SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
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RAUL A. FONTAINE,

Plaintiff,

-against-

ALEXANDER S. MCLAY,

Defendant.
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DECISION & ORDER

Index No.: 31222/2017

(Motion# 1)

Sherri L. Eisenpress, A.J.S.C.

The following papers, numbered 1 through 4, were considered in connection with Plaintiff's Notice of Motion for an Order, pursuant to *Civil Practice Law and Rules* § 3212, granting Plaintiff partial summary judgment on the issue of liability, and upon such Judgment setting this matter down for an immediate assessment of damages:

PAPERS	**NUMBERED**
NOTICE OF MOTION/AFFIRMATION IN SUPPORT/EXHIBITS "A-G"	1-2
AFFIRMATION IN OPPOSITION	3
AFFIRMATION IN REPLY	4

Upon a careful and detailed review of the foregoing papers, the Court now rules as follows:

This personal injury action was commenced by Plaintiff on March 17, 2017, with the filing of the Summons and Complaint through the NYSCEF system. Issue was joined as to Defendant Alexander McLay with the filing of an Answer through the NYSCEF system on April 3, 2017. The parties engaged in discovery including the examinations before trial and a Note of Issue was filed on April 12, 2018.

The action arises from an accident which occurred on January 13, 2017, at approximately 6:00 p.m., on East Route 59, approximately 250 feet west of College Avenue, in the Town of Clarkstown, in the far right west-bound lane. In the moments prior to the subject

accident, the Defendant struck a stopped vehicle in the rear (which is not part of this lawsuit). Defendant remembered that his vehicle came to a stop but could not recall for how long it was stopped before moving again. After his vehicle came to a stop, Defendant testified that "I put my car in park, or so I thought, and started to get out of my car." Defendant conceded that the engine was still running and that he did not attempt to engage the parking brake prior to exiting his vehicle. He claims that as he got out of his car, he tripped and fell and hit his head on the road. He then observed his vehicle move backwards but did not observe the contact with Plaintiff's vehicle, which was stopped behind it. After hearing the contact, Defendant did observe that the rear of his vehicle had made contact with the front of Plaintiff's vehicle. Defendant concedes that he told the police that he placed his vehicle in park and exited the vehicle when it began to move in reverse, striking the front of Vehicle #1.

Plaintiff testified as to the sequence of events as follows: he observed a red traffic light ahead of him; he observed the first accident in which the Defendant struck another car in the rear; a car which had been between the Plaintiff and the Defendant moved out of the way and to the left; before Plaintiff could react, the Defendant's vehicle backed into the Plaintiff's car. Plaintiff's testimony differed from that of Defendant in that Plaintiff states that the Defendant was within his vehicle the entire time from the first impact, through the second impact with his vehicle. Plaintiff claims that Defendant attempted to exit his vehicle after contact with his vehicle, during which he was caused to fall to the ground.

Plaintiff timely moves for summary judgment and argues that under either Plaintiff's or Defendant's version of events, Defendant is unable to provide a non-negligent explanation for striking Plaintiff's stopped vehicle when it moved backwards. He claims that Defendant violated New York VTL 1210(a) which states that "no person driving...a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition, removing key from the vehicle and effectively setting the brake thereon..." Alternatively, Plaintiff argues that VTL 1211(a) was violated which provides that "the driver of a vehicle shall

not back the same unless such movement can be made with safety and without interfering with other traffic."

In opposition thereto, Defendant submits an attorney affidavit in which counsel avers that the subject occurrence was "a pure accident without negligence on the part of either driver." Counsel posits that "unbeknownst to the defendant, it appears that the first impact caused a coin to become lodged into the gearshift lever which prevented the defendant from fully shifting his vehicle in 'park.'" Notwithstanding this claim, defense counsel fails to cite to any deposition testimony in support of this contention. Presumably, this is a reference to a hearsay statement contained in the police report which is attributed to an unidentified tow truck driver. Nor does defense counsel support this argument with any mechanical evidence. Additionally Defendant argues that VTL 1210(a) is inapplicable to the instant occurrence, as the purpose of this law is to help protect the public from injury due to the operation of motor vehicles by unauthorized persons.

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. *Giuffrida v. Citibank Corp., et al.*, 100 N.Y.2d 72, 760 N.Y.S.2d 397 (2003), citing *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. *Lacagnino v. Gonzalez*, 306 A.D.2d 250, 760 N.Y.S.2d 533 (2d Dept. 2003). However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. *Gonzalez v. 98 Mag Leasing Corp.*, 95 N.Y.2d 124, 711 N.Y.S.2d 131 (2000), citing *Alvarez*, *supra*, and *Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 508 N.Y.S.2d 923 (1985). Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. *Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988); *Zuckerman v. City of New York*,

49 N.Y.2d 557,427 N.Y.S.2d 595 (1980).

In the instant matter, Plaintiff has established his *prima facie* entitlement to summary judgment under either version of the subject occurrence. After an exhaustive search of case law pertaining to VTL Sec. 1210(a), this Court agrees that the statute does not apply to the circumstances present in the instant matter but rather has been strictly construed to apply to instances where vehicles were stolen as a result of the failure of a defendant to take the required actions to prevent such an occurrence. Notwithstanding the inapplicability of that statute, Plaintiff has established that the Defendant exited his vehicle without insuring that it would not roll back and admits that he left the engine running and did not engage the emergency brake. Under these circumstances, it was certainly foreseeable that these negligent acts could result in Plaintiff's stopped vehicle being struck by Defendant's vehicle as it moved backwards. Alternatively, if Defendant remained in his vehicle until such time as contact was made, as Plaintiff contends, there is no question that VTL 1211(a) was violated in that it was not safe to back up under the existing circumstances.

In response to Plaintiff's demonstration of his *prima facie* entitlement to summary judgment, Defendant has failed to raise a triable issue of fact in opposition thereto. Defense counsel claims that Defendant is not responsible because a coin became lodged into the gearshift lever which prevented the defendant from fully shifting his vehicle in park, as the result of the first impact. However, no admissible evidence is submitted in support of the claim. In fact, Defendant does not even testify that a coin prevented him from putting the vehicle into park nor did he have the transmission checked after the accident to see if it was functioning properly. "Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to raise a triable issue of fact. Garcia v. Verizon New York, Inc., 10 A.D.3d 339, 340, 781 N.Y.S.2d 93 (1st Dept. 2004). Defendant has failed to offer a non-negligent explanation for his vehicle rolling back and striking Plaintiff's stopped vehicle.

Accordingly, it is hereby

ORDERED that Plaintiff's Notice of Motion for Summary Judgment on the issue of liability is granted in its entirety; and it is further

ORDERED that counsel for the parties shall appear in the Trial Readiness Part on **WEDNESDAY, SEPTEMBER 12, 2018, at 9:45 a.m.**

The foregoing constitutes the Decision and Order of this Court on Motion # 1.

Dated: New City, New York
July 18, 2018, 2018

HON. SHERRI L. EISENPRESS
Acting Justice of the Supreme Court

To: All parties via NYSCEF