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SCANNED ON 3/4/2008

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

PRESENT: Hon Deborah Kaplan PART 22

DEBORAH A. KAPLAN J.S.C.

Index Number : 108132/2005

QUINONEZ, SILAS

VS

MANHATTAN FORD

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 11-21-07

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

Cal # 90

is 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 denied in accordance with the attached Opinion and Order.

This constitutes the Decision and Order of the Court.

FILED
MAR 04 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 2-22-08

Deborah Kaplan
DEBORAH A. KAPLAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 22

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SILAS QUINONEZ,

Plaintiff,

-against- Index No.108132/05

MANHATTAN FORD, LINCOLN-MERCURY, INC., ALL TAXI MANAGEMENT, INC., ADROINE THOMAS, KHALID MAHMOOD and ALL TAXI AUTOMOBILE, INC.,

Defendants.

----------X

MANHATTAN FORD, LINCOLN-MERCURY, INC.,

Third-Party Plaintiff,

-against- Index No. 559003/06

LAZ PARKING OF NEW YORK/NEW JERSEY, INC.,

Third-Party Defendant.

----------X

MANHATTAN FORD, LINCOLN-MERCURY, INC.,

Second Third-Party Plaintiff,

-against- Index No. 590768/06

KHALID MAHMOOD and ALL TAXI AUTOMOBILE, INC.,

Second Third-Party Defendants.

----------X

LAZ PARKING OF NEW YORK/NEW JERSEY, INC.,

Third Third-Party Plaintiff,

-against- Index No. 659083/06

ALL TAXI AUTOMOBILE, INC., ALL TAXI MANAGEMENT, INC., ADROINE THOMAS and KHALID MAHMOOD,

Third Third-Party Defendants.

----------X

DEBORAH ANN KAPLAN, J.:

Sequence numbers 001, 002 and 003 are consolidated for disposition.

The third-party defendant, and third third-party plaintiff Laz Parking of New York/New Jersey, Inc. (Laz Parking) moves, pursuant to CPLR 3212, for an order granting summary

judgment dismissing the third third-party complaint and all cross claims and counterclaims.

The defendant, and second and third third-party plaintiff Manhattan Ford, Lincoln-Mercury, Inc. (Manhattan Ford) moves, pursuant to CPLR 3212, for an order dismissing the complaint and all cross claims and counterclaims, or, in the alternative, directing Laz Parking to defend and indemnify Manhattan Ford.

The defendants, and second and third third-party defendants Adroine Thomas, Khalid Mahmood and All Taxi Automobile, Inc. move, pursuant to CPLR 3212, for an order granting summary judgment dismissing the second and third third-party complaints, and any cross claims and counterclaims.

The defendant and third third-party defendant All Taxi Management, Inc. cross-moves for an order dismissing the complaint.

This is an action to recover damages for personal injuries suffered by the plaintiff Silas Quinonez (Quinonez) in an automobile collision in a parking garage. Quinonez was working as a parking valet in the service department of Manhattan Ford, driving a yellow taxi up a ramp from the first floor to the fourth floor when the brakes failed, causing a collision with a parked vehicle.

The taxi cab driver, Khalid Mahmood, started working at 4:00 A.M. and brought the vehicle in for service at approximately 11:00 A.M after noticing low brakes. Upon arriving at Manhattan Ford's service department, Khalid Mahmood was greeted by a Manhattan Ford security person who asked the reason for the visit. Khalid Mahmood told Manhattan Ford's employee that the brakes were low and in need of service.

Quinonez was employed by Laz Parking. Pursuant to an operating agreement, Laz Parking provided valet parking services to Manhattan Ford. All Taxi Automobile, Inc. is the title owner of

the vehicle. All Taxi Management, Inc. alleges that it is a licensed agent for taxi medallion owners. Thomas Adroine is the taxi medallion owner, and his name also appears on the vehicle's registration.

The plaintiff Quinonez's complaint against Manhattan Ford and All Taxi Management, Inc. pleads a single cause of action for negligence. The third-party complaint by Manhattan Ford against Laz Parking sets forth causes of action for common-law indemnification/contribution (first), contractual indemnification (second and third), and for breach of an insurance procurement clause (fourth). The second third-party complaint by Manhattan Ford is for common-law contribution/indemnification against both the tax driver, Khalid Mahmood (first cause of action), and against All Taxi Automobile, Inc. (second cause of action). The third third-party complaint by Laz Parking is for common-law contribution/indemnification against All Taxi Automobile, Inc. (first cause of action), All Taxi Management, Inc. (second cause of action), Adroine Thomas (third cause of action), and Khalid Mahmood (fourth cause of action).

In addition to the foregoing, the defendants' answers plead cross claims for apportionment and common-law indemnification.

In support of its motion for summary judgment, Laz Parking argues that there is no evidence that it had notice of the defective brakes.

In support of its motion for summary judgment, Manhattan Ford argues that it neither owed, nor breached a duty of care. Despite the fact that immediately upon his arrival, the taxi driver, Khalid Mahmood, advised Manhattan Ford's security attendant to check the brakes because they were low, Manhattan Ford argues that it had no notice that the vehicle was in any way unsafe. It is also argued that the operating agreement requires Laz Parking to defend and indemnify

Manhattan Ford.

In support of their motion for summary judgment, Adroine Thomas, Khalid Mahmood and All Taxi Automobile, Inc. argue that there is no evidence that Khalid Mahmood was negligent in any way.

In support of its cross motion for summary judgment, All Taxi Management, Inc. alleges that it is a licensed medallion manager, and argues that, as a known agent for the medallion owner, Thomas Adroine, there is no legal theory that can hold it liable in this case.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case (JMD Holding Corp. v Congress Fin. Corp., 4 NY3d 373 [2005]; Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065 [1979]). The "[f]ailure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient for this purpose (Zuckerman v City of New York, 49 NY2d 557 [1980]). It is uncommon to grant summary judgment in a negligence action, even where the facts are uncontradicted (Ugarriza v Schmieder, 46 NY2d 471 [1979]).

The court will first dispose of the motions made by Manhattan Ford and Laz Parking, before turning to the motions made by All Taxi Management, Inc., Adroine Thomas, Khalid Mahmood and All Taxi Automobile, Inc.

Contrary to Manhattan Ford's and Laz Parking's assertions, as the entities in charge of the vehicle brought in for brake service, they owed to others a duty of inspection, and may be held negligent for their failure to discover patent defects in equipment (Fried v Korn, 286 App Div 107 [1st Dept 1955] affd 1 NY2d 691 [1956]). Under the circumstances of this case, even the brief period of time during which Manhattan Ford and Laz Parking were in charge of the vehicle led to a duty to use reasonable care to have it in a reasonably safe condition and properly equipped for operation so that the vehicle could be controlled, and not a source of danger to others.

In addition, bailors for hire, such as Manhattan Ford and Laz Parking, are under a duty to discover defects and are therefore subject to liability for defects which they, as bailors, reasonably should have discovered even though they had no actual knowledge of such defects (La Rocca v Farrington, 276 App Div 126 [2d Dept 1949] aff'd 301 NY 247 [1950]). Further, the bailor for hire is not relieved of liability for a defect discoverable on inspection, even though the bailee had an equal opportunity to discover the defect. The duty of reasonable care to discover defects applies to a bailor for hire of a motor vehicle (Elfeld v Burkham Auto Renting Co., 299 NY 336 [1949]; O'Brien v Hendrick Hudson Garage, 250 App Div 650 [3d Dept 1937]).

Finally, contrary to the assertions of Manhattan Ford and Laz Parking, they are not absolved of all liability because the taxi driver, Khalid Mahmood, may have been of the opinion that the vehicle was safe enough to drive. Obviously, the service department of a new car dealership, and its valet parking service, are charged with more knowledge than a taxi cab driver is about the danger of complete failure presented by a failing hydraulic brake system.

Summary judgment on a claim for common-law indemnification is appropriate only where there are no issues of material fact concerning the precise degree of fault attributable to each party.

There are clearly triable issues concerning the apportionment and degree of fault among the plaintiff and the defendants (CPLR 1401, 1402; Raquet v Braun, 90 NY2d 177 [1997]). For example, the plaintiff was not wearing his seat belt and may have been speeding.

Common-law indemnification is warranted where a defendant's role in causing the plaintiff's injury is solely passive, and thus its liability is purely vicarious (Perri v Gilbert Johnson Enters., 14 AD3d 681, 684 [2d Dept 2005]). Contrary to the assertion made by each of the movants, as described below, there are triable issues of material fact concerning each parties' active negligence.

Turning to the question of contractual indemnification, on the submissions made on these motions, as between Manhattan Ford and Laz Parking, the issue of contractual indemnification cannot be determined. "A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement, and the surrounding facts and circumstances' citations omitted" (Drzewinski v Atlantic Scaffold & Ladder Co., Inc., 70 NY2d 774, 777 [1987]). Since there is evidence that Manhattan Ford supervised, directed or controlled the work of parking customers cars, Manhattan Ford fails to establish its entitlement to judgment as a matter of law on the issue of contractual indemnification against Laz Parking.

The agreement between Laz Parking and Manhattan Ford provides, in relevant part, that:

> Agent agrees to indemnify, defend and hold harmless the Owner, its directors, officers, shareholders, agents and their respective successors and assigns (each, an "Owner Party"), against any and all claim, obligation, liability, demand, action, loss, damage, cost (including without limitation, reasonable attorneys' fees) and expense (collectively, "Damages") suffered or incurred by an Owner Party in connection with, arising out of, or relating to: (i) any act or omission of the Agent's employees, including, without limitation, damage to property or person caused by such employees.

A contract imposing a duty to indemnify "must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (Great Northern Ins. Co. v Interior Constr. Corp., 7 NY3d 412, 417 [2006]; Hooper Assoc. v AGS Computers, 74 NY2d 487, 491 [1989]). No finding has yet been made with respect to the parties' respective fault, if any, for the underlying injury, and therefore, any award of summary judgment at this juncture would be premature.

In the event that Manhattan Ford is found negligent, the broad indemnity provision in the operating agreement between Manhattan Ford and Laz Parking may be unenforceable under General Obligations Law § 5-325 because it was not limited to Laz's acts or omissions, it failed to make an exception for Manhattan Ford's own negligence, and it did not limit the recovery of Manhattan Ford to insurance proceeds.

Although it is not cited by the parties, Section 5-325 (1) of the General Obligations Law provides:

> No person who conducts or maintains for hire or other consideration a garage, parking lot or other similar place which has the capacity for the housing, storage, parking, repair or servicing of four or more motor vehicles, as defined by the vehicle and traffic law, may exempt himself from liability for damages for injury to person or property resulting from the negligence of such person, his agents or employees, in the operation of any such vehicle, or in its housing, storage, parking, repair or servicing, or in the conduct or maintenance of such garage, parking lot or other similar place, and, except as hereinafter provided, any agreement so exempting such person shall be void.

Thus, Manhattan Ford, as the operator of a parking garage with the capacity to repair or service four or more motor vehicles, by statute, is prohibited from exempting itself from liability for its negligence.

In addition, the indemnification provision in the relevant operating agreement between Laz Parking and Manhattan Ford may be unenforceable because there is evidence of active negligence

on the part of Manhattan Ford, in that it had actual or constructive notice of the dangerous condition. The liability of Manhattan Ford is not entirely derivative, as it also had some role in the event that actually caused the injury. The evidence demonstrates that Manhattan Ford exercised some control over the parking operation by greeting each arriving customer's vehicle; asking the driver the reason for their visit; giving a claim check to the customer; and directing the customer to the service manager. Therefore, the indemnification clause cannot be construed as absolving Manhattan Ford for its negligence (Colozzo v National Ctr. Found., Inc., 30 AD3d 251 [1st Dept 2006]; Linarello v City Univ. of N.Y., 6 AD3d 192, 193-194 [1st Dept 2004]).

Turning to the movants other than Manhattan Ford and Laz Parking, there is a triable issue as to whether the taxi driver, Khalid Mahmood, by bringing the vehicle into the dealer's service department for warrantied brake repair, was exercising reasonable care to keep the brakes in working order. The failure of the person in charge of the vehicle to comply with the statutory requirement (Vehicle and Traffic Law § 375 [1]) to maintain the vehicle's brakes in good working order may be excused if he or she exercised reasonable care in an effort to comply (Alfano v Amchir, 23 AD2d 659 [2d Dept 1965]; Alongi v Beuter, 286 App Div 990 [4th Dept 1955]; Schaeffer v Caldwell, 273 App Div 263 [4th Dept 1948]). Khalid Mahmood could have brought the taxi cab in for service sooner on the day in question, or had it towed to Manhattan Ford. Thus, there is a triable issue of material fact as to whether or not Khalid Mahmood exercised reasonable care to keep the brakes in good working order.

Furthermore, by statute, negligence is attributable to the owners of the taxi. Vehicle and Traffic Law § 388 (1) provides that:

> Every owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries 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 owner.

"Owner" is defined by Vehicle and Traffic Law § 128 as:

> A person, other than a lien holder, having the property in or title to a vehicle or vessel. The term includes a person entitled to the use and possession of 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.

Vehicle and Traffic Law § 388 makes the owners' liability solely derivative by virtue of law. Therefore, the owners of the taxi may bring a cross claim against those alleged to be actively negligent (Hassan v Montuori, 99 NY2d 348 [2003]).

In addition to the foregoing, All Taxi Automobile, Inc., as the medallion owner, is subject to Administrative Code of the City of New York § 19-530 which states, in relevant part, that:

> Nothing herein shall relieve the owner of a taxicab medallion of responsibility for compliance with any applicable provision of law or rule. Such owner shall be fully responsible for the operation of a vehicle bearing such medallion, including compliance with all regulatory requirements applicable to such vehicle, regardless of the appointment by such owner of an agent licensed pursuant to this section.

The statute clearly holds a medallion owner, such as Thomas Adroine, responsible for the operation of a vehicle bearing his medallion.

Thus, All Taxi Automobile, Inc., as the record title owner, and Thomas Adroine, as both the medallion and registered vehicle owner, clearly can be held liable (Golden v Winjohn Taxi Corp., 311 F3d 513 [2d Cir 2002]).

Under Vehicle and Traffic Law § 128, the applicable definition of "owner" includes any lessee or bailee of a motor vehicle, such as Khalid Mahmood, having the exclusive use thereof, under a lease or otherwise, for a period greater than 30 days. Therefore, Khalid Mahmood is also

statutorily liable as an owner.

All Taxi Management, Inc., on the other hand, is an entity licensed by the New York City Taxi and Limousine Commission (Administrative Code § 19-530) to manage taxi medallions, and was the managing agent of the taxicab medallion leased to Khalid Mahmood. "To establish a prima facie case for negligence, a [party] must prove (1) that defendant owed a duty to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom" (Friedman v Anderson, 23 AD3d 163, 164 [1st Dept 2005]). "The existence of a legal duty is, of course, an essential element of any negligence claim" (Shante D. v City of New York, 190 AD2d 356, 361 [1st Dept 1993], affd 83 NY2d 948 [1994]).

Under separate lease agreements with All Taxi Management, Inc., Khalid Mahmood had custody, possession and control over both the motor vehicle and the medallion (see the testimony of a witness for All Taxi Management, Inc., Mr. Alpha Ba, exhibit "C" to Smitelli affirmation dated September 10, 2007). All Taxi Management, Inc. received separate payments each week from Khalid Mahmood. One payment in the sum of $780 per week was for the medallion. A separate payment in the sum of $260 per week was for the motor vehicle. Therefore, contrary to All Taxi Management, Inc.'s assertion, under the circumstances of this case, there is a triable issue of material fact concerning whether or not All Taxi Management, Inc. is a statutory owner of the vehicle under the Vehicle and Traffic Law's definition of an owner.

Therefore, there is a statutory basis for holding All Taxi Management, Inc. vicariously liable in this case. As a lessor engaged in the trade or business of renting or leasing motor vehicles, All Taxi Management, Inc. is vicariously liable for negligence committed in the day-to-day operation of the motor vehicle. Vehicle and Traffic Law § 388 imposes vicarious liability upon the

lessor of a vehicle for the negligence of the driver. Although 49 USC § 30106, the "Graves Amendment," bars state law vicarious liability actions commenced on or after August 10, 2005, against owners of motor vehicles "engaged in the trade or business of renting or leasing motor vehicles," the section applies to all actions commenced on or after August 10, 2005 (see 49 USC § 30106 [c]), and has been enforced as preempting the vicarious liability imposed on commercial lessors by Vehicle and Traffic Law § 388 (Graham v Dunkley, __ AD3d__, 2008 WL 269527, 2008 NY App Div LEXIS 593 [2d Dept 2008]; Hernandez v Sanchez, 40 AD3d 446 [1st Dept 2007]).

This action was timely commenced in June 2005, two months prior to the effective date of the Graves Amendment on August 10, 2005. As a result, All Taxi Management Inc., fails to meet its burden on its cross motion for summary judgment.

Accordingly, it is

ORDERED that the motions and the cross motion for summary judgment are all denied.

Dated: February 22, 2008

ENTER:

Deborah Kaplan J.S.C.