

**Hills v Newton**

2022 NY Slip Op 34470(U)

May 26, 2022

Supreme Court, Westchester County

Docket Number: Index No. 65783/2019

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT: STATE OF NEW YORK  
IAS PART WESTCHESTER COUNTY  
PRESENT: HON. JOAN B. LEFKOWITZ, J.S.C.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

-----X  
CYNTHIA M. HILLS,

Plaintiff,

DECISION & ORDER

Index No: 65783/2019

-against-

Motion Sequence Nos. 04 and 05

LENZELL D. NEWTON and TOWN MOTOR CAR  
CORP., ANTHONY PARKING GARAGE and  
CARCIERGE VALET,

Defendant(s).

-----X  
TOWN MOTOR CAR CORP.,

Third-Party Plaintiff,

-against-

ANTHONY PARKING GARAGE and CARCIERGE  
VALET,

Third-Party Defendants.

-----X

The following papers (NYSCEF document nos. 88-99; 102-108) were read on: (1) the motion by the defendant/third-party plaintiff, Town Motor Car Corp., for an order, (a) pursuant to CPLR 3212, granting summary judgment on its cross-claim for contractual indemnification against the defendants/third-party defendants, Anthony Parking Garage and Carcierge Valet; and (b) requiring defendants'/third-party defendants' insurance carrier to pay all defense costs and legal expenses for any work following the date of tender to the insurance carrier (sequence no. 04); and (2) the motion by the plaintiff for an order, pursuant to CPLR 3212, granting partial summary judgment on the issue of liability and dismissing the affirmative defenses alleging culpable conduct (sequence no. 05).

Motion Sequence No. 04

Notice of Motion-Affirmation-Exhibits (A-G)-Affidavit-Statement of Facts  
Affirmation in Opposition (by defendants/third-party defendants, Lenzell D. Newton,  
Anthony Parking Garage d/b/a Carcierge Valet)-Counter Statement of Facts

Affirmation in Opposition (by plaintiff)-Counter Statement of Facts  
Reply Affirmations (2)

Motion Sequence No. 05

Notice of Motion (amended)-Affirmation-Statement of Facts-Memo of Law-Exhibits (11)  
Affirmation in Opposition (by defendants/third-party defendants, Anthony Parking Garage  
d/b/a Carcierge Valet)-Counter Statement of Facts-Exhibits (A-E)  
Affirmation in Opposition (by defendant/third-party plaintiff, Town Motor Corp.)-  
Response to Statement of Facts  
Reply Affirmation

Upon reading the foregoing papers, the motions are determined as follows:

Plaintiff sues to recover damages for personal injuries allegedly sustained in a motor vehicle accident that occurred on February 4, 2019, on Interstate 287 near the ramp of exit 8E in White Plains, New York. The accident purportedly occurred when the motor vehicle operated by the plaintiff was struck by the motor vehicle operated by the defendant, Lenzell D. Newton (Newton), when Newton allegedly made an unsafe lane change into plaintiff's lane of travel.

At the time of the accident, Newton was performing valet services for the defendant/third-party plaintiff and movant herein, Town Motor Corp. (Town Motor), during the course of his employment with the defendants/third-party defendants, Anthony Parking Garage (Anthony Parking) and Carcierge Valet (Carcierge) (collectively, Anthony Parking). As relevant herein, on or about February 1, 2018, Town Motor entered into a contract for the term of one-year for services with Anthony Parking by which Carcierge would provide drivers to transport vehicles on behalf of Town Motor to Town Motor's customers. The contract contained an indemnification clause which provided as follows:

“Indemnity: Provider [Anthony Parking and Carcierge] agrees to indemnify & defend its affiliates, parent companies, subsidiary companies, and each of their officers, employees, and directors, from and against any and all losses, claims, lawsuits, costs & liabilities (collectively “Losses”) arising out of or related to the acts or omissions of Provider or Provider's employees. Without limiting the foregoing, this includes losses arising out of Provider's employee's claims for compensation and/or benefits, and any losses arising out of Provider's employee's personal injury, property damage or death” (exhibit “D”, NYSCEF Doc No. 93 at ¶ 18).

Following the completion of discovery, Town Motor now moves (#04) for summary judgment on its cross-claim for contract indemnification against Anthony Parking. Defendants Anthony Parking and Newton and the plaintiff oppose the motion. Plaintiff also moves (#05) for summary judgment on the issue of liability against defendants.

Anthony Parking, Newton, and Town Motor oppose the plaintiff's motion. The court consolidates the motions for joint disposition and decides them as follows.

On a motion for summary judgment the court's function is to determine whether triable issues of fact exist or whether judgment can be granted to a party on the proof submitted as a matter of law (*see* CPLR 3212 [b]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). In determining the motion, the court must view the evidence in a light most favorable to the nonmovant and is obliged to draw all reasonable inferences in the nonmovant's favor (*see Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]; *Stukas v Streiter*, 83 AD3d 18, 22 [2d Dept 2011]). Such a motion may be granted only if the movant tenders sufficient evidence in admissible form demonstrating, prima facie, the absence of triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Failure to make a prima facie showing requires denial of the motion regardless of the sufficiency of the opposing papers (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the prima facie burden is met, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form establishing the existence of material issues of fact requiring a trial (*see Zuckerman*, 49 NY2d at 562).

Motion by Plaintiff for Partial Summary Judgment on Liability  
Sequence No. 05

Plaintiff failed to demonstrate her prima facie entitlement to judgment as a matter of law. In support of the motion, plaintiff tendered, among other things, the affidavit of the plaintiff, the police accident report, as well as the deposition testimony of the defendant Newton. Initially, contrary to the plaintiff's contention, the police accident report constitutes inadmissible hearsay (*see Memenza v Cole*, 131 AD3d 1020, 1022 [2d Dept 2015]; *Sanchez v Steenson*, 101 AD3d 982, 983 [2d Dept 2012]). Inasmuch as the evidence proffered by the plaintiff raises material issues of fact as to how the subject collision occurred, the motion must be denied without regard to the sufficiency of the opposing papers (*see Alvarez*, 68 NY2d at 324; *Weisberg v James*, 146 AD3d 920, 921 [2d Dept 2017]; *Farruggio v Lavender*, 123 AD3d 875, 875-876 [2d Dept 2014]). In particular, in an affidavit submitted in support of the motion, plaintiff averred that the accident occurred when Newton made an unsafe lane change directly into her lane of travel and that she had no time to react, while at deposition, Newton testified that before entering the right lane (the plaintiff's lane of travel), he slowed his vehicle down, checked to make sure "the coast [was] clear", did not see any cars in the right lane when he looked in the right passenger side mirror, and activated his blinker before switching from the middle to the right lane. Newton further confirmed the validity of an earlier statement made in an affidavit that his vehicle was struck by the plaintiff's vehicle when half of his motor vehicle was already situated in the right lane. Thus, in light of the conflicting factual versions as to how the

accident occurred, the motion by the plaintiff for partial summary judgment on the issue of liability is denied.

The court next addresses the branch of plaintiff's motion for an order dismissing the affirmative defenses alleging culpable conduct. Although a plaintiff moving for partial summary judgment on the issue of a defendant's liability need no longer demonstrate the absence of her own comparative negligence in order to be entitled to summary judgment (*see Rodriguez v City of New York*, 31 NY3d 312 [2018]; *Xin Fang Xia v Saft*, 177 AD3d 823, 825 [2d Dept 2019]), "the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where, as here, the plaintiff moved for summary judgment dismissing a defendant's affirmative defense of comparative negligence" (*Poon v Nisanov*, 162 AD3d 804, 808 [2d Dept 2018]).

Here, as outlined above, the moving papers raise a triable issue of fact as to how the accident occurred and, as relevant to this branch of the motion, in viewing the evidence in a light most favorable to the defendants, as nonmovants, the plaintiff failed to eliminate all triable issues of material fact regarding her freedom from comparative fault in the happening of the accident (*see Yubin Ni v Milio*, 192 AD3d 816, 817 [2d Dept 2021]; *Chang-Hoon Lee v Kew Gardens Sung Shin Refm. Church of N.Y.*, 84 AD3d 1299, 1299-1300 [2d Dept 2011]). In particular, the plaintiff failed to eliminate all triable issues of material fact as to whether she saw "that which through proper use of h[er] senses [s]he should have seen," and that she used reasonable care to avoid the collision with Newton's vehicle (*Chang-Hoon Lee*, 84 AD3d at 1300 [internal quotation marks omitted]). Consequently, that branch of the plaintiff's motion seeking dismissal of the affirmative defenses alleging culpable conduct on the part of plaintiff is similarly denied without regard to the sufficiency of the opposing papers (*see Alvarez*, 68 NY2d at 324).

Motion by Town Motor for Contract Indemnification  
Sequence No. 04

In support of the motion, Town Motor contends, among other things, that although the original contract between it and Anthony Parking had expired on January 31, 2019, before the date of the subject accident, since the parties continued to do business together in the same manner as when the contract was in effect, the parties impliedly agreed that their rights and obligations as defined by the contract should continue to be measured by the original contract.

In opposition, defendants Anthony Parking and Newton argue, among other things, that the plain language of the contract does not require Anthony Parking to defend and indemnify Town Motor. As such, Anthony Parking and Newton submit that the motion by Town Motor should be denied in its entirety. Plaintiff opposes arguing, among other things, that no implied contract existed since at the time of the subject collision, Town Motor and Anthony Parking were operating under an expired contract.

“Indemnity...involves an attempt to shift the entire loss from one who is compelled to pay for a loss, without regard to his own fault, to another person who should more properly bear responsibility for that loss because he was the actual wrongdoer” (*County of Westchester v Welton Becket Assoc.*, 102 AD2d 34, 46-47 [2d Dept 1984]). “[A] contractual promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances” (*Vigliarolo v Sea Crest Constr. Corp.*, 16 AD3d 409, 410 [2d Dept 2005]). In interpreting a contract, a court must give full force and effect to all of the contract’s provisions (*see Richner Communications, Inc. v Tower Ins. Co. of N.Y.*, 72 AD3d 670, 671 [2d Dept 2010]). Unambiguous provisions of a contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court (*see White v Continental Cas. Co.*, 9 NY3d 264, 267 [2007]). “Thus, if the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity” (*Greenfield v Philles Records*, 98 NY2d 562, 569-570 [2002]). “Mere assertion by one that contract language means something to him, where it is otherwise clear, unequivocal and understandable when read in connection with the whole contract, is not in and of itself enough to raise a triable issue of fact” (*Bethlehem Steel Co. v Turner Constr. Co.*, 2 NY2d 456, 460 [1957]). The aim of contract interpretation is “a practical interpretation of the expressions of the parties to the end that there be a realization of [their] reasonable expectations” (*Brown Bros. Elec. Contrs. v Beam Constr. Corp.*, 41 NY2d 397, 400 [1977] [internal quotation marks omitted]). The Second Department has explained that:

“In searching for the probable intent of [contracting] parties, lest form swallow substance, our goal must be to accord the words of the contract their fair and reasonable meaning. Put another way, the aim is a practical interpretation of the expressions of the parties to the end that there be a realization of [their] reasonable expectations. Concordantly ... not merely literal language, but whatever may be reasonably implied therefrom must be taken into account. [U]nless there are reservations to the contrary, embraced in the interpretative result should be any promises which a reasonable person in the position of the promisee would be justified in understanding were included. A written contract will be read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose” (*Mintz v Pazer*, 152 AD3d 761, 762-763 [2d Dept 2017] [internal quotation marks and citations omitted]).

Here, Town Motor established its prima facie entitlement to judgment as a matter of law on its claim for contract indemnification against Anthony Parking. It is undisputed that at the time of the subject motor vehicle accident, the contract between Anthony Parking and Town Motor had expired. “[I]t is well settled in New York that ‘[w]hen an agreement

expires by its terms, if, without more, the parties continue to perform as theretofore, an implication arises that they have mutually assented to a new contract containing the same provisions as the old' ” (*North Am. Hyperbaric Ctr. v City of New York*, 198 AD2d 148, 149 [1st Dept 1993], *lv denied* 83 NY2d 758 [1994], quoting *Martin v Campanaro*, 156 F2d 127, 129 [2d Cir 1946], *cert denied* 329 US 759 [1946]). At deposition, Ted Siebold of Town Motor testified that “[d]ue to the pace of our [Town Motor and Anthony Parking] business and the relationship working well, we always carried on as if we had a contract at all times” (Siebold deposition tr. at 39, NYSCEF Doc No. 95). Siebold further testified that “Anthony [Fonti] [of Anthony Parking Garage] and I were both surprised [upon learning that the contract had expired before the accident] – we thought we had renewed the contract because we had been working so long together and working well...[W]e operated like we were under contract the entire time...and never once did we deviate” (*id.* at 39, 41, 110). Thus, “despite the fact the original contract had expired, their conduct evidenced their mutual assent to a new contract embracing the same provisions and terms as their prior contract” (*Curreri v Heritage Prop. Inv. Trust, Inc.*, 48 AD3d 505, 506-507 [2d Dept 2008]; *cf. Bessette v Niles*, 23 AD3d 996, 997 [4th Dept 2005]; *Cronin & Byczek, LLP v Patrolmen's Benevolent Assn. of City of N.Y.*, 7 AD3d 748, 749 [2d Dept 2004]; *National Telecom. Consultants v United Artists Theatre Circuit*, 225 AD2d 750, 750 [2d Dept 1996]). Accordingly, the contract obligating Anthony Parking and Carcierge to indemnify and defend Town Motor was in effect at the time of the accident.

Moreover, contrary to Anthony Parking's contention, the indemnification provision, when read in the context of the entire agreement, is unambiguous and entitles Town Motor to indemnification from Anthony Parking (*see Mintz*, 152 AD3d at 762-763). Further, the indemnification provision is broad enough to cover the costs including counsel fees reasonably incurred by Town Motor in defense of the action brought by plaintiff, even though the provision does not expressly mention counsel fees (*see Milani v Broadway Mall Props.*, 261 AD2d 370, 371 [2d Dept 1999]; *DiPerna v American Broadcasting Cos.*, 200 AD2d 267, 269-270 [1st Dept 1994]; *Merchants Mut. Ins. Co. v Saxon Indus.*, 170 AD2d 654, 655-656 [2d Dept 1991]; *Lavorato v Bethlehem Steel Corp.*, 91 AD2d 1184, 1185 [4th Dept 1983]). Moreover, although there has been no finding of negligence on the part of Anthony Parking, the indemnification provision requires Anthony Parking to indemnify Town Motor (*see Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 178 [1990]). As such, the burden of going forward shifted to the opponents of the motion to raise a triable issue of material fact (*see Zuckerman*, 49 NY2d at 562).

In opposition, the defendants, Anthony Parking and Newton, as well as the plaintiff failed to raise a triable issue of material fact (*see CPLR 3212 [b]*). Accordingly, the motion by Town Motor seeking contractual indemnification against Anthony Parking for costs reasonably incurred in defense of the action brought by plaintiff, including reasonable counsel fees, is granted on the issue of liability only (*cf. Utica Mut. Ins. Co. v Cardet Constr. Co., Inc.*, 114 AD3d 847, 849 [2d Dept 2014]).

All other arguments raised on the motions and evidence submitted by the parties in connection thereto have been considered by the court, notwithstanding the specific absence of reference thereto. Based on the foregoing, it is hereby:

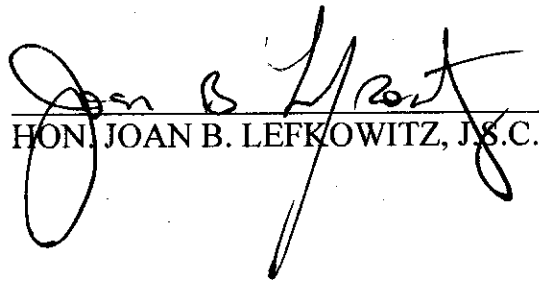
ORDERED the motion by the plaintiff (#5) is denied; and it is further

ORDERED the motion by Town Motor (#4) for contractual indemnification against Anthony Parking is granted on the issue of liability only, and the amount of damages shall be determined at the time of trial of the main action; and it is further

ORDERED the parties shall appear for a settlement conference on a date and time set by the clerk.

ENTER,

Dated: White Plains, New York  
May 26, 2022

  
HON. JOAN B. LEFKOWITZ, J.S.C.

To:

Counsel of record via NYSCEF