Nationwide Ins. Co. of Am. v Jimmy Martins Auto
2014 NY Slip Op 32804(U)
February 14, 2014
Sup Ct, Westchester County
Docket Number: 52886/2011
Judge: James W. Hubert
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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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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Nationwide Insurance Company of America as Subrogee of John P. & Donna Squitieri,

Plaintiffs,

-against-

Jimmy Martins Auto & Jenny Reddin,

Defendants.

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Index No. 52886/2011

DECISION & ORDER

Motion Seq. 002

Hubert, A.J.S.C.

Presently before the Court is a motion by Defendant Jimmy Martins Auto for an Order pursuant to CPLR § 3212 granting summary judgment and dismissing the complaint against it on the grounds that the pleadings do not allege a cause of action against Jimmy Martins Auto, and for an Order granting summary judgment on its cross-claim against Defendant Jenny Reddin for common law indemnification. Jimmy Martins Auto cross-moves, in effect, for leave to amend its complaint to allege vicarious liability pursuant to VTL § 388.

The instant subrogation action was commenced by Plaintiff on July 20, 2011 in order to recover $13,602.75 it paid on behalf of its insured, John and Donna Squitieri, as a result of a two-vehicle accident that occurred on February 9, 2011. On that date, Reddin went to Jimmy Martins Auto, located in the City of Clarkstown, New York, to shop for a used vehicle. Reddin decided to test drive a 2002 Honda CRV. After taking the vehicle for a test-drive, Reddin was driving northbound on Route 304 in order to return the car to the lot. According to police

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reports, she was waiting in the center turning lane in order to make a left turn into the parking lot, at the same time that Donna Squitieri was traveling southbound on Route 304 in the right turning lane. Two lanes of southbound traffic stopped for Reddin so she could make the left turn. As she turned, however, Reddin allegedly did not see Squitieri's car, and the vehicles collided.

Jimmy Martins Auto is named as a Defendant in this case based solely upon its ownership of the vehicle that Reddin took for a test drive. In support of its motion, Defendant states that while the complaint sets forth a negligence allegation, it fails to allege fault or responsibility on the part of Jimmy Martins. It further states that there are no statutory allegations set forth in the complaint against Jimmy Martins.

Plaintiff's Bill of Particulars states that Jimmy Martins "was negligent, careless and culpable in allowing an inexperienced and unskilled driver to operate their vehicle; [and] in failing to supervise and instruct the operator on the operation of the vehicle." Plaintiff further states that it brought suit against Jimmy Martin's because it was negligent in allowing Reddin access to the car keys although an employee was still photocopying her license, and in allowing her to test drive the vehicle without first requesting her insurance information.

Even assuming, *arguendo*, that Jimmy Martin's was negligent in allowing Reddin to take the keys to the vehicle while it was copying her driver's license, and/or in not requesting her insurance information, there is no nexus between either of these acts and the subsequent accident. Nor are sufficient facts alleged in support of Plaintiff's theory of negligent entrustment, supervision or instruction. In order to establish a cause of action under a theory of negligent entrustment, "the defendant must either have some special knowledge concerning a characteristic or condition peculiar to the [person to whom a particular chattel is given] which renders [that

person's] use of the chattel unreasonably dangerous. . . or some special knowledge as to a characteristic or defect peculiar to the chattel which renders it unreasonably dangerous." *Cook v. Schapiro*, 58 A.D.3d 664, 666, 871 N.Y.S.2d 714 (2d Dep't 2009), *citing Zara v. Perzan*, 185 A.D.2d 236, 586 N.Y.S.2d 139 (2d Dep't 1992). Here, there is no showing that Jimmy Martins had reason to suspect any incompetency on the part of Reddin, who possessed a valid New York State driver's license. *See Byrne v. Collins*, 77 A.D.3d 782, 910 N.Y.S.2d 449 (2d Dep't 2010); *Weinstein v. Cohen*, 179 A.D.2d 806, 579 N.Y.S.2d 693 (2d Dep't 1992). Accordingly, summary judgment on the claim based upon common law vicarious liability is granted.

With respect to Plaintiff's motion to cross-move, in effect, for leave to amend its complaint to assert a cause of action for vicarious liability pursuant to VTL § 388[1], the Court notes that leave to amend a pleading "shall be freely given" in the absence of surprise or prejudice. CPLR § 3025 (b). The determination whether to grant such leave is within the sound discretion of the Court. *Sewkarran v. DeBellis*, 11 A.D.3d 445, 782 N.Y.S.2d 758 (2d Dep't 2004). Here, there has been an extended delay by Plaintiff in moving for leave to amend the complaint, and no excuse for the delay has been offered. Mere lateness, however, is not a basis for denying an amendment absent "significant prejudice to the other side." *HSBC Bank v. Picarelli*, 110 A.D.3d 1031, 974 N.Y.S.2d 90 (2d Dep't 2013), *quoting Edenwald Contracting Co. v. City of New York*, 60 N.Y.2d 957, 959, 471 N.Y.S.2d 55 (1983).

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[1]Section 388 (1) of the Vehicle and Traffic Law 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." The purpose of this section is to "ensure access by injured persons to 'a financially responsible insured person against whom to recover for injuries.'" *Morris v. Snappy Car Rental*, 84 N.Y.2d 21, 27 , 614 N.Y.S.2d 362 (1994), *quoting Plath v. Justus*, 28 N.Y.2d 16, 20, 319 N.Y.S.2d 433 (1971).

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Jimmy Martins states that it will be prejudiced because discovery is complete and the case is currently on a trial calendar. Apart from simply claiming prejudice, however, Defendant does not explain in any detail how it would be burdened. The type of prejudice required to defeat an amendment must include a showing of prejudice traceable not simply to the new matter sought to be added, but also to the fact that it is only now being added. "There must be 'some special right lost in the interim, some change of position or some significant trouble or expense that could have been avoided had the original pleading contained what the amended one wants to add.'" *A.J. Pegno Constr. Corp. v. City of New York*, 95 A.D.2d 655, 656, 463 N.Y.S.2d 214 (1st Dep't 1983), *citing* Siegel, New York Practice 237, p. 289; *see also U.S. Bank, Natl. Assn. v. Sharif*, 89 A.D.3d 723 (2d Dep't 2011)(plaintiff failed to demonstrate the existence of any prejudice or surprise that would result from the amendment, or that the proposed amended answer was palpably insufficient or patently devoid of merit). No such showing has been made here. Accordingly, Plaintiff's motion to amend the complaint is granted.

With respect to Jimmy Martins' motion for summary judgment on its cross-claim against Reddin for common law indemnification, the Court finds that Plaintiff has failed to demonstrate, as a matter of law, that Squitieri was not negligent. "In order to establish a claim for common-law indemnification, a party must prove not only that [it was] not negligent, but also that the proposed indemnitor. . . was responsible for negligence that contributed to the accident." *Hart v. Commack Hotel*, LLC, 85 A.D.3d 1117, 1118-1119, 927 N.Y.S.2d 111 (2d Dep't 2011) (internal quotation marks omitted); Baron v. Grant, 48 A.D.3d 608, 852 N.Y.S.2d 374 (2d Dep't 2008)(where evidence established ownership of the vehicle and that negligence of the driver was the sole, proximate cause of the accident, owner was entitled to seek from driver any damages it

was required to pay to plaintiff, either under common-law indemnification, or contractual indemnification). Inasmuch as Plaintiff has failed to meet its prima facie burden that Squitieri was not negligent as a matter of law, an award of summary judgment is premature as to its cross claim for common-law indemnification against Reddin. *Dautaj v. Alliance El. Co.*, 110 A.D.3d 839, 972 N.Y.S.2d 691 (2d Dep't 2013); *Fritz v. Sports Auth.*, 91 A.D.3d 712, 936 N.Y.S.2d 310 (2d Dep't 2012). Accordingly, it is hereby:

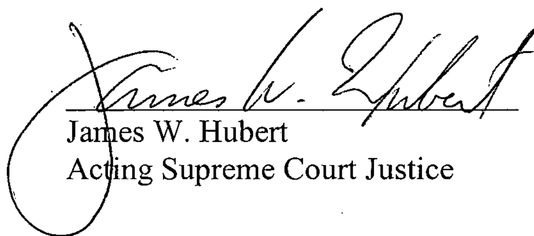
ORDERED, that summary judgment in favor of Jimmy Martins Auto dismissing any cause of action alleging common law negligence is granted; and it is further

ORDERED, that Plaintiff's cross-motion to amend the complaint to add a cause of action under VTL § 388 is granted; and it is further

ORDERED, that Jimmy Martins motion for summary judgment on its common law claim for indemnification against Reddin is denied.

The foregoing constitutes the Decision and Order of the Court.

Dated: White Plains, New York
February 14, 2014



James W. Hubert
Acting Supreme Court Justice