SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: HON. R A L P H P. F R A N C O, Justice

TRIAL/IAS, PART 11

TIG SPECIALTY INSURANCE and ROSEMARY VALENTE,

NASSAU COUNTY

Plaintiff(s),

INDEX No.: 018586/02

-against-

MOTION SEQ. 1 &2

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS, TRAVELERS PROPERTY CASUALTY, ALEX MAYORGA and MARION MAYORGA,

Defendant(s).

The following papers read on this motion:

Notice of Motion/ Order to Show Cause....._____

Answering Affidavits....._____

Replying Affidavits....._____

Motion (Seq. No.1) by attorney for plaintiffs for an Order pursuant to C.P.L.R. 3212 granting summary judgment and declaring that the defendant, Travelers Indemnity Company of Illinois (hereinafter " Travelers") must defend and indemnify the plaintiff, Rosemary Valente, in the underlying action under Index number 000650/02 pending in Supreme Court, Nassau County to the extent of the Traveler's policy which was in effect on

October 26, 2000; and declaring that the Travelers Insurance Policy is the primary policy in the underlying action is granted.

Cross motion (Seq. No.2) by attorney for defendant The Travelers Indemnity Company of Illinois for an Order pursuant to C.P.L.R. 3211 (a) (7) is denied.

Rosemary Valente was driving a loaner car from Acura of Valley Stream. Travelers issued an automobile liability insurance policy to Rosemary Valente's husband's company for the Honda Accord. She had permission to drive the Honda Accord owned by Automatic Heating Supply Corporation (her husband's company). As owner of the loaner vehicle, Acura had a garage coverage insurance policy with plaintiff TIG Specialty Insurance. While operating the loaner car Ms. Valente had an accident.

The issue before the Court is whether the no liability clause contained in the TIG garage form may shift any legal responsibility to be determined in the underlying action from the owner of the loaner car (Acura). The answer to this question is in the affirmative. The subject "no liability" exclusion has been previously upheld by the Court of Appeals in **Davis vs.**

Defrank, 27 N.Y.S.2d 924. The Court of Appeals in **Davis** supra, held that a provision of an automobile policy which excluded coverage of a driver was valid, if the driver was not a named insured and if other insurance, either primary or excess, was in force, was clear in its language and its intents, and excluded liability only when there was other full legal coverage. Id. at 142.

The Court upheld this "no liability clause" because it did not operate unless sufficient insurance existed to meet the minimum requirements set by the financial responsibility laws. The Court reasoned that public policy did not prohibit enforcing the no liability clause. Id. at 142. The facts in Davis, mirror the facts in the present action. In Davis, a prospective purchaser, De Frank, was permitted by Monroe Auto Sales Corporation (" Monroe") to test drive one of its Mercedes-Benz automobiles. In the course of the test drive, DeFrank, collided with another vehicle causing injuries to a number of people. At the time of the accident, DeFrank had an automobile insurance policy with Empire while Monroe had an insurance policy with Globe. As in the present case, the Globe (Monroe) policy, in

defining "Persons Insured" under the title "Limited Coverage" for certain insured (Garage), provided coverage to those individuals who had received permission by the insured to drive the vehicle. However, the Globe (Monroe) policy contained a no liability clause, which is exactly the same as the no liability clause contained in the TIG garage insurance policy in the case at hand, which was issued to Acura.

The no liability clause in Davis states:

> "... any other person, But only if no other valid and collectible automobile liability insurance either primary or excess, with limits of liability at least equal to the minimum specified by the state financial responsibility law... is available to such person."

In the event a policy provision conditions coverage and there being no other valid and collectible insurance, either primary or excess, then the clause conditioning the coverage will be given effect and the other insurer, whose policy contains an excess clause will have primary liability.

Also, the Court in **Mills v. Liberty Mutual Insurance Co.**, 30 N.Y.2d 546, held that a person driving an automobile covered by a garage

policy containing a no liability clause could be denied coverage when the driver was insured under an automobile policy containing excess insurance. The Court did not find any reason of public policy to forbid the enforcement of the no liability clause. Despite defendants assertion, plaintiffs are not seeking to " shift " legal responsibility. Defendant is confusing liability with priority of insurance coverage. In the instant case, TIG is not disclaiming coverage, but is simply seeking to have Travelers insurance assume their obligation to their insured, Rosemary Valente. The Court of Appeals in Davis, found such a provision valid.

Further, as acknowledged in paragraph 21 of defendant's opposition papers, defendants are primarily relying on case law which addresses rental vehicles which are not relevant to this case. See also **Progressive Northeastern Insurance Company v. Motors Insurance Company**,. 288 A.D. 2d 363 appeal denied by 98 N.Y. 2d 608. **Progressive supra and Davis** supra state that a "no liability" clause in a garage policy covering automobile inventory of the insured automobile dealer precluded coverage

for damages resulting from a motor vehicle caused by the dealer's customer while operating dealer's automobile where the customer had personal automobile liability insurance policy.

In the instant case, summary judgment is warranted. It is uncontested that Automatic's insurance policy with Travelers was in full force and effect on October 26, 2000. Further, it is uncontested that Rosemary Valente is a covered individual under the Travelers policy. Moreover, the Travelers policy is primary. Lastly, plaintiffs acknowledge that Acura will still bear responsibility in the underlying action as owner of the subject vehicle if a verdict exceeds the primary policy.

This decision is the Order and Judgment of the Court.

Dated: August 5, 2003
018586

Hon. Ralph P. Franco, J. S. C.
XXX

ENTERED

AUG 08 2003

NASSAU COUNTY
COUNTY CLERK'S OFFICE