

Au v VW Credit, Inc.

2013 NY Slip Op 31838(U)

August 2, 2013

Supreme Court, New York County

Docket Number: 150479-2012

Judge: Arlene P. Bluth

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH
Justice

PART 22

Index Number : 150479/2012
AU, ZAMEN THOMAS
vs.
VW CREDIT, INC.
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 3, were read on this motion to/for dismissal - grants amdmt.

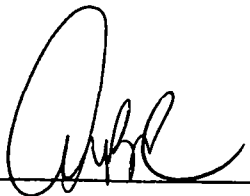
Notice of Motion/Order to Show Cause — Affidavits — Exhibits of 2 ds | No(s). 1
Answering Affidavits — Exhibits _____ | No(s). 2
Replying Affidavits _____ | No(s). 3

Upon the foregoing papers, it is ordered that this motion is

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 8-2-13


_____, J.S.C.

HON. ARLENE P. BLUTH
 NON-FINAL DISPOSITION

- 1. CHECK ONE: CASE DISPOSED
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

**SUPREME COURT OF THE STATE OF NY
COUNTY OF NEW YORK: PART 22**

Index No.:150479-2012
Mot. Seq. O2

Zaman Thomas Au,

Plaintiff,

-against-

**VW Credit, Inc., Volkswagon Group of America,
Inc., Brittany Barbarise and Marlene Barbarise,
*Defendants.***

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

Defendants VW Credit Leasing, Ltd., sued herein as VW Credit, Inc. ("VW") and Volkswagon Group of America, Inc.'s ("Volkswagon") motion to dismiss the complaint as against them based on the Graves amendment is granted.

In this action, plaintiff alleges that he sustained serious injuries in a June 11, 2011 car accident involving his vehicle and a 2010 Volkswagon Jetta, owned by VW and Volkswagon, leased to defendant Marlene Barbarise and driven by defendant Brittany Barbarise.

The moving defendants assert that the Graves Amendment prohibits the imposition of vicarious liability on vehicle lessors for injuries resulting from the negligent use or operation of the leased vehicle (*Tirado v Elrac*, 2008 NY Slip Op 6506 [1st Dept]) and applies this action which was commenced on or after August 10, 2005 (see 49 USC §30106[c]; *Hernandez v Sanchez*, 2007 NY Slip Op 4361 [1st Dept]).

The statute provides that "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 an 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 of the part of the owner (or an affiliate of the owner)" (49 USC §30106). Therefore, "[i]n order to claim immunity to vicarious liability under the Graves Amendment, the owner of the subject vehicle must be 'engaged in the trade or business of renting or leasing motor vehicles'; the subject vehicle must have been 'rent[ed] or lease[d] . . . to a person'; and 'harm to persons or property' must have occurred 'during the period of the rental or lease'" (*Luma v Elrac*, 2008 NY Slip Op 51062[U] [Sup Ct, Kings County]).

In support of their motion, the moving defendants assert that Volkswagen is the lessor of the Jetta by submitting a copy of the lease agreement dated July 7, 2010 made between Volkswagen, as lessor, and defendant Marlene Barbarise as lessee, listing defendant Brittany Barbarise as the principal operator (exh C). Additionally, movants submit the affidavit of VW's Risk Manager, Richard Vassar, who states that on the date of the accident, VW was engaged in the business of leasing cars pursuant to long-term leases and was the titled owner of the Jetta, and that VW is a wholly-owned subsidiary of Volkswagen (exh D, paras. 2-4).

In opposition, plaintiff's counsel states that the motion should be denied as premature because "there has been no evidence presented that the defendant was not acting within the scope of Brittany Barbarise's employment with Volkswagen when she operated the vehicle" (aff. in opp., para. 9). This opposition makes no sense because as the lease makes clear, Marlene, the lessee, not her daughter Brittany, the driver, was a Volkswagen employee. As indicated in Mr. Vassar's reply affidavit (exh A), Brittany Barbarise was never was an employee of either moving defendant.

Counsel's next ground for opposing the motion is that movants have not shown that either of them was in the business or trade of renting or leasing motor vehicles. As previously indicated, Mr. Vassar, in his moving affidavit, stated that on the date of the accident VW was engaged in the business of leasing cars pursuant to long-term leases and was the titled owner of the Jetta, and the lease clearly identifies Volkswagon as the lessor of the Jetta.

Finally, plaintiff's counsel asserts that the motion should be denied because there has not been any discovery on the issue of negligent entrustment. Absent automatic vicarious liability (which the Graves Amendment made obsolete), just because the lessee's daughter, an authorized operator, was involved in an accident does not mean the lessor was negligent in leasing the car to the lessee. Here, plaintiff failed to allege that defendants had special knowledge concerning a characteristic or condition peculiar to defendant Brittany Barbarise that rendered her use of the leased vehicle unreasonably dangerous (*Burell v Barreiro*, 83 AD3d 984, 922 NYS2d 465 (2d Dept 2011)). Certainly, the happening of an accident during the course of a lease cannot automatically trigger an argument of negligent entrustment – if that were so, then the Graves Amendment would be meaningless. Accordingly, the opposition fails to defeat the motion, and it is hereby

ORDERED that this motion to dismiss the complaint as against defendants VW Credit, Inc. and Volkswagon Group of America, Inc. based on the Graves Amendment is granted and the complaint is dismissed as to these defendants, and these defendants shall be removed from the caption; and it is further

ORDERED that counsel for the moving defendants shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of Trial Support (Room 158) who are respectfully requested to amend their records to remove VW Credit, Inc. and

Volkswagon Group of America, Inc. from in the caption herein; and it is further

ORDERED that the remaining defendants, Brittany Barbarise and Marlene Barbarise, are directed to appear at the August 5, 2013 DCM conference in Room 103, 80 Centre Street at 9:30AM.

This is the Decision and Order of the Court.

Dated: August 2, 2013
New York, New York



HON. ARLENE P. BLUTH, JSC