Disp ____ Dec __x__ Seq. Nos. __1-2___ Type _partial SJ__

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

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MATTHEW GAETANO,

Plaintiff,

-against-

Index No. 57955/2011

CHRYSLER JEEP OF WHITE PLAINS, INC. a/k/a WHITE PLAINS CHRYSLER JEEP, INC., JOSEPH F. CAVALIERE, JONATHAN GRANT, AGOSTINO DIFEO, MATTHEW CASTANEDA,

DECISION AND ORDER

Defendants.

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The following papers numbered 1 to 7 were read on these motions:

Paper	Number
Notice of Motion, Affidavit, Affirmation and Exhibits	1
Memorandum of Law	2
Notice of Motion, Affirmation and Exhibits	3
Affidavit, Affirmation and Exhibits in Opposition	4
Affirmation in Opposition	5
Reply Affirmation	6
Reply Affirmation	7

There are two motions before the Court in this case involving the total loss of plaintiff's limited edition Dodge Viper car by defendant Cavaliere, a mechanic at defendant Chrysler Jeep of White Plains, Inc. ("Chrysler Jeep"). Plaintiff's motion seeks partial summary judgment on the issue of

liability against Chrysler Jeep and Mr. Cavaliere. Defendants' motion seeks partial summary judgment on damages, or, in the alternative, dismissing certain damage allegations.

The facts are not much in dispute in this case. Plaintiff brought his car in to Chrysler Jeep for servicing on a Friday, April 29, 2011. Mr. Cavaliere is employed there. The next day, Mr. Cavaliere put new brake pads on the vehicle. At his deposition, Mr. Cavaliere testified that after he put the brake pads on, he took the car out "to burnish" the brake pads. To do so, he had to "get some heat in the tires," for traction, and when he was doing so, he lost control of the car. Mr. Cavaliere testified at his deposition that "The rear end of the vehicle lost traction . . . [and] when the vehicle starts to go out sideways like that, you immediately lose control of the vehicle." Mr. Cavaliere further testified that although he tried to "correct the vehicle to go straight but it happened so fast, it just didn't make a difference." The car hit the curb and then the stone retaining wall, rendering it a total loss. There is no dispute that at the time of the accident, Mr. Cavaliere was acting in the course of his employment with Chrysler Jeep.

Plaintiff has sustained his prima facie burden of demonstrating that the accident was caused by the negligence of Mr. Cavaliere in losing control of the vehicle. *Dudley v. Ford Credit Titling Trust*, 307 A.D.2d 911, 762 N.Y.S.2d 905 (2d Dept.

2003). In opposition, defendants argue that the accident was not caused by Mr. Cavaliere's negligence, but because, as he testified at his deposition, Mr. Cavaliere "pretty much assume[d]" that plaintiff had installed an after-market "stage one engine control module," which would make the care "unsafe to drive." In support of this assumption, defendants point to a section of plaintiff's deposition testimony in which he testified that he did purchase this engine control module. Defendants state that these pages prove that the module was "installed in his vehicle at the time of the accident." However, a review of the pages identified by defendants shows that plaintiff did **not,** in fact, testify that the module was installed at the time of the accident. Rather, all he stated was that he had purchased these parts. The deposition testimony does not actually state what defendants allege that it says. Moreover, in his affidavit submitted on this motion, in contrast, plaintiff actually stated that the module "was not in the vehicle at the time of the accident." (Emphasis in original).

Because there is direct evidence that the module was not in the car at the time of the accident, and no evidence to contradict this statement, defendants' attempt to create an issue of fact about the cause of the accident must fail. *Id.* ("In opposition thereto, [defendant] failed to raise a material issue of fact sufficient to necessitate a trial on the issue of her

liability."). *See also Felberbaum v. Weinberger*, 40 A.D.3d 808, 837 N.Y.S.2d 664 (2d Dept. 2007). Moreover, since defendants do not dispute that Mr. Cavaliere was acting within the scope of his employment at the time of the accident, there is no reason not to hold Chrysler Jeep accountable as well. *Selmani v. City of New York*, --- N.Y.S.2d ----, 2014 WL 1613337 (2d Dept. April 24, 2014). Accordingly, the Court grants partial summary judgment to plaintiff on the issue of liability.

Turning to defendants' motion, this motion seeks partial summary judgment on the issue of damages. Defendants argue that plaintiff is not entitled to the replacement cost of the car, plus taxes and fees, because that would grant plaintiff a windfall since his insurance company paid off the entire amount that plaintiff owed on the lease, and plaintiff has not actually tried to replace the car. Nor, defendants argue, is plaintiff entitled to the value of the loss of use for the racing season, because this is speculative. It is well-settled that "when an automobile is totally destroyed, the measure of damages is the reasonable market value immediately before destruction, less the salvage value of the wreckage." *Aurnou v. Craig*, 184 A.D.2d 1048, 584 N.Y.S.2d 249 (4th Dept. 1992). The damages should also include any personal items that were lost, as well as "the costs of towing, storage, insurance and loss of use of the vehicle, but only for those costs incurred from the date of the accident until

the expiration of a reasonable time for obtaining a replacement vehicle." Given all of the issues of fact that are in dispute about the value of the car, the Court cannot grant defendants summary judgment on these points. *See generally 69 West 9 Owners Corp. v. Admiral Indem. Co.*, 114 A.D.3d 469, 979 N.Y.S.2d 591 (1st Dept. 2014).

The parties are directed to appear for a Settlement Conference in the Settlement Conference Part on June 17, 2014 at 9:30 a.m. in Courtroom 1600.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
April 30, 2014

HON. LINDA S. JAMIESON
Justice of the Supreme Court

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