

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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JOSE AYBAR, ORLANDO GONZALES, JOSE AYBAR
as Administrator of THE ESTATE OF CRYSTAL CRUZ-
AYBAR, JESENIA AYBAR as Administratrix of THE
ESTATE OF NOELIA OLIVERAS, JESENIA AYBAR as
LEGAL GUARDIAN on behalf of K.C., a minor, ANNA
AYBAR and JESENIA AYBAR as Administratrix of THE
ESTATE OF T.C.,

Plaintiffs,

-against-

US TIRES AND WHEELS OF QUEENS, LLC,

Defendant.

-----X
US TIRES AND WHEELS OF QUEENS, LLC,

Third-Party Plaintiff,

-against-

THE GOODYEAR TIRE & RUBBER COMPANY,
GOODYEAR DUNLOP TIRES NORTH AMERICA, LTD.
and FORD MOTOR COMPANY,

Third-Party Defendants.

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Adam C. Calvert, an attorney admitted to practice law in the New York State Courts,
affirms the following under the penalty of perjury:

1. I am a shareholder with Marshall Dennehey Warner Coleman & Goggin,
attorneys for defendant/third-party plaintiff U.S. Tires. I am familiar with this case, and I submit
this affirmation in opposition to Goodyear's motion to dismiss the third-party complaint against it
for lack of personal jurisdiction.

Index No.: 9344/2014

E-file Index No.: 703632/17E

**AFFIRMATION
IN OPPOSITION
TO GOODYEAR
MOTION TO DISMISS**

I. Goodyear's motion is barred by collateral estoppel—the court has already determined that there is personal jurisdiction over Goodyear

2. Goodyear's motion disingenuously omits the most important fact—that this issue was already decided against Goodyear in a related action—and Goodyear is therefore barred by collateral estoppel from making the same argument here.

3. Goodyear's motion fails to mention that there are two related actions. The plaintiffs sued Ford and Goodyear for negligence and products liability for the same accident as our case, alleging that the tire and Ford Explorer at issue were defective. One action was brought by Jose Aybar, the driver of the vehicle, against Goodyear for negligence and products liability in the manufacture of the tires. Complaint – Index No.: 706908/15 (**Exhibit A**); Goodyear Answer—Index No.: 706908/15 (**Exhibit B**). The other action was brought by the passengers against Jose Aybar, Goodyear, Ford, and John Doe defendants. The complaints against Goodyear and Ford were for negligence and products liability in the manufacture of the tires and the vehicle. Complaint—Index No.: 706909/15 (**Exhibit C**); Goodyear Answer— Index No.: 706909/15 (**Exhibit D**); Ford Answer— Index No.: 706909/15 (**Exhibit E**).

4. U.S. Tires' third-party complaint against Goodyear and Ford in this action is based on the plaintiffs' claims against Ford and Goodyear in the other actions. The three actions are joined for discovery with leave for the parties to file a later motion to consolidate and/or joint trial at a later date. Joint Discovery Stipulation (**Exhibit F**).

5. Ford and Goodyear moved to dismiss the complaints in those other actions for lack of personal jurisdiction, making the same arguments Goodyear makes in the instant motion. Those motions were denied by this Court in two orders issued by Judge Raffaele. Orders on Motions to Dismiss (**Exhibit G**). Judge Raffaele found that there was personal jurisdiction over Goodyear and Ford even after *Daimler* based on their being "at home" in New York and their

consent to jurisdiction by registering to do business in New York. Those decisions are currently the subject of an appeal, which is pending before the Second Department.

6. Those decisions are binding on the instant motion under the doctrine of collateral estoppel. Collateral estoppel, or issue preclusion, requires the court to give conclusive effect to another court's determination when two basic components are met: (1) the issue sought to be precluded is identical to a material issue necessarily decided in the first action and decisive of the second action; and (2) there was a full and fair opportunity to contest this issue. *See D'Arata v. New York Central Mutual Fire Ins. Co.*, 76 N.Y.2d 659 (1990); *Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d 449 (1985).

7. Here, the elements of collateral estoppel are satisfied. First, the issues are identical to the issues decided in the other actions—whether there is personal jurisdiction over Goodyear for the accident involving the plaintiffs. The court decided that there was personal jurisdiction over Goodyear based on Goodyear being "at home" in New York and its consent to jurisdiction by registering to do business in New York. Second, Goodyear had a full and fair opportunity to contest the issue in the other actions, as demonstrated by its motions to dismiss on those grounds and pending appeal.

8. Courts have routinely found that collateral estoppel bars defendants from re-litigating personal jurisdiction issues already decided against defendants in other proceedings. In *Keeler v. West Mountain Corp.*, 105 A.D.2d 953 (3d Dep't 1984), a fourth-party defendant moved to dismiss the complaint against it for lack of personal jurisdiction and the court denied on the grounds of collateral estoppel because the fourth-party defendant had previously moved to dismiss a related complaint for lack of personal jurisdiction and that motion was denied. *See also Staton Wholesale v. Barker*, 257 A.D.2d 902 (3d Dep't 1999) (previously decided personal

jurisdiction question was collateral estoppel on later motion to dismiss for lack of personal jurisdiction). In *Matter of Lunt & Bell, LLC v. State of New York*, 90 A.D.3d 930 (2d Dep't 2011), the court found that collateral estoppel barred a defendant from claiming lack of personal jurisdiction in one action because there was a finding of personal jurisdiction over that defendant in another action. In *DirectTV Latin America, LLC v. Pratola*, 94 A.D.3d 628 (1st Dep't 2012), the court held that "the issue whether New York courts have personal jurisdiction over defendants Pratola and Clemente pursuant to CPLR 301 and 302 was determined in the prior federal action and, pursuant to the doctrine of collateral estoppel, may not be re-litigated." *See also Fernando v. Fernando*, 2010 U.S. Dist. LEXIS 79254 (E.D.N.Y. 2010) (previously decided personal jurisdiction issue had collateral estoppel effect).

9. Therefore, collateral estoppel bars Goodyear from moving to dismiss the third-party action based on lack of personal jurisdiction. Whether or not this court has personal jurisdiction over Goodyear was already decided in the related actions and that decision is binding on the instant motion.

10. Notably, collateral estoppel bars Goodyear from rearguing the personal jurisdiction ground already decided against it, so this court does not need to analyze whether the decision was correct. We submit that the prior decision was correct for the reasons detailed in U.S. Tire's brief on the appeal of that decision. Brief (**Exhibit H**).

11. We would also add that there are additional reasons for finding that Goodyear is subject to personal jurisdiction on the third-party claims for contribution and indemnity asserted by U.S. Tires. Namely, the contribution and indemnity claims arise from U.S. Tires' alleged liability to the plaintiff for installing a Goodyear tire in New York at U.S. Tires' garage. In other words, the act at issue—installation of the tire—occurred in New York. And any judgment

against U.S. Tires would be in New York, meaning that U.S. Tires' claims against Goodyear on that judgment would also arise in New York. This additional ground for specific jurisdiction was recognized in an earlier decision from Your Honor after Goodyear made a motion to stay this action. Decision on Stay (**Exhibit I**).

II. The claim for common-law indemnification should not be dismissed

12. Goodyear also argues that the claim for indemnification should be dismissed. However, there is a valid indemnity claim against Goodyear because the plaintiffs claims are that U.S. Tires was negligent for installing a defective Goodyear tire on the vehicle. Courts have consistently held that "it is well settled that a seller or distributor of a defective product has an implied right of indemnification as against the manufacturer of the product." *Godoy v. Abamaster of Miami, Inc.*, 302 A.D.2d 57 (2d Dep't 2003). In addition, a downstream seller or installer of a defective product (like U.S. Tires) has a right of indemnification against the manufacturer of that product. *Nutting v. Ford Motor Co., Inc.*, 180 A.D.2d 122 (3d Dep't 1992).

13. "That common-law right of indemnification 'encompasses the right to recover attorneys' fees, costs, and disbursements incurred in connection with defending the suit brought by the injured party.'" *Chapel v. Mitchell*, 84 N.Y.2d 345, 347 (1994). Therefore, if a jury were to find that U.S. Tires was not at fault, but that Goodyear was at fault for manufacturing a defective product, U.S. Tires would be entitled to attorney's fees, costs, and disbursements for defending this suit.

14. Moreover, it is simply too soon to decide the merits of the various claims amongst the parties. There has been little to no discovery and the basis for each parties' liability is still in question.

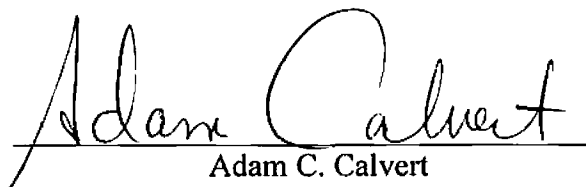
15. Finally, we should mention that Goodyear's answer to U.S. Tire's third-party complaint also asserts a counter-claim for indemnity against U.S. Tires. If, as Goodyear claims, there cannot be indemnity in this type of action, its indemnity counter-claim should be dismissed as well.

Conclusion

16. The court should deny Goodyear's motion. The issue of personal jurisdiction over Goodyear was already decided in the related actions and those decisions have collateral estoppel effect against Goodyear in this action. The common-law indemnification claim should not be dismissed because U.S. Tires has a right of indemnification against Goodyear, an alleged manufacturer of a defective product.

WHEREFORE, the court should issue an order denying Goodyear's motion in its entirety, together with such other and further relief as the court deems just and proper.

Dated: New York, New York
June 5, 2018


Adam C. Calvert

E-file

STATE OF NEW YORK)
 :
COUNTY OF NEW YORK)

AFFIDAVIT OF SERVICE

Lynel J. Taylor, being duly sworn, deposes and says:

I am not a party to the within action, am over 18 years of age, am employed by Marshall, Dennehey, Warner, Coleman & Goggin, Wall Street Plaza, 88 Pine Street, 21st Floor, New York, New York 10005 and resides in Hudson County, New Jersey.

On June 5, 2018, I served a true copy of the within **AFFIRMATION IN OPPOSITION TO GOODYEAR MOTION TO DISMISS** in the following manner:

by mailing same in a sealed envelope, with postage prepaid thereon, in a post office or official depository of the U.S. Postal service by first class mail, addressed to the last known address of the addressee(s) indicated below:

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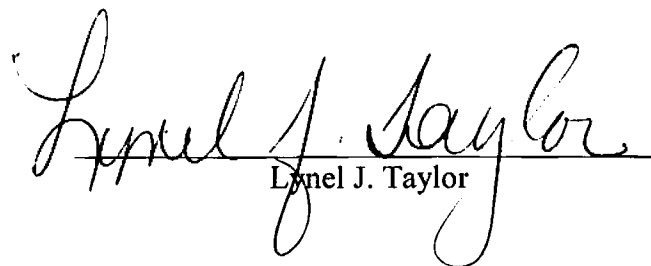
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Sworn to before me this
5th day June, 2018


Notary Public

MARI-ANN B. BROWNELL
Notary Public State of New York
No. 01BR6214011
Qualified in New York County
Commission Expires November 23, 2021


Lynel J. Taylor

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

-----X Index No.: 703632/2017

JOSE AYBAR, ORLANDO GONZALES, JOSE AYBAR
as Administrator of THE ESTATE OF CRYSTAL CRUZ-
AYBAR, JESENIA AYBAR as Administratrix of THE
ESTATE OF NOELIA OLIVERAS, JESENIA AYBAR as
LEGAL GUARDIAN on behalf of KEILA CABRAL, a
minor, ANNA AYBAR and JESENIA AYBAR as
Administratrix of THE ESTATE OF TIFFANY CABRAL,

Plaintiffs,

-against-

US TIRES AND WHEELS OF QUEENS, LLC,

Defendant.

-----X

****AND OTHER ACTIONS****

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AFFIRMATION IN OPPOSITION TO GOODYEAR MOTION TO DISMISS

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