SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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ANTHONY SPOTO,

Plaintiff,

- v -

LEONARDO E. MATOS, DONNA D. PIARD, Y&H GARAGES

Defendant.

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INDEX NO. 156083/2019

MOTION DATE 03/16/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 55

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

Upon the foregoing documents and following oral argument, the motion by Defendant Piard for summary judgment pursuant to CPLR 3212, dismissing the complaint and any and all cross claims against her on the basis that she did not breach any duty owed to Plaintiff and for summary judgment on the cross-claim against co-Defendants Matos and Y&H Garages is decided as follows:

This matter was joined for trial with *Christopher v. Piard*, Index Number 152872/2019. Plaintiff seeks recovery for injuries allegedly sustained as a result of a February 8, 2019 motor vehicle accident between a vehicle owned by Defendant Piard and operated by Defendant Matos and a vehicle owned by New York City Department of Sanitation and operated by Plaintiff. Defendant Piard parked her vehicle in the parking garage owned by Defendant Y&H Garages, within which Defendant Matos worked.

In support of her motion, Defendant Piard submits, in pertinent part, an affidavit in which she avers that she left her vehicle at the Y&H Garages, which she frequently did, as it was close to her residence, she did not give express or implied permission to any employee of Y&H Garages, specifically not to Leonardo Matos, to operate her vehicle outside the premises of Y&H Garages, and that she learned that her vehicle was involved in an accident after the subject accident occurred.

In opposition, Plaintiff contends that he must be given an opportunity to depose the parties to this action, particularly Defendant Piard in order to develop the facts and circumstances surrounding the use of her vehicle at the time of the happening of this accident, her custom and usage with the co-defendants in this action, and to assess their respective credibility.

In reply, Defendant Piard contends she was merely a passive owner of the vehicle that was under the control of the co-Defendants Matos and Y&H Garages when the accident occurred and that there is no evidence of any negligent conduct on the part of Defendant Piard that was a proximate cause of this accident, entitling her to common law indemnification from co-Defendants.

Y&H Garages also opposes Defendant Piard's motion contending that the instant application is premature because there has been no investigation of the circumstances of the accident or of the non-answering Defendant Matos. Y&H Garages submit the affidavit of Yves Michel, president of Y&H Enterprises, Inc., owner and operator of Y&H Garages. Michel avers that Matos worked parking and retrieving vehicles that customers brought into the garage, Matos was not allowed to take vehicles off the premises or use them for personal purposes, and Michel was not on the premises of Y&H Garages at the time of the subject accident, he does not know why Matos took Piard's vehicle out of the garage, as such act was not allowed within the scope of his employment, and he does not know what caused the subject accident, or if the vehicle had any defect. Michel further avers that Matos has not worked for Y&H Garages since the subject incident.

In reply, Defendant Piard contends that the evidence shows that Defendant Piard dropped off her vehicle to be parked at Y&G Garages, and the vehicle remained in the exclusive control of co-Defendants when the accident occurred.

Defendant Piard's uncontroverted affidavit establishes that she was indeed a passive owner of the vehicle at the time of the accident, subject only to vicarious liability pursuant to VTL 388. VTL 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." It is designed to hold vehicle owners vicariously liable for the negligence of those whom they allow to drive their vehicles (*Tikhonova v Ford Motor Co.*, 4 NY3d 621 [2005]). Under this statute, an owner of a vehicle is responsible for the negligence of whomever, with his or her consent, operates the vehicle, whether on a public highway, private highway, or parking lot (*Carter v Travelers Ins. Co.*, 113 AD2d 178 [1st Dept 1985]). Once proof of ownership has been established, as it has here, a presumption, rebuttable only by substantial evidence to the contrary, attaches that the operator is using the vehicle with the owner's consent, express or implied (*Leotta v Plessinger*, 8 NY2d 449 [1960]).

A defendant, on its motion for summary judgment, has the burden of demonstrating its prima facie entitlement to judgment as a matter of law (*Zuckerman v New York*, 49 NY2d 557 [1980]). Thus, to obtain summary judgment on its defense that the vehicle was used without its permission, a defendant must present substantial evidence that the vehicle was used without its permission (*Murphy v Carnesi*, 30 AD3d 570 [2d Dept 2006]). In cases with uncontradicted disavowals of permission by both the owner of a vehicle and the driver, their testimony may constitute substantial evidence negating permissive use and in those specific cases, entitle the owner to summary judgment (*Country Wide Ins. Co. v Natl. R. R. Passenger Corp.*, 6 NY3d 172 [2006]). The question of consent is ordinarily one for the jury (*id.* at 178). Ultimately, "whether summary judgment is warranted depends on the strength and plausibility of the disavowals [of permission], and whether they leave room for doubts that are best left for the jury" (*id.* at 179).

Here, to obtain summary judgment, Defendant Piard must present substantial evidence that the vehicle was used without her permission, however she has failed to sufficiently rebut the strong presumption that Defendant Matos was operating the subject vehicle with her permission. The affidavit of Defendant Piard and Michel that Defendant Matos only had permission to drive the vehicle within the garage, does not, by itself, overcome the presumption of permissive use (*id.* at 177; *see also Murphy v Carnesi*, 30 AD3d 570 [2d Dept 2006]). Thus, Defendant Piard has failed to establish her prima facie entitlement to judgment as a matter of law on the cause of action alleging that she was vicariously liable for the Defendant Matos' negligence under VTL 388.

Accordingly, it is

ORDERED that the motion by Defendant Piard for summary, dismissing the complaint and any and all cross claims against her on the basis that she did not breach any duty owed to Plaintiff and for summary judgment on the cross-claim against co-Defendants Matos and Y&H Garages is DENIED; and it is further

ORDERED that any relief sought not expressly addressed herein has nonetheless been considered; and it is further;

ORDERED that within 30 days of entry, Plaintiff shall serve a copy of this Decision and Order upon Defendants with Notice of Entry.

This constitutes the Decision and Order of the Court.

10/5/2023
DATE

James G Clynes
JAMES G. CLYNES, J.S.C.

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