

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TOKIO MARINE AND FIRE INSUPANCE CO., as
subrogee, and MITSUBISHI MOTORS CREDIT OF
AMERICA, INC., as subrogor,

Plaintiffs

v

ERNA PAGAN, MONIKA PAGAN, and
ERIC PAGAN,

Defendants

02 Civ. 4211 (JSR)

MEMORANDUM ORDER

JED S. RAKOFF, U.S.D.J.

Plaintiff Tokio Marine and Fire Insurance Co. ("Tokio Marine") and its insured, Mitsubishi Motors Credit of America, Inc. ("Mitsubishi Motors Credit"), demand that defendants Pagan indemnify Tokio Marine for monies it paid stemming from an automobile accident caused by defendant Eric Pagan's negligence. Following discovery, both sides moved for summary judgment in their respective favor.

The following pertinent facts are undisputed. In July 1997, Erna Pagan and her daughter-in-law Monika Pagan leased a Mitsubishi automobile from Bay Ridge Mitsubishi, which assigned its rights under the lease to Mitsubishi Motors Credit. Pursuant to the lease, the Pagans agreed to indemnify Mitsubishi Motors Credit and hold it harmless "for all losses, damages, claims, injuries and expenses (including attorneys' fees) that . . . relate to the condition, maintenance, use or operation of the [v]ehicle" Alikakos Aff. Ex. E, ¶ 12. On or about October 10, 1999, Eric Pagan (Erna's son and Monika's husband) drove the car while intoxicated, collided with a rock jetty, and seriously injured a passenger, Jaime Wilkens. Under New York law,

motor vehicle lessors like Mitsubishi Motors Credit are liable for the negligence of permissive drivers. N.Y. Veh. & Traf. Law § 388 (McKinney 1996), Accordingly, Wilkens filed a claim against Mitsubishi Motors Credit and its insurer, Tokio Marine, which was eventually settled for \$180,000. Plaintiffs therefore seek to recover from defendants that amount plus additional expenses of approximately \$1,500,¹ alleging that Erna Pagan and Monika Pagan are liable under the lease and that Eric Pagan is liable under common law principles of indemnification.

In resisting these claims, defendants' principal contention is that, even though Tokio Marine's insurance contract with Mitsubishi Motors Credit excludes lessees from coverage, Endorsement 1, Alikakos Aff. Ex. H, New York state law required Mitsubishi Motors Credit to insure the Pagans, and therefore the exclusion is void as a matter of public policy. If correct, defendants would then be insureds of Tokio Marine, and plaintiffs' claims would be barred by the antissubrogation rule, which holds that an insurer may not recover from its own insured for a claim arising from the very risk for which the insured was covered. See Penn. Gen. Ins. Co. v. Austin Powder Co., 502 N.L2d 982, 985 (NY. 1986).

It is true that in New York those "engaged in the business of renting or leasing rental vehicles" are required to carry \$25,000 in insurance against bodily injury claims and that such insurance must "inure to the benefit of" permissive users as well. N.Y. Veh. & Traf. Law § 370(1)(a), (1)(b), (3) (McKinney 1996) (emphasis supplied). This mandatory insurance requirement, where applicable, prevents owners from seeking indemnification of amounts up to the statutory minimum of \$25,000. See ELRAC, Inc. v. Ward, 748 N.E.2d 1 (N.Y. 2001); Morris v. Snappy Car Rental Inc., 637 N.E.2d 253

¹ Specifically, Tokio Marine incurred an additional \$1,417.50 in attorney's fees and \$84.97 in other disbursements.

(N.Y. 1994). Even then, however, it would not avoid indemnification above \$25,000.

More fundamentally, section 370 does not apply to this case in any respect because Mitsubishi Motors Credit, unlike a rental car company such as Hertz or Avis, was not "engaged in the business of renting or leasing rental vehicles," but rather, like General Motors Credit Corp., was in the business of selling or leasing non-rental vehicles. In the parlance of New York law, the Pagans' car was simply a "leased vehicle" as opposed to a "leased rental vehicle," compare N.Y. Veh. & Traf. Law § 121-d with id. § 137-a: as such it was outside the mandatory insurance provisions of § 370. Moreover, this was a 42-month lease under terms that required the Pagans to obtain their own primary insurance coverage, which they did, see Motor Vehicle Lease Agreement, Alikakos Ex. E, not a short-term rental. The policy behind § 370 ensuring minimum insurance coverage of short-term rentals -- is therefore inapplicable to this case. See Barber v. Muldoon No. 10417/01, slip op. at 2 (N.Y. Sup. Ct. Jan. 25, 2002); see also State Farm Mut. Auto. Int. Co. v. John Deere Ins. Co., 733 N.Y.S.2d 198, 200 (2d Dep't 2001) (holding that Ward did not abolish the traditional rule that owners may subordinate their insurance coverage and disclaim liability where alternative coverage is available).²

Defendants argue in the alternative that a trial is required to determine whether Tokio Marine's settlement payment was reasonable and made in good faith. However, while they allege that plaintiffs settled hastily, without sufficient investigation of the damages and the various defenses available to the Pagans against Wilkins, and that Tokio Marine's contingency

² While defendants also purport to rely on New York Insurance Law § 3420(e), that section merely requires every insurance policy to cover the named insured (here Mitsubishi Motors Credit) for losses occasioned by a permissive user, but in no way requires insurance of the permissive user himself.

fee arrangement with its counsel discouraged it from looking out for the Pagans' interests during the settlement, they have failed to adduce any competent evidence of record that materially supports any of these speculations. Therefore, as they were on notice of Wilkens' claim, they are bound by their indemnitee's settlement. See Goldmark Indus., Ltd. v. Tessoriere, 681 N.Y.S.2d 327 (2d Dep't 1995); Coleman v. J.R.'s Tavern, Inc., 622 N.Y.S.2d 334 (2d Dep't 1995)

Accordingly, for the foregoing reasons, the Court hereby grants plaintiffs' motion for summary judgment in its entirety, denies defendants' motion for summary judgment with prejudice, and hereby holds defendants jointly and severally liable to plaintiffs in the amount of \$181,502.47. Clerk to enter judgment.

SO ORDERED.

JED S. RAKOFF U. S. D. J.

Dated: New York, New York
April 8, 2003