STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

DEANNA WILLIAMS and ABRAHAM WILLIAMS,
Plaintiff,

-against-

J. LUKE CONSTRUCTION CO., LLC, J. LUKE CONSTRUCTION INC., JOHN HODOROWSKI and JAMES L. PRICE,
Defendants.

DECISION/ORDER

Index No.900572-2016
RJI No. 01-16-122463

APPEARANCES:

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For Plaintiffs
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For Defendants Luke Construction Co. LLC,
J. Luke Construction Inc. and John L. Hodorowski
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Defendant Pro Se
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RYBA, J.

On February 27, 2016, defendant James I. Price was driving to work in a company vehicle owned by his employer, defendant J. Luke Construction Co. LLC, when he crossed over the center line and entered into a lane of oncoming traffic, causing a head-on collision with the vehicle operated by plaintiff Deanna Williams (hereinafter plaintiff). A blood test administered by police after the accident revealed that Price had a blood alcohol content of 0.14%, and as a result Price was arrested

and charged with the crime of driving while intoxicated. As a result of the accident, defendant was terminated from his employment and was convicted of the crime of vehicular assault in the second degree, for which he is presently serving a term of imprisonment.

Plaintiff, and her husband derivatively, commenced this action seeking to recover damages against Price, J. Luke Construction Co. LLC and J. Luke Construction Inc. (hereinafter collectively referred to as J. Luke), and an owner of J. Luke, John L. Hodorowski, in his individual capacity. Presently before the Court is a motion by plaintiffs for a default judgment against Price, who failed to appear or answer the complaint, and a motion by J. Luke and Hodorowski for summary judgment dismissing the complaint against them. Plaintiffs oppose the summary judgment motion, while the motion for a default judgment is unopposed.

Initially addressing plaintiffs' unopposed motion for a default judgment against Price, plaintiffs established their entitlement to a default judgment through proof of proper service of the summons and complaint and Price's failure to respond, along with plaintiff's affidavit establishing the facts constituting the claim (see, CPLR 3215 [f]; Woodson v Mendon Leasing Corp., 100 NY2d 62, 70 [2003]). Accordingly, the motion for a default judgment against Price is granted on the issue of liability, with the issue of damages to await a trial.

Turning to the motion for summary judgment dismissing the complaint, the evidence submitted establishes that Hodorowski was neither the titled owner of the company vehicle Price was driving at the time of the accident, nor was he otherwise involved on a personal level in any conduct giving rise to the allegations of vicarious liability and negligence in this action. Plaintiffs have offered no substantive opposition to this showing. Given the lack of evidence that would give rise to any basis for imposing personal liability on Hodorowski in his individual capacity, and

considering plaintiffs' failure to provide any meaningful response to the request for dismissal, the Court deems it appropriate to grant summary judgment dismissing plaintiffs' claims against Hodorowski in his individual capacity.

Next addressing the motion for summary judgment dismissing the complaint against J. Luke, the Court must be mindful that "summary judgment is a drastic remedy and should only be granted when no material facts exist and the movant is entitled to judgment as a matter of law" (see, Gadani v Dormitory Auth. of State of NY, 43 AD3d 1218, 1219 [2007]; Matter of La Bier v La Bier, 291 AD2d 730, 732 [2002], lv dismissed 98 NY2d 671 [2002]). Moreover, the Court must view the evidence in a light most favorable to the nonmoving parties, who should be afforded the benefit of every reasonable inference (see, Tenkate v Tops Mkts., LLC, 38 AD3d 987, 989 [2007]; Albany Comm. Dev. Agency, 279 AD2d 93, 95 [2001]). Summary relief should be denied if there is any doubt as to the existence of a material issue of fact.

As the proponent of the requested relief, J. Luke bears the initial burden of coming forward with prima facie evidence in admissible form to eliminate all material issues of fact from the case and demonstrate entitlement to judgment as a matter of law based upon the causes of actions alleged in the complaint (see, Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]; Berkeley v Rensselaer Polytechnic Institute, 289 AD2d 690, 691 [2001]). Only if the initial burden is satisfied, the Court must then examine whether plaintiffs have come forward with sufficient admissible evidence to demonstrate the existence of a triable issue of fact warranting a trial (see, Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). However, if J. Luke fails to satisfy this initial burden, the requested relief must be denied without reference to the sufficiency of the opposing papers (see, Winegrad v New York Univ. Med. Ctr., 64 NY2d at 853 [1985]; Mountain Candy & Cigar Co. Inc.

v Dairy Mart Convenience Stores, 267 AD2d 570 [1999]).

Here, the complaint alleges two causes of action. The first cause of action is asserted on behalf of plaintiff alone and the second cause of action is asserted on behalf of plaintiff's husband, Abraham Williams, for loss of consortium. The first cause of action appears to advance two theories of liability against J. Luke, specifically, vicarious liability for Price's negligence and liability for J. Luke's own negligence in hiring and retaining Price as an employee. As framed by the motion papers, the vicarious liability claim is premised upon the permissive use provisions of Vehicle and Traffic Law § 388 and upon principles of respondeat superior. The Court will first address the motion for summary judgment as it pertains to the claims of vicarious liability, and will then proceed to address the motion as it relates to the allegations of J. Luke's independent negligence.

Vehicle and Traffic Law § 388 imposes vicarious liability upon a vehicle owner for personal injuries caused by any person operating the vehicle with the owner's express or implied permission. "It is well settled that Vehicle and Traffic Law § 388 (1) creates a strong presumption that the driver of a vehicle is operating it with the owner's permission and consent, express or implied, and that presumption continues until rebutted by substantial evidence to the contrary" (Liberty Mut. Ins. Co. v General Acc. Ins. Co., 277 AD2d 981, 981-982 [2000] [internal quotation marks omitted]). Even where there is substantial evidence to the contrary, the issue of permission is ordinarily a question of fact for a jury (see, Country-Wide Ins. Co. v National R.R. Passenger Corp., 6 NY3d 172, 178 [2006]; Britt v Pharmacologic PET Servs., Inc., 36 AD3d 1039, 1040 [2007], lv dismissed 9 NY3d 831 [2007]; Lawrence v Myles, 221 AD2d 913, 914 [1995]). Even the uncontradicted testimony of the vehicle owner that the driver did not have the owner's permission to operate the vehicle is not alone sufficient to overcome the presumption of permissive use (see, Country-Wide Ins. Co. v

National R.R. Passenger Corp., 6 NY3d 172, 178 [2006]; Baker v Lisconish, 156 AD3d 1324, 1326 [2017], appeal dismissed, 31 NY3d 1042 [2018]; Marino v City of New York, 95 AD3d 840, 841 [2012]).

Moreover, when the owner has given the driver initial consent to operate the vehicle, the driver's decision to operate the vehicle in violation of the express terms of a company policy or a written contract may not necessarily be sufficient to negate the presumption of permissive use created by Vehicle and Traffic Law § 388 (see, Baker v Lisconish, 156 AD3d at 1326 [2017], appeal dismissed, 31 NY3d 1042 [2018]; see also, Blassberger v Varela, 129 AD3d 756 [2015]). This can be attributed to this State's strong policy stating that "one injured by the negligent operation of a motor vehicle should have recourse to a financially responsible defendant" (Motor Vehicle Acc. Ind. Corp. v Continental Nat. Amer. Group Co., 35 NY2d 260, 264 [1974]; see, Morris v Snappy Car Rental, Inc., 189 AD2d 115, 121 [1993], aff'd, 84 NY2d 21 [1994]). However, while proof that the owner placed a limitation on the permission for the use of the vehicle will not negate permission as a matter of law, it may serve to create a question of fact for the jury to resolve (see, Walls v Zuvic, 113 AD3d 936, 937 [1985]).

Here, J. Luke concedes that Price was operating the vehicle with its initial consent at the time of the accident, thus triggering the strong presumption that the vicarious liability of Vehicle and Traffic Law § 388 applies. However, contrary to J. Luke's contention, the mere fact that Price was operating the vehicle while under the influence of alcohol in violation of company policy at the time of the accident is not, without more, sufficient to overcome the strong presumption of permissive use as a matter of law (see, Motor Vehicle Acc. Ind. Corp. v Continental Nat. Amer. Group Co., 35 NY2d at 264 [1974]; Baker v Lisconish, 156 AD3d at 1326 [2017], appeal dismissed, 31 NY3d 1042

[2018]). At most, proof that J. Luke may have placed limitations on Price's permission to use the vehicle creates a question of fact for the jury. Under the circumstances, evidence that Price was operating the vehicle in violation of company policy fails to establish J. Luke's prima facie entitlement to dismissal as a matter of law under Vehicle and Traffic Law § 388. As a result, the Court need not consider the sufficiency of the plaintiffs' opposing proof on this issue.

In view of the above finding that plaintiffs' vicarious liability claim remains intact, the issue of whether plaintiffs' vicarious liability claim under the theory of respondent superior also remains viable is academic. In any event, were the Court to address the issue, it would note that the evidence demonstrates that when the accident occurred Price was driving to work in a company vehicle that he had permission to use while he traveled to and from job sites, and that such travel was a normal part of his work duties (see, Lundberg v State of New York, 25 NY2d 467, 471 [1969]; Davis v Larhette, 39 AD3d 693, 694-695 [2007]; McBride v County of Schenectady, 110 AD2d 1000, 1001 [1985]). Defendants argue that Price's otherwise work-related use of the vehicle was brought outside of the scope of his employment by his violation of company policy and his use of alcohol, which creates a question of fact. In view of the foregoing, that portion of J. Luke's motion that seeks dismissal of any vicarious liability claims is denied.

Turning to that aspect of J. Luke's motion which seeks dismissal of plaintiffs' claims for negligent hiring and/or retention of Price, in order to establish a cause of action based on negligent hiring or retention it must be shown that the employer knew or should have known of the employee's propensity to engage in the conduct that gave rise to the injury (see, Honohan v Martin's Food of S. Burlington, 255 AD2d 627, 628 [1998]; Mary KK. v Jack LL., 203 AD2d 840, 842 [1994]). Here, the proof submitted in support of the motion is sufficient to satisfy J. Luke's initial burden to

demonstrate that, prior to the accident, it did not know or have reason to know that Price had any propensity to drive under the influence of alcohol. Although Price was apparently arrested for driving under the influence of alcohol while he was driving the company vehicle a few weeks prior to the subject accident, the evidence demonstrates that Price never advised J. Luke of the arrest and that J. Luke was not otherwise aware that any charges were pending against Price until after the subject accident occurred. Moreover, Price testified that his issues with alcohol only began to surface a short time before the accident and that he never drank alcohol while socializing with J. Luke employees or at company social functions. Under these circumstances, there is no proof of any prior circumstances that would have put J. Luke on notice that Price was inclined to drive while under the influence of alcohol (see, Taylor v Point at Saranac Lake, Inc., 135 AD3d 1147, 1149 [2016]; Steinborn v Shor v Touch N–Go Farms, Inc., 89 AD3d 830, 831 [2011]; Pinkney v City of New York, 52 AD3d 242, 243 [2008]). In opposition, plaintiffs were required to submit sufficient evidence to create a material question of fact as to circumstances that should have alerted J. Luke to any propensity of Price to drive under the influence of alcohol. Plaintiffs fail to offer any evidence on this issue whatsoever. Given plaintiff's failure to oppose J. Luke's motion in this regard, summary judgment dismissing the negligence claims against J. Luke is warranted.

For the foregoing reasons, it is

ORDERED that the motion for a default judgment against defendant James I. Price is granted as to the issue of liability, without costs, and it is further

ORDERED that the motion for summary judgment is granted in part, without costs, to the extent that all claims against defendant John L. Hodorowski are dismissed and all negligence claims against defendants J. Luke Construction Co. LLC and J. Luke Construction Inc. are dismissed, and

the motion is otherwise denied.

This shall constitute the Decision and Order of the Court. The original Decision and Order is being returned to the counsel for the plaintiffs who is directed to enter this Decision and Order and to serve counsel for the defendant with a copy of this Decision and Order with notice of entry. The Court will transmit a copy of this Decision and Order and the papers considered to the County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the provision of that rule regarding filing, entry, or notice of entry.

Dated: August 21, 2018

HON. CHRISTINA L. RYBA
Supreme Court Justice

8/28/18 AB