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 7th day of October, 2022.

PRESENT:
CARL J. LANDICINO, J.S.C.

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ROSETTA DITOMASSO,

Plaintiff,

-against-

CHRISTINA M. BAGLIVO, ANN BAGLIVO, ZIAD MASRI and EAN HOLDINGS, LLC,

Defendants.

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Index No.: 526155/2018

DECISION AND ORDER

Motion Sequence #2

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

	Papers Numbered (NYSCEF)
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	52-70,
Opposing Affidavits (Affirmations)	72-76,
Reply Affidavits (Affirmations)	78

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

The instant action concerns a claim for personal injuries arising from a motor vehicle collision that allegedly occurred on July 11, 2017. Plaintiff Rosetta Ditomasso (hereinafter the "Plaintiff") alleges that she was injured when her vehicle collided with a vehicle operated by Defendant Christina Baglivo and owned by Defendant Ann Baglivo (hereinafter the "Baglivo Defendants") and a vehicle operated by Defendant Ziad Masri (hereinafter "Defendant Masri") and owned by Defendant EAN Holdings, LLC (hereinafter the "Defendant EAN"). The incident allegedly occurred on the Verrazano Bridge in Staten Island, New York.

Defendant EAN now moves (motions sequence #2) for an order pursuant to CPLR 3212 granting summary judgment and dismissing the complaint and any cross-claims. Defendant EAN argues that it is

not a proper party to the action as it is immune from claims of vicarious liability, as the owner of the vehicle, pursuant to 49 U.S.C. §30106 (hereinafter "the Graves Amendment"). In support of its position EAN relies on an affidavit from Phillip Plett, the title to and registration of the vehicle, the lease agreement, the deposition of Defendant Masri and other documents related to the vehicle.

The Plaintiff opposes the motion. The Plaintiff argues that EAN has failed to meet its *prima facie* burden in as much as it has failed to show that they had leased the vehicle that they own to Defendant Ziad Masri or otherwise qualify for the protections provided by the Graves Amendment. Specifically, the Plaintiff argues that the actual lessor of the vehicle is non-party CLERAC, LLC and that EAN has failed to show that this party is an affiliate of EAN. Plaintiff also contends that EAN has failed to provide a lease agreement for the vehicle at issue. The Plaintiff also argues that the motion is premature.

Summary 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 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 NY2d 361, 364, 362 N.Y.S.2d 1341, 320 N.E.2d 853[1974]. The proponent for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. See *Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324, 508 N.Y.S.2d 923, 501 N. E.2d 572 [1986], *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985]. "In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inference must be resolved in favor of the nonmoving party." *Adams v. Bruno*, 124 AD3d 566, 566, 1 N.Y.S.3d 280, 281 [2d Dept 2015] citing *Valentin v. Parisio*, 119 AD3d 854, 989 N.Y.S.2d 621 [2d Dept 2014]; *Escobar v. Velez*, 116 AD3d 735, 983 N.Y.S.2d 612 [2d Dept 2014].

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 [2d 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 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick*, 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994].

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 AD3d 55, 852 N.Y.S.2d 169 [2d 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 AD3d 833, 834, 954 N.Y.S.2d 595, 596 [2d Dept 2012].

Turning to the merits of the motion by Defendant EAN, the Court finds that EAN has met its *prima facie* burden. In support of its application, Defendant EAN relies on the deposition testimony of Defendant Ziad Masri, a Police Accident Report, an affidavit from Rick Plett, the purported subject rental agreement, the title and registration of the purported vehicle at issue, a document reflecting the vehicle exchange, and maintenance records for the purported vehicle. When Defendant Masri was asked how he came into possession of the vehicle that was involved in the accident at issue he stated "[i]t was rental." When asked what company he rented the vehicle from he stated "I think it was Enterprise." When asked about the rental term, he stated "I believe I had it for a week, probably." When asked if the accident on July 11, 2017 involved the same car he had rented, he stated "I picked the car -- not the car, the same car, some

little car from local office close to my place where I live." He then stated that "on the way to New York, I had some problem with it. So I stopped in, I think, Canton, some airport. At the Enterprise office, they change the car for me to the exact car I asked them." When asked where he obtained the vehicle he stated, "[i]t was, yes, from airport, in Akron-Canton airport." (See EAN Defendant Motion, Exhibit "J", Pages 10 through 12).

As part of his affidavit, Phillip Plett states that he is a Risk Manager for CLERAC, LLC, which he represents is affiliated with Defendant EAN. In explaining this relationship, Mr. Plett states that "EAN Holdings, LLC is the company that owned the rental vehicle and CLERAC. LLC is the company that met with the customer and prepared the rental agreement that was signed by Ziad Masri." Mr. Plett also states that, "[t]he Rental Agreement Summary sets forth that on July 6. 2017, Masri rented a Jeep bearing license plate number 6311V52l. The records of the companies reflect that thereafter, this vehicle was then exchanged for a 2016 Jeep bearing lowa license plate number ELG367, hereinafter referred to as "the rental vehicle"." Mr. Plett further states that "[a] new rental agreement summary was not generated when Zind Masri exchanged the vehicles." (See EAN Defendants' Motion, Exhibit "K" Paragraphs 6-11). This testimony, in conjunction with the rental agreement and the document reflecting the vehicle exchange, as reflected in both Defendant Masri's deposition and the affidavit of Mr. Plett are sufficient for Defendant EAN to meet its *prima facie* burden. The servicing agent's employee had sufficient knowledge to authenticate the lease for the subject vehicle, which was annexed to the motion. See *Antoine v. Kalandrishvili*, 150 AD3d 941, 942, 56 N.Y.S.3d 142, 144 [2d Dept 2017].; *see also Gluck v. Nebgen*, 72 AD3d 1023, 1023, 898 N.Y.S.2d 881, 882 [2d Dept 2010].

In opposition, Plaintiff has failed to raise an issue of fact as it relates to Defendant EAN's ownership and liability. As an initial matter, the application by Defendant EAN was not premature. "A party contending that a motion for summary judgment is premature is required to demonstrate that

additional discovery might lead to relevant evidence or that the facts essential to oppose the motion are exclusively within the knowledge and control of the movant." *Reynolds v. Avon Grove Properties*, 129 AD3d 932, 933, 12 N.Y.S.3d 199, 201 [2d Dept 2015]. What is more, the Court finds that the Plaintiff has not raised a material issue of fact by pointing to the fact that the Defendant Masri rented the vehicle at issue after renting an initial vehicle. "The servicing agent's employee had sufficient personal knowledge to authenticate the lease for the subject vehicle, which was annexed to her affidavit." *Antoine v. Kalandrishvili*, 150 AD3d 941, 942, 56 N.Y.S.3d 142, 144 [2d Dept 2017]; *see also Aviaev v. Nissan Infiniti LT*, 150 AD3d 807, 808, 55 N.Y.S.3d 297, 299 [2d Dept 2017]. Accordingly, Plaintiff has failed to establish the existence of a material issue of fact requiring denial of the motion.

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

Defendant EAN's motion (Motion Sequence #2) for summary judgment is granted and the action and any cross-claims against EAN are dismissed.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.

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