SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 56 SUFFOLK COUNTY

PRESENT:

Hon. Carmen Victoria St. George
Justice of the Supreme Court

LONNY ROSENBLUM and ABBY ROSENBLUM,

Plaintiffs,

-against-

DANIELLE VALENTINO, GREAT NECK NISSAN LLC, and JAMES CUSH

Defendants.

Index No.
611398/15

Motion Seq:
006 MD
008 Mot D
Decision/Order

The following electronically-filed and numbered papers were read upon this motion:

Notice of Motion/Order to Show Cause.....	126-141; 213-226
Answering Papers.....	167-172; 227-232
Reply.....	197-203; 235
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	

Defendant Great Neck Nissan LLC (Nissan) moves this Court for an Order granting summary judgment dismissal of the complaint and all cross-claims asserted against it in this motor vehicle injury action, pursuant to 49 USC § 30106 (a), known as the Graves Amendment (Motion Sequence 006). Plaintiffs oppose the requested relief.

Plaintiffs cross-move for an Order compelling Nissan to produce Joseph Valentino, one of its owners, for deposition, and to compel Nissan to "sufficiently respond" to discovery demands (Motion Sequence 008). Nissan opposes the relief requested in the cross-motion.

It is undisputed that the motor vehicle accident giving rise to this action occurred on October 1, 2014, at approximately 3:30-3:40 p.m., on the Northern State Parkway, in Nassau County New York. The chain-reaction rear-end accident involved four vehicles. Vehicle 1 was operated by non-party Desiree Aaron; Vehicle 2 was operated by plaintiff Lonny Rosenblum; Vehicle 3 was operated by defendant Danielle Valentino, and Vehicle 4 was operated by

defendant James Cush. Plaintiff Lonny Rosenblum claims that he suffered a number of injuries as a result of the subject accident, and his wife, Abby Rosenblum, sues derivatively.

Nissan's Summary Judgment Motion (Motion Sequence 006)

The Court recognizes that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact (***Andre v. Pomeroy,*** 35 NY2d 361[1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact (***Cauthers v. Brite Ideas, LLC,*** 41 AD3d 755 [2d Dept 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiff and co-defendants (***Makaj v. Metropolitan Transportation Authority***, 18 AD3d 625 [2d Dept 2005]).

The proponent of a summary judgment motion must tender sufficient evidence to demonstrate the absence any material issue of fact (***Winegrad v. New York University Medical Center***, 64 MY2d 851, 853 [1985]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Id.*) "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (***Alvarez v. Prospect Hospital***, 68 NY2d 320, 324 [1986]).

The Graves Amendment, enacted in 2005, is federal legislation preempting vicarious liability imposed by states on commercial lessors of vehicles (***Vehicle and Traffic Law § 388***). The Graves Amendment has been found to be constitutional, and it acts as a bar to an action against a rental or leasing company for injuries and/or damages based solely on a theory of vicarious liability (*see* ***Graham v Dunkley***, 50 AD3d 55 [2d Dept 2008]). The legislation reads, in pertinent part:

> (a) In general. An owner of a motor vehicle that rents or leases the vehicle to a person (or an affiliate of the owner) shall not be liable under the law of any State or political subdivision thereof, by reason of being the owner of the vehicle (or an affiliate of the owner), for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle *during the period of the rental* or lease, if--(1) the owner (or an affiliate of the owner) is engaged in the trade or business of renting or leasing motor vehicles; and (2) there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner) (***49 USC § 30106)*** (emphasis added).

A movant seeking summary judgment dismissal of the claims against it based upon the Graves Amendment must, *inter alia*, eliminate all triable issues of fact as to whether there was any lease agreement in effect on the date of the accident (***Cioffi v. S.M. Foods, Inc.***, 2019 NY Slip Op 09251 [2d Dept 2019]; ***Cioffi v. S.M. Foods, Inc.***, 129 AD3d 888 [2d Dept 2015]; ***Currie v. Mansoor***, 159 AD3d 797 [2d Dept 2018]; ***Lynch v. Baker***, 138 AD3d 695 [2d Dept 2016]).

Here, the complaint alleges negligence against all defendants in the ownership, operation, management, maintenance, supervision, use, control, inspection and repair of the defendants' vehicles. The Bills of Particulars also allege that the defendants were, among other allegations of negligence, negligent in failing to maintain their motor vehicles, "particularly the steering, braking, signaling devices and tires, in proper working condition. . ."

In support of its motion, Nissan submits, *inter alia*, the pleadings, the certified police accident report, the deposition testimony of defendant Danielle Valentino and that of Joseph Rello, Nissan's former rental manager, the first page of the rental agreement upon which it relies, a receipt for payment concerning the subject rental vehicle, a repair report for the subject vehicle following the accident, an inspection report for the vehicle, and New York State Department of Motor Vehicles literature concerning vehicle inspections.

Nissan argues that it is entitled to summary judgment pursuant to the Graves Amendment because it is in the business of renting motor vehicles; there is no negligence or criminal wrongdoing alleged against it; the vehicle operated by defendant Valentino had passed its state inspection less than one month prior to the accident that occurred on October 1, 2014, so Nissan was not negligent in maintaining the rental vehicle's brakes; the vehicle operated by Valentino "was rented at the time the subject accident occurred and . . . Ms. Valentino was an authorized driver of the rental vehicle."

Nissan submits the first page of the rental agreement, but both pages of the agreement were apparently introduced into evidence by plaintiff, as plaintiff's Exhibit 1, during the deposition of Nissan's rental manager, Joseph Rello. In fact, Mr. Rello was questioned about the terms of the rental agreement printed on the second page thereof. The Court also notes that both pages of the rental agreement had been exchanged with plaintiff prior to depositions, evidenced by plaintiff's counsel's inquiry as to its terms during Mr. Rello's deposition. There is no dispute that the rental agreement about which Mr. Rello was questioned is the agreement that Nissan relies upon in support of the instant motion. Mr. Rello identified it as Nissan's rental agreement pertaining to the car involved in the subject accident that was being driven by Danielle Valentino.

Mr. Rello further testified that Joseph Valentino is a co-owner of Nissan, and it is undisputed that Danielle is Mr. Valentino's daughter. It is further undisputed that Danielle Valentino was working at Nissan at the time of the subject accident. Mr. Rello identified Mr. Valentino's signature appearing at the bottom of the first page of the rental agreement. Mr. Valentino is listed as the "customer" according to the agreement, and Danielle Valentino is listed as an "additional driver."

The Graves Amendment protects rental/leasing companies during the period of the rental. In this case, the first page of the rental agreement raises a material question of fact as to whether there was a rental agreement in effect on the date of the accident: October 1, 2014. The section of the agreement entitled "Rental Vehicle Information" contains boxes for "Date and Time OUT" and "Date and Time DUE IN." The date and time that the vehicle was "out" is typewritten as "09/24/2014 09:32 AM." The date and time that the vehicle was "due in" is

typewritten as being "09/25/2014 0932 AM." Based on this information, the vehicle was a one-day/24-hour rental, due back on September 25, 2014, at 9:32 a.m.; therefore, the accident occurred outside of the time period listed on the rental agreement. While this would seem to settle the question, the section entitled "Rates Do Not Include Fuel" raises the prospect that the rental was for nine (9) days, which would include the accident date. Specifically, this section of the rental agreement contains pre-printed rows to fill in the hours, days, and weeks of the rental, plus a row to record the mileage. The hourly rate as reflected on the agreement was "$6.67 per hour," and the number of days of the rental is listed as being "9," at $20.00 per day, for a total of $180.00. Not only is the nine-day rental at odds with the date and time listed for the car's release and return (24 hours), but the $180.00 fee charged for the rental is incorrect if the hourly charge as listed is $6.67 per hour. At that hourly rate, the rental would have cost $1,440.72.

The terms of the rental agreement, paragraph 3, require the return of the rented vehicle to Nissan's office before the due date if the lessee wishes to extend the rental period, which must be accomplished by "written amendment." Nissan has failed to offer any proof that the rental period was extended; thus, the critical fact as to the duration of the rental, 24 hours versus 9 days, has not been established.

Although Mr. Rello was able to identify the rental agreement at his deposition, as well as the signature of Mr. Valentino thereon, Mr. Rello was unable to state who filled out the information typed on the rental agreement pertaining to the car that Danielle Valentino was driving at the time of the subject accident.

The foregoing evidence, standing alone, raises a critical issue of fact that must be resolved by the trier of fact who will have the opportunity to consider the evidence and assess the credibility of the witnesses presented. "Resolving questions of credibility, assessing the accuracy of witnesses, and reconciling conflicting statements are tasks entrusted to the trier of fact" (***Bravo v. Vargas***, 113 AD3d 579, 581 [2d Dept 2014]; see also ***Kahan v Spira***, 88 AD3d 964, 965-966 [2d Dept 2011]; ***Gille v Long Beach City School Dist.***, 84 AD3d 1022, 1023 [2d Dept 2011]; ***Ruiz v Griffin***, 71 AD3d 1112, 1115 [2d Dept 2010]).

The deposition testimony of Danielle Valentino compounds the critical issues of fact and credibility already raised by the first page of the rental agreement. She testified that the car she was driving at the time of the accident was a rental owned by Nissan, and that she had just rented the car on that day, October 1, 2014. This testimony is at odds with the dates listed on the rental agreement. The Court notes that Danielle Valentino was never shown a copy of the rental agreement at her deposition.

Also, it is undisputed that Danielle Valentino was only eighteen (18) years old on the date of the accident. According to the terms of the rental agreement, "Each Authorized Driver must be at least age 21 (except Customer, at least age 18) and possess a valid driver's license." Danielle Valentino was not the "customer;" her father, Joseph Valentino, is listed as the "customer." Danielle is listed as an "authorized driver," which she does not appear to be according to the terms of the rental agreement; therefore, an additional question of fact is raised

as to whether she was operating the vehicle involved in the accident in violation of the rental agreement.

The Court further notes that the first page of the rental agreement submitted by Nissan states that the vehicle that Danielle Valentino drove on the day of the accident had twelve (12) miles on it when it left Nissan on September 24, 2014 (Mileage OUT section). The New York State safety inspection documentation submitted by Nissan (Exhibit L) reveals that the subject vehicle had twenty (20) miles on its odometer on September 8, 2014, prior to the rental. The post-accident repair invoice for the subject vehicle dated October 1, 2014, also submitted by Nissan (Exhibit L), records the mileage on the vehicle as being 838 miles. Additional questions of fact and credibility are raised by these discrepancies in the documents submitted by the movant, Nissan.

Based upon the foregoing, it is this Court's determination that Nissan has failed to establish its *prima facie* entitlement to summary judgment as a matter of law. Accordingly, it is unnecessary to determine whether the plaintiffs' papers submitted in opposition are sufficient to raise a triable issue of fact (*see* ***Levin v Khan***, 73 AD3d 991 [2d Dept 2010]; ***Kjono v Fenning***, 69 AD3d 581[2d Dept 2010]).

A motion for summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (***Scott v. Long Island Power Authority***, 294 AD2d 348, 348 [2d Dept 2002]). With this principle in mind, Nissan's summary judgment motion is denied (Motion Sequence 006).

Plaintiffs' Cross-Motion to Compel (Motion Sequence 008)

Plaintiffs seek to compel the deposition of Joseph Valentino and to compel Nissan to "sufficiently respond to discovery demands." A trial Certification Order has not yet been issued in this case; accordingly, no note of issue/certificate of readiness has been filed. This matter next appears on this Court's compliance conference calendar on March 2, 2020.

Since Nissan's summary judgment motion has been denied as outlined above, it is reasonable to anticipate that Nissan will attempt to present evidence at trial relative to the Graves Amendment defense, in which case Nissan may wish to call Joseph Valentino, Nissan's co-owner, as a witness on its behalf to explain the contradictory information contained in the rental agreement that he signed as the "customer." Whether the Graves Amendment applies in this case depends upon the validity of the rental agreement that Nissan claims was in effect at the time of the accident. As noted, Nissan has failed to establish, *prima facie*, that the Graves Amendment applies herein. Mr. Rello, who already testified on behalf of Nissan, had no idea who filled in the information appearing on the rental agreement form; thus, Mr. Rello was insufficiently knowledgeable about the information contained in the agreement, especially as it relates to the critical duration of the lease, and it is reasonable to conclude that there is a substantial likelihood that Mr. Valentino possesses information that is material and necessary to the defense of this action; therefore, he should be deposed (***Gomez v. State of New York***, 106 AD3d 870 [2d Dept 2013]; ***Aronson v. Im***, 81 AD3d 577 [2d Dept 2011]; ***Zollner v. City of New York***, 24 AD2d 626 [2d Dept 1994]). That branch of plaintiffs' motion to compel Nissan to

produce Joseph Valentino for deposition is granted. Joseph Valentino's deposition shall be completed on or before February 28, 2020.

Nissan's claim that plaintiffs failure to request Joseph Valentino's deposition prior to Nissan making its summary judgment motion evidences plaintiffs' attempt to avoid summary judgment by claiming a need for more discovery is rendered unavailing considering the Court's determination that Nissan failed to sustain its *prima facie* burden.

As far as the paper discovery demanded by plaintiffs from Nissan, plaintiffs' demand for Nissan's operating agreement identifying the managing members is specifically denied. As for the other written discovery demanded by plaintiffs, it appears that Nissan has substantially complied with the written demands thus far, but now that Joseph Valentino's deposition has been ordered to be held, plaintiffs may inquire of Joseph Valentino concerning the written responses already provided by Nissan. Following the conclusion of Joseph Valentino's deposition, any party, including plaintiffs, may make any appropriate motions concerning discovery; therefore, that branch of plaintiffs' motion seeking to compel Nissan to "sufficiently respond" to discovery demands is denied without prejudice to renewal.

The foregoing constitutes the Decision and Order of this Court concerning Motion Sequences 006 and 008.

Dated: January 15, 2020
Riverhead, NY

CARMEN VICTORIA ST. GEORGE, J.S.C.

FINAL DISPOSITION [ ] NON-FINAL DISPOSITION [X]