NEW YORK SUPREME COURT – COUNTY OF BRONX

Mtn. Seq. # 03
Mtn. Seq. # 05

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, **PART 14**

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PERALTA, ROBERTO, et ano

- against -

EAN HOLDINGS LLC, et ano

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Index №. **28421/2018E**

Hon. **JOHN R. HIGGITT**, J.S.C.

The following papers in the NYSCEF System were read on this motion for **SUMMARY JUDGMENT (DEFENDANT) (Motion Sequence #3)**, duly submitted as No. ___ on the Motion Calendar of **June 4, 2020**, and the following papers in the NYSCEF System were read on this motion for **SUMMARY JUDGMENT (DEFENDANT) (Motion Sequence #5)**, duly submitted as No. ___ on the Motion Calendar of **June 4, 2020**

	NYSCEF Doc. Nos.
Notice of Motion –Exhibits and Affidavits Annexed (**Motion Sequence #3**)	48-64
Notice of Cross-Motion –Exhibits and Affidavits Annexed	
Answering Affidavits and Exhibits	
Replying Affidavits and Exhibits	
Notice of Motion –Exhibits and Affidavits Annexed (**Motion Sequence #5**)	77-78
Notice of Cross-Motion –Exhibits and Affidavits Annexed	
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Replying Affidavits and Exhibits	

Upon the May 4, 2020 notice of motion of defendant EAN Holdings, LLC ("EAN") and the affirmation and exhibits submitted in support thereof (Motion Sequence #3); there being no opposition to the application; the May 11, 2020 notice of motion of defendant Shirley, sued herein as Shirley Lauren Street West Valerie, and the affirmation submitted therewith (Motion Sequence #5); there being no opposition to the application; the court having advised the parties on June 4, 2020 at 6:32 p.m. and June 26, 2020 at 11:57 a.m., by emails directed to the addresses associated with the action on the NYSCEF site, together with the email address akivao@hotmail.com (an additional NYSCEF-indicated email address for the user "Ofshtein, A."), in light of the fact that, at the NYSCEF site the email address eugene@ofshteinlaw.com, the primary designated email address for this user, has appended to it a plus sign (i.e. eugene@ofshteinlaw.com+), which, in common NYSCEF usage, indicates an email address no longer accepting NYSCEF notifications, that the motion was unopposed, and having received no indication that the court's communications were not received by the parties; the court not having received any response to its communications; the court's review of the records relating to this matter indicating that the matter has not been settled, discontinued or otherwise disposed; and due deliberation; defendant EAN's motion for summary judgment dismissing plaintiff Peralta's claims on the grounds of the Graves Amendment and that plaintiff Peralta did not sustain a "serious injury" in the subject November 16, 2017 motor vehicle accident is granted in part, and defendant Shirley's motion for summary judgment on the ground that plaintiff Peralta did not sustain a "serious injury" in the subject accident is granted.

GRAVES AMENDMENT

The complaint alleges that defendant EAN was the owner, lessor and lessee of the offending vehicle, driven by defendant Shirley, and that the defendants were negligent in the ownership, operation, management, maintenance, supervision, use and control of the vehicle.

Check one:
□ Case Disposed in Entirety
■ Case Still Active

Motion is:
■ Granted (Mtn Seq #3)
■ Granted (Mtn Seq #3)

Check if appropriate:
□ Schedule Appearance
□ Fiduciary Appointment
□ Settle Order
□ Submit Order

Defendant EAN moves for summary judgment on the ground that the claims against it are barred by the Graves Amendment (*see* 49 USC § 30106[a]), which exempts from liability under Vehicle and Traffic Law § 388(1) those vehicle owners and their affiliates "engaged in the trade or business of renting or leasing motor vehicles."

In support of the motion, defendant EAN submits, among other things, the affidavit of a risk manager employed by ELRAC, LLC ("ELRAC"), an affiliate of defendant EAN, the vehicle rental agreement between its affiliate and defendant Shirley, and the transcript of defendant Shirley's January 21, 2020 deposition testimony. Defendant EAN's witness avers that defendant EAN and ELRAC are limited liability corporations that are in the business of renting motor vehicles to the general public under the trade name Enterprise Rent-A-Car. The witness has access to all business and employee data, and is familiar with defendant EAN's business practices.

The risk manager avers that defendant EAN owned the vehicle that defendant ELRAC rented to defendant Shirley pursuant to the appended rental agreement, and that a search of the vehicle's records, including maintenance records, was negative for complaints and repairs of the brakes and steering mechanism, and indicated that the vehicle was not overdue for the manufacturer's recommended scheduled maintenance. The risk manager also averred that a search of personnel records indicated that defendant Shirley was not an employee of defendant EAN or ELRAC.

Defendant Shirley testified that she experienced no mechanical issues while driving the vehicle.

The foregoing was sufficient to establish defendant EAN's prima facie entitlement to summary judgment on the claims of vicarious liability (*see Hall v Elrac, Inc.*, 52 AD3d 262 [1st Dept 2008]) and, to the extent such a claim is discernable from the complaint, respondeat superior (*see Freibaum v Brady*, 143 AD 220 [1st Dept 1911]; *cf. Cassidy v DCFS Tr.*, 89 AD3d 591 [1st Dept 2011]). The motion being unopposed, no party raised an issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]).

The court notes that plaintiff Quezada has discontinued her claims against defendant EAN.

Given the foregoing, the court addresses the alternative ground for the relief sought -- that plaintiff Peralta did not sustain a "serious injury" -- with respect to defendant Shirley.

"SERIOUS INJURY"

Defendant Shirley moves separately for summary judgment, adopting defendant EAN's arguments and proof with respect to the issue of "serious injury" (*see e.g. Assaf v City of New York*, 28 Misc3d 1233[A], 2010 NY Slip Op 51581[U] [Sup Ct, N.Y. County 2010]; *see also* CPLR 3212[b]).

Plaintiff Peralta claims injuries to the cervical and lumbar aspects of his spine, and alleges "serious injury" under the Insurance Law § 5102(d) categories of permanent loss of use, significant limitation and 90/180-day injury (*see* CPLR 3043[a][6]).

In support of the motion, defendant EAN submits, and defendant Shirley adopts, the affirmed report of orthopedic surgeon Dr. Kashyap and the transcript of plaintiff Peralta's November 6, 2019 deposition testimony.

Dr. Kashyap examined plaintiff Peralta on January 7, 2020, measuring full ranges of motion in all tested planes of movement of plaintiff Peralta's cervical and lumbar spine, without tenderness or spasm. The neurological examination was normal, with intact sensation, full motor strength, and symmetrical reflexes. Dr. Kashyap concluded that plaintiff Peralta had sustained resolved cervical and lumbar sprain/strain, with no objective clinical findings to substantiate plaintiff Peralta's subjective complaints of pain.

This proof was sufficient to meet defendant Shirley's prima facie burden of demonstrating that plaintiff Peralta did not sustain a significant limitation of use of his cervical and lumbar spine (*see Bianchi v* Mason, 179 AD3d 567 [1st Dept 2020]).

Defendant Shirley, through defendant EAN, also asserts that plaintiff Peralta's cessation of treatment approximately six months after the accident severs the causal connection between the accident and the claimed injuries and requires explanation (*see Pommells v Perez*, 4 NY3d 566, 574 [2005] ["a plaintiff who terminates therapeutic measures following the accident, while claiming "serious injury," must offer some reasonable explanation for having done so"]). Plaintiff Peralta testified that he ceased treatment because he felt better, and because the insurance "stopped covering" (*see* Peralta transcript at p. 68). Plaintiff Peralta, however, had private health insurance and never inquired about coverage for further treatment. Accordingly, plaintiff Peralta does not provide "some reasonable explanation" (*Ramkumar v Grand Style Transp. Enters. Inc.*, 22 NY3d 905, 907 [2013], *rearg den* 22 NY3d 1102 [2014]) for his cessation of treatment (*see Latus v Ishtarq*, 159 AD3d 433 [1st Dept 2018]; *Vila v Foxglove Taxi Corp.*, 159 AD3d 431 [1st Dept 2018]; *Merrick v Lopez-Garcia*, 100 AD3d 456 [1st Dept 2012]).

With respect to plaintiff Peralta's 90/180-day claim, the bill of particulars alleged that plaintiff Peralta was confined to bed and home for five days following the accident, but that he was not incapacitated from his full-time employment as a driver. Plaintiff Peralta testified that he missed no time from work. This proof is sufficient to meet defendant Shirley's prima facie burden and warrant dismissal of the claim (*see Abreu v Miller*, 181 AD3d 435 [1st Dept 2020]; *Cano v U-Haul Co. of Ariz.*, 178 AD3d 409 [1st Dept 2019]; *Williams v Laura Livery Corp.*, 176 AD3d 557 [1st Dept 2019]; *Pouchie v Pichardo*, 173 AD3d 643 [1st Dept 2019]; *Streety v Toure*, 173 AD3d 462 [1st Dept 2019]; *Curet v Kuhlor*, 172 AD3d 634 [1st Dept 2019]; *Ortiz v Boamah*, 169 AD3d 486 [1st Dept 2019]; *Tejada v LKQ Hunts Point Parts*, 166 AD3d 436 [1st Dept 2018]; *Rosario v Cablevision Sys.*, 160 AD3d 545 [1st Dept 2018]; *Latus v Ishtarq*, 159 AD3d 433 [1st Dept 2018]; *Moreira v Mahabir*, 158 AD3d 518 [1st Dept 2018]; *Sanchez v Oxcin*, 157 AD3d 561 [1st Dept 2018]; *Fernandez v Hernandez*, 151 AD3d 581 [1st Dept 2017]; *Rose v Tall*, 149 AD3d 554 [1st Dept 2017]). Plaintiff Peralta's deposition testimony is insufficient to raise an issue of fact as to whether he was prevented from performing *substantially all* of the material acts constituting his usual and customary daily activities for the statutory period (*see Pouchie*, *supra*; *Moreira*, *supra*; *Sanchez*, *supra*; *Fernandez*, *supra*), even though he was receiving treatment (*see Arenas v Guaman*, 98 AD3d 461 [1st Dept 2012]).

It is obvious that plaintiff Peralta did not sustain a permanent loss of use (*see Riollano v Leavey*, 173 AD3d 494 [1st Dept 2019]). Such loss must be total (*see Swift v N.Y. Transit Auth.*, 115 AD3d 507 [1st Dept 2014]; *Oberly v Bangs Ambulance Inc.*, 96 NY2d 295 [2001]), and evidence of mere limitations of use is insufficient (*see Melo v Grullon*, 101 AD3d 452 [1st Dept 2012]; *Byong Yol Yi v Canela*, 70 AD3d 584 [1st Dept 2010]).

The court notes that defendants' prior motions seeking an order vacating the note of issue sought discovery potentially bearing on the issues herein; however, defendants made the present motions while decision on the discovery motions was outstanding, thus indicating that the extension of time for the making of summary judgment motions granted in the June 10, 2020 decision and order of the undersigned resolving the discovery motions does not prevent consideration of the present motions. A summary judgment motion stays discovery unless the court orders otherwise, and the court has not so ordered (*see* CPLR 3214[b]; *Jeffers v American Univ. of Antigua*, 125 AD3d 440 [1st Dept 2015]).

Accordingly, it is

ORDERED, that the aspect of defendant EAN's motion for summary judgment dismissing the claims of plaintiff Peralta on the ground that the claims against it are barred by the Graves Amendment

is granted, without opposition (Motion Sequence #3); and it is further

ORDERED, that defendant EAN's motion is otherwise denied as moot; and it is further

ORDERED, that defendant Shirley's motion for summary judgment dismissing plaintiff Peralta's claims on the ground that plaintiff Peralta did not sustain a "serious injury" in the subject motor vehicle accident is granted, without opposition (Motion Sequence #5); and it is further

ORDERED, that the Clerk of the Court shall enter judgment in favor of defendants dismissing the claims of plaintiff Peralta as against them and all cross claims against them.

The court notes that, in light of the foregoing, the claims remaining are those of plaintiff Quezada against defendant Shirley.

The remaining parties are reminded of the October 19, 2020 pre-trial conference before the undersigned.

This constitutes the decision and order of the court.

Dated: June 30, 2020

Hon. John R. Higgitt, J.S.C.