

District Court of Appeal of Florida, Third District.
AEROVIAS, S.A. d/b/a Aerovias Airlines, Appellant,

v.

AIR HAITI, S.A., Appellee.

No. 96-764.

Oct. 9, 1996.

Shipper brought action against carrier to recover for theft of vehicle in transit. Carrier asserted third-party complaint against entity with which it shared storage facilities, seeking indemnity. After judgment for shipper was reinstated on appeal, 584 So.2d 175, the Circuit Court of Dade County, Robert P. Kaye, J., concluded that indemnity was not available, and carrier appealed. The District Court of Appeal, Fletcher, J., held that principle that a former adjudication against an indemnitee, finding the indemnitee's acts to be wrongful, is binding against the indemnitee and precludes indemnification did not apply.

Reversed.

West Headnotes

Indemnity 208 72

208 Indemnity

208III Indemnification by Operation of Law

208k63 Particular Cases and Issues

208k72 k. Successive Sellers; Products Liability. Most Cited Cases

(Formerly 208k13.2(4.1))

Indemnity 208 85

208 Indemnity

208IV Conclusiveness of Former Adjudication

208k85 k. In General. Most Cited Cases

(Formerly 208k13.2(4.1))

Principle that a former adjudication against an indemnitee, finding the indemnitee's acts to be wrongful, is binding against the indemnitee and precludes indemnification (in the absence of a clear and unequivocal contractual expression to the contrary) did not apply even though shipper's complaint against carrier (indemnitee) alleged negligence against

carrier and judgment was entered against carrier in favor of shipper; although complaint included allegations of negligence, carrier in its third-party complaint against another entity for indemnity asserted that its liability to shipper arose only vicariously from other entity's negligence.

***1078** De La O, Marko & Wang and David Everett Marko, Miguel M. De La O and Adrian C. Delancy, Miami, for appellant.

McCormack & Knoblock and Richard R. McCormack, Miami, for appellee.

Before SCHWARTZ, C.J., and COPE and FLETCHER, JJ.

FLETCHER, Judge.

Aerovias, S.A. d/b/a Aerovias Airlines appeals a final summary judgment denying its complaint against Air Haiti, S.A. for common law and contractual indemnity. We reverse.

Aerovias contracted with Wolfgang Langer to transport Langer's BMW automobile from Miami to Guatemala, in furtherance of which Langer delivered the car to storage facilities shared by Aerovias and Air Haiti. The automobile was stolen before it could be shipped to Guatemala and Langer sued Aerovias for its failure to deliver the automobile to him upon his demand and presentation of the warehouse receipt. Aerovias then filed a third-party complaint seeking indemnity from Air Haiti, contending that Air Haiti's negligence was the actual cause of the loss and that Aerovias was only vicariously liable based on the contract with Langer.

The trial court granted summary judgment in favor of Langer against Aerovias and in favor of Aerovias on the third-party complaint for indemnity against Air Haiti. A timely motion for rehearing was filed by Air Haiti as to Aerovias' judgment against it, which motion was granted. Aerovias filed an *untimely* rehearing motion as to Langer's judgment, which motion the trial court also granted.

Langer appealed the trial court's rehearing order which set aside his summary final judgment against Aerovias. This Court, *Langer v. Aerovias, S.A.*, 584 So.2d 175 (Fla. 3d

DCA 1991), reversed the order granting Aerovias motion, thus reinstating Langer's judgment against Aerovias. Simply put, when the dust had settled Langer had a judgment against Aerovias and Aerovias had no judgment against Air Haiti.

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On remand, the trial court (albeit reluctantly) concluded that because Langer had alleged negligence against Aerovias, and a judgment had been entered against Aerovias in favor of Langer, indemnification was not available against Air Haiti. The trial court then granted a final summary judgment in favor of Air Haiti on the basis that Aerovias' "wrongful act," "adjudicated" by Langer's summary judgment, precluded indemnification by Air Haiti.

The principle ^{FN1} that the trial court believed to be controlling is inapplicable here. Although Langer's complaint against Aerovias included allegations of negligence, Aerovias, in its third-party complaint asserts that its liability to Langer arises only vicariously from Air Haiti's negligence. As a consequence, Aerovias' maintenance of its indemnity claim against Air Haiti is not precluded. *Julien P. Benjamin Equip. Co. v. Blackwell Burner Co.*, 450 So.2d 901 (Fla. 3d DCA 1984). Indeed, we fail to discern that any just conclusion would result by precluding indemnification where an indemnitee is innocent of any active negligence, but the indemnitor is not.

FN1. That a former adjudication against an indemnitee, finding the indemnitee's acts to be wrongful, is binding against the indemnitee and precludes indemnification (in the absence of a clear and unequivocal contractual expression to the contrary). See *Hoskins v. Midland Ins. Co.*, 395 So.2d 1159 (Fla. 3d DCA), *rev. denied*, 407 So.2d 1104 (Fla.1981).

As material issues of fact remain unresolved, we reverse the summary final judgment and remand for further proceedings.

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