SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
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SOPHIA HAROLD,

Plaintiff,

-against-

STEVEN A. SCHULTZ and KEVIN B. SCHULTZ,

Defendants.
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DECISION & ORDER

Index No.: 031339/2020

(Motions # 1 and #2)

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

The following papers, numbered 1-10, were considered in connection with (i) Defendants' Notice of Motion, pursuant to *Civil Practice Law and Rules* § 3212, for partial summary judgment dismissing Plaintiff's property damage claim/cause of action; and (ii) Plaintiff's Notice of Motion for an Order, pursuant to *Civil Practice Law and Rules* § 3212, granting summary judgment as to liability in her favor:

PAPERS	**NUMBERED**
DEFENDANT'S NOTICE OF MOTION (#1)/STATEMENT OF MATERIAL FACTS/ AFFIRMATION IN SUPPORT/EXHIBITS A-K	1-3
PLAINTIFF'S NOTICE OF MOTION (#2)/AFFIDAVIT OF SOPHIA HAROLD/ MEMORANDUM OF LAW/EXHIBITS A-G	4-6
PLAINTIFF'S AFFIRMATION IN OPPOSITION TO DEFENDANTS' MOTION	7
DEFENDANTS' AFFIRMATION IN OPPOSITION TO PLAINTIFF'S MOTION	8
DEFENDANTS' AFFIRMATION IN REPLY/EXHIBITS H-K	9
PLAINTIFF'S MEMORANDUM OF LAW IN REPLY	10

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

This action was commenced by Plaintiff on March 1, 2020, with the filing of the Summons and Complaint through the NYSCEF system. Issue was joined as to Defendants by service of an Answer through the NYSCEF system on March 12, 2020. This personal injury and property damage action arises out of a two car accident on November 14, 2019, which

took place on eastbound I-84, on the Exit 44 off-ramp, in the Town of Fishkill, New York, when the vehicle operated by Kevin Schultz, struck the rear of a vehicle stopped and waiting at a red light, in which Plaintiff Sophia Harold was a front seat passenger.

In the Complaint, in additional to a cause of action for personal injury, Plaintiff alleges that her Cadillac cost $27,249.33, and had "minimal depreciation"; she made a $10,000 down payment towards the purchase; the Cadillac was totaled due to the defendant's negligence, causing her to lose her down payment; and she had to increase her former monthly payment from $468 to $1,200 per month so as to secure a new vehicle because she did not make another $10,000 down payment. She claims she is entitled to reimbursement of the down payment and reimbursement of the increase in her monthly payment.

The Parties' Contentions

Defendants move for partial summary judgment and dismissal of Plaintiff's property damage claim. They assert that Plaintiff had collision and comprehensive coverage at the time of the accident and that Allstate Insurance Company, after finding the vehicle to be totaled, issued a check paying off the remainder of the loan with Ally Financial Services in the amount of $21,222.05 and three checks to Plaintiff for the remaining equity in the vehicle totaling $4,017.01. In all, Cadillac paid $25,239.06 towards the loss of the Cadillac, which was the full value of the car prior to the Accident, and inclusive of sales tax, as per a CCC One Market Value Report prepared for Allstate and submitted in support of the motion. Defendants assert that the measure of damages to property resulting from negligence is the difference in the market value immediately before and immediately after the accident, or the reasonable coast of repairs necessary to restore it to its former condition, whichever is the less. Parkoff v. Stavsky, 109 A.D.3d 646, 647, 970 N.Y.S.2d 817 (2d Dept. 2013). They claim in the matter at bar, Plaintiff has already received the Cadillac's value immediately before the accident- i.e. $25,239.06. In opposition to Defendants' motion, Plaintiff claims that her insurance provided market value, instead of replacement cost, and she is therefore not made whole. She disagrees with Allstate's valuation but does not submit her own.

Plaintiff also moves for summary judgment on the issue of liability and contends that Defendants struck her vehicle in the rear and that they have a non-negligent explanation for doing same. In support of her motion, she submits her own affidavit as well as excerpts from Defendant Schultz' examination before trial in which he testified that he was exiting an off ramp, did not apply his brakes, and struck Plaintiff's stopped vehicle at a speed of 50 to 60 mph. He also pled guilty to driving while intoxicated. In opposition to the motion, Defendants argue that same should be denied because Plaintiff did not annex the pleadings to its moving papers; plaintiff's affidavit is an improper vehicle to introduce evidence of which she had no personal knowledge; Kevin Schutz deposition was unsigned and there was no proof of compliance with CPLR Sec. 3116(a); and the police report constitutes hearsay.

Legal Analysis

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

Defendants' Motion

Defendants are entitled to summary judgment and dismissal of Plaintiff's claim/cause of action for property damage. "The measure of damages for injury to property resulting from negligence is the difference in the market value immediately before and immediately after the accident, or the reasonable cost of repairs necessary to restore it to its former condition, whichever is the lesser." *Parkoff v. Stavsky*, 109 A.D.3d 646, 647, 970 N.Y.S.2d 817 (2d Dept. 2013). Moreover, where an automobile is totally destroyed, the measure of damages is its reasonable market value immediately before destruction. *Gass v. Agate Ice Cream*, 264 N.Y.141, 190 N.E. 323 (1934); *Schwartz v. Crozier*, 169 A.D.2d 1003, 1004, 565 N.Y.S.2d 567 (3rd Dept. 1991); *Owens v. State*, 96 A.D.2d 630, 464 N.Y.S.2d 870 (3rd Dept. 1983). Pursuant to Defendants' proof, the vehicle was worth $25,239.06 before the accident. Plaintiff was reimbursed the full value of the vehicle at the time of the accident, with payments totaling $25,239.06, a portion of which paid off the existing loan and the remainder paid to her directly. Although Plaintiff argues that the value of car was in excess of $25,239.06, no proof to support that contention has been submitted. Given that no damages exist with regard to the property damage claim, it is dismissed.

Plaintiff's Motion

As an initial matter, Plaintiff's failure to annex the pleadings to the summary judgment motion does not require denial of the motion because "if the pleadings are otherwise available to the Court either electronically or in the opponent's papers or in the movant's reply papers, the Supreme Court has the discretion to disregard the error as a mere irregularity if there is no impairment of the rights of the opponent of the motion." *Stahlman v. NYU Langone Health System*, 63 Misc.3d 496, 94 N.Y.S.3d 798 (Sup. Ct. Kings County 2019). Here, the Court was able to access the pleadings as they were e-filed and also considered Defendants' summary judgment motion at the same time, which did include a copy of the pleadings. As there is no impairment to the rights of the Defendants premised upon Plaintiff's failure to annex the pleadings, the Court will address the motion on the merits.

It is well-settled that a rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of liability with respect to the operator of the moving vehicle, unless the operator of the moving vehicle can come forward with an adequate, non-negligent explanation for the accident. *See Smith v. Seskin,* 49 A.D.3d 628, 854 N.Y.S.2d 420 (2d Dept. 2008); *Harris v. Ryder*, 292 A.D.2d 499, 739 N.Y.S.2d 195 (2d Dept. 2002)]. Further, when the driver of an automobile approaches another from the rear, he or she is bound to maintain a reasonably safe rate of speed and control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle. *VTL* § 1129(a) ("The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon the condition of the highway."); *Taing v. Drewery*, 100 A.D.3d 740, 954 N.Y.S.2d 175 (2d Dept. 2012). Drivers must maintain safe distances between their cars and cars in front of them and this rule imposes on them a duty to be aware of traffic conditions, including vehicle stoppages. *Johnson v. Phillips*, 261 A.D.2d 269, 271, 690 N.Y.S.2d 545 (1st Dept. 1999).

Defendants are incorrect that Plaintiff failed to support her motion with admissible evidence. Defendant Schultz' unsigned examination before trial transcript is admissible, as it constitutes an admission by a party; the transcript was certified by the court reporter and Defendants do not challenge its accuracy. *Franco v. Rolling Firto-Lay Sales, Ltd*, 103 A.D.3d 543, 962 N.Y.S.2d 54, 55 (1st Dept. 2013); *Vetrano v. J. Kokolakis Contracting, Inc.*, 100 A.D.3d 984, 954 N.Y.S.2d 464 (2d Dept. 2012). Based upon Defendant's testimony, Plaintiff has met her burden upon summary judgment since Ms. Harold was in a vehicle stopped at a traffic light when her vehicle was struck in the rear by Defendant's vehicle. Additionally, Plaintiff has demonstrated that she is free from any comparative negligence. In opposition thereto, Defendants failed to raise a triable issue of fact or present a non-negligent excuse for the happening of the subject occurrence.

Accordingly, it is hereby

ORDERED that Defendants' Notice of Motion for Summary Judgment (Motion #1) to dismiss the property damage claim/cause of action is GRANTED in its entirety; and it is further

ORDERED that Plaintiffs' Notice of Motion for Summary Judgment (Motion #2) on the issue of liability is GRANTED in its entirety; and it is further

ORDERED that counsel for the parties shall appear for a settlement conference on **OCTOBER 8, 2021, at 10:00 a.m. via Microsoft Teams.** The parties should communicate a demand and offer to each other prior to said conference, the attorneys participating in the conference must be fully familiar with the case, have settlement authority, and be able to communicate with their client at the time of the conference.

The foregoing constitutes the Decision and Order of this Court on Motions # 1 and #2.

Dated: New City, New York
July 19, 2021

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

To: All parties via NYSCEF