At an IAS Term, Part 83, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 1st day of May, 2024.

P R E S E N T:

HON. INGRID JOSEPH,
Justice.

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ERNEST BESSARD,

Plaintiff,

Index No. 519092/2022

-against-

MAITRE CYNTHIA, DARON Q. PEARSON, LAKHBIR SINGH and BALJIT SINGH,

DECISION & ORDER

Defendants.

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The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion/Affirmation/Exhibits.....	55 – 62
Affirmation in Opposition/Exhibits.....	68 – 72
Affirmation in Reply.....	75

Upon the foregoing papers, Defendant Daron Q. Pearson ("Pearson") moves for an order, pursuant to CPLR 3025 (b), granting him leave to amend his answer; and, if granted, an order, pursuant to CPLR 2001, deeming the amended answer served nunc pro tunc (Mot. Seq. No. 2). Plaintiff Ernest Bessard ("Plaintiff") opposes the motion.

This action arises out of a motor vehicle accident that occurred on June 24, 2021. Plaintiff alleges that he was a passenger is a vehicle owned by Pearson and operated by defendant Maitre Cynthia ("Cynthia") when it was struck by a vehicle owned by defendant Baljit Singh and operated by defendant Lakhbir Singh. In his complaint, Plaintiff seeks to recover damages for his personal injuries resulting from the subject accident.

Pearson now moves to amend his answer to include a full denial of Paragraph 4 of Plaintiff's complaint, which alleged that Cynthia was operating the vehicle with the knowledge and consent of Pearson, whether expressed or implied. Pearson's counsel asserts that an

amendment is necessary because after depositions, it was brought to his attention that there was no affirmative denial of the allegation of permission, consent, and knowledge of use of the car by Pearson. Counsel attributes this to law office failure.[1] In his motion, Pearson asserts that he has consistently maintained that he has no knowledge of who the operator of the vehicle was and did not consent to the use of his vehicle by this person.[2] Pearson further asserts that there is no prejudice to Plaintiff or co-defendants because the action is still in the discovery stage and the parties are already aware of Pearson's argument that he did not give permission or consent and had no knowledge based on his deposition testimony. In addition, Pearson contends that the amendment has merit because his denial is a valid and meritorious defense.

In opposition to the motion, Plaintiff argues that (a) the motion is untimely, (b) no reasonable excuse or cause was offered for the failure to assert the defense in the original answer, (c) such unexcused delay has been part of a pattern by Pearson in this case, and (d) Plaintiff has been prejudiced by the delay. Plaintiff argues that Pearson seeks to amend his answer 13 months after the initial answer was filed. According to Plaintiff, Pearson's answer did not allege denial or assert an affirmative defense of permissive use. Since Plaintiff was unaware that Pearson was denying permissive use, Plaintiff asserts that he did not seek paper discovery on this issue. Nonetheless, Plaintiff claims that Pearson has not responded to Plaintiff's initial discovery demands or complied with the preliminary conference order, constituting a pattern of delay and neglect on Pearson's part. The issue of permissive use was first raised at Pearson's deposition and without written discovery; thus, according to Plaintiff, the parties were unable to effectively question Pearson on this issue, resulting in prejudice. In fact, Plaintiff argues that Pearson's deposition testimony raised even more issues. For instance, Plaintiff contends that Pearson claimed he was out-of-state at the time, but offered no proof and could not remember details about this trip. At his deposition, Pearson testified that he never filed any report about his car or how it was driven without his permission. Plaintiff further contends that there can be no good cause for the delay in moving to amend because Pearson claims he had no involvement in the accident from the beginning and should have also disclaimed permissive use at that time.

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[1] According to Pearson's counsel, "when this case was received by [their] offices, [they] were still dealing with significant personnel and staffing shortages due to the COVID-19 pandemic" (NYSCEF Doc No. 56, ¶ 16).
[2] Pearson argues that in *Fabien v. Cynthia, et al.*, a related action arising out of the same accident, the denial was made in his answer (NYSCEF Doc No. 56, ¶ 6). Though Pearson refers to the answer in that case as Exhibit "B", he did not actually attach it to his moving papers (*see* NYSCEF Doc No. 58).

In his reply, Pearson maintains that the amendment is a mere administrative change. Pearson's counsel asserts that in the second related action, Pearson's answer denied permissive use. In addition, since Plaintiff's counsel brought up the issue that the allegation of permissive use was not denied in the answer, Pearson argues he cannot in good faith claim surprise or prejudice.

Under CPLR 3025 (b), a defendant may amend his answer by leave of court and such leave "shall be freely given" unless the party opposing the motion establishes that the proposed amendment is palpably insufficient or patently devoid of merit, or that the delay is seeking the amendment would cause prejudice or surprise to the other parties (CPLR 3025 [b]; *Lucido v Mancuso*, 49 AD3d 220, 229 [2d Dept 2008]; *Wells Fargo Bank, N.A. v Spatafore*, 183 AD3d 853, 853 [2d Dept 2020]). Lateness in seeking an amendment or a party's failure to offer an excuse for the delay will not bar the amendment absent prejudice (*Quiros v Polow*, 135 AD2d 697, 699 [2d Dept 1987]; *Smith v D.L. Peterson Trust*, 254 AD2d 479, 480 [2d Dept 1998]). It is not for this Court to determine on a motion to amend an answer the "legal sufficiency or merits" of the proposed amendment (*Sample v Levada*, 8 AD3d 465, 467-468 [2d Dept 2004]). However, "[w]here the lack of merit of a proposed defense is clear and free from doubt, a motion for leave to amend an answer to raise that defense should be denied" (*Lucido*, 49 AD3d at 226 [2d Dept 2008]). Ultimately, "the determination to permit or deny amendment is committed to the sound discretion of the trial court" (*US Bank N.A. v Murillo*, 171 AD3d 984, 986 [2d Dept 2019]).

The Court turns first to the question of whether Plaintiff[3] would be prejudiced by the amended answer due to Pearson's delay. Upon consideration of the papers submitted, the Court finds that the answer to that question is no. Though Pearson did fail to attach his answer in the related action, the Singh defendants previously moved to join this action with the related action for purposes of discovery and trial.[4] Thus, Plaintiff was at the very least aware that there was a second action arising out of the same accident. In the context of permissive use, the Second Department has determined that prejudice and surprise will not result where a defendant "claimed nonpermissive use in its original answer, and the relevant facts were explored during discovery proceedings" (*Smith*, 254 AD2d at 480). It is undisputed that Pearson failed to deny the allegation of permissive use; however, at his deposition, Pearson testified that he did not know the person that was driving his vehicle and that the person did not have his permission (*Hanchett v Graphic*

[3] Defendants Maitre Cynthia, Lakhbir Singh and Baljit Singh have not filed opposition papers to Pearson's motion.
[4] The motion (Mot. Seq. No. 1) was granted (NYSCEF Doc No. 51).

Techniques, 243 AD2d 942, 943 [3d Dept 1997] [finding no prejudice where plaintiffs had notice of proposed defense from deposition testimony]). The deadline to file the Note of Issue has not passed and there is nothing preventing Plaintiff from serving discovery demands on Pearson relating to the issue of permissive use. In addition, Plaintiff may move to compel a second deposition of Pearson on this limited issue.

The Court next turns to the issue of whether Pearson's proposed amendment lacks merit. In this case, Pearson "sufficiently alleged that the driver of his vehicle did not have his permission or consent to operate his vehicle at the time of the subject accident" (*Jeboda v Danza*, 133 AD3d 569, 569 [2d Dept 2015]). Moreover, Pearson denied giving permission or consent to the same alleged driver in the related action. To deny Pearson the ability to assert the same denial in this action arising out of the same motor vehicle accident would be nonsensical at this stage (*see Norman v Ferrara*, 107 AD2d 739, 740 [2d Dept 1985] [proposed amendment denying ownership would be ineffectual where defendant already admitted that vehicle was registered in his name]). The determination of whether Pearson's denial or defense will be successful would be inappropriate here absent a motion for summary judgment.

Accordingly, it is hereby

ORDERED, that Defendant Daron Q. Pearson's motion (Mot. Seq. No. 2) is granted in its entirety.

All other issues not addressed are either without merit or moot.

This constitutes the decision and order of the Court.

HON. INGRID JOSEPH, J.S.C.
Hon. Ingrid Joseph
Supreme Court Justice