SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JAMES G. CLYNES** **PART** **22M**

Justice

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CELESTINO ACEVEDO JR.,

Plaintiff,

- v -

STEVEN ADELSON, IVAN ADELSON

Defendants.

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INDEX NO. 153331/2021

MOTION DATE 01/24/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 62, 63, 64, 65, 66, 67

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, the motion of co-defendant Steven Adelson (Steven) to dismiss and Plaintiff Celestino Acevedo's (plaintiff) cross-motion to amend are decided as follows:

The case at hand involves a motor vehicle accident. According to the complaint (NYSCEF Doc. No. 13), co-defendant Steven owns a 2015 Ford Escape (the Ford), and on July 3, 2019, his son, co-defendant Ivan J. Adelson (Ivan) operated the car with Steven's knowledge and consent. On the same day, plaintiff was operating his vehicle, a 2018 SYM motorcycle (the motorcycle). The complaint asserts that the Ford and the motorcycle collided around First Avenue and East 96th Street in Manhattan, due solely to the negligence of defendants.

Plaintiff filed the complaint on April 6, 2021, naming both Steven and Ivan as defendants (*see* NYSCEF Doc. No. 13). The complaint states that, as owner and controller of the Ford, and as the individual responsible for its maintenance, Steven is liable for the accident (*id.*, ¶¶ 5, 7, 9, 11). Defendants filed a joint answer on June 1, 2021 (NYSCEF Doc. No. 14). The answer asserts

six affirmative defenses: 1) negligence or contributory negligence by plaintiff, 2) assumption of risk, 3) prior compensation, 4) nonparty negligence or contributory negligence, 5) failure to state a cause of action, and 6) negligence by plaintiff in failing to use seat belt or other restraints (*id.*, ¶¶ 6-12).

Subsequently, Steven filed the motion currently before the court, which seeks dismissal of the complaint as against him under CPLR §§ 3211 (a) (7) and (a) (1), and under CPLR § 3212 (NYSCEF Doc. No. 11). In support, Steven has filed an affidavit in which he states that his ownership of the Ford is irrelevant because, on the date of the accident, Ivan was driving a rental car – specifically, a Hyundai Accent SE [the Hyundai], with a New Jersey license plate number T45LGF (NYSCEF Doc. No. 17, ¶¶ 9, 11). In addition, Steven states that he was not a passenger in the vehicle (*id.*, ¶ 13). Steven submits a copy of the rental receipt, which indicates that Ivan rented the Hyundai between July 2, 2021 and July 7, 2021 (NYSCEF Doc. No. 15). Steven argues that because had no relationship to the rental in question, plaintiff has not stated a valid cause of action against him under CPLR § 3211 (a) (7). Further, Steven alleges that the rental record is documentary evidence which conclusively establishes that he is not liable in this action. Allegedly, Ivan's charge card record, which shows that he paid for the rental in question on June 13, 2019, is additional documentary evidence that establishes that Ivan, rather than his father, is liable under CPLR § 3211 (a) (1).[1] Finally, Steven contends that the documents, along with his own affidavit, establish his right to relief under CPLR § 3212.

Plaintiff opposes the motion. Plaintiff notes that because there was no police report filed, he filed an MV-104 form with the Department of Motor Vehicles using the driver's license and

[1] Plaintiff has filed copies of Steven's insurance policy for the Ford (NYSCEF Doc. Nos. 25, 43). However, as both copies are illegible on the point at issue, the court cannot evaluate whether Steven's policy names Ivan as an insured.

insurance registration card (*see* NYSCEF Doc. No. 23). He points out that the insurance coverage was for a 2015 Ford Escape, and that the insurance registration card lists both Steven and Ivan as insureds. Although there was a denial of coverage by defendants' insurer, the letter of denial did not explain the basis for the company's determination (*see* NYSCEF Doc. No. 28). Plaintiff's affidavit also states that "[f]rom what I recall, [Ivan] was operating an American make vehicle at the time of the accident" (NYSCEF Doc. No. 37, ¶ 4). He also notes that Steven's affidavit is self-serving and not determinative, and that defendants have not responded to any of plaintiff's discovery demands and have not complied with the July 16, 2021 preliminary conference order (NYSCEF Doc. No. 51). In light of the above, plaintiff contends that outstanding discovery precludes resolution (CPLR § 3212 [f]). He also states that it is premature to dismiss Steven from this action because Ivan may deny liability and argue that, instead, Steven is liable for any injuries.

In light of the new information about the vehicle Ivan allegedly drove during the accident, plaintiff also cross-moves to amend the summons and complaint to add Advantage Rent-a-Car, LLC (Advantage) as a defendant (NYSCEF Doc. No. 39). The proposed amended complaint still alleges, as its first cause of action, that Ivan operated the Ford at the time of the accident. As the second cause of action, however, it states, in the alternative, that Ivan operated the Hyundai, which he rented from Advantage (NYSCEF Doc. No. 57). It also alleges that Advantage owned, managed, controlled, and maintained the Hyundai (*id.*, ¶¶ 34, 40, 42, 44). It alleges that plaintiff sustained severe injuries due to the negligence of all defendants, including Advantage (*id.*, ¶ 63). In the cross-motion, plaintiff argues that the addition of Advantage is proper because an Advantage rental car was involved in the accident, the statute of limitations has not run, and there is no prejudice to the current defendants.

In response, Steven states that he does not oppose the cross-motion. However, he maintains that dismissal of the complaint as against him is proper. He reiterates that he had no relationship to the Hyundai and was not involved in the accident, and that summary judgment warrants dismissal of the case as against him.[2] Steven rejects plaintiff's contention that Ivan may contradict his father's argument and contend that his father, rather than Ivan, is responsible for the accident – specifically, because there is no evidence that ties Steven to the case, and because plaintiff also contends that Ivan was the driver. Therefore, Steven concludes, only Ivan's possible negligence is at issue.

Analysis.

"On a motion to dismiss pursuant to CPLR § 3211, the court must accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion" (*Liberty Sq. Realty Corp. v Doe Fund, Inc.*, 202 AD3d 55, 65 [1st Dept 2021]). Under CPLR 3211 (a) (1), dismissal based on documentary evidence must "conclusively establish[] a defense to the asserted claims as a matter of law" (*id.* at – [internal quotation marks and citation omitted]). Further, to qualify as documentary evidence, a document must be unambiguous and of undisputed authenticity, and the statements within it must be essentially undeniable (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019]). Finally, a party must assert the defense based on documentary evidence either in his answer or his pre-answer

[2] Steven also argues that the Graves Amendment (49 USC § 30106) bars any claims against him, but this is incorrect. Instead, the amendment, which protects rental companies, states that "the owner of a leased or rented motor vehicle cannot be held vicariously liable for harm to persons or property" arising from the use of the vehicle by the lessee unless the owner itself negligently maintained the vehicle or in another respect was negligent (*Villa-Capellan v Mendoza*, 135 AD3d 555, 556 [1st Dept 2016] [internal quotation marks and citation omitted]).

motion in order to preserve the defense (*see US Bank N.A v Nelson*, 36 NY3d 998, 999 [2020] [*Nelson*]).

Defendants' answer, which defendants filed on June 1, 2021, does not set forth as an affirmative defense the defense that documentary evidence defeats the claim. Moreover, the motion, which Steven filed on August 11, 2021, clearly is not a pre-answer motion. Therefore, this basis for relief is denied (*see M&E 73-75 LLC v 57 Fusion LLC*, 189 AD3d 1, 6 [1st Dept 2020]; *Goncalves v Soho Vil. Realty, Inc.*, 47 Misc 3d 76, 77 [App Term, 1st Dept 2015]).

Even if the court were to reach the merits, it would deny the motion because the evidence does not conclusively establish Steven's right to the requested relief. Although the car rental agreement makes it quite possible that Ivan was driving the Hyundai rather than the Ford when the accident occurred, it is not dispositive on the issue. As plaintiff states, Ivan provided plaintiff with insurance information that applied specifically to the Ford.[3] The credit card record showing that Ivan paid for a car rental on June 13, 2019, weeks before the accident, does not tie the charge to the rental in question.[4] Steven's affidavit is not documentary evidence under CPLR 3211 (a) (1) (*see Serao v Bench-Serao*, 149 AD3d 645, 646 [1st Dept 2017]).

Further, plaintiff's affidavit states that the car in question was American made (NYSCEF Doc. No. 37, ¶ 4). Though, like Steven's affidavit, this one is self-serving (*see Serao*, 149 AD3d

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[3] Although both copies of the insurance document are largely unreadable, the court can see that, just under the name of the insurance company, the policy states that the covered vehicle is a 2015 Ford Escape (*see* NYSCEF Doc. Nos. 25, 43).

[4] The court notes that Ivan also charged $891.75 for an Airbnb rental six days after he rented the car – that is, on June 19, 2019 (*see* NYSCEF Doc. No. 16). This is before the period during which Ivan rented the Hyundai. Also, the estimated charge for the Hyundai rental is $289.90 (*see* NYSCEF Doc. No. 15), and the credit card charge is for $408.88. Although it is possible that the charge is for the July rental and that Ivan incurred substantial additional charges, it is also possible that the credit card charge was for an earlier rental. This leaves open the possibility that Ivan was not driving a rental car on the date of the accident.

at 646), when coupled with the other evidence it suffices to raise a factual issue. Finally, as plaintiff notes, defendants have not provided plaintiff with any discovery, and therefore plaintiff is unable to fully evaluate Steven's position.

When a court considers a motion to dismiss under CPLR § 3211 (a) (7), it reads the complaint liberally and gives the plaintiff the benefit of every possible favorable inference, dismissing only if the allegations do not "fit within any cognizable legal theory" (*Schmidt-Sarosi v Offices for Fertility & Reproductive Medicine, P.C.*, 195 AD3d 479, 480 [1st Dept 2021] [internal quotation marks and citation omitted]). It is not sufficient to state that the circumstances at hand show the lack of a valid claim (*see Chester County Empls. Retirement Fund v Alnylam Pharms., Inc.*, 193 AD3d 638, 639 [1st Dept 2021]). Here, Steven's argument is that there is no viable claim against him because he did not drive the vehicle, he did not own or operate the vehicle, he was not a passenger in the vehicle, and he had no other relationship to the vehicle. However, for the reasons above, Steven has not established beyond question that his car was not involved in the accident. Accordingly, the allegations as set forth in the complaint state a valid claim.

A party who seeks summary judgment has to show his or her "entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact" (*Stonehill Capital Mgt. LLC v Bank of the W.*, 28 NY3d 439, 448 [2016] [internal quotation marks and citation omitted]). Further, courts consider the facts "in the light most favorable to the non-moving party" (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013] [internal quotation marks and citation omitted]). Only then does the burden shift to the nonmoving party to show that a triable issue exists (*see id.*). In addition, under CPLR 3212 (f), the nonmoving party may argue that summary judgment is premature because

there is outstanding discovery (*see Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 102-103 [1st Dept 2006]). There must be a specific basis for this argument (*id.* at 103). Conjecture alone is insufficient (*see Rios v City of New York*, 199 AD3d 478, 479 [1st Dept 2021]). Where the moving party has not responded to discovery requests and there have been no depositions, the court generally has the discretion to deny the motion (*see Cruz v City of New York*, 183 AD3d 466, 468 [1st Dept 2020]).

Under this standard, the court determines that the application for summary judgment is premature (CPLR § 3212 [f]). For one thing, as the court has stated, the evidence is not absolutely conclusive. Plaintiff has pointed out the discrepancies between the information that Ivan provided and the evidence the Steven now submits (*see, e.g.*, NYSCEF Doc. No. 40, ¶ 6). Further, as plaintiff notes and as Steven stresses, Steven, upon whose affidavit the motion is based, lacks personal knowledge of the accident. Moreover, as Steven's insurer has not provided an explanation for its denial of coverage, plaintiff urges that more information is needed about the policy and the potentially liable parties. Plaintiff states that the deposition of Ivan is necessary, as he can speak to the particulars of the accident and clarify whether the Ford or the Hyundai was involved. The court notes that the motion is denied because of the high burden a party has at this stage of discovery. Indeed, if defendants can show, through discovery, that Steven bears no liability, it will lead to an easy resolution of this matter.

Finally, there is no opposition to the cross-motion to amend the complaint. CPLR § 3025 (b) states that courts shall freely give leave to amend in the absence of prejudice or surprise (*see Machado v Gulf Oil, L.P.*, 195 AD3d 26, 30 [1st Dept 2021]). The court notes that, as plaintiff contends, Advantage likely will argue that there is no liability as against it due to the Graves Amendment (49 USC § 30106; *see supra*, n 2). However, the allegations against Advantage in

the amended complaint leave room for the possibility that an exception applies. Accordingly, for the foregoing reasons, it is hereby

ORDERED that the motion to dismiss the complaint as against Steven Adelson is denied; and it is further

ORDERED that the cross-motion for leave to amend the complaint is granted; and it is further

ORDERED that the amended complaint, in the form filed as NYSCEF Doc. No. 57, shall be deemed served upon service of a copy of this order with notice of entry upon all parties who have appeared in the action; and it is further

ORDERED that a supplemental summons and amended complaint, in the form filed as NYSCEF Doc. No. 57, shall be served in accordance with the Civil Practice Law and Rules, upon the additional parties in this action within 30 days; and it is further

ORDERED that the action shall bear the following caption:

CELESTINO ACEVEDO JR., Index No. 153331/2021

Plaintiff,

-against-

STEVEN ADELSON, IVAN J. ADELSON, and ADVANTAGE RENT-A-CAR, L.L.C.,

Defendants.

And it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the additional party.

This constitutes the Decision and Order of the Court.

2/22/2022
DATE

JAMES G. CLYNES, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED		GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE