SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LISA HEADLEY** **PART** **22M**

Justice

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DELFINO SANDOVAL,

Plaintiff,

- v -

P & A 665 RESTAURANT CORP. D/B/A GALAXY DINER, JUAN PONCE-UZIEL

Defendant.

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INDEX NO. 157985/2019

MOTION DATE N/A

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52

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

In this personal injury action, the movant-defendant, P & A 665 Restaurant Corp. d/b/a Galaxy Diner (defendant Galaxy), moves for summary judgment pursuant to *CPLR §3212*, to dismiss the complaint, brought by plaintiff, Delfino Sandoval, as against it.

Plaintiff, Delfino Sandoval, opposes and cross-moves, pursuant to CPLR 3126, seeking an order precluding defendant, Juan Ponce-Uziel (Ponce-Uziel), from offering any evidence in this action due to his alleged default.

For the reasons set forth below, the motion is denied and the cross motion is held in abeyance.

Background

The Parties

At all times relevant hereto, plaintiff was employed as a food delivery person for a mobile app called "Chowbus". At all relevant times herein, Ponce-Uziel was employed by Galaxy as a dishwasher and occasional delivery person.

Uziel's Employment with Galaxy

According to Galaxy, Ponce-Uziel, a former employee at Galaxy, lived a few blocks away from the Galaxy restaurant, and worked the 4:00 p.m. to 9:00 p.m. shift, five days per week. On May 24, 2019, Ponce-Uziel did not show up for his 4:00 p.m. shift at Galaxy but called the diner to say that something had happened, and that he did not know if he was going to be able to make it to work.

The Accident

According to Galaxy, on May 24,2019, the date of the accident, at approximately 3:50 p.m., Ponce-Uziel left his apartment, riding his personal bike, to get to work. Plaintiff was in the process of crossing from the north side of 49th Street in Manhattan, New York, to the south side of the same street. Plaintiff was crossing the street midblock, not at a crosswalk, when he was struck from the right side by Ponce-Uziel. Ponce-Uziel was operating an electric bicycle at that time. Ponce-Uziel told plaintiff his name.

Plaintiff's Deposition Testimony

During plaintiff's deposition, plaintiff was asked and testified to the following:

Q. [W]as there anything that indicated what company [Ponce Uziel] worked for?

A. He told me that he worked for Galaxy Restaurants?

Q. As a delivery driver?

A. Yes.

Q. Did he specifically say that he worked for them or did he say he was delivering on behalf of this restaurant or something else?

A. That he worked for them, for Galaxy Restaurant.

Q. So, I take it you had a conversation with the man at some point, correct?

A. Yes, after the accident.

* * *

Q. After him saying he worked for Galaxy, what else did you talk about?

A. No, that was it.

Q. Did he say anything about the accident?

A. Well, he called the restaurant to let them know that he had an accident.

Q. Did you hear the phone call he had with the restaurant?

A. He said that he was - - he finished or he finished the delivery, but it was going to take him a while to go back because he had an accident.

Q. Did he say anything else that you heard?

A. No.

(plaintiff tr at 50-51, NYCEF Doc. No. 40). Plaintiff was again asked and testified:

Q. [D]id [Ponce-Uziel] say that at the time he was riding his bike he was doing a delivery or coming from a delivery on behalf of Galaxy that day at that time?

A. Yes, he just finished doing a delivery and that he was going to go back late to work because he had an accident.

Q. And did he say specifically he finished a delivery for Galaxy Restaurant?

A. No. The phone call that he made to the restaurant, he told them that he already did the delivery and it was going to take him a while to come back.

(*id*. at 61-62).

Deposition of Steven Antonatos – Defendant Galaxy's Owner

On April 13, 2021, Steven Antonatos, co-owner of Galaxy was deposed, wherein he testified that Ponce-Uziel was employed at Galaxy as a dishwasher (Antonatos tr dated April 13, 2021 at 14). According to Antonatos, he became aware of the accident at issue "when [Ponce-Uziel] didn't show up for work" (*id*. at 16).

He testified as follows:

"Q. What time was he due to come into work?

A. His schedule was always at 4 o'clock.

* * *

Q. And how did you learn that an accident had occurred?

A. He called to tell us the stuff that had happened, because we were trying to figure out why he didn't show up, but he made a phone call and let us know something happen, and he didn't know if he was able to make it.

Q. Did he tell you what happened?

A. No, no specifics about it.

Q. Who did he speak to?

* * *

A. I think it was Elias that was there. I don't remember exactly.

* * *

Q. Did [Ponce] ultimately return to work at the diner, at some point, after you learned that this accident had occurred?

A. Yes, he did.

Q. Did you talk to him about the accident?

A. No.

Q. In May of 2019, did the Galaxy Diner provide any delivery services for the deliver[y] of its food?

A. Delivery services, yes.

* * *

Q. In May of 2019, how many people were employed in that capacity?

A. I don't remember.

Q. Can you approximate?

A. Approximately, maybe 3 or 4 during the whole thing.

Q. What were their names?

A. I don't recall them"

(Antonatos tr at 17-19). When asked if the three to four employees who made deliveries used bicycles to make those deliveries, Antonatos responded "Yes" (*id*. at 20), and that those bicycles were not owned by Galaxy (*id*.). Antonatos also testified that Ponce Uziel did make deliveries on behalf of the diner, and that he would use his own bicycle (*id*.). When asked if Ponce-Uziel made any deliveries on his bike during the month of May 2019 on behalf of Galaxy, Antonatos responded, "I couldn't answer that. That would just be speculating, but." (*id*. at 21). He was then asked

"Q. Do you have any way of determining, as you sit here today, whether [Ponce Uziel] made any deliveries on behalf of Galaxy Diner on May 24th, 2019?

* * *

A. No, No, I don't know"

(Antonatos tr at 21-22). Antonatos confirmed that he was not working at Galaxy on the date of the accident, i.e., May 24th 2019, but that his partner Elias would have been, and that their knowledge as to whether Ponce-Uziel was working in any capacity on behalf of Galaxy that day would be "about the same" (Antonatos tr at 23-24). He further confirmed that the payroll records would indicate whether Ponce-Uziel did in fact show up for work that day, which is recorded through a fingerprinting database (*id*. at 24-25).

Procedural History

On May 21, 2020, plaintiff filed a motion seeking a default judgment against Ponce-Uziel for his failure to answer the complaint (motion seq. no. 001). On September 23, 2020, the court denied the motion with leave to renew as the country was at the height of the Covid-19 pandemic; and the court was not issuing default judgments at that time (NYSCEF Doc. No. 18). However, the parties were advised that plaintiff may move for judgment when the court's procedures change (*id*.).

Thereafter, on April 6, 2021, plaintiff again moved for an order granting plaintiff a default judgment against Ponce-Uziel for failing to answer the complaint and sought to set the matter

down for an inquest and assessment of damages (motion seq. no. 002). By decision and order dated June 3, 2021, the court noted that plaintiff demonstrated that the summons and verified complaint were served on Juan Ponce-Uziel on September 23, 2019 at his last known address, and an affidavit of service was filed (NYSCEF Doc. No. 22). Plaintiff's counsel also submitted a letter dated April 6, 2020, to defendant advising of his default and requested that an answer be interposed (*id.*). As of the date of the decision and order, i.e., June 3, 2021, Ponce-Uziel failed to answer, appear or obtain an order from the court seeking to extend his time to answer, and the time to answer or appear had expired (*id.*).

The court found, however, that the "general claims alleged in the affirmation in support of the motion are insufficient to establish defendant's liability as to the alleged injuries. As such, plaintiff's motion for a default judgment is granted only to the extent that the defendant Juan Ponce-Uziel['s] default in appearing in this action *is noted*. All issues regarding the defendant's liability and damages therefore are to be decided at an Inquest" (*id.*).

Discussion

Defendant Galaxy's Motion for Summary Judgment

It is well settled that "'the proponent of a summary judgment motion 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'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], *rearg denied* 10 NY3d 885 [2008], quoting Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Once this requirement is met, the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012]).

Galaxy argues that it should be granted summary judgment because Ponce-Uziel was not acting within the scope of his employment at the time of the accident. Under the doctrine of *respondeat superior*, an employer may be vicariously liable for torts committed by an employee acting within the scope of the employment "so long as the tortious conduct is generally foreseeable and a natural incident of the employment" (*Kelly v Starr*, 181 AD3d 799, 801 [2d Dept 2020], quoting *Scott v Lopez*, 136 AD3d 885, 886 [2d Dept 2016]). The general rule is that an employee acts in the scope of his[/her] employment when he is acting in furtherance of the duties owed to [their] employer and where the employer is or could be exercising some control, directly or indirectly, over the employee's activities (*Lundberg v State of New York*, 25 NY2d 467, 470 [1969]). "An employer, however, cannot be held vicariously liable for its employee's alleged tortious conduct if the employee was acting solely for personal motives unrelated to the furtherance of the employer's business at the time of the incident" (*Gui Ying Shi v McDonald's Corp.*, 110 AD3d 678, 679 [2d Dept 2013]).

Galaxy claims that the accident occurred on Ponce-Uziel's way to work and not during the scope of making deliveries, which is not considered to be within the scope of employment, citing a number of older cases, primarily from the Third and Fourth Departments. However, the First Department has held that while generally an employer will "not [be] subject to respondeat superior liability when its employee was merely driving to and from work," an issue may be "raised as to whether the employee's operation of the car was within the scope of, and incidental to, his[/her]

employment" (*Baguma v Walker*, 195 AD2d 263, 264 [1st Dept 1993]; *see also Couillard v The Shaw Group, Inc.*, 2013 NY Slip Op 31807[U] [Sup Ct, NY County 2013]).

In *Baguma*, the court found, as here, that the "jury would be free to find that [defendant's] use of the vehicle on the day of the accident was not simply to convey him to work, but rather that it was necessary for [defendant] to bring the vehicle to the [building] for the benefit of the employer in conducting its business" (195 AD3d at 264). . More recently, the Second Department in *Dimitrakakis v Bridgecom Intl., Inc.* (70 AD3d 885, 886-887 [2d Dept 2010]), found, relying on *Baguma*, that the defendant employer failed to make a prima facie showing where the employee was required to provide his own automobile for the purpose of performing his job duties. There, the employee testified that though he was traveling from the office towards his home, he could not recall whether he intended to go straight home or make a stop to visit an existing or potential client (*id.*).

Here, Galaxy submits an unsworn statement taken of the defaulting party on October30, 2019, which states, among other things, that: (1) Ponce-Uziel used his "personal bike to make the food deliveries for Galaxy Diner;" (2) he "rode the bike to work and used it to do the deliveries;" and (3) he left his "apartment at 3:50 p.m. to go to work for Galaxy Diner on 5/24/19" when he got into the accident with plaintiff.

Plaintiff counters by submitting the affidavit of plaintiff and plaintiff's wife, Yasmin Salazar.[1] Specifically, plaintiff avers that "[a]fter the accident occurred[,] Defendant Juan Ponce Uziel told me he had just completed a delivery and was returning to [Galaxy] to continue his work day" (Sandoval aff dated October 21, 2021, ¶ 4. NYSCEF Doc. No. 50). Further, plaintiff avers that he "also heard [Ponce Uziel] call [Galaxy] to inform that that he had been in an accident after having completed a delivery and that he was unsure when he could return" (*id.*, ¶ 5). Salazar's affidavit avers that she "came to the accident shortly after it occurred and while Juan Ponce Uziel was still at the location" (Salazar aff, dated October 21, 2021, ¶ 4, NYSCEF Doc. No. 50). She also avers that "[w]hile [she] was at the location, [Ponce Uziel] told me he had just completed a delivery and was returning to [Galaxy] to continue his work day" (*id.*, ¶ 5), and further that she "also heard [Ponce Uziel] call [Galaxy] to inform that that he had been in an accident after having completed a delivery and that he was unsure when he could return" (*id.*, ¶ 6).

Plaintiff argues that Ponce Uziel's statement may not be used to support defendant's motion in granting summary judgment as he is a party in default and reliance on this statement "is wholly inequitable and goes against all principles of equity under the law." However, plaintiff contends that Ponce Uziel's statement may be admissible as evidence of liability as a party admission and as a present sense impression. Plaintiff may not have two bites of the apple, particularly where plaintiff seeks, via his cross-motion, to preclude Ponce Uziel from offering any evidence in this action.

Regardless, even if the court were to exclude Ponce Uziel's statement, there remains a question of fact as to whether Ponce Uziel was acting within the scope of his employment simply by using his bike as a means to get to work to make deliveries. Anonatos testified that employees who made deliveries used their own bicycles, and while he could not testify to the specifics of May 24, 2019, he did confirm that Ponce Uziel did at times make deliveries on Galaxy's behalf. Therefore, as in *Baguma*, there remains a question of fact as to whether Ponce-Uziel's use of his

[1] Both affidavits were taken in Spanish but were translated by Ruiny Ferreira, a Spanish-English interpreter and paralegal who works with plaintiff's counsel's Spanish clients, who submits an affidavit declaring the truth of the affidavits' translations (Ferriera aff, dated October 26, 2021, NYSCEF Doc. No. 50).

personal bicycle was a necessary part of his job and therefore used within the scope of his employment such that Galaxy may be vicariously liable. Accordingly, the motion by Galaxy for summary judgment is denied.

Plaintiff's Cross Motion

Plaintiff seeks to preclude, pursuant to CPLR 3126, defendant Ponce Uziel from providing any evidence in this action due to his default.

CPLR 3126 provides

> "If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:
>
> 1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
>
> 2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or
>
> 3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party."

Contrary to Galaxy's argument, judicial estoppel does not apply here (*see Becerrill v City of N.Y. Dept. of Health & Mental Hygiene*, 110 AD3d 517, 519 [1st Dept 2013] [explaining that judicial estoppel precludes a party from taking a given legal position only where the party took a contrary position in a prior proceeding]).

Before a court invokes the drastic remedy of striking a pleading, or even of precluding all evidence, there must be a clear showing that the failure to comply with a court order was willful and contumacious (*Brigham v Jaffe*, 189 AD3d 475 [1st Dept 2020]). Here, plaintiff's served Ponce-Uziel at his last known address, which was at his parent's residence located in Brooklyn, New York. However, Antonatos testified and Ponce-Uziel's statement dated October 30, 2019, indicate that his home address is "543 West 49th Street, Apartment # 13, New York, NY 10019." It is not clear whether plaintiff ever attempted to personally serve Ponce-Uziel at this address.

The court, therefore orders, *sua sponte*, in the interest of justice, that a traverse hearing is necessary to determine whether substituted service was properly effected such that Ponce-Uziel's failure to appear can be found willful and contumacious warranting preclusion (*see Poree v Bynum*, 56 AD3d 261, 261 [1st Dept 2008]) and/or to determine if vacatur of the default judgment is proper if defendant Ponce-Uziel was not properly

served. Accordingly, the cross motion is held in abeyance pending the outcome of the traverse hearing.

Conclusion

Accordingly, it is

ORDERED that the motion by defendant, P & A 665 Restaurant Corp. d/b/a Galaxy Diner, for summary judgment is DENIED; and it is further

ORDERED that his matter shall be set down for a traverse hearing on the issue of service of process with respect to defendant Juan Ponce-Uziel to take place **in person on August 16, 2022, at 10:30 a.m., Part 28, Room 122**; and it is further

ORDERED that the cross motion by plaintiff, Delfino Sandoval is held in abeyance pending the outcome of the traverse hearing; and it is further

ORDERED that, within 14 days of the entry of this order, movant-defendant shall serve a copy of this order, with notice of entry, upon all remaining parties; and it is further

ORDERED that any requested relief sought not expressly addressed herein has nonetheless been considered and is denied.

This constitutes the decision and order of the court.

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6/14/2022	LISA HEADLEY, J.S.C.
DATE	

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		[ ] REFERENCE