To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.

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MELINDA ROLFS,

Plaintiff,

-against-

JOSEPH MEDINA and ARILEYDA M. ORTIZ,

Defendant(s).

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JOSEPH MEDINA and ARILEYDA M. ORTIZ,

Third-Party Plaintiff,

-against-

MARK ROLFS,

Third-Party Defendant.

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DECISION & ORDER
Index No. 59515/2017
Seq. # 3

The following papers numbered 1 to 18 were read on Plaintiff's motion for summary judgment on the issue of liability:

Notice of Motion/Affirmation in Support/Exhibits A-H	1-10
Affirmation in Opposition/Exhibits A	11-12
Reply Affirmation/Exhibits A-D	13-17

Factual and Procedural Background

The plaintiff, Melinda L. Rolfs ("Rolfs") commenced this action on June 23, 2017, to recover damages for injuries she allegedly sustained in a motor vehicle accident which occurred on April 23, 2017, when Joseph Medina ("Medina") made a left turn at the intersection of North Goodwin Avenue and East Main Street in Elmsford, New York, and collided with the plaintiff's vehicle in which she was a passenger.

The plaintiff now files the instant motion for an order pursuant to CPLR 3212 granting summary judgment against the defendants on the issue of liability; pursuant to CPLR 1412, dismissing the defendants Joseph Medina and Arileyda Ortiz's first and fourth affirmative defenses; and setting the matter down for trial on the issue of damages. The third-party defendant, Mark Rolfs filed a cross-motion, which by Decision and Order dated September 18, 2018, this Court (Ruderman, J.) found to be untimely and denied.

The plaintiff argues that no genuine question of fact exists as to Medina's negligence and that his negligence is the sole proximate cause of the accident because Fuentes made a left turn into the path of an oncoming vehicle when it was hazardous to do so causing a collision while he had an unobstructed view of oncoming traffic in violation of Vehicle & Traffic Law §1141. In opposition, the defendants argue that a genuine issue of material fact still remains as to whether or not Rolfs exercised reasonable care to avoid the collision and whether Rolfs' vehicle was travelling at an excessive speed. The defendants also argue that Rolfs' motion is procedurally defective because she failed to include the pleadings of the third-party action, the depositions were not signed and the police report is uncertified and contains hearsay.

Upon review of the facts and relevant case law, the Court hereby grants Rolfs' motion for summary judgment on the issue of liability, but denies that portion of the motion to dismiss the defendants' first and fourth affirmative defenses.

In support of the motion, Rolfs submitted her deposition and Medina's deposition, a police report, and copies of the pleadings of the plaintiff's action.

Discussion

A party moving for summary judgment bears the initial burden of affirmatively demonstrating its entitlement to summary judgment as a matter of law (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). To demonstrate its entitlement to relief, the moving party must come forward with evidentiary proof that establishes the absence of any material issues of fact, (*see McDonald v Mauss*, 38 AD3d 727, 728 [2d Dept 2007]). Once the moving party has established its prima facie entitlement to summary judgment, the burden shifts to the opposing party to submit evidentiary proof in admissible form to establish material issues of fact (*see Alvarez*, 68 NY2d at 324; *Winegrad,* 64 NY2d at 853).

The defendants assert that the plaintiff's motion should be dismissed because she failed to include a copy of the third-party pleadings with her motion. However, "[n]otwithstanding that CPLR 3212(b) requires that motions for summary judgment be supported by a copy of the pleadings, CPLR 2001 permits a court, at any stage of an action, to "'disregard a party's mistake, omission, defect, or irregularity if a substantial right of a party is not prejudiced'" (*see Wade v Knight Transp., Inc.*, 151 AD3d 1107, 1109 [2dfd Dept 2017]). Here, the record is sufficiently complete and the defendants/third-party

plaintiffs have not been prejudiced by the plaintiff's failure to include the pleadings. Furthermore, since this action and motion was filed electronically, the Court has access to all documents in the file and the plaintiff rectified her error by submitting a copy of the pleadings with her reply papers (*see Jones, LLP v Sitomar*, 139 AD3d 805 [2d Dept 2016]).

With regard to the unsigned transcripts, the Second Department has found that unsigned transcripts submitted in support of a summary judgment motion, once certified by the stenographer and unchallenged in accuracy by the opponents, are admissible and should be considered by the Court, on the motion. (*Thomas v City of New York*, 124 AD3d 872 [2d Dept 2015]; *Montalvo v United Parcel Service, Inc.*, 117 AD3d 1004 [2d Dept 2014]). The deposition transcripts, although unsigned, were certified by the stenographer/reporter The Courts have further found that the motion proponents' unsigned depositions, submitted in support of their motions, were admissible under CPLR 3116(a), since they are submitted by the party deponents themselves and accordingly, are adopted as accurate by those deponents (*Pavane v Marte,* 109 AD3d 970 [2d Dept 2013]; *David v Chong Sun Lee*, 106 AD3d 1044 [2d Dept 2013]).

The plaintiff's attorney also submitted a letter which was sent to opposing counsel requesting that the deposition transcript be signed and returned within sixty days or be deemed signed pursuant to CPLR 3116. Therefore, the transcript can be used as if fully signed (*see Rosenblatt v St. George Health and Racquetball Associates, LLC*, 119 AD3d 45 [2d Dept 2014]).

Rolfs alleges that Medina was negligent as a matter of law by making a left turn into an intersection when it was hazardous to do so in violation of New York State Vehicle and Traffic Law §1141, which states in pertinent part that:

> "The driver of a vehicle intending to turn to the left within an intersection or into an alley, private road, or driveway shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard." VTL §1141.

"A plaintiff driver is entitled to judgment as a matter of law on the issue of liability if he or she demonstrates that the sole proximate cause of an accident was the defendant driver's violation of VTL §1141 in turning left directly into the path of the plaintiff's oncoming vehicle which was lawfully present in the intersection" (*see Gause v Martinez*, 91 AD3d 595, 596 [2d Dept 2012]). However, there may be more than one proximate cause of an accident and the proponent of a summary judgment motion bears the burden of establishing freedom from comparative negligence as a matter of law (*Id*), since a driver with a right-of-way also has a duty to use reasonable care to avoid a collision (*see Attl v Spetler*, 137 AD3d 1176, 1176 [2d Dept 2016]). Nevertheless, "a driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision" (*Id*); *see also Smith v. Omanes*, 123 AD3d 691, 691 [2d Dept 2014]).

The Second Department has also held that "[a] driver is negligent if he or she has failed to see that which, through the proper use of senses, should have been seen" (*see Berner v Koegel*, 31 AD3d 591, 592 [2d. Dept 2006]). "The operator of a vehicle with the

right-of-way is entitled to assume that the opposing driver will obey the traffic laws requiring him or her to yield" (*see Gause*, 91 AD3d at 596).

In this case, Rolfs claims that by Medina's failing to yield the right of way to her vehicle approaching from the opposite direction, and his failing to see her vehicle which should have been seen with proper use of his senses, constituted negligence as a matter of law and was the sole proximate cause of the accident.

Since the evidence shows that Medina did not have the right of way when making his left turn, admitted to not seeing the vehicle prior to beginning to execute his turn, had an unobstructed view of traffic and proceeded into the intersection, the Court finds that Rolfs has established a prima facie showing of entitlement to judgment as a matter of law. The burden now shifts to the defendants to set forth evidentiary proof establishing the existence of a material issue of fact.

In opposition to Rolfs' motion, the defendants submit an attorney's affirmation and the deposition testimony of the Rolfs' husband, Mark Rolfs, and assert that there are issues of material fact as to whether Mark Rolfs was comparatively negligent for failing to brake and/or avoid the collision and for speeding. The defendants argue that there are triable issues of fact as to how the accident occurred, including who had entered the intersection first, and whether Mark Rolfs began his left-turn at a time when Medina's vehicle was not within the intersection and not so close as to constitute an immediate hazard.

However, "[t]he right of an innocent passenger to an award of judgment on the issue of liability against one driver is not barred or restricted by potential issues of

comparative fault as between that driver and the driver of another vehicle involved in the accident" (*Rodriguez vFarrell*, 115 AD3d 929 [2d Dept 2014]).

Medina also disregards the fact that Mark Rolfs, who had the right of way was entitled to anticipate that Medina would obey the traffic laws requiring him to yield (*see Gause*, 91 AD3d at 596; *Yelder*, 64 AD3d at 764; *see* Vehicle and Traffic Law § 1141). The courts have held that "a driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision" (*see Attl v Spetler*, 137 AD3d 1176, 1176 [2d Dept 2016], *quoting Yelder v Walters*, 64 AD3d 762, 764 [2d Dept 2009]) [citations omitted]. Even if the vehicle failed to brake or avoid the collision, an error of judgment or wrong choice of action is not negligence when one is called upon to act quickly in the face of sudden and unexpected circumstance which leave little or no time for thought, deliberation or consideration. (14 N.Y.Prac., New York Law of Torts §7:15; *Rivera v New York City Transit Authority*, 77 NY2d 322, 327 [1991]).

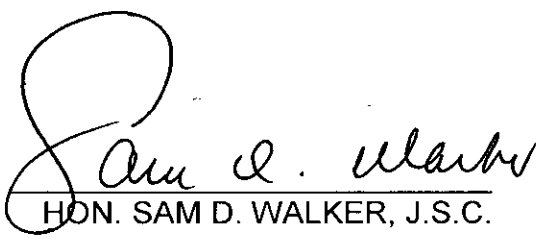
Additionally, the defendants' assertion that the plaintiff's vehicle was speeding when the accident occurred is mere speculation and not supported by the evidence. Medina testified that he could not estimate the speed at which Rolfs' vehicle was travelling. Therefore, that argument is insufficient to defeat summary judgment. (*see Batts v Page*, 51 A.D.3d 833, 834 [2d Dept 2008]; *McCain v Larosa*, 41 AD3d 792, 793 [2d Dept 2007]; *Meliarenne v Prisco*, 9 AD3d 353, 354 [2d Dept 2004]). Therefore, the Court finds that the defendants have not raised an issue of material fact to rebut the plaintiff's prima facie showing of entitlement to judgment as a matter of law.

Accordingly, it is

ORDERED that the plaintiff's motion for summary judgment on liability is GRANTED; and it is further

ORDERED that the defendants' affirmative defenses as to comparative negligence are dismissed. The parties are directed to appear in the Settlement Conference Part in courtroom 1600 on February 5 at 9:15 a.m., to schedule a date for a trial on damages.

Dated: White Plains, New York
December 31, 2018



HON. SAM D. WALKER, J.S.C.