NEW YORK SUPREME COURT - COUNTY OF BRONX

Mot. Seq. 12
Mot. Seq. 13

PART 19

Case Disposed ❑
Settle Order ❑
Schedule Appearance ❑

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

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LUGO, WILLIAM

Index Nº. **300682/2008**

- against -

Hon. **LUCINDO SUAREZ**,
Justice.

PURPLE & WHITE MARKETS, INC., et al

----------X

and a third-party action.

The following papers numbered 1 to **19** read on this motion, **SUMMARY JUDGMENT (DEFENDANT) (Motion Sequence #12)**, noticed on **January 14, 2011** and duly submitted as No. **37** on the Motion Calendar of **March 7, 2011**, and the following papers numbered **14** to **17** and **20** to **23** read on this motion, **SUMMARY JUDGMENT (DEFENDANT) (Motion Sequence #13)**, noticed on **January 27, 2011** and duly submitted as No. **38** on the Motion Calendar of **March 7, 2011**

	PAPERS NUMBERED	
Notice of Motion - Exhibits and Affidavits Annexed (Motion Sequence #12)	1, 2, 3	
Answering Affidavit and Exhibits (Motion Sequence #12)	4, 5, 6, 7, 8	
Replying Affidavit and Exhibits (Motion Sequence #12)	9	
Notice of Cross-Motion - Exhibits and Affidavits Annexed (Motion Sequence #12)	10, 11, 12, 13	
Answering Affidavit and Exhibits (Motion Sequence #12)	14, 15, 16, 17, 18	
Replying Affidavit and Exhibits (Motion Sequence #12)	19	
Notice of Motion - Exhibits and Affidavits Annexed (Motion Sequence #13)	20, 21, 22	
Answering Affidavit and Exhibits (Motion Sequence #13)	14, 15, 16, 17	
Replying Affidavit and Exhibits (Motion Sequence #13)	23	

Upon the foregoing papers, the motions of third-party defendant Fica Transportation, Inc. and defendant Purple & White Markets, Inc., sued herein as Purple & White Markets, Inc. d/b/a Associated Supermarket, and the cross-motion of defendants and third-party plaintiffs White Rose, Inc., White Rose Foods, Inc., Rose Trucking Corp. and DiGiorgio Corp. s/h/a Digorgio Corp., all seeking summary judgment, are consolidated for decision and disposed of in accordance with the annexed decision and order.

Dated: **03/30/2011**

Hon. _____
LUCINDO SUAREZ, J.S.C.

FILED Apr 11 2011 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19

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WILLIAM LUGO,

Plaintiff,

- against -

PURPLE & WHITE MARKETS, INC. d/b/a ASSOCIATED SUPERMARKET, WHITE ROSE, INC., WHITE ROSE FOODS, INC., ROSE TRUCKING CORP. and DIGORGIO CORP.,

Defendants.

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WHITE ROSE, INC., WHITE ROSE FOODS, INC., ROSE TRUCKING CORP. and DIGIORGIO CORP.,

Third-Party Plaintiffs,

- against -

FICA TRANSPORTATION INC.,

Third-Party Defendant.

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DECISION AND ORDER

Index No. 300682/2008

Third-Party Index No. 84169/2008

PRESENT: Hon. Lucindo Suarez

Upon the notice of motion dated December 14, 2010 of third-party defendant Fica Transportation, Inc. and the affirmation and exhibits submitted in support thereof (Motion Sequence #12); the affirmation in opposition dated February 25, 2011 of defendants and third-party plaintiffs White Rose, Inc., White Rose Foods, Inc., Rose Trucking Corp. and DiGiorgio Corp. s/h/a Digorgio Corp. and the affidavits (2), exhibits and memorandum of law submitted therewith; the affirmation in reply dated March 4, 2011 of third-party defendant Fica Transportation, Inc.; the notice of cross-motion dated December 29, 2010 of defendants and third-party plaintiffs White Rose, Inc., White Rose Foods, Inc., Rose Trucking Corp. and DiGiorgio Corp. s/h/a Digorgio Corp. and the

affirmation, exhibits and memorandum of law submitted in support thereof (Motion Sequence #12); the affirmation in opposition dated February 2, 2011 of plaintiff and the affidavits (2) and exhibits submitted therewith, the papers also being submitted in opposition to the motion for summary judgment of defendant Purple & White Markets, Inc., sued herein as Purple & White Markets, Inc. d/b/a Associated Supermarket; the affirmation in opposition dated February 25, 2011 of third-party defendant Fica Transportation, Inc.; the affirmation in reply dated March 4, 2011 of defendants and third-party plaintiffs White Rose, Inc., White Rose Foods, Inc., Rose Trucking Corp. and DiGiorgio Corp. s/h/a Digorgio Corp.; the notice of motion dated December 28, 2010 of defendant Purple & White Markets, Inc., sued herein as Purple & White Markets, Inc. d/b/a Associated Supermarket and the affirmation and exhibits submitted in support thereof (Motion Sequence #13); the affirmation in reply dated March 3, 2011 of defendant Purple & White Markets, Inc., sued herein as Purple & White Markets, Inc. d/b/a Associated Supermarket; and due deliberation; the court finds:

The motions of third-party defendant Fica Transportation, Inc. ("Fica") and defendant Purple & White Markets, Inc., sued herein as Purple & White Markets, Inc. d/b/a Associated Supermarket ("P&W"), and the cross-motion of defendants and third-party plaintiffs White Rose, Inc. ("WRI"), White Rose Foods, Inc. ("WRFI"), Rose Trucking Corp. ("RTC") and DiGiorgio Corp. s/h/a Digorgio Corp. ("DiGiorgio"), collectively, the "White Rose defendants," all seeking summary judgment, are consolidated for decision herein, inasmuch as all involve common questions of law and fact and inasmuch as plaintiff has submitted a single opposition to the motions of P&W and the White Rose defendants.

Plaintiff William Lugo, a driver employed by third-party defendant Fica, alleges to have fallen from a trailer owned or leased by WRFI, a subsidiary of WRI, while delivering grocery items to a store owned by defendant P&W. The trailer had been loaded by one or more of the White Rose

defendants and was attached to a tractor supplied by Fica. While unloading boxes, plaintiff fell from the side door of the trailer onto rollers that had been provided and placed by employees of P&W to assist in the unloading, and fell from the rollers to the ground. It is alleged that the White Rose defendants improperly loaded the trailer such that plaintiff had no room to maneuver in the trailer to unload the goods, being thereby forced into the doorframe, and that they failed to provide plaintiff with a trailer having a side platform on which to stand while unloading, and that P&W improperly placed the rollers without plaintiff's knowledge. The White Rose defendants impled Fica, each alleging causes of action for common law indemnity, common law contribution, contractual indemnification and breach of contract for failure to procure insurance on behalf of RTC.

P&W's Motion for Summary Judgment

P&W moves for summary judgment dismissing the complaint and the cross-claims of the other defendants on the ground that the rollers were not a proximate cause of plaintiff's accident because the accident was caused by the lack of a side platform on which to stand while unloading, the failure to load the trailer such that there was room to maneuver at its side door, and plaintiff's election to unload the trailer in an unsafe manner, all of which caused plaintiff to slip from the trailer itself onto the rollers. P&W also argues that, premised upon the testimony of P&W employees, plaintiff was the sole proximate cause of his injuries because he voluntarily stepped onto the rollers.

Plaintiff testified that the accident occurred while he balanced in the doorframe of the rear side trailer door, with both feet turned to the right on the doorframe itself and one hand bracing himself on the trailer, and handed cases to the P&W employees. He slipped off the frame while facing toward the interior of the trailer after having handed off two boxes, both feet leaving the

doorframe simultaneously; fell onto rollers, both feet landing simultaneously; and slipped backward onto the ground. He released his grasp on the trailer simultaneously as he slipped from the doorframe. The rollers were behind him at the level of the trailer and although he did not know the distance between where he had been standing on the doorframe and the rollers, he knew he had been standing on the doorframe and not the rollers. He testified that he, himself, was not using rollers on the day of the accident. He also testified that he did not know where the rollers came from, whether the rollers were there when he began removing things from truck, whether the rollers were attached to trailer or how the rollers were elevated to the height of the trailer. He did not see the rollers at any time before he fell on them.

P&W employee Pedro Ramirez ("Ramirez") testified that he and plaintiff set up the rollers together, and P&W employee Antonio Cruz ("Cruz") testified that he observed plaintiff adjust the end of the rollers abutting the trailer, indicating that plaintiff was aware of the rollers. Ramirez testified that the accident occurred when plaintiff voluntarily stepped onto the rollers to gain height to reach the top of a loaded pallet, although elsewhere Ramirez testified that he did not know if he was physically able to see plaintiff's foot come into contact with the rollers as opposed to the doorframe or the general area. Cruz testified that plaintiff put his left foot on the rollers when he turned to place a box on the rollers, and that his foot slipped while he faced and looked toward the rollers.

The differing versions of the facts present questions of credibility which cannot be decided here. *See Gaspari v. Sadeh*, 61 A.D.3d 405, 876 N.Y.S.2d 46 (1st Dep't 2009); *Chunn v. New York City Hous. Auth.*, 55 A.D.3d 437, 866 N.Y.S.2d 145 (1st Dep't 2008). Viewing the facts most favorably to plaintiff, *see Shands v. Escalona*, 44 A.D.3d 524, 843 N.Y.S.2d 504 (1st Dep't 2007), *appeal denied*, 10 N.Y.3d 705, 886 N.E.2d 803, 857 N.Y.S.2d 38 (2008), and drawing all

reasonable inferences in his favor, *see Segree v. St. Agatha's Convent*, 77 A.D.3d 572, 909 N.Y.S.2d 364 (1st Dep't 2010), there are questions as to the precariousness of plaintiff's positioning, and the P&W employees' knowledge thereof, such that the placement of rollers behind plaintiff without his knowledge contributed to his injuries. "Proximate cause is a question of fact for the jury where varying inferences are possible." *Sweeney v. Bruckner Plaza Assoc.*, 57 A.D.3d 347, 348, 869 N.Y.S.2d 453, 454 (1st Dep't 2008), *appeal dismissed*, 12 N.Y.3d 832, 908 N.E.2d 918, 881 N.Y.S.2d 10 (2009). Accordingly, P&W failed to demonstrate *prima facie* entitlement to summary judgment.

The White Rose Defendants' Motion for Summary Judgment

The White Rose defendants move for summary judgment dismissing the complaint and all cross-claims on the ground that plaintiff's actions in unloading the trailer in an imprudent and unauthorized manner (choosing to unload through the side door rather than the rear door and then balancing precariously in a doorframe) constituted the sole proximate and/or superseding cause of his injuries.

Plaintiff testified that the daily manifest provided by the White Rose defendants would state the order of deliveries to be made and where each individual store's merchandise was located within the trailer, which would indicate whether unloading was to be through the side or rear door of the trailer. P&W store manager John Branco ("Branco") testified that the driver's decision as to a rear or side delivery depended on the order of delivery, and that since trailers are unloaded from back to front, the day's first delivery would have to be through the rear and subsequent deliveries could be made through the side because the driver would then have room to move. Branco testified that his employees do not offer input to the driver as to how merchandise should be unloaded, and while Martinez testified that he jointly decided with plaintiff how to unload, Martinez made clear that the

basis of the decision was the location of the merchandise within the trailer. Cruz testified that whether an unload occurs from the side or rear depends on the driver and where the groceries are located within the trailer.

Fica's president, Paul Rodrigues ("Rodrigues"), testified that the training provided to newly-hired Fica drivers included choosing the door from which to unload, which depended upon the totality of the circumstances, but both Rodrigues and RTC's Vice President of Logistics, Patrick Caffrey ("Caffrey"), testified that to unload from the side door, cargo must first be unloaded from the rear to create accessible space abutting the side door.

Caffrey also testified that trailers were assigned according to whether a side or rear unload was to be done at the destination, depending on customer request and need as defined in the customer profile by the type of trailer that would fit in the location and the type of unload that could be accommodated, although the unloading process was ultimately the driver's determination. The White Rose defendants would not specify whether a delivery required a rear or side unload, as that depended on the driver's common sense and the feasibility of performing a particular type of unload. Accordingly, trailers could be loaded to capacity without regard as to whether the unload would be side or rear, although if a store had specifically requested a particular type of unload or if the loaders were aware that only one particular type of unload could be performed at a particular destination, the loaders would leave room in the appropriate zone of the trailer. Caffrey further testified that a rear unload was preferable and that if one could not be performed and the driver did not have adequate room to perform a side unload, a driver should use his common sense and wait until a rear unload could be performed.

Finally, Caffrey testified that as side unloads were rarely to be performed, the absence of a side platform would not be sufficient reason to take a trailer out of service. Plaintiff testified that he

frequently complained to White Rose and to Fica, both orally and in writing, regarding the lack of a side platform, although he frequently performed side unloads in the same manner as on the day of the accident.

Plaintiff testified that the day's manifest indicated that the delivery to P&W's store was to be made through the side door. He further testified that at the time of the accident, loaded pallets came to within two or three inches of the trailer's side door and that the side door was approximately four to six feet from the trailer's rear. He also testified that the delivery to the P&W store was his first delivery of the day.

The motion papers contain nothing indicating whether a rear unload was feasible and safer under all attendant circumstances, and there is a question of fact as to whether the trailer was double-parked so as to occupy a lane normally reserved for oncoming traffic. Caffrey's testimony suggests that a driver had the flexibility to perform the type of unload dictated by the circumstances and his common sense, although it is not clear that a driver had fully unfettered authority to choose a particular unloading method when a customer's profile dictated otherwise. Accordingly, the White Rose defendants failed to demonstrate *prima facie* entitlement to summary judgment, as they failed to affirmatively establish that the loading of the trailer was non-negligent, *cf. Kocurek v. Home Depot, U.S.A.P., Inc.*, 286 A.D.2d 577, 730 N.Y.S.2d 74 (1st Dep't 2001), or that plaintiff's attempt at a side unload was not foreseeable given the conflicting testimony whether the White Rose defendants knew what type of unload P&W required and whether they adjusted their loading methods given such knowledge, *see Pensabene v. San Francisco Constr. Mgt., Inc.*, 27 A.D.3d 709, 812 N.Y.S.2d 624 (2d Dep't 2006); *Gleason v. Holman Contract Warehousing*, 223 A.D.2d 959, 636 N.Y.S.2d 505 (3d Dep't 1996); *see also Soto v. New York City Tr. Auth.*, 6 N.Y.3d 487, 846 N.E.2d 1211, 813 N.Y.S.2d 701, *reargument denied*, 6 N.Y.3d 891, 850 N.E.2d 673, 2006 N.Y.

LEXIS 1320, 817 N.Y.S.2d 626 (2006).

Motions for Summary Judgment Affecting the Third-Party Pleadings

The White Rose defendants further move for partial summary judgment on their third-party complaint against Fica, and Fica moves for summary judgment dismissing the third-party complaint. The White Rose defendants argue that Fica is contractually obligated to indemnify them and that Fica has breached the contractual requirement to procure insurance naming them as additional insureds because neither of Fica's insurers has provided them with a defense. The White Rose defendants further move for summary judgment on Fica's counterclaim for common-law indemnification on the basis of their lack of negligence; however, as above, the White Rose defendants have not established such freedom from negligence as a matter of law.

Common-Law Contribution and Common-Law Indemnification

Fica moves for summary judgment dismissing the common-law causes of action on the ground that plaintiff failed to sustain a "grave injury" as required under Workers' Compensation Law § 11. Plaintiff's bill of particulars alleges various injuries to his shoulders, knees, right fingers, right hand and cervical and lumbosacral spine and psychological sequelae, none of which, either separately or in the aggregate, appears to correspond to the injuries listed in Workers' Compensation Law § 11. *See e.g. Suits v. City of New York*, 12 Misc.3d 1156A, 819 N.Y.S.2d 213 (Sup Ct N.Y. County 2006). "The categories of grave injuries listed in section 11, providing the sole bases for a third-party action, 'are deliberately both narrowly and completely described;' the list, both 'exhaustive' and 'not illustrative,' is 'not intended to be extended absent further legislative action.'" *Fleming v Graham*, 10 N.Y.3d 296, 300, 886 N.E.2d 769, 772, 857 N.Y.S.2d 8, 11 (2008).

Plaintiff did not oppose the motion, and the White Rose defendants did not oppose this facet of the motion, but a review of the admissible medical evidence submitted in opposition to the White

Rose defendants' cross-motion and P&W's motion, *see* CPLR 3212(b), does not lead to a different conclusion. The absence of a grave injury, however, disposes of only the White Rose defendants' common-law contribution and indemnification causes of action, *see e.g. Petrillo v. Durr Mech. Constr., Inc.*, 306 A.D.2d 25, 759 N.Y.S.2d 662 (1st Dep't 2003), as the employer's liability may be predicated upon either an express indemnification agreement or a grave injury, *see* Workers' Compensation Law § 11;[1] *Fleming, supra.* The White Rose defendants did not move for summary judgment with regard to these causes of action.

Contractual Privity

While the White Rose defendants each allege causes of action against Fica, the third-party complaint is premised upon the 2002 contract between Fica and only RTC. Accordingly, Fica moves on the ground that the claims of third-party plaintiffs WRI, WRFI and DiGiorgio are without merit because Fica was not in contractual privity with any third-party plaintiff other than RTC. The third-party complaint alleges that Fica entered into a 2002 contract with RTC in which it agreed to indemnify RTC for Fica's "acts or omissions related to the use of the Equipment outside the scope of the performance of [Fica's] obligations to [RTC] as contemplated" by the contract and that Fica would maintain liability insurance naming RTC as an additional insured. It is further alleged that all of the White Rose defendants were beneficiaries of the contract with RTC.

While these motions were pending, the Appellate Division, First Department, affirmed the decision and order of the undersigned dated August 19, 2009 which had granted Fica's cross-motion to dismiss the third-party complaint to the extent of dismissing WRFI's claim for breach of contract.

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[1] Workers' Compensation Law § 11 states, "For purposes of this section the terms 'indemnity' and 'contribution' shall not include a claim or cause of action for contribution or indemnification based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered."

See Lugo v. Purple & White Markets, Inc., 2011 WL 867511 (1st Dep't Mar. 15, 2011). The Appellate Division stated that the 2001 agreement provided the only basis for a relationship between WRFI and Fica, and it would be assumed that Fica would argue for an extension of this reasoning to the remaining similarly-situated White Rose defendants. Ordinarily, a finding of an appellate court is binding upon the lower courts as law of the case. *See People v. Evans*, 94 N.Y.2d 499, 727 N.E.2d 1232, 706 N.Y.S.2d 678 (2000), *reargument denied*, 96 N.Y.2d 755, 748 N.E.2d 1076, 725 N.Y.S.2d 280 (2001); *J. A. Preston Corp. v. Fabrication Enterprises, Inc.*, 68 N.Y.2d 397, 502 N.E.2d 197, 509 N.Y.S.2d 520 (1986). However, the additional evidence of the White Rose defendants' response to Fica's notice to admit and Rodrigues' deposition testimony, providing a context for Rodrigues' affidavit of which the Appellate Division did not have the benefit, does not preclude consideration of the issue of contractual privity. *See Barrett v. State Mut. Life Assurance Co.*, 44 N.Y.2d 872, 378 N.E.2d 1047, 407 N.Y.S.2d 478 (1978); *Estate of Nevelson v. Carro, Spanbock, Kaster & Cuiffo*, 290 A.D.2d 399, 736 N.Y.S.2d 668 (1st Dep't 2002); *Simpson v. Bronx Cross County Med. Group, P.C.*, 288 A.D.2d 109, 733 N.Y.S.2d 340 (1st Dep't 2001); *Boston Concessions Group v. Criterion Ctr. Corp.*, 250 A.D.2d 435, 673 N.Y.S.2d 111 (1st Dep't 1998); *Smith v. Metropolitan Transp. Auth.*, 226 A.D.2d 168, 641 N.Y.S.2d 8 (1st Dep't 1996), *appeal denied*, 89 N.Y.2d 803, 675 N.E.2d 1233, 653 N.Y.S.2d 280 (1996); *Cromwell v. Le Sannom Bldg. Corp.*, 222 A.D.2d 307, 636 N.Y.S.2d 256, 636 N.Y.S.2d 257 (1st Dep't 1995); *Holloway v. Cha Cha Laundry, Inc.*, 97 A.D.2d 385, 467 N.Y.S.2d 834 (1st Dep't 1983).

An entity may enforce a contract to which it is not a party where it is shown to be an intended third-party beneficiary of the contract. "Parties asserting third-party beneficiary rights under a contract must establish '(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [their] benefit and (3) that the benefit to [them] is

sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [them] if the benefit is lost.'" *Mendel v. Henry Phipps Plaza W., Inc.*, 6 N.Y.3d 783, 786, 844 N.E.2d 748, 751, 811 N.Y.S.2d 294, 297 (2006) (citation omitted); *see also Mandarin Trading Ltd. v. Wildenstein*, 2011 N.Y. LEXIS 114 (Feb. 10, 2011). "Essential to status as an intended beneficiary . . . is . . . that 'the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.'" *Fourth Ocean Putnam Corp. v. Interstate Wrecking Co.*, 66 N.Y.2d 38, 44, 485 N.E.2d 208, 212, 495 N.Y.S.2d 1, 5 (1985) (citation omitted).

Among the circumstances to be considered is whether manifestation of the intention of the promisor and promisee is "'sufficient, in a contractual setting, to make reliance by the beneficiary both reasonable and probable.'" *Id.* Not every party who actually benefits from the performance of a contract qualifies as an intended beneficiary with standing to sue on the contract - absent the showing of intent, a beneficiary is merely "incidental" with no such standing. *See Port Chester Electrical Constr. Corp. v. Atlas*, 40 N.Y.2d 652, 357 N.E.2d 983, 389 N.Y.S.2d 327 (1976); *Crown Wisteria, Inc. v. F.G.F. Enterprises Corp.*, 168 A.D.2d 238, 562 N.Y.S.2d 616 (1st Dep't 1990). Furthermore, the mere conferral of benefits upon the third party is insufficient; "[t]he contract must evince a discernible intent to allow recovery for the specific damages to the third party that result from a breach thereof before a cause of action is stated." *Strauss v. Belle Realty Co.*, 98 A.D.2d 424, 427, 469 N.Y.S.2d 948, 950 (2d Dep't 1983), *affirmed*, 65 N.Y.2d 399, 482 N.E.2d 34, 492 N.Y.S.2d 555 (1985); *Castorino v. Unifast Bldg. Products Corp.*, 161 A.D.2d 421, 555 N.Y.S.2d 350 (1st Dep't 1990).

"The best evidence of the intent to bestow a benefit upon a third party is the language of the contract itself." *767 Third Ave. LLC v. Orix Capital Mkts.*, LLC, 26 A.D.3d 216, 218, 812 N.Y.S.2d

8, 11 (1st Dep't 2006), *appeal denied*, 8 N.Y.3d 803, 862 N.E.2d 791, 830 N.Y.S.2d 699 (2007). Here, the 2002 agreement contains no language alluding to any third party or suggesting the existence of any third-party beneficiary, whether intended or incidental. Even where the proposed third party is not mentioned in the contract, "the parties' intent to benefit the third party must be apparent from the face of the contract." *LaSalle Nat'l Bank v. Ernst & Young LLP*, 285 A.D.2d 101, 108, 729 N.Y.S.2d 671, 676 (1st Dep't 2001), *reargument denied*, 2001 N.Y. App. Div. LEXIS 11868 (1st Dep't Nov. 27, 2001); *see also Aymes v. Gateway Demolition Inc.*, 30 A.D.3d 196, 817 N.Y.S.2d 233 (1st Dep't 2006). However, proof may be introduced to establish an entity's status as an intended beneficiary. *See 243-249 Holding Co., LLC v. Infante*, 4 A.D.3d 184, 771 N.Y.S.2d 651 (1st Dep't 2004).

To that end, the White Rose defendants point to Rodrigues's affidavit submitted in the course of prior motion practice. It is not the inconsistency of Fica's position regarding the viability of the 2001 agreement but the bearing of the affidavit upon Fica's understanding of the relationship between the White Rose defendants, and between itself and the White Rose defendants, which is relevant in this context. The third-party complaint alleged that DiGiorgio, which has since been acquired by WRI, owned the property where plaintiff's accident occurred, that WRFI owned and sold the goods contained in the trailer, and that RTC was a division of WRI and owned the trailer. While Rodrigues's deposition testimony suggested a lack of knowledge of the existence of several of the White Rose defendants and of the relationship between the White Rose defendants, his affidavit stated that Fica had been providing trucking services to all of the White Rose defendants pursuant to the 2001 contract, which he characterized as being between Fica and all of the White Rose defendants, and that the warehouses at which Fica's drivers picked up trailers belonged to all of the White Rose defendants. Rodrigues testified that Fica's work at the time of the accident was

solely pursuant to the 2002 contract.

In response to Fica's notice to admit, the White Rose defendants denied that a December 19, 2001 contract between Fica and WRFI was in effect on the date of plaintiff's accident, admitted that the 2002 contract between RTC and Fica was in effect on the date of plaintiff's accident and admitted that there existed no other contracts between Fica and any of the White Rose defendants on the date of plaintiff's accident. Furthermore, Caffrey testified that he understood the 2002 contract with RTC to supersede the 2001 contract with WRFI as necessary to satisfy federal Department of Transportation trucking regulations and that on the date of plaintiff's accident Fica provided services under only the 2002 contract.

Rodrigues's affidavit conflicts with his later deposition testimony, and although the affidavit mentioned only the 2001 contract, its presents a question of fact regarding Fica's broader knowledge of the relationship between the White Rose defendants, such that Fica's continued relationship and performance after the 2001 contract ceased to be operative could be considered indicative of its intent to confer a benefit not only on a contract carrier, as RTC is defined in the 2002 contract, but upon the White Rose defendants' interests as a whole. *See e.g. Dominion Fin. Corp. v. Asset Indem. Brokerage Corp.*, 60 A.D.3d 461, 874 N.Y.S.2d 115 (1st Dep't 2009); *Castle Vil. Owners Corp. v. Greater N.Y. Mut. Ins. Co.*, 58 A.D.3d 178, 868 N.Y.S.2d 189 (1st Dep't 2008); *Dinerstein v. Anchin, Block & Anchin, LLP*, 41 A.D.3d 167, 838 N.Y.S.2d 46 (1st Dep't 2007); *Williams v. Sidley Austin Brown & Wood, L.L.P.*, 38 A.D.3d 219, 832 N.Y.S.2d 9 (1st Dep't 2007). Accordingly, under the circumstances presented here, the lack of contractual privity does not itself provided a basis to dismiss the third-party claims.

Contractual Indemnification

Fica seeks summary judgment on the ground that the accident did not trigger the indemnity

provision of the contract between Fica and RTC because plaintiff was not acting outside the scope of the contract at the time of the accident; the White Rose defendants seek summary judgment arguing that the parties did not contemplate the unloading method pursued by plaintiff which was therefore outside such scope. Pursuant to the 2002 contract, drafted by the White Rose defendants, between Fica and RTC for the transportation by Fica of freight offered by RTC, Fica was

> To defend, indemnify and hold the Company harmless from claims or damages of any kind as a result of the Contractor's or any Driver's acts or omissions related to the use of the Equipment outside the scope of the performance of its obligations to the Company as contemplated herein.

The "Company" was defined in the contract as RTC, the "Contractor" was defined as Fica, and the "Equipment" was defined as the tractors supplied by Fica under the contract. The contract further stated that

> It is understood that Contractor shall transport goods to and from such places and at such times as the various shippers shall require and that, subject to the provisions of this Agreement, Contractor reserves the right to determine routes and means and methods of performing its obligations under this Agreement.

Fica argues that plaintiff's accident did not occur outside the scope of the performance of its obligations, and thus it is not obligated to indemnify any party, because Caffrey testified that plaintiff would have been acting within the scope of the contract, had he been delivering food from a White Rose trailer at the time of the accident (the deposition question was posed as a hypothetical). It is undisputed that plaintiff's accident occurred while he was unloading a White Rose trailer loaded with White Rose products, and that delivery by a Fica driver, such as plaintiff, to a grocery store specified by RTC of White Rose products supplied by RTC and stored in a White Rose trailer supplied by RTC would be an act in furtherance of the purpose of the contract. The White Rose defendants argue, however, that plaintiff acted outside the scope of the contract by using an unloading method not contemplated by the parties, as demonstrated by the testimony of

both Rodrigues and Caffrey that the preferred unloading method was through the rear trailer door.

The contract unambiguously defines "Equipment" solely as the tractors supplied by Fica (as opposed to "tractor-trailers," which is used elsewhere in the contract), and as there is no claim that the accident arose from the use of the tractor hauling the White Rose trailer, the indemnification provision is not triggered. *See e.g. Hamill v. Mutual of Am. Inv. Corp.*, 79 A.D.3d 478, 913 N.Y.S.2d 62 (1st Dep't 2010) (no proof of a triggering event); *Hartz Consumer Group, Inc. v. JWC Hartz Holdings, Inc.*, 33 A.D.3d 555, 824 N.Y.S.2d 227 (1st Dep't 2006) (indemnification provisions are subject to heightened scrutiny and must establish the parties' unmistakable intent to provide for indemnification under the particular circumstances presented). Furthermore, the contract unambiguously states that Fica's freedom to determine the means and methods of performing its obligations under the contract is qualified only by the other provisions of the contract, none of which seeks to define the mechanics of unloading a trailer for delivery.

Evidence of the parties' purportedly "true intent" may not be used to contravene the express intent in a written contract. *See Halkedis v. Two East End Ave. Apartment Corp.*, 137 A.D.2d 452, 525 N.Y.S.2d 31 (1st Dep't 1988), *affirmed*, 72 N.Y.2d 933, 529 N.E.2d 173, 532 N.Y.S.2d 843 (1988). "[A] contract should be enforced according to its terms and is 'not to be subverted by straining to find an ambiguity which otherwise might not be thought to exist.'" *Uribe v. Merchants Bank of N.Y.*, 91 N.Y.2d 336, 341, 670 N.Y.S.2d 393, 396, 693 N.E.2d 740, 743 (1998), *cited in White Rose Food v. Saleh*, 99 N.Y.2d 589, 592 n1, 788 N.E.2d 602, 603, 758 N.Y.S.2d 253, 254 (2003). Where the meaning of a contract is clear upon its face, "evidence of the intention and acts of the parties other than exists in the contract itself plays no part in the decision" and "no proof need be taken as to its real meaning." *Parochial Bus Systems, Inc. v. Board of Education*, 91 A.D.2d 13, 17, 457 N.Y.S.2d 285, 288 (1st Dep't 1983) (citations omitted), *affirmed*, 60 N.Y.2d 539, 458

N.E.2d 1241, 470 N.Y.S.2d 564 (1983).

The self-serving affidavit of Caffrey submitted by the White Rose defendants seeks to "correct" his earlier unqualified testimony regarding the scope of the contract work. Had the parties intended that the scope of Fica's performance of its obligations to RTC as contemplated within the contract be defined not merely by the ends to be achieved but by the particular methods employed to achieve those ends, "they had only to say so unambiguously." *Tonking v. Port Auth.*, 3 N.Y.3d 486, 490, 821 N.E.2d 133, 135, 787 N.Y.S.2d 708, 710 (2004). Accordingly, Fica's motion is granted and the White Rose defendants' cross-motion is denied with respect to these causes of action.

Breach of Contract for Failure to Procure Insurance

Fica claims that it did not breach the contract because it procured the required insurance; the White Rose defendants claim that the insurers' failure to provide them with a defense entitles them to summary judgment. Pursuant to the 2002 contract between Fica and RTC, Fica was

> To maintain general liability, automobile liability, property damage (to third parties and the Company's equipment) and cargo insurance coverage throughout the term of this Agreement from an insurance carrier reasonably acceptable to the Company and naming the Company as Additional Insured and Loss Payee, with such limits as the Company may require, but in no event less than $1 million combined single limit per occurrence and $5 million in the aggregate.

The contract does not specify the scope of the required coverage. *See Nuzzo v. Griffin Tech.*, 212 A.D.2d 980, 624 N.Y.S.2d 703 (4th Dep't 1995). Fica submits a May 12, 2005 certificate of automobile liability insurance from ACE American Insurance Company insuring "S.L. Benfica Transportation" and naming as the certificate holder "White Rose," and October 16, 2007 certificates of commercial general liability and motor cargo insurance from Burlington Insurance Co. and Fireman's Fund Insurance Co. insuring Fica and naming as the certificate holders "White Rose, Inc." and "Rose Trucking, Inc." A certificate of insurance, while evidence of an insurance

contract, is insufficient to establish coverage as a matter of law. *See Long v. Tishman/Harris*, 50 A.D.3d 356, 855 N.Y.S.2d 102 (1st Dep't 2008); *Horn Maintenance Corp. v. Aetna Cas. & Sur. Co.*, 225 A.D.2d 443, 639 N.Y.S.2d 355 (1st Dep't 1996). Fica does not submit the subject insurance polices. While an insurance disclaimer, in and of itself, may not necessarily be dispositive on the issue of the failure to procure insurance, *see e.g. Murphy v. University Club*, 200 A.D.2d 532, 607 N.Y.S.2d 13 (1st Dep't 1994), the correspondence submitted on the motion raises questions of fact as to whether RTC was named as an additional insured on the policies. It is noted that none of the Burlington Insurance Co. correspondence submitted on the motion was complete.

Accordingly, it is

ORDERED, that the motion of third-party defendant Fica Transportation, Inc. for summary judgment dismissing the third-party complaint is granted to the extent of dismissing each third-party cause of action for common-law indemnification, common-law contribution and contractual indemnification (Motion Sequence #12); and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of third-party defendant Fica Transportation, Inc. dismissing the causes of action of third-party plaintiff White Rose, Inc. for common-law indemnification, common-law contribution and contractual indemnification; dismissing the causes of action of third-party plaintiff White Rose Foods, Inc. for common-law indemnification, common-law contribution and contractual indemnification; dismissing the causes of action of third-party plaintiff Rose Trucking Corp. for common-law indemnification, common-law contribution and contractual indemnification; and dismissing the causes of action of third-party plaintiff DiGiorgio Corp. s/h/a Digorgio Corp. for common-law indemnification, common-law contribution and contractual indemnification; and it is further

ORDERED, that the cross-motion of defendants and third-party plaintiffs White Rose, Inc.,

White Rose Foods, Inc., Rose Trucking Corp. and DiGiorgio Corp. s/h/a Digorgio Corp. for summary judgment is denied (Motion Sequence #12); and it is further

ORDERED, that the motion of defendant Purple & White Markets, Inc., sued herein as Purple & White Markets, Inc. d/b/a Associated Supermarket, for summary judgment is denied (Motion Sequence #13).

This constitutes the decision and order of the court.

Dated: March 30, 2011

Lucindo Suarez, J.S.C.