

SCAN

SHORT FORM ORDER

MOD

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

GOVERNMENT EMPLOYEES INSURANCE COMPANY,

TRIAL/IAS PART 13

Plaintiff(s),

INDEX NO. 2852/05

- against -

MOTION SEQUENCE  
NO. 3 & 4 & 5

PHILADELPHIA INDEMNITY INSURANCE COMPANY,  
NATIONAL CAR RENTAL, ALAMO FINANCING, LP,  
VANGUARD CAR RENTAL USA INC., STEPHANIE  
MOORE, an infant by her Father and Natural Guardian  
GREGORY MOORE and GREGORY MOORE, Individually,  
JONATHAN GRIERSON, an infant by his Mother and  
Natural Guardian, NIDIA DONE and NIDIA DONE,  
Individually, EMMANUEL LUNA and NALLIBE LUNA,

MOTION SUBMISSION  
DATE: April 12, 2006

Defendant(s).

The following papers read on this motion:

Notice of Motion	X
Notice of Cross Motion	XX
Affidavit in Opposition	X
Affirmation in Opposition	X
Reply Affirmation	X

Upon the foregoing papers, the motion by the defendant Philadelphia Indemnity Insurance Company (hereinafter referred to as Philadelphia Insurance) for an Order pursuant to CPLR 320 [sic] seeking renewal, pursuant to CPLR 2221, and upon renewal summary judgment pursuant to CPLR 3211 dismissing plaintiff's complaint; the cross motion by the plaintiff Government Employees Insurance Company (hereinafter referred to as GEICO) for an Order pursuant to CPLR §3001 (1) declaring that defendant, National Car Rental, defendant Alamo Financing, LP and defendant Vanguard Car Rental USA Inc., are obligated, individually and/or through their insurer, to provide primary coverage in accordance with their obligations as the vehicle owner, in connection to the subject automobile accident, having occurred on June 10, 2004 together with a further Order, (2) declaring that defendants, National Car Rental, Alamo Financing, LP and Vanguard Car Rental USA Inc. either individually or through their primary policy of insurance, be declared primarily obligated to provide coverage for all lawsuits arising out of the subject accident, having occurred on June

10, 2004, together with a further Order (3) declaring that the plaintiff herein, Government Employees Insurance Company, be reimbursed in total, for all defense costs, disbursements and other payments made in connection to the defense of the renter of the subject vehicle, Nallibe Luna and her permissive user, Emmanuel Luna, in connection to any suit arising out of the subject accident, based upon the primary obligation of the vehicle owner (National/Alamo/Vanguard), as the owner of the rental vehicle, either individually or through its insurers, is obligated to provided primary coverages for such a vehicle, together with a further Order, (4) having the Court schedule the above matter for a Hearing to determine all amounts owed to plaintiff by defendants, National Car Rental, Alamo Financing, LP, and Vanguard Car Rental USA Inc. for defense costs, disbursements and other expenses that were the obligation of National/Alamo/Vanguard, as vehicle owner, together with a further Order, (5) declaring that GEICO's obligation in connection to any underlying personal injury lawsuits is solely as an excess insurer and that GEICO has no obligation to indemnify its insureds, Emmanuel Luna and Nallibe Luna unless and until the limits of either defendants self-insured retention or primary coverages have been exhausted in their entirety and the cross-motion by the defendants Philadelphia Insurance, National Car Rental, Alamo Financing, LP and Vanguard Car Rental USA Inc. for an Order pursuant to CPLR §3001 and §3211 seeking (A) A declaration that the plaintiff, Government Employees Insurance Company, (hereinafter referred to as "GEICO") is obligated to provide primary coverage in accordance with their obligations as insurer to the defendant, Nallibe Luna, in that she permitted the "UNAUTHORIZED" operation of a vehicle owned by Alamo Finance LP and rented by National Car Rental, by the defendant, Emmanuel Luna; along with a further order of (B) A declaration that plaintiff, GEICO, be declared primarily obligated to provide insurance coverage for all lawsuits arising from their insured's permitting the "UNAUTHORIZED" operation of the vehicle owned by Alamo Finance LP and rented by National Car Rental, and which is alleged to have resulted in the subject accident of June 10, 2004; along with a further order of © A declaration that defendants, Nallibe Luna and Emmanuel Luna fully indemnify, in common law and in contract, and otherwise hold the defendants, Alamo Finance LP, National Car Rental and Vanguard Car Rental, harmless for having permitted and engaged in the "UNAUTHORIZED" operation of the vehicle owned by Alamo Finance LP and rented by National Car Rental, which is alleged to have resulted in the subject accident on June 10, 2004; along with a further order of (D) A declaration that defendants Alamo Finance LP, National Car Rental and Vanguard Car Rental, obligations to any underlying personal injury lawsuits are as an excess insurer to that coverage provided by GEICO, and that defendants, Alamo Finance LP, National Car Rental and Vanguard Car Rental, have no obligation to indemnify either Nallibe Luna and/or Emmanuel Luna, unless and until the limits of GEICO's insurance policy has been exhausted in its entirety, are all determined as hereinafter provided:

The respective applications arise out of a rental of an automobile by the defendant Nallibe Luna from the defendant National Car Rental on June 9, 2004. Amongst other things, the rental agreement set forth that the rental vehicle may only be used by an authorized driver and defined an authorized driver as the rentor and an additional driver if an additional fee was paid. The rental vehicle was driven by the defendant Nallibe Luna's son the defendant Emmanuel Luna with the permission of the defendant Nallibe Luna (see Notice to Admit) and was involved in a motor vehicle accident on June 10, 2004 at the intersection of Crossbay Boulevard and 86th Road, Queens, New York. Two of the passengers in the vehicle both defendants herein Stephanie Moore and Jonathan Grierson were injured in the accident and have commenced separate actions against Nallibe Luna and Emmanuel Luna. The defendant Philadelphia Insurance is the insurance carrier for the rental agency and the plaintiff GEICO is the insurer for Nallibe Luna. Based upon Philadelphia Insurance's position that its policy is an excess insurance policy rather than a primary policy, GEICO has appeared for the respective Luna defendants in the respective actions. The instant actions are brought to determine the priority of insurance coverage.

In an extensive examination of the issue of insurance coverage, the Court in **Lancer Insurance**

**Company v Republic Franklin Insurance Company**, 304 AD2d 794, 759 NYS2d 734 (Second Dept., 2003) stated:

"Vehicle and Traffic Law §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." In *Motor Veh. Ace. Indem. Corp. v Continental Natl. Am. Group Co.* (35 NY2d 260 [1974]), the Court of Appeals held that where the lessee of a rental vehicle permits another person to operate it, the rental company is deemed to have constructively consented to such use, even where the lessee violated the rental agreement by entrusting the rental car to another. The Court of Appeals recently reaffirmed this rationale in *Murdza v Zimmerman* (99 NY2d 375 [2003]), explaining that its finding of constructive consent in *Motor Veh. Acc. Indem. Corp. v Continental Natl. Am. Group Co.* (*supra*) "rested, in part, on the public policy concerns surrounding the large number of vehicles placed on the road by businesses that rent cars to others for profit, and the inevitability that these vehicles will 'become involved in their fair share of accidents' " (*Murdza v Zimmerman, supra at 380, quoting Motor Veh. Acc. Indem. Corp. v Continental Natl. Am. Group Co., supra at 263*). The Court of Appeals has also expressed concern that restricting a rental company's liability as owner of the vehicle to the negligence of authorized drivers only could leave an injured victim without the "recourse of a financially responsible defendant" contemplated by Vehicle and Traffic Law §388, in violation of the public policy of this State (*Murdza v Zimmerman, supra' see Motor Veh. Acc. Indem. Corp. v Continental Natl. Am. Group Co., supra at 264*). Accordingly, the fact that Massie was the only individual expressly authorized to operate the rental car in the case at bar does not make Peyton a nonpermissive user as a matter of law.

Furthermore, the Supreme Court's reliance upon the *Masara* decision was misplaced. *Masara* involved a situation where a self-insured automobile rental company was seeking to require the lessee of its vehicle, and her father, who she had permitted to operate the vehicle, to indemnify it for property damage settlements. Notably, the *Masara* Court's decision that the rental company could seek full indemnification from the lessee and her father rested primarily upon the fact that Vehicle and Traffic Law §370, which requires rental companies to obtain a minimum amount of coverage for bodily injury, does not specify a minimum insurance requirement for property damage. *Masara* cannot be interpreted as supporting the proposition that a rental company's insurer has no obligation to provide coverage, in accordance with its policy, for personal injuries caused by the negligence of a third party driving the rental car with the permission of the lessee. To the extent that our decision in *AIU Ins. Co v ELRAC, Inc.* (287 AD2d 668 [2001]) may support a contrary conclusion, it should not be followed.

We note, however, that the "linchpin" to a finding that a rental company has constructively consented to the use of its vehicle is "the third-party's driver's permissive use vis-a-vis the lessee" (*Murdza v Zimmerman, supra at 381*). If the rental car is operated without the lessee's consent, "the third-party's

operation would have been that of a thief-the antithesis of a permissive user" (*id.*) Thus, in order to find permissive use, there must be "a consensual link between the negligent operator and one whose possession of the vehicle is authorized" (*id.*)" Although Vehicle and Traffic Law §388 creates a strong presumption that the driver of a vehicle is operating it with the owner's consent, which can only be rebutted by substantial evidence (*see Murdza v Zimmerman, supra; Matter of Allstate Indem. Co. v Nelson, 285 AD2d 545 [2001]; Matter of General Acc. Ins. Co. v Bonfont, 277 AD2d 379 [2000]; Leonard v Karlewicz, 215 AD2d 973 [1995]*), the existence of permission and consent normally presents a question of fact for the jury (*see Matter of Allstate Indem, Co. v Nelson, supra*). Here, the record discloses an issue of fact as to whether Peyton was operating the rental car with the express or implied permission of Massie. Since the issue of whether Peyton was a permissive user cannot be determined as a matter of law, and neither insurance company would be required to provide coverage if Peyton operated the vehicle without Massie's consent, it would be premature to grant summary judgment to either insurer."

**Lancer Insurance Company v Republic Franklin Insurance Company, supra at 796-797**

As the Court stated heretofore, the rental vehicle was used by Emmanuel Luna with the permission of Nallibe Luna pursuant to the defendant's Notice to Admit (*see, GEICO Exhibit C*).

Based upon all of the foregoing, those portions of GEICO's cross-motion which seek an Order declaring that defendant, National Car Rental, defendant Alamo Financing, LP and defendant Vanguard Car Rental USA Inc., are obligated, individually and/or through their insurer, to provide primary coverage in accordance with their obligations as the vehicle owner, in connection to the subject automobile accident, having occurred on June 10, 2004 together with a further Order declaring that defendants, National Car Rental, Alamo Financing, LP and Vanguard Car Rental USA Inc. either individually or through their primary policy of insurance, be declared primarily obligated to provide coverage for all lawsuits arising out of the subject accident, having occurred on June 10, 2004, together with a further Order declaring that GEICO's obligation in connection to any underlying personal injury lawsuits is solely as an excess insurer and that GEICO has no obligation to indemnify its insureds, Emmanuel Luna and Nallibe Luna unless and until the limits of either defendants self-insured retention or primary coverages have been exhausted in their entirety, are all respectively **granted**. Those branches of the defendants Philadelphia Insurance, National Car Rental, Alamo Financing, LP and Vanguard Car Rental USA, Inc. cross-motion which seeks an Order of a declaration that the plaintiff, Government Employees Insurance Company, (hereinafter referred to as "GEICO") is obligated to provide primary coverage in accordance with their obligations as insurer to the defendant, Nallibe Luna, in that she permitted the "UNAUTHORIZED" operation of a vehicle owned by Alamo Finance LP and rented by National Car Rental, by the defendant, Emmanuel Luna; along with a further order of a declaration that plaintiff, GEICO, be declared primarily obligated to provide insurance coverage for all lawsuits arising from their insured's permitting the "UNAUTHORIZED" operation of the vehicle owned by Alamo Finance LP and rented by National Car Rental, and which is alleged to have resulted in the subject accident of June 10, 2004 with a further order of a declaration that defendants Alamo Finance LP, National Car Rental and Vanguard Car Rental, obligations to any underlying personal injury lawsuits are as an excess insurer to that coverage provided by GEICO, and that defendants, Alamo Finance LP, National Car Rental and Vanguard Car Rental, have no obligation to indemnify either Nallibe Luna and/or Emmanuel Luna, unless and until the limits of GEICO's insurance policy has been exhausted in its entirety, are all respectively **denied**. That branch of the application which seeks an Order of a declaration that defendants, Nallibe Luna and Emmanuel Luna fully indemnify, in common law and in contract, and

otherwise hold the defendants, Alamo Finance LP, National Car Rental and Vanguard Car Rental, harmless for having permitted and engaged in the "UNAUTHORIZED" operation of the vehicle owned by Alamo Finance LP and rented by National Car Rental, which is alleged to have resulted in the subject accident on June 10, 2004, is granted based upon a lack of opposition which is tantamount to consent.

Those portions of GEICO's application which seek an Order declaring that the plaintiff herein, Government Employees Insurance Company, be reimbursed in total, for all defense costs, disbursements and other payments made in connection to the defense of the renter of the subject vehicle, Nallibe Luna and her permissive user, Emmanuel Luna, in connection to any suit arising out of the subject accident, based upon the primary obligation of the vehicle owner (National/Alamo/Vanguard), as the owner of the rental vehicle, either individually or through its insurers, is obligated to provided primary coverages for such a vehicle, is granted to the extent that the Court will conduct a **hearing on July 27, 2006 at 9:30 a.m. in Part 13, Nassau County Supreme Court** to determine the amount of costs, disbursements and fees incurred in relation to the defense of the action.

Based upon the foregoing, Philadelphia Insurer's application for an Order pursuant to CPLR 320 seeking renewal, pursuant to CPLR 2221, and upon renewal summary judgment pursuant to CPLR 3211 dismissing plaintiff's complaint, is denied as moot.

SO ORDERED.

DATED:

*6/21/2006*

*Roy S. Nelson*  
.....  
J.S.C.

**ENTERED**

JUN 27 2006

NASSAU COUNTY  
COUNTY CLERK'S OFFICE