, and late notice is grounds for declining coverage without requiring the insurer to show that it was prejudiced by the delay. Argo v Greater New York Mutual Ins. Co., 4 NY3d 322 (2005). Hertz learned of the Malkie accident no later than June or July 2001, when the summons and complaint was served upon it. The occurrence was described in greater detail in the bill of particulars Malkie's attorney served on Hertz in December 2001, including the date, place and circumstances of the incident. However, Hertz did not give notice to American Guarantee of the of the occurrence or its receipt of a summons and complaint until November 2002, more than sixteen months after it learned of the lawsuit and the underlying incident. This notice is late as a matter of law, and the disclaimer is valid

under New York law without any further inquiry.

Hertz contends that the insurance contract should be construed under New Jersey law because its principal place of business is located there. New Jersey law provides that late notice is sufficient grounds for declining coverage only if the insurer can show a likelihood that it suffered appreciable prejudice by the delay. Cooper v GEICO, 51 NJ 86, 94 (1968). Since Hertz ultimately prevailed in the Malkie lawsuit, it argues, American Guarantee cannot meet its burden of showing a likelihood of appreciable prejudice because it would not have obtained a better result if it had the opportunity to investigate.

Where there is a conflict between the applicable laws of two or more jurisdictions in a contract case, New York courts analyze the facts and follow the law of the jurisdiction which has the most significant relationship to the transaction and the parties. See, Zurich Ins. Co. v Shearson Lehman Hutton, Inc., 84 NY2d 309 (1994). This analysis is referred to as a "center of gravity" or "grouping of contacts" approach. Id., and see Certain Underwriters at Lloyd's, London v. Foster Wheeler Corp., 36 AD3d 17 (1<sup>st</sup> Dept 2006), lv. to appeal granted, 2007 NY App. Div. LEXIS 2440 (1<sup>st</sup> Dept., March 1, 2007).

In a contract case, the principal factors to be considered are the place of negotiation, place of performance,

location of the subject matter of the contract, and the domicile or place of business of the contracting parties. Zurich Ins. Co., 84 NY2d at 317. The First Department held in Certain Underwriters at Lloyd's, London, supra, that where an insurance contract covering risks scattered through a multitude of jurisdictions is involved, the state of the insured's domicile is the principal location of the insured risk. The insured's principal place of business is the "primary factor" in the choice of law analysis, outweighing such factors as where the contract was negotiated and the location of the insurance broker. Munzer v St. Paul Fire & Marine Ins. Co., 203 AD2d 770 (3<sup>rd</sup> Dept 1994). Placing greater weight on the insured's principal place of business is desirable because it makes it more likely that consistent and uniform results will be reached in different cases. Certain Underwriters at Lloyd's, London, 36 AD3d at 23-24.

In the present case, Hertz maintains its principal place of business in New Jersey. But it has a substantial presence in New York, the policy was issued in New York and delivered to Hertz's New York broker, and the underlying action was litigated in New York with New York plaintiffs and New York counsel. Nevertheless, since this insurance policy contemplated coverage of risks across many jurisdictions and has its primary impact on Hertz, defendant's argument that the substantive law of

New Jersey law should apply is persuasive. Therefore, the court looks to the substantive law of New Jersey to decide whether Hertz can recover under the policy.

Hertz argues that New Jersey law prohibits the application of a defense costs deductible in a policy for automobile insurance, citing N.J. Stat. § 45:21-3. Hertz relies on no other New Jersey authority to support its claim that the deductible provided for in the insurance policy does not apply to this claim. N.J. Stat. § 45:21-3 addresses the obligation of a person in the business of renting automobiles to carry liability insurance at certain minimum levels, presumably to protect both renters and the innocent victims of automobile accidents involving rented vehicles in New Jersey. The statute does not provide that a defense cost deductible to Hertz is unenforceable, and it has no application to this lawsuit.<sup>1</sup> Therefore, Hertz has not met its burden of showing that the deductible is unenforceable under New Jersey Law, and the policy will be enforced as written.

Since it is undisputed that Hertz seeks to recover defense costs of \$90,983.12, and the policy provides for a deductible in the amount of \$100,000, American Guarantee is entitled to summary judgment. Even if the claim exceeded

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<sup>1</sup> It appears that a defense cost deductible that reduces liability coverage is prohibited, but that is not at issue here.

\$100,000, Hertz would not be entitled to summary judgment because there would be a question of fact as to whether American Guarantee was prejudiced by Hertz's failure to give timely notice, and American Guarantee would have the opportunity to show that it could have resolved the Malkie Action with less expense. Accordingly, it hereby is

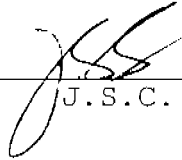
ORDERED, ADJUDGED and DECLARED that the motion by American Guarantee for summary judgment is granted; the counter-claim is dismissed; and it is declared that American Guarantee has no duty to pay any costs or expenses incurred by Hertz in connection with the Malkie Action; and it further is

ORDERED that the cross-motion is denied; and it further is

ORDERED that the Clerk is directed to enter judgment accordingly, with costs and disbursements to American Guarantee as taxed.

Dated: May 25, 2007

ENTER:

  
\_\_\_\_\_  
J.S.C.

G:\SHARED\070523 Amer Guarantee v Hertz sj.wpd

JANE S. SOLOMON

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