SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

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GAYLE J. CALLI,

Plaintiff,

-against-

STEPHEN A. STALLINGS,

Defendant.

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DECISION/ORDER

Index No. 19-1120
R.J.I. No. 55-19-1708
Richard Mott, J.S.C.

Motion Return Date: November 18, 2019

APPEARANCES:

Plaintiff: Levi Lipton, Esq.
Rutberg Breslow Personal Injury Law
3344 Route 9 North
Poughkeepsie, NY 12601

Defendant: Patrick Finnegan, Esq.
Law Offices of John Trop
94 New Karner Road, Suite 209
Albany, NY 12203

Mott, J.

Plaintiff moves for partial summary judgment on the issue of liability in this action to recover for personal injuries arising from a motor vehicle accident. Defendant opposes.

Background

In July 2016, Plaintiff was injured when, while sitting in her parked vehicle in a parking lot, Defendant's unoccupied vehicle, which he allegedly failed to secure, rolled down the parking lot's incline and struck the rear of Plaintiff's vehicle.

Defendant's answer, filed May 10, 2019, asserts a general denial and defenses of contributory negligence for failure to wear a seatbelt, absence of a serious physical injury and that the accident resulted from an emergency situation not of Defendant's own making.

Parties' Contentions

Plaintiff claims entitlement to summary judgment based upon the complaint and her affidavit reiterating the complaint's allegations and stating that she did not contribute to the accident. Further, she submits a certified copy of the police incident report, dated the day following the accident, which identifies Defendant as the owner of the parked unattended vehicle that struck Plaintiff's parked vehicle. Finally, Plaintiff insists that this motion is not premature because a summary judgment motion is properly filed at any time after joinder of issue and Defendant has failed to proffer any rebuttal on the liability issue or to indicate potential discovery in Plaintiff's exclusive possession that might merit deferral of this motion.

Defendant counters that summary judgment is premature because there has been no preliminary conference or discovery. Further, it avers that Plaintiff has failed to comply with his discovery demands, served with his answer, including demands for discovery and inspection, medical records and authorizations and a verified bill of particulars. Further, he maintains that summary judgment is premature because facts relating to potential defenses, including Plaintiff's comparative negligence, may be within the exclusive knowledge of Plaintiff, thereby requiring discovery prior to adjudicating this motion.

Discussion

Summary Judgment

To prevail on a motion for summary judgment, the moving party must establish *prima facie* entitlement to judgment as a matter of law "by adducing sufficient competent evidence to show that there are no issues of material fact." *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]. "Only when the movant bears this burden and the nonmoving party

fails to demonstrate the existence of any material issue of fact will the motion be properly granted." *Staunton v Brooks*, 129 AD3d 1371 [3d Dept. 2015], citing *Lacasse v Sorbello*, 121 AD3d 1241, 1241 [3d Dept. 2014]. However,

> "where the moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so." *Zuckerman v City of New York*, 49 NY2d 557, 560 [1980].

Here, Plaintiff's motion is not premature as Defendant has failed to proffer an

> "evidentiary basis to suggest that discovery might lead to relevant evidence and that facts essential to justify opposition to the motion [are] exclusively within the knowledge and control of the plaintiff." *Harrinarain v Sisters of St. Joseph*, 173 AD3d 983, 984 [2d Dept 2019];

cf., *Schleich v Gruber*, 133 AD2d 224, 225 [2d Dept 1987] (cross-motion for summary judgment properly denied with leave to renew, because there was sufficient reason to believe there were pertinent facts essential to the plaintiff's case, which were within the exclusive knowledge and control of the defendant hospital that might be revealed in pretrial discovery). Further, despite Plaintiff's delay in responding to discovery demands, Defendant has failed to move or cross-move to compel discovery. *Herba v Chichester*, 301 AD2d 822, 823 [3d Dept 2003]. Indeed, Defendant makes no factual averments concerning the accident which occurred nearly three years ago and has failed to proffer his own affidavit in support. *Bailey v New York City Tr. Auth.*, 270 AD2d 156, 157 [1st Dept 2000] (summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence).

Moreover, Defendant fails to state any basis for the conclusory assertion that Plaintiff might have exclusive control of information on the issue of contributory negligence, even upon information and belief, in circumstances where Plaintiff's vehicle

was parked in a lot when it was struck from the rear. *Kelly v Shin*, 171 AD3d 905 [2d Dept 2019] (a rear-end collision with a stopped or stopping vehicle establishes a *prima facie* case of negligence on the part of the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision); cf., *Barletta v Lewis*, 237 AD2d 238 [2d Dept 1997] (where there is sufficient reason to believe that facts essential to justify opposition to the motion are within the exclusive knowledge of the plaintiff and may be revealed through pretrial discovery, summary judgment is premature).

Finally, on the facts here, the invocation of the emergency doctrine, without more, likewise fails to raise an issue of fact as to whether there is information in Plaintiff's exclusive control crediting such defense. *Maisonet v Roman*, 139 AD3d 121, 123 [1st Dept 2016] (an actor may not be negligent if the actions taken are reasonable and prudent in the emergency context, so long as said actor did not create the emergency); *Sweeney v McCormick*, 159 AD2d 832 [3d Dept 1990] (emergency doctrine was inapplicable to preclude driver's liability for striking unoccupied vehicle, where driver had created or contributed to emergency). Thus, on this record, partial summary judgment for Plaintiff on the issue of liability is merited.

Accordingly, the motion is granted and a **conference to set a discovery schedule on remaining issues will be held on February 18, 2020, at 2:00 PM at the Ulster County Courthouse.**

This constitutes the Decision and Order of this Court. The Court is forwarding the original Decision and Order directly to the Plaintiff, who is required to comply with the provisions of CPLR §2220 with regard to filing and entry thereof. A photocopy of the

Decision and Order is being forwarded to all other parties who appeared in the action. All original motion papers are being delivered by the Court to the Supreme Court Clerk for transmission to the County Clerk.

Dated: Hudson, New York
January 14, 2020

RICHARD MOTT, J.S.C.

Papers Considered:

1. Notice of Motion and Affirmation of Levi Lipton, Esq., dated October 28, 2019 with Exhibits A-D;
2. Opposition Affirmation of Patrick T. Finnegan, Esq., dated November 6, 2018;
3. Reply Affirmation of Levi Lipton, Esq., dated November 8, 2019.

FILED
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MAR 06 2020
Nina Postupack
Ulster County Clerk