At an IAS Term, Part 81 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 2nd day of August, 2019.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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JESSALIE RIVERA,

Plaintiffs,

- against -

HERTZ VEHICLES, LLC and PIERRE STEVENSON,

Defendants.

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Index No.: 507093/2018

DECISION AND ORDER

Motion Sequence #1, #2

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

	Papers Numbered
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed.....	1/2, 3/4,
Opposing Affidavits (Affirmations).....	5, 6,
Reply Affidavits (Affirmations).....	7, 8,

Upon the foregoing papers, and after oral argument, the Court finds as follows:

This action concerns a motor vehicle accident that occurred on December 9, 2017 between a vehicle owned and operated by Plaintiff Jessalie Rivera (hereinafter the "Plaintiff") and a vehicle owned by Defendant Hertz Vehicles, LLC (hereinafter "Defendant Hertz") and operated by Defendant Pierre Stevenson (hereinafter "Defendant Stevenson"). In her Verified Complaint, the Plaintiff alleges that the accident occurred at 36th Street and 5th Avenue in the County of Kings State of New York.

The Plaintiff now moves (motion sequence #1) for partial summary judgment on the issue of liability and immediate trial on the assessment of damages pursuant to CPLR 3212. The Plaintiff contends that her vehicle was parked when the vehicle owned by Defendant Hertz and operated by Defendant Stevenson collided with it. The Plaintiff contends that as a result the

Defendants are the sole proximate cause of the accident at issue. Defendant Stevenson opposes the motion and argues that it should be denied as premature.

Defendant Hertz cross-moves (motion sequence #2) for an Order pursuant to CPLR 3212, dismissing the complaint as against Defendant Hertz and argues that Defendant Hertz is not a proper party to the action as it is immune from claims of vicarious liability pursuant to 49 U.S.C. §30106 (hereinafter "the Graves Amendment"). In support of this position Defendant Hertz relies on a leasing agreement between Defendant Hertz and Defendant Stevenson, an Affidavit from Defendant Hertz employee Christopher Morales, documents related to the vehicle at issue and a Police Accident Report. The Plaintiff opposes the motion and argues that Defendant Hertz has not established as a matter of law that the vehicle owned by Defendant Hertz was not negligently maintained.

It has long been established that "[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff,* 14 AD3d 493 [2nd Dept, 2005], *citing Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept, 2004], *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a prima facie showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the

action"*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2nd Dept, 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept, 2006]; *see Menzel v. Plotnick,* 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

Plaintiff's Motion

Turning to the merits of the Plaintiff's motion, the Court finds that the movant has provided sufficient evidence to meet her *prima facie* burden. In her affidavit, the Plaintiff states (See Plaintiff Motion, ExhibitD, Paragraph 2) that "[o]n December 9, 2017, the vehicle I was operating was parked between 5th Avenue and 36th Street in the County of Kings, City and State of New York, waiting to pull into the bus depot, when a vehicle owned by defendant Hertz Vehicles, LLC and operated by defendant Pierre Stevenson, struck my vehicle in the rear." This testimony is sufficient for the Plaintiff to meet her prima facie burden given that it is axiomatic that, "[a] rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of negligence against the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision." *Klopchin v. Masri*, 45 A.D.3d 737, 737, 846 N.Y.S.2d 311, 311 [2nd Dept, 2007].

In opposition to the motion, Defendant Stevenson has failed to raise a material issue of fact that would prevent this Court from granting the motion. In his Affirmation in Opposition, Defendant Stevenson contends that the Plaintiff's motion should be denied as premature, without demonstrating that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the Plaintiff. *See*

Tone v. Studin, 148 A.D.3d 1205, 1206, 51 N.Y.S.3d 548, 549 [2nd Dept, 2017]. What is more, Defendant Stevenson does not provide any evidence that would create an issue of fact as to a non-negligent explanation for its conduct and/or whether the Plaintiff's operation of his vehicle somehow contributed to the accident at issue. *See Hakakian v. McCabe*, 38 A.D.3d 493, 494, 833 N.Y.S.2d 106, 107 [2nd Dept, 2007]; *see also Tumminello v. City of New York*, 148 A.D.3d 1084, 1085, 49 N.Y.S.3d 739, 741 [2nd Dept, 2017]. As a result, the Plaintiff's motion is granted.

Defendant Hertz Motion

In general, the Graves Amendment "pre-empt[s] the vicarious liability imposed on commercial lessors by Vehicle and Traffic Law § 388," and is "a constitutional exercise of Congressional power pursuant to the Commerce Clause of the United States Constitution." *Graham v. Dunkley*, 50 A.D.3d 55, 852 N.Y.S.2d 169 [2nd Dept, 2008]. "Under the Graves Amendment, in order for recovery to be barred, the owner, or an affiliate of the owner, must be engaged in the trade or business of renting or leasing motor vehicles, and the owner, or its affiliate, must not be negligent." *Khan v. MMCA Lease, Ltd.*, 100 A.D.3d 833, 834, 954 N.Y.S.2d 595, 596 [2nd Dept, 2012].

Turning to the merits of the Hertz motion, the Court finds that Defendant Hertz has provided insufficient evidence to meet its *prima facie* burden. While it is undisputed that Defendant Hertz is in fact engaged in the business of leasing motor vehicles and that Defendant Stevenson had leased the vehicle at issue from Defendant Hertz, the Court finds that Defendant Hertz failed to provide sufficient evidence that the vehicle at issue was not negligently maintained at the time of the alleged incident.. As stated above, the Plaintiff's Verified Complaint and Bill of Particulars does allege negligent maintenance of the vehicle at issue by Defendant Hertz. More

specifically, the Plaintiff alleges in the Bill of Particulars that Defendants were negligent "[i]n failing and neglecting to maintain his motor vehicle, and more particularly the steering, braking, signaling devices and tires in proper working condition." In support of its position Defendant Hertz relies on an affidavit from Defendant Hertz employee Christopher Morales, the police accident report, the leasing agreement between Defendant Hertz and Defendant Stephenson, documents related to the servicing and inspection of the vehicle at issue and a vehicle incident report. In his affidavit, Christopher Morales states (Defendant Hertz Motion, Exhibit D, Paragraph 8(c)) that "prior to the plaintiff's accident of December 9, 2017, the vehicle (FL plate number "CTQT95") was inspected on July 15, 2016 at odometer reading of 11,504 miles and the vehicle was serviced on May 31, 2017 including replacement of 2 tires at odometer reading of 29,882 miles." However, as stated "[t]he Graves Amendment does not apply where, as here, a plaintiff seeks to hold a vehicle owner liable for the alleged failure to maintain a rented vehicle." *Olmann v. Neil*, 132 A.D.3d 744, 745, 18 N.Y.S.3d 105, 106 [2nd Dept, 2015]; *Terranova v. Waheed Brokerage, Inc.*, 78 A.D.3d 1040, 1040, 912 N.Y.S.2d 253, 254 [2nd Dept, 2010]. As such, the statement by Christopher Morales, in conjunction with the associated documents, showing that Defendant Hertz performed an inspection of the vehicle nearly seven months prior to the incident at issue, is insufficient for Defendant Hertz to show as a matter of law that the vehicle had not been negligently maintained at the time of the alleged collision or that the accident was not proximately caused by improper maintenance of the vehicle. The documentation does not expressly address the negligent maintenance allegations, and the Morales affidavit is conclusory. *See Casine v. Wesner*, 165 A.D.3d 749, 750, 85 N.Y.S.3d 530, 532 [2nd Dept, 2018]; *Nelson v. Citiwide Auto Leasing, Inc.*, 154 A.D.3d 863, 63 N.Y.S.3d 76 [2nd Dept, 2017]; *Olmann v. Neil*, 132 A.D.3d 744, 745, 18 N.Y.S.3d 105, 105 [2nd Dept, 2015] [showing of regular maintenance

insufficient]. "In his bill of particulars the Plaintiff alleged, *inter alia*, that the van driven by [Defendant] had 'ineffectual brakes, appliances and other devices'... in order to establish its *prima facie* entitlement to judgment as a matter of law, [Defendant] was required to show that it did not negligently maintain the subject [vehicle]". *Lozano v. Magda, Inc.*, 165 A.D.3d 1249, 84 N.Y.S.3d 802 [2nd Dept, 2018].

As a result, the motion by Defendant Hertz is denied.

Based upon the foregoing, it is hereby ORDERED as follows:

The Plaintiff's motion (motion sequence #1) is granted and Plaintiff is awarded summary judgment on the issue of liability.

The motion of Defendant Hertz (motion sequence #2) is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino
J.S.C.

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