

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: ROGER N. ROSENGARTEN,
JUSTICE.

PART IAS 23

-----X
LESLIE MINTO,

Index No. 15401/09

Plaintiff,

Motion Date: 3/17/10

-against-

Calendar No. 18

ZIPCAR NEW YORK, INC. and DOUGLAS DALE,

Motion Seq. # 002

Defendants.
-----X

The following papers numbered 1 to 11 read on this motion for summary judgment.

Notice of Motion - Affirmation in Support - Exhibits.....	1 - 3
Affirmation in Opposition - Exhibits.....	4 - 5
Reply Affirmation - Exhibits.....	6 - 7
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Upon the foregoing papers it is ordered that this motion is decided as follows:

**This is a personal injury action arising from a May 25, 2009 motor vehicle collision. Plaintiff Leslie Minto alleges that his vehicle was rear-ended while stopped at a red light by a vehicle driven by Defendant Dale Douglas, named here as Douglas Dale. Douglas had the use and possession of his vehicle pursuant to his membership in Defendant Zipcar New York ("Zipcar"). Zipcar is a membership-based business that, after an application process and pursuant to a "membership contract," provides cars to its members for an hourly or daily charge. Zipcar had leased the vehicle Douglas was driving from its title owner, non-party Union Leasing. Now before the Court is Plaintiff's motion for summary judgment on the issue of liability.

As an initial matter, Plaintiff's motion is properly before the Court and not withdrawn. Although Plaintiff filed the motion after Zipcar filed a motion to dismiss and refers to his motion as a "cross-motion," it was noticed as a motion, not a cross-motion, and not automatically withdrawn when Zipcar withdrew its motion.

Plaintiff's asserted basis for liability against Zipcar is Vehicle and Traffic Law § 388(1), which provides that "[e]very 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" Plaintiff asserts that Zipcar is an "owner," as the term is defined in Vehicle and Traffic Law § 128 to "include[] any lessee or bailee of a motor vehicle or vessel having the exclusive use thereof, under a lease or otherwise, for a period greater than thirty

days.” Zipcar admits that it leased the vehicle from Union Leasing and the September 26, 2008 Registration Document for the vehicle is in Zipcar’s name and expired on September 30, 2009. (Mot. Exh. F; Zipcar Opp. Exh. A.) Zipcar argues that it was not an owner by virtue of this lease, however, because it did not have exclusive use of the vehicle and in fact relinquished control to its members on a near daily basis. This argument misses the point. Zipcar has not pointed to any evidence that it did obtain exclusive use of the vehicle from Union Leasing for the length of its lease. Zipcar was therefore an owner within the meaning of § 128 and the fact that it then relinquished that exclusive use to its members does not alter this conclusion. Vicarious liability under § 388(1) may therefore attach to Zipcar.

The primary point of contention on this motion is Zipcar’s assertion that vicarious liability on its part is precluded by section 14 of the Federal Transportation Equity Act of 2005, 49 U.S.C. § 30106, better known as the “Graves Amendment,” which provides in relevant part:

(a) 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 on the part of the owner (or an affiliate of the owner).

The Graves Amendment was passed by Congress under its authority to regulate interstate commerce pursuant to the Commerce Clause of the United States Constitution and preempts conflicting state statutes such as Vehicle and Traffic Law § 388(1). Graham v. Dunkley, 50 A.D.3d 55 [2d Dept. 2008]. Plaintiff contends that the Graves Amendment does not bar his claim, however, because Zipcar is not “engaged in the trade or business of renting or leasing motor vehicles.” Plaintiff relies for this contention primarily on Zipcar’s own marketing. Zipcar’s website describes it as a “car-sharing company” and “more convenient, cost-effective and more fun than renting.” (Mot. Exhs. G-H.) The website tells prospective members, “you could rent a car (but that would be silly)” and touts the advantages of the company “when considering rental cars over zipcar,” such as avoiding lines and waits, additional costs for gas, parking and insurance, and inflexible return deadlines. (Mot. Exh. H.) The Court finds, however, that these marketing statements do not resolve the question presented by Plaintiff’s motion. That Zipcar advertises itself by drawing contrasts to “traditional rental cars,” does not foreclose the possibility that it is nevertheless also in the rental car business, although not of a traditional sort.

In determining whether the Graves Amendment applies to a car-sharing company such as Zipcar, the Court begins with the statutory text. Maraia v. Orange Regional Med. Center, 63 A.D.3d 1113 [2d Dept. 2009]. The Graves Amendment does not define “the trade or business of renting or leasing motor vehicles,” or its constituent terms “renting” and “leasing.” The consistent and established understanding of “leasing” is the “transfer of the right to possession and use of goods for a term in return for consideration.” UCC 2-A-103(j); see also First Franklin Sq. Assocs., LLC v. Franklin Sq. Prop. Account, 15 A.D.3d 529, 532 [2d Dept. 2005] (“The central distinguishing characteristic of a lease is the surrender of absolute possession and control of property to another party for an agreed-upon rent.”); Black’s Law Dictionary (8th Ed., 2004) (“To grant the possession and use of (land, buildings, rooms, movable property, etc.) to another in return for rent or other consideration.”) Black’s Law Dictionary defines “rent,” used as a

noun, as the “[c]onsideration paid, usu. periodically, for the use or occupancy of property (esp. real property).” (8th Ed., 2004.) “When used as verbs, the words ‘lease’ and ‘rent’ are synonymous.” Zizersky v. Life Quality Inc., 21 Misc. 3d 871, 878 [N.Y. Sup. 2008] (citing Richards v. Princeton Ins. Co., 178 F Supp 2d 386, 395 [SD NY 2001]). Zipcar’s contract with Douglas allowed him to “use Zipcar’s vehicles, to the extent available, in accordance with the terms of this Contract and subject to paying the corresponding fees.” (Supp. Opp., Exh. C.) This bargain – use of a car in exchange for a fee – appears little different from “traditional rental car[]” companies, notwithstanding Zipcar’s marketing statements that contrast it with those companies. The Court finds that Zipcar is in “the trade or business of renting or leasing motor vehicles” as those words are traditionally and plainly understood.

Having made this finding based on the statutory language, the Court need look no further “[a]s a general proposition.” Jones v. Bill, 10 N.Y.3d 550, 555 [2008]. Plaintiff urges, however, that since the Graves Amendment acts to reverse an expressed policy of New York State – that “one injured by the negligent operation of a motor vehicle should have recourse to a financially responsible defendant,” Graham, supra, at 57 – the Court should construe it narrowly and follow Zipcar’s example of distinguishing the car-sharing business from car-renting. See Jones, supra, at 555 (“Without clearer indication from Congress, we see no reason to infer greater retroactive application of a law that otherwise denies injured plaintiffs a viable cause of action.”) Initially, the Court notes that some of the cases Plaintiff cites as examples of the courts limiting the statute turned solely on the statutory language and are thus not relevant to the interpretive principle he cites. See Lexington Ins. Co. v. G&K Taxi Inc., 2008 NY Slip. Op 32648 [N.Y. Sup.] (Graves Amendment not applicable to owner-lessor of taxicab medallion); Lee v. Rivera, 2009 NY Slip Op. 31673 [N.Y. Sup.] (inapplicable because non-motorized “delivery equipment” – a trailer – not a “*motor vehicle*”) (emphasis in original). One case cited by Plaintiff did discuss the principle, however, and warrants additional discussion.

In Zizersky, supra, the individual defendant struck the plaintiff’s vehicle while driving a vehicle that was owned by one of two BMW entities and loaned to her by a BMW dealer while it serviced her own vehicle. The plaintiff joined the three BMW companies in her suit, and they moved to dismiss her vicarious liability claim based on the Graves Amendment. First considering the statutory language, the Supreme Court concluded that “leasing” or “renting” requires payment and, because the car was loaned without payment, “there is no ‘lease’ or ‘rental’ for purposes of the Graves Amendment.” Id., at 878. The court then considered the policy goals of the Graves Amendment, that “elimination of vicarious liability will result in a reduction of insurance costs that will in turn result in a reduction of consumer prices and allow more lessors to remain in business.” Id., at 879 (quoting Hall v. ELRAC, 52 A.D.3d 262, 263 [1st Dept. 2008]). Applying the interpretive rule that statutory language should be read to effectuate its purpose and avoid Constitutional doubt, the Court concluded that “loaner” vehicles did not affect interstate commerce in the same way as rentals and leases, and that the Graves Amendment should therefore not be read to apply to them. Id., at 880. The Court concluded:

Finally, the court is mindful that, unlike the interpretation of other federal statutes, the determined scope of the Graves Amendment will undermine the policy of the State’s Vehicle and Traffic Law. Like our Court of Appeals, this court looks for “clearer indication from Congress” before “infer[ring] greater . . . application of a law that otherwise denies injured plaintiffs a viable cause of action.”

Id. (quoting Jones, supra, at 555) (modifications in original).

A comparison of Zipcar's claim to the protection of the Graves Amendment with the claim rejected in Zizersky reveals significant differences. Unlike the driver in Zizersky, Zipcar members pay for their use of vehicles. Furthermore, Zipcar's marketing – on which Plaintiff relies so heavily – shows that the company competes with traditional car-rental companies and serves a similar consumer need. Zipcar's subjection to vicarious liability, unlike auto mechanics giving temporary loaners to their customers, will thus affect interstate commerce and falls within Congress's Constitutional authority to regulate to the same extent as those traditional companies. Although application of the Graves Amendment in this case will no doubt frustrate the State's policy and deny an allegedly injured Plaintiff a viable cause of action, neither the statutory language nor its intent allow another conclusion. The Court therefore finds that the Graves Amendment bars Plaintiff's claim based on vicarious liability against Zipcar and, pursuant to CPLR § 3212(b) entitles Zipcar to summary judgment on that claim without the necessity of a cross-motion.

Plaintiff's Complaint alleges that Zipcar was negligent in its operations, specifically "in the manner they rented their vehicles to the people." (Mot. Exh. B, ¶¶ 43-46.) The Graves Amendment, by its terms, does not preempt such claims of direct negligence. Plaintiff does not attempt, however, to offer any evidence or argument in support of these allegations in its moving papers. The only relevant evidence offered is by Zipcar, which states in a sworn affidavit from a company official that its policies require a valid driver's license for at least one year and no record of an alcohol violation for at least seven years prior to renting, and that these policies were followed before renting to Douglas. (Zipcar Opp. Exh. A.) With the record containing no conflicting evidence, the Court finds Plaintiff's claim for direct negligence cannot withstand summary judgment.

Plaintiff's motion also seeks summary judgment as to liability against Douglas. Douglas asserts that Plaintiff's bare assertion of being rear-ended while stopped does not warrant summary judgment, because questions of fact remain as to how quickly Plaintiff approached the red light and stopped. The Court finds, however, that the affidavit is sufficient to establish prima facie entitlement to summary judgment and shift the burden to Douglas to rebut the inference of negligence. See Kimyagarov v. Nixon Taxi Corp., 45 A.D.3d 736 [2d Dept. 2007]. In opposition, Douglas' counsel states "Mr. Douglas has chosen not to submit an affidavit due to the fact that a criminal case is pending based upon this incident." (Douglas Opp.) Any unadjudicated criminal allegations against Douglas arising from this collision are not admissible or relevant on this motion, but they also do not relieve him of his burden. See Access Capital, Inc. v. DeCicco, 302 A.D.2d 48 [1st Dept. 2002]. The decision to "stay a civil action pending resolution of a related criminal action is directed to the sound discretion of the trial court," based on factors including "avoiding the risk of inconsistent adjudications, application of proof and potential waste of judicial resources." Britt v. Int'l Bus Servs., Inc., 255 A.D.2d 143, 144 [1st Dept. 1998]. "A compelling factor is a situation where a defendant will invoke his or her constitutional right against self incrimination." Id. Here, defendant's liability arises from the presumption of negligence raised by a rear-end collision; it is not based on criminal allegations and acquittal in a criminal proceeding would not be inconsistent. Furthermore, resolution of the liability portion of the case conserves judicial resources. Nor does the Court find Douglas's privilege claim compelling, since it does not affect his ability to testify as to any negligence on Plaintiff's part. The Court finds a stay is not warranted and that Plaintiff is entitled to summary judgment as to Douglas' liability.

Based on the foregoing, it is hereby

ORDERED that Plaintiff Leslie Minto's Motion for Summary Judgment on the issue of liability is denied with respect to Defendant Zipcar New York, Inc.; and it is further

ORDERED, that Defendant Zipcar New York, Inc. is granted summary judgment and the claims of said plaintiff Leslie Minto are dismissed as against said defendant Zipcar; and it is further

ORDERED, that Plaintiff Leslie Minto's Motion for Summary Judgment on the issue of liability is granted with respect to Defendant Dale Douglas; and it is further

ORDERED, that a trial will be held on the issue of damages only.

ORDERED, that the Clerk of the Court is authorized to enter judgment in accordance with the above.

ENTER,

Dated _____

ROGER N. ROSENGARTEN, J.S.C.

** The court wishes to thank and acknowledge Attorney Volunteer Ashkan Mojdehi for his research and drafting in this matter.