

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 11-3-08
ADJ. DATE 12-9-08
Mot. Seq. # 004 - MG
005 - XMD

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MARKUS GLUCK and CARY GLUCK, :
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 Plaintiffs, :
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 - against - :
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 JAMES M. NEBGEN, MICHAEL J. NEBGEN, :
 NILT, INC. and YVONNE C. TURCO, :
 :
 Defendants. :
-----X

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant Nilt, Inc., dated October 10, 2008, and supporting papers (including Memorandum of Law dated October 23, 2007); (2) Notice of Cross Motion by the plaintiffs, dated October 27, 2008, and supporting papers; (3) Affirmation in Opposition by the defendant Nilt, Inc., dated December 1, 2008, and supporting papers; (4) Reply Affirmation by the plaintiffs, dated December 8, 2008, and supporting papers; (5) Other (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that this motion (004) by the defendant, NILT Inc., for an order pursuant to CPLR §3211 (a) (7) dismissing all claims against it granted; and it is further

ORDERED that the cross motion (005) by plaintiffs for partial summary judgment in their favor dismissing the portion of NILT Inc.'s answer asserting the Graves Act as an affirmative defense is denied.

This action was commenced to recover damages, personally and derivatively, for injuries allegedly sustained by plaintiff, Markus Gluck, as a result of a two-car motor vehicle accident that occurred on Veteran's Highway near its intersection with Sunken Meadow Parkway in Smithtown, New York, on August 20, 2005. At the time of the accident, Markus Gluck, was traveling as a passenger in a motor vehicle owned and operated by defendants James Nebgen and Michael Nebgen ("Nebgen"). The Nebgen motor vehicle allegedly collided with a motor vehicle operated by defendant Yvone Turco ("Turco"). Turco's motor vehicle allegedly was leased from defendant NILT Inc. ("NILT"), which was the title owner of Turco's motor vehicle. NILT is the trustee of Nissan-Infiniti LT, a Delaware statutory trust.

NILT now seeks an order pursuant to CPLR §3211(a)(7) dismissing plaintiff's complaint for failure to state a cause of action. NILT asserts that as lessor of Turco's motor vehicle, it can not be held vicariously liable under a theory of negligence since the promulgation of the Transportation Equity Act 49 USC 3016 ("Graves Amendment") has preempted New York Vehicle and Traffic Law § 388. Alternately, NILT requests that in as much as plaintiffs' cause of action is now barred by the Graves Amendment, it should be granted summary judgment dismissing plaintiffs' complaint in its entirety. In support of its motion NILT submits, inter alia, the pleadings, an affidavit from its representative, and copies of orders dated November 13, 2006, June 30, 2008 and September 11, 2008, previously issued by this Court. Plaintiffs oppose the motion and cross moves for partial summary judgment dismissing the portion of NILT's answer asserting an affirmative defense based upon the Graves Amendment. Specifically, plaintiffs argue that the Graves Amendment is inapplicable under the circumstances, because NILT neither leased the vehicle in question nor is engaged in the business of leasing vehicles. Plaintiffs also assert that the Graves Amendment violates the Commerce Clause of the United States Constitution. Plaintiffs submit the transcript of the deposition testimony of Alan Hunn and an excerpt of the New York Law Journal dated October 27, 2008.

In opposition to plaintiffs' cross motion, NILT argues that as trustee of Nissan-Infiniti LT, it has been and continues to be in the trade and business of leasing motor vehicles. NILT also asserts that the clear purpose of the Graves Amendment is to protect it and similarly situated business entities and affiliates from liability pursuant to New York Vehicle and Traffic Law § 388. Attached to NILT's reply papers are, among other things, an affidavit from the Senior Managing Director of Jeninson Financial LLC, Paul Jeninson.

At his examination before trial, Alan Hunn, an employee of Nissan North America testified that NILT is a subsidiary of Nissan North America. Mr. Hunn testified that NILT is the trustee of NILT Trust, the owner of Nissan-Infiniti LT. He also testified that NILT Trust is owned by Nissan Motor Acceptance Corporation, which relies on dealers to originate leases directly to consumers. Mr. Hunn further testified that once dealers originate a lease directly to a consumer, the lease is purchased by Nissan-Infiniti LT. Mr. Hunn testified that as trustee for Nissan-Infiniti LT, NILT was not directly involved in the practice of leasing automobiles to the ultimate consumer. NILT's main purpose,

according to Mr. Hunn, was to acquire motor vehicle titles from Nissan Motor Acceptance Corp in order to allow it to raise capital for the funding of the lease financing business. Mr. Hunn testified that after defendant Turco leased her motor vehicle from Smithtown Nissan, the lease was assigned to Nissan-Infiniti LT, who by way of the NILT Trust, is owned by NILT.

In his affidavit, Paul Jeninson avers that NILT, like other "originating" or "titling" trusts widely employed in the automotive industry, is a critical part of the structure of lease transactions and the securitization of lease interests. The primary purpose of an originating trust, according to Mr. Jeninson, is to isolate the ownership of the lease contracts in the event of creditor rights actions against a non-bank corporation engaged in the manufacture and leasing of motor vehicles. Mr. Jeninson states that the use of these types of trusts has been the custom practice within the automotive industry for at least 15 years, and that without it the funding of motor vehicle lease contracts to consumers would be considerably more expensive or unavailable.

In determining a motion pursuant to CPLR §3211(a)(7), a court must afford the pleading a liberal construction, accept all the facts alleged in the complaint as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 614 NYS2d 972 [1994]; *Hynes v Griebel*, 300 AD2d 628, 754 NYS2d 293 [2d Dept 2002]; *Glassman v Zoref*, 291 AD2d 430, 737 NYS2d 537 [2d Dept 2001]). Thus, the criterion is whether the plaintiff has a cause of action, not whether he or she has stated one (*see Vorel v NBA Props.*, 285 AD2d 641, 728 NYS2d 397 [2d Dept 2001]). 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 issues of fact from the case. Once the movant meets this burden, the burden shifts to the opposing party to show by tender of sufficient facts in admissible form that triable issues of fact remain which preclude summary judgment in the movant's favor (*see CPLR §3212; Altieri v Golub Corporation*, 292 AD2d 734, 741 NYS2d 126 [2002]). However, in opposing a summary judgment motion, mere conclusions, unsubstantiated allegations or assertions are insufficient to raise triable issues of fact (*see Zuckerman v New York*, 497 NYS2d 557, 404 NE2d 718 [1980]). In determining a motion for summary judgment, the court's function is not to resolve issues of fact or to determine matters of credibility but rather to determine whether issues of fact exist precluding summary judgment (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

The Graves Amendment provides that the owner of a vehicle that is engaged in the trade or business of renting or leasing motor vehicles shall not be liable under any State law for damages sustained in a motor vehicle accident provided there is no negligence or criminal wrongdoing on the part of the owner (*see 49 USC § 30106[a]*). Thus, the statute preempts the vicarious liability imposed pursuant to Vehicle and Traffic Law § 388 with respect to actions commenced after its effective date (*see Graham v Dunkley*, 50 AD3d 55, 852 NYS2d 169 [2d Dept 2006], *lv dismissed* 10 NY3d 835, 852 NYS2d 169; *Hall v Elrac Inc.*, 52 AD3d 262, 859 NYS2d 641 [1st Dept 2008]; *Leuchner v Cavanaugh*, 42 AD3d 893, 837 NYS2d 887 [4th Dept 2007]; *Hernandez v Sanchez*, 40 AD3d 446, 836 NYS2d 577 [1st Dept 2007]). Enacted on August 10, 2005, the Act states in pertinent part:

§30106. Rented or leased motor vehicle safety and responsibility

(a) In general—An owner of a motor vehicle that rents or leases the vehicle to a person (or an affiliate of the owner) shall not be liable under the law of any State or political subdivision thereof, by reason of being the owner of the vehicle (or an affiliate of the owner), for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if

(1) The owner (or affiliate of the owner) is engaged in the trade or business of renting or leasing motor vehicles: and

(2) There is no negligence or criminal wrongdoing on the part of the owner (or affiliate of the owner).

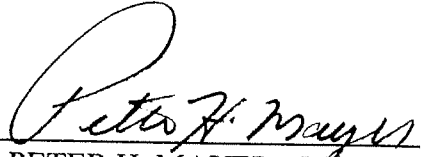
Initially, the Court notes that the Appellate Division Second Department has recently ruled that the Graves Amendment, 49 USC § 30106, is a constitutional exercise of Congressional power pursuant to the Commerce Clause of the United States Constitution (*see Graham v Dunkley, supra*). During a meeting of House of Representatives Committee on Rules on March 9, 2005, the representative from the state of Missouri, Sam Graves, stated that the purpose of the Act, which bears his name, was to correct an inequity in the rental and leasing industry by reforming the laws of states that impose vicarious liability on companies and their affiliates simply because they own a motor vehicle involved in an accident. Representative Graves also asserted that the Act was meant to restore fair competition to the industry and lower costs for consumers (*see* 151 Cong. Rec H1034-01 at 1202). Consistent with these broad aims, the Act provides protection to owners and their affiliates who engage in the trade or business of leasing or renting motor vehicles.

Here, deposition testimony by Alan Hunn indicates that NILT is the owner of Nissan-Infiniti LT, whose primary role is to purchase customer leases directly from Nissan dealerships. Mr. Hunn testified that by purchasing the motor vehicle titles, NILT allows Nissan-Infiniti LT to raise capital for the funding of the lease financing business. NILT's expert explained that as an "originating trust", NILT is indispensable to the leasing trade since it lowers Nissan-Infiniti's costs to consumers. Plaintiffs' restrictive interpretation of the Act, as relating only to those businesses which directly lease a car to the consumer, is belied by the Acts' attempt to effect an industry-wide reformation and deliver lower costs to the consumer. Plaintiffs' interpretation of the Act would negate its broad aim and ignore NILT's integral role in the assumption of leases from Nissan dealerships. Under these circumstances, NILT is unmistakably among those affiliates targeted by the Act. Moreover, the instant action is distinguishable from *Zizerski v Life Quality Motor Sales*, NYLJ October 27, 2008, Kings County. Unlike *Zizerski* where the Court refused to extend the protection of the Graves Act to the defendants because they provided defendants with a loaner rather than a leased vehicle, here it is undisputed that the car provided to defendant Turco was a leased motor vehicle.

With regard to NILT's motion to dismiss plaintiffs' complaint pursuant to CPLR §3211 (a) (7), a review of plaintiffs' complaint does not find any allegations of negligence on the part of NILT. The

sole allegations of negligence in plaintiffs' complaint relates to the operation of the motor vehicle by defendant Turco, and not by NILT or any affiliate of Nissan-Infiniti LT. Indeed, plaintiffs' cause of action against NILT for vicarious liability is predicated solely upon New York Vehicle and Traffic Law § 388. Further, the complaint contains no allegations that the motor vehicle accident was caused by a vehicular or component defect or malfunction, or any other claim of products liability. The allegations contained in plaintiffs' complaint fails therefore to fit within any legally cognizable theory and should be dismissed in its entirety (see *Graham v Dunkley, supra*; *Hernandez v Sanchez, supra*). Accordingly, the motion by NILT Inc., for an order pursuant to CPLR §3211 (a) (7) dismissing all claims against it is granted. Plaintiffs' cross motion seeking summary judgment dismissing the portion of NILT's answer asserting the Graves Act as an affirmative defense is likewise denied. The action is severed and shall continue against the remaining defendants.

Dated: 4/15/09


PETER H. MAYER, J.S.C.