SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID B. COHEN **PART** 58

Justice

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PV HOLDING CORP., AVIS BUDGET CAR RENTAL, LLC,BUDGET RENT A CAR SYSTEM, INC.,

Plaintiff,

- v -

ALEXANDER FERNANDEZ, ANA DE LOS SANTOS, ANA Y. OSORIO, ESTAISI SANCHEZ, BLADIMIR GARCIA, LEONARD SANDOVAL, ANGELINA WING YAN NGO, RANJIT CHITTIBABUSURIYA, KELLY ELIZABETH MATOS VICIOSO

Defendant.

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INDEX NO. 160035/2020

MOTION DATE 10/01/2021, 05/20/2022, 10/27/2022

MOTION SEQ. NO. 002 004 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 81, 115, 116, 117, 118, 119, 120, 121, 122, 123, 126, 127, 128, 129, 130

were read on this motion to/for JUDGMENT - DEFAULT.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 164, 165, 166, 167, 168, 169, 170, 171, 172, 173

were read on this motion to/for LEAVE TO FILE.

In this declaratory judgment/no-fault action, plaintiffs PV Holding Corp. ("PV"), Avis Budget Car Rental, LLC ("Avis"), and Budget Rent A Car System, Inc. ("Budget") (collectively "plaintiffs") move (Seq. 002), pursuant to CPLR 2004 and 3215, for an order granting them an extension of time to file proof of service upon nominal defendants Bladimir Garcia, Ana Y. Osorio, Estaisi Sanchez, Leonardo Sandoval, Ana De Los Santos, individually and on behalf of L.M., an infant (collectively, "De Los Santos"), and Kelly Elizabeth Matos Vicioso, and granting a default judgment against defendant Alexander Fernandez. Sanchez, Osorio, and De Los Santos

(collectively, "nominal defendant movants") oppose. Nominal defendant movants move (Seq. 004), pursuant to CPLR 3212, for summary judgment and an order declaring, among other things, that plaintiffs are liable for Fernandez's actions. Plaintiffs oppose. Plaintiffs also move (Seq. 005), pursuant to CPLR 2214(c), for leave to file a surreply. Nominal defendant movants oppose.

Factual and Procedural Background

This case arises from a motor vehicle accident in May 2017 (NYSCEF Doc No. 151 at 1-2; Doc No. 154 at 1-2). At the time of the accident, Fernandez, an employee of Budget, was driving a motor vehicle owned by PV ("the subject vehicle") (Doc No. 151 at 1-2; Doc No. 154 at 1-2). Shortly thereafter, nominal defendants,[1] who are other individuals involved in the accident, commenced an action against him in Supreme Court, Queens County bearing Index No. 710928/2020, in which PV was one of several named defendants (Doc No. 133 at 3-4). In November 2020, plaintiffs commenced the above-captioned action seeking, among other things, a declaratory judgment that they were not vicariously liable for Fernandez's actions because he did not have authorization or permission to use the subject vehicle (Doc No. 1 at 13-18). They then moved for, and were granted, an extension of time to serve Fernandez and defendant Angelina Win Yan Ngo (Doc Nos. 20-21, 38).

After allegedly serving Fernandez, plaintiffs move (Seq. 002), pursuant to CPLR 3215, for a default judgment against him (Doc Nos. 43-44). They also move (Seq. 002), pursuant to CPLR 2004, for an extension of time to file proof of service upon several of nominal defendants (Doc Nos. 43-44). Nominal defendant movants oppose, arguing, among other things, that plaintiffs failed to properly serve Fernandez and that he denied receipt of such service when he testified in the Queens County action (Doc No. 115).

[1] Nominal defendants include Garcia, Osorio, Sanchez, Vicioso, and De Los Santos, as well as defendants Angelina Wing Yan Ngo and Ranjnit Chittibabusuriya.

Nominal defendant movants move (Seq. 004), pursuant to CPLR 3212, for an order granting them summary judgment against plaintiffs and, among other things, for a declaration that plaintiffs are vicariously liable for Fernandez and his conduct in the Queens County action (Doc Nos. 132-133). They argue that they have made a prima facie showing that plaintiffs gave Fernandez permission to operate the subject vehicle and that plaintiffs are therefore liable for his actions pursuant to Vehicle and Traffic Law § 388 (Doc No. 133 at 6-21). In support of their motion, they submit video surveillance footage from inside the Avis/Budget garage (Doc No. 149) and deposition testimony from the Queens County action from Fernandez and Laura Perez, an Avis employee (Doc Nos. 142-144). Plaintiffs oppose the motion for summary judgment arguing, among other things, that the motion is premature, that such motion is supported by inadmissible evidence, and that there are questions of fact regarding the issue of Fernandez's permission to operate the subject vehicle (Doc No. 153 at 5-17).

Video Surveillance Footage

The surveillance video footage showed Fernandez entering the subject vehicle while it was parked inside the garage, and driving it to the elevator (Doc No. 149 at minutes 00:20 – 02:58). He did not appear to speak to anybody while in the garage.

Fernandez Deposition Testimony

At his deposition in the Queens County action, Fernandez testified that he worked at the Avis Budget Rental Car office located at W. 49th Street in Manhattan (Doc No. 143 at 111-112). He regularly rented motor vehicles from this location for personal use, so he was familiar with the rental procedures (Doc No. 143 at 30). There were two different rental procedures: one for regular customer rentals and one for employee personal use rentals (Doc No. 143 at 166-170). When an employee wanted to rent a vehicle for personal use, he or she would provide a driver's license and

payment information, the local manager would complete the necessary paperwork, and both individuals would sign such paperwork (Doc No. 143 at 166-170).

Fernandez maintained that he followed the required procedure for renting the subject vehicle (Doc No. 143 at 170). He approached his local manager, asked her if he could rent the subject vehicle beginning on Friday, May 20, 2016, and she agreed (Doc No. 143 at 30, 171). Shortly before that rental date, he completed the rental paperwork with the local manager in her office and paid for the subject vehicle with a credit card (Doc No. 144 at 111-113).

On May 20th, he spoke to the local manager on the phone, and she reaffirmed that all the rental paperwork was complete (Doc No. 143 at 173-174). He was to arrive at the rental office, explain to the person at the front desk that he was there to be pick up the subject vehicle, and then he would be provided with the keys (Doc No. 143 at 173-174).[2] Later that same day, he arrived at the rental office, spoke to the person at the front desk, and someone gave him the keys to the subject vehicle, although he could not remember specifically with whom he spoke (Doc No. 143 at 177-181; Doc No. 144 at 119-120). However, he later testified that he was not given the keys directly by the front desk but instead obtained them himself from a drawer in the rental office because the front desk already knew he was coming in (Doc No. 144 at 120-121, 144-145). After obtaining the keys, he drove the subject vehicle out of the garage, but the security guard stationed at the exit never checked his rental paperwork, which was a standard practice for all rentals (Doc No. 144 at 124). Fernandez was never given a copy of the rental paperwork, but one copy was retained by the local manager and another had already been placed inside the subject vehicle (Doc No. 143 at 177-178; Doc No. 144 at 117-118).

[2] Normally the keys to a rental vehicle were left on the dashboard inside the vehicle, but they were not in this instance (Doc No. 143 at 174-175).

Laura Perez Deposition Testimony

At her deposition in the Queens County action, Perez testified that she was a Unit Manager with Avis and oversaw several Avis/Budget rental locations in Manhattan, including the rental office in question (Doc No. 142 at 12-13). She explained that there were two separate procedures for vehicle rentals: the standard rental agreement, used for regular customers; and a nonrevenue ticket, used for employees renting vehicles for personal use (Doc No. 142 at 24-26). A nonrevenue ticket was always required for an employee to use a vehicle for personal use (Doc No. 142 at 111). Nonrevenue tickets were generated at the office where the vehicle was rented, and they were filed at that same location after being signed by both the local manager and the employee (Doc No. 142 at 26). After the rental paperwork was completed, the employee was required to take the vehicle past a security guard who verified the same (Doc No. 142 at 38-39, 96).

Perez searched Avis's computer systems and physical filings but found "no system record" of a rental agreement or a nonrevenue ticket allowing Fernandez to use the subject vehicle (Doc No. 142 at 26-29, 44-45, 96-97). She opined that he failed to follow the requisite procedure and that he took the subject vehicle without permission (Doc No. 142 at 34-35, 98).

Legal Conclusions

Plaintiffs' Request for Extension of Time to File Proof of Service

Plaintiffs' motion for an extension of time to file proof of service is academic. "[F]ailure to file proof of service within the 20-day time period . . . is not a jurisdictional defect, but a mere irregularity, and . . . service is deemed complete only 10 days after the late filing" (*Reem Contr. v Altschul & Altschul*, 117 AD3d 583, 584 [1st Dept 2014] [internal quotation marks and citations omitted]; *but see Reporter Co. v Tomicki*, 60 AD2d 947, 947 [3d Dept 1978] [holding that "[f]ailure to file is an irregularity, *curable by motion*, if, under the facts, the court in the exercise

of discretion deems it best (emphasis added)]). Here, plaintiffs already filed the affidavits of service which they now seek an extension of time to file (Doc Nos. 9-13, 16, 18), and, therefore, service upon those individuals was deemed complete 10 days after the initial filing. Thus, there is now no need for an extension of time to file proof of service.

Plaintiffs' Request for a Default Judgment

To obtain a default judgment against a party for failing to appear, the movant must provide "proof of service of the summons and complaint and proof of the facts constituting the claim, [and] the default" (*Gantt v North Shore-LIJ Health Sys.*, 140 AD3d 418, 418 [1st Dept 2016]; *see* CPLR 3215 [f])). "[A] properly executed affidavit of service raises a presumption that a proper mailing occurred, and a mere denial of receipt is not enough to rebut th[at] presumption" (*Kihl v Pfeffer*, 94 NY2d 118, 122 [1999]; *see San Lim v MTA Bus Co.*, 190 AD3d 493, 493 [1st Dept 2021], *lv dismissed* 37 NY3d 1041 [2021]). However, "a sworn nonconclusory denial of service by a defendant is sufficient to dispute the veracity or content of the affidavit" (*NYCTL 1998-1 Trust & Bank of N.Y. v Rabinowitz*, 7 AD3d 459, 460 [1st Dept 2004]; *see HMC Assets, LLC v Trick*, 199 AD3d 454, 455 [1st Dept 2021]), so long as such denial is made "personally" by the defendant (*Walkes v Benoit*, 257 AD2d 508, 508 [1st Dept 1999] [finding no rebuttal of presumption of proper service where denial of service made through attorney affirmation and employer affidavit]; *see Omansky v Gurland*, 4 AD3d 104, 108 [1st Dept 2004] [noting that proper service questions existed where defendant failed to submit affidavit personally denying receipt of service]; *cf. Ananda Capital Partners v Stav Elec. Sys. (1994)*, 301 AD2d 430, 430 [1st Dept 2003] [remanding for determination on issue of proper service after defendant himself "personally contested the claim that he was served"]).

Here, plaintiffs' affidavit of service indicates that the summons and complaint were left with Fernandez's sister at her home in Valley Stream, New York, that she confirmed that he resided there, and that a timely follow-up mailing occurred thereafter (Doc No. 54). This is sufficient to demonstrate substitute service under CPLR 308(2) and create a presumption of proper service (*see e.g. U.S. Bank N.A. v Martinez*, 139 AD3d 548, 549 [1st Dept 2016]). Contrary to nominal defendant movants' contention that Fernandez's deposition testimony from the Queens County action amounts to denial of service because he testified from his residence in Japan and stated that had not resided at the Valley Stream, New York address for some time, his testimony contains no express denial of receipt of service (Doc Nos. 117-118). Thus, nominal defendant movants have not rebutted that presumption because Fernandez himself has not "personally" contested service (*Walkes*, 257 AD2d at 508; *cf. Ananda Capital Partners*, 301 AD2d at 430). Since plaintiffs have presented proof of service through the affidavit of service (Doc No. 54), proof of the facts constituting their claim through their complaint (Doc No. 45), and proof that Fernandez has not appeared (Doc No. 44), plaintiffs have satisfied the requirements for a default judgment (*see PV Holding Corp. v AB Quality Health Supply Corp.*, 189 AD3d 645, 646 [1st Dept 2020]; *Gantt*, 140 AD3d at 418).

Although "defaulters are [generally] deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]; *see State Farm Fire and Cas. Co. v Axial Chiropractic, P.C.*, 205 AD3d 656, 657 [1st Dept 2022]), "[d]eclaratory judgment can rarely, if ever, be granted solely on default, with no inquiry by the court as to the merits" (*Tanenbaum v Allstate Ins. Co.*, 66 AD2d 683, 684 [1st Dept 1978]; *see Onrubia de Beeck v Lopez Costa*, 39 Misc 3d 347, 355 [Sup Ct, New York County 2013]). In support of their default judgment motion, plaintiffs submit,

among other things, a complaint verified by a PV employee, a police accident report, several Avis and Budget company policies concerning use of company motor vehicles, and company policy acknowledgment forms signed by Fernandez (Doc No. 45). To obtain their requested default declaratory judgment, plaintiffs bear the burden of "establish[ing]" their right to a declaration against Fernandez (*Onrubia de Beeck*, 39 Misc 3d at 355).

Despite presenting proof of their claims, they have not established their right to the declaration they seek, and therefore a hearing is necessary for plaintiffs to make that required showing (*see id.*; *cf. State Farm Mut. Auto. Ins. Co. v Surgicore of Jersey City, LLC*, 195 AD3d 454, 455 [1st Dept 2021] [granting default declaratory judgment where moving party submitted affidavit from insurance claim representative, examination testimony, and arbitration award to establish right to declaration of noncoverage]; *PV Holding Corp.*, 189 AD3d at 646 [granting default declaratory judgment where moving party provided verified complaint, affidavit, affirmation, and documentary evidence of defendant failing to appear for properly noticed examination to establish right to declaration on insurance coverage]).

Nominal Defendants' Request for Summary Judgment

A motion for summary judgment may be denied as premature when "it appear[s] . . . that facts essential to justify opposition may exist but cannot . . . be stated" (CPLR 3212 [f]; *see Corona v HHSC 13th St. Dev. Corp.*, 197 AD3d 1025, 1026 [1st Dept 2021]). The party opposing summary judgment bears the burden of demonstrating that the motion is premature (*see Lyons v New York City Economic Dev. Corp.*, 182 AD3d 499, 499-500 [1st Dept 2020]), and demonstrating that such essential facts lie within the "exclusive knowledge or control" of someone other than themselves (*Barreto v City of New York*, 194 AD3d 563, 563-564 [1st Dept 2021] [internal quotation marks and citations omitted]). However, "conclusorily . . . [stating] that certain facts are

currently unavailable and needed to properly oppose summary judgment" is insufficient (Hon. Mark C. Dillon, 2021 Practice Commentaries, McKinney's Cons Laws of NY, CPLR C3212:50); a party "cannot avoid summary judgment based on speculation that further discovery may uncover something" (*W & W Glass Sys., Inc. v Admiral Ins. Co.*, 91 AD3d 530, 531 [1st Dept 2012] [declining to find summary judgment motion premature where defendants opposing motion "participated in lengthy discovery in the underlying action . . . and had ample opportunity to gather evidence"]).

Here, two of the three plaintiffs have been unable to depose Fernandez or obtain any meaningful discovery from him, as he has not appeared in the instant action.[3] Although he was deposed in the Queens County action (Doc Nos. 143-144), in which PV took part, Avis and Budget should not be denied the opportunity to depose him, despite the fact that plaintiffs are represented by the same attorney. Further, plaintiffs identify the specific essential facts that exist but cannot be asserted because they lie within Fernandez's exclusive knowledge and control (*see Barreto*, 194 AD3d at 563-564). Specifically, Fernandez previously testified that he rented the subject vehicle using his credit card (Doc No. 143 at 181; Doc No. 144 at 132-133). However, those credit card statements — or other similar financial documents — have not yet been produced, and such items would likely be relevant to the question of whether he had permission to operate the subject vehicle. Therefore, plaintiffs have satisfied their burden of demonstrating that the motion for summary judgment is premature (*see Lyons*, 182 AD3d at 499-500; *Groves v Land's End Hous. Co.*, 175 AD2d 733, 733 [1st Dept 1991], *affd* 80 NY2d 978 [1992]; *cf. W & W Glass Sys., Inc.*, 91 AD3d at 531).

[3] Although it is unclear whether Fernandez would appear for a deposition given his failure to appear in the instant action thus far, the lack of deposition still weighs in favor of concluding that nominal defendant movants' summary judgment motion is premature (*see e.g. Burke v Yankee Stadium, LLC*, 146 AD3d 720, 721 [1st Dept 2017]; *Ali v Effron*, 106 AD3d 560, 560 [1st Dept 2013]).

In any event, plaintiffs demonstrate that there are questions of fact regarding the issue of whether Fernandez had permission to operate the vehicle, thereby preventing summary judgment as a matter of law. "Vehicle and Traffic Law § 388(1) makes every owner of a vehicle liable for injuries resulting from negligence in the use or operation of such vehicle by any person using or operating the same with the permission, express or implied, of such owner" (*Murdza v Zimmerman*, 99 NY2d 375, 379 [2003] [internal quotation marks and ellipsis omitted]), and "proof of ownership of a motor vehicle creates a rebuttable presumption that the driver was using the vehicle with the owner's permission" (*Leotta v Plessinger*, 8 NY2d 449, 461 [1960]; *see Matter of Fiduciary Ins. Co. of Am. [Jackson].*, 99 AD3d 625, 625 [1st Dept 2012]). However, that presumption may be rebutted by "substantial evidence sufficient to show that a vehicle was not operated with the owner's consent" (*Murdza*, 99 NY2d at 380; *accord Leon v Citywide Towing, Inc.*, 111 AD3d 464, 465 [1st Dept 2013]).

Although Fernandez previously testified that he followed the proper procedures and had permission to operate the subject vehicle (Doc No. 143 at 30, 170-181; Doc No. 144 at 117-124, 144-145),[4] his testimony is contradicted by Perez's representation that there was no digital or physical record of any rental agreement pertaining to Fernandez and the subject vehicle (Doc No. 142 at 26-29, 44-45, 96-97). This substantial evidence is sufficient to rebut the presumption of permission and preclude summary judgment as a matter of law (*see American Country Ins. Co. v*

[4] Plaintiffs' contention that the use of depositions from the Queens County action is impermissible under CPLR 3117(a) is unavailing (Doc No. 153 at 5-9). The application of CPLR 3117 to summary judgment motions is "superseded" by CPLR 3212(b) (*Sipos v Bridgeville Realty Corp.*, 177 Misc 2d 840, 842-844 [Sup Ct, Sullivan County 1998]; *see State of New York v Metz*, 241 AD2d 192, 199 [1st Dept 1998]), which "states that affidavits and other available proof, such as depositions and written admissions are adequate" (*Metz*, 241 AD2d at 199 [internal quotations marks and citations omitted]). Thus, "any item of proof as reliable as an affidavit should be considered on a summary judgment motion" (*id.*; *see Sipos*, 177 Misc 2d at 842-844). Therefore, the use of deposition testimony from the Queens County action by nominal defendant movants is permissible.

Umude, 176 AD3d 542, 542 [1st Dept 2019]; *Leon*, 111 AD3d at 465; *Powell v Hertz Corp.*, 182 AD2d 441, 442 [1st Dept 1992]).

Plaintiffs' Request for Leave to File a Surreply

A trial court has the discretion to allow a party to file a surreply after a motion is fully submitted (*see* CPLR 2214 [c]; *Foitl v G.A.F. Corp.*, 64 NY2d 911, 913 [1985]). Although the statute allows such additional papers to be filed upon a showing of good cause, "[t]he practice of filing a surreply . . . [has been] repudiated by [the First Department] . . . [and] has been applied to bar consideration of such submissions" (*Garced v Clinton Arms Assoc.*, 58 AD3d 506, 509 [1st Dept 2009]; *see Ritt v Lennox Hill Hosp.*, 182 AD2d 560, 562 [1st Dept 1992]). Plaintiffs' surreply herein is unnecessary, since it would not alter this Court's determination of the summary judgment motion. As described above, plaintiffs presented evidence that rebutted the presumption that Fernandez had permission to operate the subject vehicle. Thus, there is no need to consider any papers included in plaintiffs' proposed surreply, which would only allow them to bolster their position on an issue that was already decided in their favor. Therefore, plaintiffs' request for leave to file a surreply is denied (*see Garced*, 58 AD3d at 509).

Accordingly, it is hereby:

ORDDERED that the branch of plaintiffs' motion (Seq. 002) seeking an extension of time to file proof of service is denied as academic; and it is further

ORDERED that the branch of plaintiffs' motion (Seq. 002) seeking a default judgment against defendant Alexander Fernandez is granted to the extent that this matter is referred to a Judicial Hearing Officer of Special Referee for an evidentiary hearing on the issue of whether Fernandez had permission to use the subject vehicle; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that such granting of an evidentiary hearing and/or referral is conditioned on plaintiffs PV Holding Corp., Avis Budget Car Rental, LLC, and Budget Rent A Car System, Inc. serving a copy of this order, within 30 days of entry of this order, with notice of entry, upon opposing counsel and upon the Special Referee Clerk (60 Centre Street, Room 119M), for the placement of this matter on the Special Referee's calendar; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

ORDERED that failure to serve the order on the Special Referee Clerk within the time period set forth above shall be deemed an abandonment of plaintiffs PV Holding Corp., Avis Budget Car Rental, LLC, and Budget Rent A Car System, Inc.'s default declaratory judgment claim, and denial of said plaintiffs' motion for default judgment; and it is further

ORDERED that the motion for summary judgment by defendants Ana Y. Osorio, Estaisi Sanchez, and Ana De Los Santos, individually and on behalf of L.M., an infant (Seq. 004), is denied; and it is further

ORDERED that plaintiffs' motion (Seq. 005) seeking leave to file a surreply is denied; and it is further

ORDERED that counsel for the moving parties shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Case* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

ORDERED that the parties are to appear for an in-person status conference at 71 Thomas Street, Room 305, on January 24th at 10:00 a.m., unless the parties provide a stipulation by 3 p.m. the day before in accordance with the Part rules.

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12/22/2022
DATE

DAVID B. COHEN, J.S.C.

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