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 ORANGE

----------X

PETER DiBERNARDI and ROSEMARIE DiBERNARDI,

Plaintiffs,

-against-

ELADIO ESTRELLA,

Defendant.

----------X

DECISION AND ORDER

INDEX NO.: EF008682/2017
Motion Date: 8/20/18
Sequence No. 1

SCIORTINO, J.

The following papers numbered 1 to 7 were considered in connection with plaintiff's application for partial summary judgment on the issue of liability:

PAPERS	NUMBERED
Notice of Motion/Affirmation (Owen)/Affidavit in Support/Exhibits 1-4	1 - 4
Affirmation in Opposition (Izzo)/Exhibits A-E	5 - 6
Affirmation in Reply (Owen)	7

Background and Procedural History

This personal injury action arises out of a motor vehicle accident that took place on November 1, 2016 on Route 202 in the Town of Haverstraw, New York. Plaintiffs commenced this action by filing a Summons and Complaint (Exhibit 2) on or about October 25, 2017. Defendant served a Verified Answer with Affirmative Defenses on or about February 6, 2018. (Exhibit 3) Plaintiffs assert that they are entitled to summary judgment on liability based on the rear-end collision, which establishes a *prima facie* case of negligence on the part of defendant.

Opposition

In opposition, defendant contends that plaintiffs have failed to establish their *prima facie* entitlement to judgment. He argues the admissibility of plaintiff's own affidavit as well as the certified police report. There are bona fide issues of fact regarding defendant's liability and plaintiff's comparative negligence in light of the fact there was a third vehicle, which has been neither named as a party or yet deposed, involved in the accident. Defendant argues that there are issues of fact regarding whether plaintiff's conduct and/or the conduct of the third vehicle contributed to the happening of the accident. This argument is unclear as there is no affidavit from the defendant himself as to how the accident happened. Defendant also contends that summary judgment is premature as discovery is still outstanding and there remain questions of fact as to whether defendant was properly served.

The Court has fully considered the submissions.

Discussion

For the reasons which follow, plaintiffs' motion is granted.

"[A]n objection that the summons and complaint ... was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading." (Civ. Prac. Law & Rules §3211 [e]) Because the defendant did not move to dismiss the complaint for lack of personal jurisdiction on the basis of improper service within 60 days of serving his answer, he has waived the defense. (see *Federici v. Metropolis Night Club, Inc.*, 48 A.D.3d 741, 742 [2d Dept 2008])

Summary judgment is a drastic remedy and is appropriate only when there is a clear demonstration of the absence of any triable issue of fact. (*Piccirillo v. Piccirillo*, 156 AD2d 748 [2d

Dept 1989], citing *Andre v. Pomeroy*, 35 NY2d 361 [1974]) The function of the Court on such a motion is issue finding, and not issue determination. *(Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]) The Court is not to engage in the weighing of evidence; rather, the Court's function is to determine whether "by no rational process could the trier of facts find for the non-moving party." (*Jastrzebski v. N. Shore Sch. Dist.*, 232 AD2d 677, 678 [2d Dept 1996])

The Court of Appeals has recently held that a plaintiff does not bear the burden of establishing the absence of her own comparative negligence in order to obtain partial summary judgment in a comparative negligence case. (*Rodriguez v. City of New York*, 2018 NY Slip Op. 02287 [April 3, 2018]). In *Rodriguez*, the Court of Appeals reversed the finding of the Appellate Division, First Department which affirmed a trial court's denial of plaintiff's motion for partial summary judgment. The basis for denial was plaintiff's failure to make a *prima facie* showing that he was free of comparative negligence. (*See, Rodriguez v. City of New York*, 142 AD3d 778 [1st Dept 2016])

The Court of Appeals held that Article 14-A of the Civil Practice Law & Rules provides that comparative negligence does not *bar* recovery, but can act to diminish the amount of damages otherwise recoverable, in the proportion of the claimant's culpable conduct. Civ. Prac. Law & Rules §1411 Moreover, section 1412 provides that such culpable conduct shall be an affirmative defense to be pleaded and proved by the party asserting the same. The majority reasoned that placing the burden on the plaintiff to show an absence of comparative fault is inconsistent with the language of section 1412. (2018 NY Slip Op. at 3) "Comparative fault is not a defense to the cause of action of negligence, because it is not a defense to any element (duty, breach, causation) of plaintiff's prima facie cause of action for negligence...but rather a diminishment of the amount of damages." (2018

NY Slip Op. at 4)

Here, there is no dispute that plaintiffs' vehicle was rear-ended by defendant's vehicle. The police accident report submitted by plaintiffs in support of their motion for summary judgment contained a statement by the defendant that he did not know what happened, but that he collided with plaintiffs' vehicle. The police officer who prepared the report was acting within the scope of his duty in recording defendant's statement, and the statement is admissible as an admission of a party. (*see Guevara v. Zaharakis*, 303 A.D.2d 555, 556 [2d Dept 2003]; *Ferrara v. Poranski*, 88 A.D.2d 904 [2d Dept 1982]) Additionally, the diagram and other entries in the police accident report showing where the vehicles struck each other and the position and path of travel of each vehicle is admissible since the reporting officer could make these determinations himself when he arrived on the scene. (*Scott v Kass.* 48 AD3d 785 [2d Dept 2008])

The affirmation of defendants' attorney submitted in opposition to the motion is devoid of any evidentiary value. (*see, Zuckerman v City of New York,* 49 NY2d 557 [1980] Defendant has failed to submit an affidavit by a person with knowledge of the facts. Defendant's supplementary statement annexed to the opposition as Exhibit E appears to be a written statement signed by the defendant but as it is not a sworn, notarized statement, it is inadmissable and insufficient to defeat a motion for summary judgment. (*see Diaz v Tumbiolo,* 111 AD3d 877 [2d Dept 2013]) Nonetheless, it confirms that the defendant struck plaintiff's car in the rear.

Defendants' contention that plaintiffs are not entitled to summary judgment until after the completion of discovery is without merit. The mere hope that evidence to support his defense would be uncovered is insufficient to deny plaintiffs' motion for summary judgment. Counsel failed to specify what facts necessary to oppose the motion were uniquely in plaintiffs' possession. (*see Miller*

v City of New York, 277 AD2d 363 [2d Dept 2000])

On the basis of the foregoing, plaintiffs' application for partial summary judgment on liability is granted.

The parties shall appear for preliminary conference on November 14, 2018 at 9:00 a.m.

This decision shall constitute the order of the Court.

Dated: October 16, 2018
Goshen, New York

ENTER

HON. SANDRA B. SCIORTINO, J.S.C.

To: *Counsel of Record via NYSCEF*