IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1054

Filed: 17 October 2017

Cabarrus County, No. 15-CVD-918

AVIS RENT A CAR SYSTEMS, LLC, Plaintiff,

v.

NITSY ANDREWS and VANESSA LOVE ANDREWS, Defendants.

Appeal by plaintiff from order granting summary judgment entered 1 July 2016 by Judge William G. Hamby, Jr. in Cabarrus County District Court. Heard in the Court of Appeals 22 March 2017.

Pinto Coates Kyre & Bowers, PLLC, by Adam L. White and Jon Ward, for plaintiff-appellant.

York Williams, LLP, by Steven A. Lucente, for defendants-appellees.

BERGER, Judge.

Avis Rent A Car Systems, LLC ("Plaintiff") appeals from the July 1, 2016 order granting summary judgment in its favor. Plaintiff contends the trial court erred by not granting the full amount of damages sought in its complaint. Specifically, Plaintiff argues (1) New York law controls interpretation of the rental vehicle contract at issue; (2) Defendant Nitsy Andrews breached the rental vehicle contract by

permitting Defendant Vanessa Andrews to drive the vehicle; (3) North Carolina's Motor Vehicle Safety and Financial Responsibility Act should be read into the rental vehicle contract provision addressing minimum financial responsibility requirements; and (4) New York's anti-subrogation rule should not be applied to the rental vehicle contract. We affirm in part, and reverse and remand in part because New York law, including its anti-subrogation rule, controls interpretation of the contract, while North Carolina minimum financial responsibility requirements apply.

Factual & Procedural Background

This matter arises out of a motor vehicle accident that occurred on September 27, 2013 in Cabarrus County. Vanessa Loye Andrews[1] ("Vanessa") was driving a vehicle leased from Plaintiff by New York resident Nitsy Andrews ("Nitsy") (Vanessa and Nitsy, collectively, "Defendants"). While driving the rental vehicle, Vanessa struck a 2004 Chevrolet pickup truck, owned and operated by Toby Joe Hill ("Hill"). As a result of the accident, Hill's pickup truck sustained $10,470.00 in property damages.

Three days prior to the accident, Nitsy had entered into an agreement with Plaintiff to lease the vehicle involved in the accident. The rental vehicle contract,

[1] The middle name of Vanessa Andrews is listed as "Loye" throughout the record, except for the summary judgment order which incorrectly identified her middle name as "Love." Therefore, the caption of this opinion must use the incorrect middle name per N.C.R. App. P. 12(b) (2017).

executed in New York, contained a liability insurance provision which stated, in pertinent part:

> **19. <u>Liability Protection.</u>** Anyone driving the car who is permitted to drive it by this agreement will be protected against liability for causing bodily injury or death to others or damaging the property of someone other than the authorized driver and/or the renter *up to the minimum financial responsibility limits required by the law of the jurisdiction in which the accident occurs*. The limit for bodily injury sustained by any one person includes any claim for loss of that person's consortium or services. Where the law extends this protection to a non-permitted driver, the same limits will apply. . . . You agree that we can provide coverage under a certificate of self-insurance or an insurance policy, or both, as we choose.

(Emphasis added).

An Addendum to the Rental Agreement, consisting of a separate writing which Nitsy signed when executing the rental vehicle contract, provided, in pertinent part:

> I understand that the only ones permitted to drive the vehicle other than the renter are the renter's spouse, the renter's co-employee (with the renter's permission, while on company business), or a person who appears at the time of the rental and signs an Additional Driver Form. These other drivers must also be at least 25 years old and validly licensed.
>
> PERMITTING AN UNAUTHORIZED DRIVER TO OPERATE THE VEHICLE IS A VIOLATION OF THE RENTAL AGREEMENT. THIS MAY RESULT IN ANY AND ALL COVERAGE OTHERWISE PROVIDED BY THE RENTAL AGREEMENT BEING VOID AND MY BEING FULLY RESPONSIBLE FOR ALL LOSS OR DAMAGE, INCLUDING LIABILITY TO THIRD

PARTIES.

In addition, the rental vehicle contract contained a provision that stated unauthorized use of the vehicle (1) automatically terminated the rental contract, (2) voided all liability protection provided through the contract, and (3) rendered Nitsy liable to Plaintiff for all fees and costs incurred as a result of the prohibited use. The rental vehicle contract also contained an "Indemnification and Waiver" provision, which provided Nitsy would indemnify Plaintiff for losses, expenses, and liabilities incurred from unauthorized use of the vehicle.

Plaintiff paid Hill $10,470.00 for the property damage, and repeatedly demanded Nitsy reimburse Plaintiff for that amount. Nitsy did not comply. On March 20, 2015, Plaintiff filed a complaint in Cabarrus County District Court alleging Nitsy breached the rental vehicle contract by (1) allowing an unauthorized driver to operate the rental vehicle, and (2) failing to indemnify. Plaintiff also alleged Vanessa was negligent when driving its rental vehicle and sought damages, interest, and attorney's fees.

Defendants filed a motion for summary judgment on February 1, 2016. On July 1, 2016, the trial court entered an order denying the motion and granting summary judgment for Plaintiff, concluding that New York law controlled the interpretation and enforcement of the rental vehicle contract and ordering

Defendants pay $470.00 to Plaintiff, plus interest and attorney's fees. Plaintiff timely appealed, seeking the full $10,470.00 amount.

Analysis

I. Standard of Review

This Court "review[s] a trial court order granting or denying a summary judgment motion on a *de novo* basis." *Holmes v. N.C. Farm Bureau Mut. Ins. Co., Inc.*, 233 N.C. App. 487, 489, 756 S.E.2d 848, 850 (citation omitted), *disc. rev. denied*, *dismissed*, 367 N.C. 520, 762 S.E.2d 445 (2014). We examine the whole record when reviewing a grant of summary judgment "to determine (1) whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) whether the moving party was entitled to judgment as a matter of law." *Sugar Creek Charter School, Inc. v. Charlotte-Mecklenburg Bd. of Educ.*, 188 N.C. App. 454, 457-58, 655 S.E.2d 850, 853 (citation and quotation marks omitted), *disc. rev. denied*, ___ N.C. ___, 667 S.E.2d 460 (2008).

> If there is any evidence of a genuine issue of material fact, a motion for summary judgment should be denied. We review the record in a light most favorable to the party against whom the order has been entered to determine whether there exists a genuine issue as to any material fact.

Smith v. Harris, 181 N.C. App. 585, 587, 640 S.E.2d 436, 438 (2007) (citations, quotation marks, and brackets omitted). "The interpretation and application of

insurance policy provisions to undisputed facts is a question of law, appropriately resolved on summary judgment." *Integon Nat'l Ins. Co. v. Phillips*, 212 N.C. App. 623, 625, 712 S.E.2d 381, 383 (2011) (citations omitted).

Here, neither party disputes the relevant facts. Both contend, however, the trial court erred in its application of the law. The issues raised on appeal turn on the proper interpretation of Plaintiff's rental vehicle contract, the liability coverage it provided to Defendants, and their interplay with New York automobile liability insurance law and New York subrogation law.

II. Applicable Law: New York Law Controls Contract Interpretation

North Carolina General Statutes Section 58-3-1 provides that "[a]ll contracts of insurance on property . . . in this State shall be deemed to be made therein." N.C.G.S. § 58-3-1 (2015). However, these contracts "should be interpreted and the rights and liabilities of the parties thereto determined in accordance with the laws of the state where the contract was entered even if liability of the insured arose out of an accident in North Carolina." *Fortune Ins. Co. v. Owens*, 351 N.C. 424, 428, 526 S.E.2d 463, 466 (2000) (citation omitted). Under the principle of *lex loci contractus*, "the substantive law of the state where the last act to make a contract occurs governs all aspects of the contract." *Johns v. Automobile Club Ins. Co.*, 118 N.C. App. 424, 426, 455 S.E.2d 466, 468 (citations and quotation marks omitted), *disc. rev. denied*, 340 N.C. 568, 460 S.E.2d 318 (1995).

In addition, our Supreme Court "recognized an exception to this general rule where a close connection exists between [North Carolina] and the interests insured by an insurance policy." *Fortune*, 351 N.C. at 428, 526 S.E.2d at 466 (citation omitted). Nonetheless, "the mere presence of the insured interests in this State at the time of an accident does not constitute a sufficient connection to warrant application of North Carolina law." *Id.*, 526 S.E.2d at 466.

Here, the trial court's conclusion that New York law controls interpretation of the rental vehicle contract is not contested. Both parties agree the rental vehicle contract was executed in New York. The record reveals no close connections linking North Carolina and the interests insured by the rental vehicle contract, other than "the mere presence of the insured interests in [North Carolina] at the time of [the] accident." *Id.* Accordingly, New York law governs interpretation of the rental vehicle contract.

III. Permitted Driver Status under New York Law

Plaintiff contends Nitsy violated the "Addendum to the Rental Agreement," the "Prohibited Use of the Car and Voiding Optional Services," and the "Who May Drive the Car" provisions of the rental vehicle contract because Vanessa was not an authorized driver under the contract. Because New York vehicle and traffic statutes overrule these contractual provisions, we disagree, and hold that Vanessa was a permitted driver as a matter of law.

New York Vehicle and Traffic Law imposes liability on vehicle owners for "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*." N.Y. Veh. & Traf. Law § 388(1) (2002) (emphasis added).

New York's stated public policy goals guide Section 388's application. These goals are: (1) to allow "one injured by the negligent operation of a motor vehicle . . . recourse to a financially responsible defendant"; (2) "to remove the hardship . . . [from] . . . innocent persons by preventing a[] [vehicle] owner from escaping liability by saying that his car was being used without authority or not in his business"; and (3) to encourage vehicle owners to exercise a "heightened degree of care . . . when selecting and supervising drivers . . . to operate their vehicles." *Murdza v. Zimmerman*, 786 N.E.2d 440, 442 (N.Y. Ct. App. 2003) (citations and quotation marks omitted).

Car rental agencies, like other vehicle owners in New York, are "subject to statutory liability under [S]ection 388 for permissive use of [their] vehicle[s]." *Id.* at 442-43. To achieve this end, car rental agencies have been "charged with constructive consent," thereby "satisf[ying] the statutory requirement that there be 'permission,' express or implied," granted by a vehicle owner, here a rental car agency, to a lessee-driver. *Motor Veh. Acc. I. Corp. v. Continental Nat. Am. Gr. Co.*, 319 N.E.2d 182, 184

(N.Y. Ct. App. 1974). "Any other interpretation would be placing an unreasonable limitation on the 'permission' contemplated by that section." *Id.*

However, constructive consent does not create strict liability. *See Murdza*, 786 N.E.2d at 443. A legally-constructed consensual link must connect the negligent operator to the authorized user of the vehicle before constructive consent applies with its attendant liability. *Id.* Accordingly, New York's "Vehicle and Traffic Law § 388 creates a strong presumption that the driver of a vehicle is operating it with the owner's consent." *Lancer Ins. Co. v. Republic Franklin Ins.*, 759 N.Y.S.2d 734, 738 (N.Y. App. Div. 2003) (citations omitted). Moreover, this presumption "can only be rebutted by substantial evidence [presented at trial and], the existence of permission and consent normally presents a question of fact for the jury." *Id.* (citation omitted).

The intent of New York's vehicle and traffic statutes is "to extend financial responsibility to all permissive users, not just those explicitly mentioned in a rental car agreement." *ELRAC, LLC v. Manzo*, 957 N.Y.S.2d 826, 828-29 (N.Y. Civ. Ct. 2012). New York's "public policy will prevent the evasion of the liability of one leasing cars for profit . . . via the attempted device of restrictions on or conditions of use which run counter to the recognized realities" of the car rental business. *Motor Veh. Acc. I. Corp.*, 319 N.E.2d at 185. Plaintiff attempted to contract around New York law by (1) restricting authorized use of the vehicle to the renter and others explicitly mentioned in the rental vehicle contract, (2) prohibiting use by anyone other than

those explicitly mentioned in the contract, (3) contractually invalidating automobile liability insurance coverage upon unauthorized use of the rental vehicle, and (4) requiring the renter indemnify Plaintiff if the rental vehicle is involved in an accident while driven by an unauthorized driver. Accordingly, "[p]ermitting . . . [P]laintiff to contractually vitiate the express terms of [New York state] statutes, . . . either via indemnification agreements or 'non-authorized driver' clauses would be to judicially overrule the statutes." *Manzo*, 957 N.Y.S.2d at 829.

Therefore, pursuant to New York law, we hold Plaintiff "constructively consented" to Vanessa's driving and her use of the vehicle was presumptively permissive. The trial court properly entered summary judgment.

IV. North Carolina's Minimum Financial Responsibility Requirements

Plaintiff asserts that the trial court erred by applying the minimum financial responsibility requirements of New York's Motor Vehicle Financial Security Act. Plaintiff contends, and we agree, the rental vehicle contract's conformity clause adopts the minimum financial responsibility requirements from North Carolina's Motor Vehicle Safety and Financial Responsibility Act.

Here, the rental vehicle contract's conformity clause states that Plaintiff assumed liability for property damage by "someone other than the authorized driver and/or renter *up to the minimum financial responsibility limits required by the law of the jurisdiction in which the accident occurs*." (Emphasis added). Because the

accident occurred in this state, North Carolina's minimum financial responsibility requirements apply. *See Cartner v. Nationwide Mutual Fire Ins. Co.*, 123 N.C. App. 251, 254-55, 472 S.E.2d 389, 390-91 (1996) (holding that an automobile insurance contract, though issued in Florida and construed by Florida law, must import North Carolina minimum financial responsibility requirements because the contract's conformity clause required that the minimum financial responsibility requirements comply with those established by the jurisdiction in which a policyholder's accident occurs).

North Carolina's minimum financial responsibility requirement for property damage sustained in an automobile accident is $25,000.00. *See* N.C. Gen. Stat. § 20-279.21 (2015). Because Plaintiff's rental vehicle contract must provide a minimum of $25,000.00 in liability coverage for property damage, the trial court erred in applying New York's $10,000.00 minimum financial responsibility requirement.

V. New York's Anti-Subrogation Rule

In its final assignment of error, Plaintiff argues this Court should not apply New York's anti-subrogation rule and should allow Plaintiff to be indemnified by Defendants for the entire loss. However, because the indemnification clause at issue violates New York's law and stated public policy, we disagree. *See ELRAC, Inc. v. Ward*, 748 N.E.2d 1, 10 (N.Y. Ct. App. 2001) (New York courts have consistently held that indemnification clauses are invalid and legally unenforceable when used to seek

amounts below statutorily prescribed minimum financial responsibility requirements).

New York Vehicle and Traffic Law holds vehicle owners civilly liable for property and personal injury damage caused by the owner or an owner's permitted user and sustained by a third party. N.Y. Veh. & Traf. Law § 388(1) (2002). Again, New York public policy seeks to "ensure access by injured persons to a financially responsible insured person against whom [they may] recover for injuries." *Ward*, 748 N.E.2d at 6 (citation and quotation marks omitted). Allowing a vehicle owner or owner-lessor "to disclaim completely the liability imposed by [S]ection 388 would be contrary to public policy." *Morris v. Snappy Car Rental, Inc.*, 637 N.E.2d 253, 255 (N.Y. Ct. App. 1994). To meet this policy goal, New York Vehicle and Traffic Law requires common carriers to obtain vehicle liability insurance. N.Y. Veh. & Traf. Law § 370(1) (2017). Rental vehicle companies are subject to the same insurance and minimum liability requirements as common carriers. *See* N.Y. Veh. & Traf. Law § 370(1)(b) and (3) (2017).

Plaintiff argues that New York's anti-subrogation rule does not apply and the contract's indemnification clause controls. "Subrogation is an equitable doctrine that entitles an insurer to stand in the shoes of its insured to seek indemnification from third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse." *Ward*, 748 N.E.2d at 8 (citations and quotation marks omitted). New

York's highest court has "long recognized an insurer's equitable right to bring a subrogation action against a third party whose wrongdoing has caused a loss to its insured." *Id*. (citations omitted). However, the anti-subrogation rule is an exception, and it holds that "an insurer has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered." *Id*. (citations and quotation marks omitted).

As a result, New York Vehicle and Traffic Law Section 370

> requires rental car companies to provide primary insurance to their renters up to the minimum liability limits provided by the statute. Thus, the indemnification clause . . . , which seeks to disclaim that duty and assign the risk to the renters themselves, is unenforceable to that extent. The indemnification clause, however, if otherwise valid, is enforceable for amounts exceeding the statutory minimum liability requirements.

Id. at 10. *Lex loci contractus* requires application of New York law when interpreting this provision of the rental vehicle contract. The contract's conformity clause imports North Carolina's minimum financial responsibility requirement of $25,000.00 for property damage liability coverage. Therefore, pursuant to New York law, "enforc[ing] the indemnification agreement for sums up to the statutory minimum coverage requirements [of $25,000.00] would, in effect, permit the insurer to pass the incidence of the loss from itself to its own insured and thus avoid the coverage that it is obligated to provide." *Id*. at 9 (citation and quotation marks omitted).

Therefore, pursuant to New York law, Plaintiff "must pay the coverage that it

is statutorily bound to provide." *Id*. Pursuant to its contract, Plaintiff was required to provide Nitsy, as party to the rental vehicle contract, and Vanessa, as a permitted driver, with a minimum amount of liability coverage established by statute in the jurisdiction where the accident occurred. Accordingly, Plaintiff must provide at least $25,000.00 in coverage without indemnification because of New York's anti-subrogation rule. Thus, the trial court erred in awarding Plaintiff $470.00.

Conclusion

In conclusion, we affirm the trial court's finding that New York law governs contract interpretation and that Vanessa was a permitted driver. However, we must reverse as North Carolina's minimum financial responsibility requirements apply. Plaintiff is not entitled to recover any of the $10,470.00 paid for property damage to the third party, Hill. We remand back to the trial court for application of North Carolina's minimum financial responsibility requirements and New York's anti-subrogation law consistent with this opinion.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

Judges CALABRIA and HUNTER, JR. concur.

Report per Rule 30(e).