

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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MARY ELLEN LIOTTA.,

Plaintiff,

-against-

JORGE E. CHINCHILLA and ALVARO E. ORELLANA
Defendants,

MICHELE M. WOODARD,
J.S.C.
TRIAL/IAS Part 12
Index No.: 04274/2009
Motion Seq. No.: 07
DECISION & ORDER

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JORGE E. CHINCHILLA
Third-party Plaintiff,

-against-

ALVARO E. ORELLANA and FREE PORT, INC.,
Third-party Defendants

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Papers Read on this Motion:

Defendant/Third- Party Plaintiff Jorge E. Chinchilla's Notice of Motion	07
Defendants'/Third Party Defendants' Alvaro E. Orellana & Freeport's Opposition	xx
Defendant/Third-Party Plaintiff's Reply	xx

The Defendant/third-Party Plaintiff Jorge E. Chinchilla moves for an order pursuant to CPLR §3212 for summary judgement based on common law indemnification against the Defendant/third party-party defendants Alvaro E. Orellana and Free Port, Inc.

On March 19, 2006, the plaintiff Mary Ellen Liotta and Jorge Chinchilla were at the USA Car Wash (sued here as the Free Port car wash) to have their motor vehicles washed. Mr. Chinchilla testified that upon arriving at the car wash, he waited in his car in line until he approached an attendant. When Chinchilla reached the attendant he exited the car with the key still in the ignition, told the attendant what service he wanted and proceeded inside to pay for the services to be rendered. Chinchilla saw his car go through the washers and then the dryers of the car wash. He did not see the car driven to the drying area. About the time he was

paying for the car wash services it is alleged that Free Port's employee, Alvaro Orellana assumed control over the vehicle and drove the car to the drying area. It is alleged that Orellana drove Chinchilla's car into the plaintiff's vehicle causing her serious injuries when Chinchilla was paying. Chinchilla testified that he did not see the car being driven to the drying area or the accident. He testified that someone in the car wash told him that his car had been crashed into another car.

The defendants/third-party defendants Orellana and Free Port argue that Chinchilla's motion should not be granted because he has not proven that he was not negligent in the ownership and maintenance of his vehicle. Defendants/third-party defendants further argue that the motion is premature because they have not had an opportunity to complete discovery. The defendants further argue that they have been prejudiced because they did not have an opportunity to inspect the vehicle before it was repaired.

A passive owner of a vehicle vicariously liable pursuant to NY Vehicle and Traffic Law § 388 is entitled to common-law indemnification from the employer of an active tortfeasor acting within the scope of his employment (*see Traub v. Dinzler*, 309 NY 395[1955]; *Dunn v. Hurtt*, 4 AD 3d 884,[4th Dept 2004]; *Denton Leasing Corp. v. Breezy Point Surf Club*, 133 AD 2d 95, [2d Dept 1987] In the instant case Alvaro Orellana was clearly acting within the scope of his employment when the accident occurred (*see Judith M. v. Sisters of Charity Hosp.*, 93 NY2d 932 [1999], *O'Boyle v. Avis Rent-A-Car System*, 78 AD2d 431, [2d Dept. 1981]. There has been sufficient discovery in this matter for the Court to make a determination on the movant's application for summary judgement. In order to provide a basis pursuant to CPLR § 3212 (f) for postponing a decision, a party must show more than a mere hope that it might be able to uncover some evidence during the discovery process (*see Kershis v City of New York*, 303 AD2d 643 [2003]. In the case at bar the Defendant failed to raise any specific missing discovery that would make a difference in this matter.

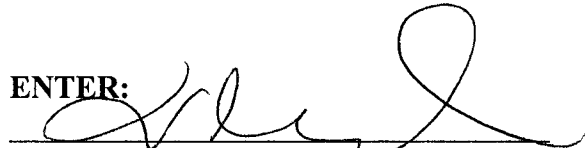
Based on the foregoing, the application of Jorge E. Chinchilla for indemnification by Alvaro E. Orellana and Free Port, Inc. is **granted**. It is hereby

ORDERED, that the remaining parties are directed to appear for a Certification Conference on January 19, 2011 at 9:30 a.m. before the undersigned.

This constitutes the Decision and Order of the Court.

DATED: December 7, 2010
Mineola, N.Y.

ENTER:



HON. MICHELE M. WOODARD
J.S.C.

F:\DECISION - DECLARATORY JUDGMENT\Liotta Indemnification.wpd

ENTERED
DEC 15 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE