SCANNED ON 5/6/2014

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. ARLENE P. BLUTH

PRESENT: HON. ARLENE P. BLUTH, *Justice* **PART** 22

Index Number : 113609/2011
GONZALEZ-SANTOS, WANDA
vs
DIAZ, VICTORIA FALLEN
Sequence Number : 003
SUMMARY JUDGMENT

INDEX NO. ____

MOTION DATE ____

MOTION SEQ. NO. ____

The following papers, numbered 1 to 3 **, were read on this motion to/for** π's MSJ on liab

Notice of Motion/Order to Show Cause — Affidavits — Exhibits	**No(s).** 1
Answering Affidavits — Exhibits	**No(s).** 2
Replying Affidavits	**No(s).** 3

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER

FILED
MAY 06 2014
NEW YORK COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ____
FOR THE FOLLOWING REASON(S): ____

Dated: 4/29/14

____, **J.S.C.**
HON. ARLENE P. BLUTH

1. **CHECK ONE:** ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. **CHECK AS APPROPRIATE: ...MOTION IS:** ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. **CHECK IF APPROPRIATE:** ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 22

WANDA GONZALEZ-SANTOS,

Plaintiff,

-against-

VICTORIA FALLEN DIAZ and "JOHN DOE",

Defendants.

INDEX NO. 113609/2011
Motion Sequence 003
DECISION & ORDER

ARLENE BLUTH, J.:

Plaintiff's motion for summary judgment on the issue of liability is denied.

Factual Background

Plaintiff was allegedly injured on July 30, 2011 when the motor vehicle that she owned and operated was in a collision with the motor vehicle owned by defendant Victoria Fallen Diaz (Diaz). The driver of the Diaz motor vehicle fled the scene and is unknown.

In her affidavit in support of the motion for summary judgment, plaintiff simply states that on July 30, 2011 she was stopped on 51st Street about 200 feet west of 10th Avenue when she was rear-ended by defendant's motor vehicle.

According to the police report annexed to the moving papers as exhibit B, five motor vehicles were involved. The first vehicle, owned by Diaz, was driving west on West 51st Street when it allegedly sideswiped three vehicles parked along the curb on the northern side of the street and then it rear-ended plaintiff's vehicle, which was stopped in the roadway as she was double-parked waiting for a parking spot. The operator of the Diaz vehicle exited the vehicle and fled the scene without being identified.

Two photographs of the accident scene annexed to the moving papers as exhibit C show a dark green Land Rover pressed against the damaged rear of plaintiff's vehicle. The police report identified Diaz as the owner of the 2008 Land Rover involved in the accident.

In opposition, defendant objects to the consideration of the uncertified police report but does not object to the photos, which were attached to the moving papers without any foundation whatsoever. The photos show the Land Rover smashed into the rear of plaintiff's car (even breaking the back windshield); it also shows that plaintiff was double parked and one of the photos shows a police officer. At her deposition, plaintiff stated that she was looking for a parking spot, noticed one was going to be vacated (the woman in the parked car indicated she was leaving), and pulled over to wait for the woman to vacate the spot. She stated she was there two or three minutes when defendant smashed into her.

Discussion

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "If there is any doubt as to the existence of a triable issue, the motion should be denied." *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 (1st Dept 2002). "But only the existence of a bona fide issue raised by evidentiary facts and not one based on conclusory or irrelevant allegations will suffice to defeat summary judgment." *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

Plaintiff maintains that there is no issue of fact as to the cause of the accident. She claims that several recent cases provide ample authority for her position. *Dicturel v Dukureh*, 71 AD3d 558, 559 (1st Dept 2010) ("summary judgment on the issue of liability should have been granted in this action for personal injuries sustained when plaintiff's vehicle was struck in the rear by defendant's vehicle"); *Maynard v Vandyke*, 69 AD3d 515, 515 (1st Dept 2010) ("[p]laintiff's vehicle, while stopped at a traffic light, was struck in the rear by defendant's vehicle. In opposition to plaintiff's motion for summary judgment, defendant failed to raise a question of fact as to whether there was a nonnegligent reason for the collision"); *McCoy v Zaman*, 67 AD3d 653, 653-654 (2d Dept 2009) ("[a] rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the moving vehicle and imposes a duty on the operator of the moving vehicle to rebut the inference of negligence by providing a non-negligent explanation for the collision").

It is undisputed that the accident occurred "while plaintiff had been double-parked and was stationary for several minutes before the collision." Tanenbaum reply affirmation, ¶ 1. Diaz contends that the police report annexed to plaintiff's papers should be disregarded as inadmissible hearsay because it is uncertified, citing *Rue v Stokes* (191 AD2d 245, 246-247 [1st Dept 1993]), where the Court held that "[u]nsworn reports, letters, transcripts and other documents do not constitute evidentiary proof in admissible form and may not be considered in opposition to a motion for summary judgment." Also, "[p]olice reports have consistently been held inadmissible to establish the main fact where the information contained in the police blotter came from witnesses not engaged in the police business in the course of which the memorandum was made." *Yeargans v Yeargans*, 24 AD2d 280, 282 (1st Dept 1965). On the other hand, "[i]t is well established that police accident reports are admissible as business records so long as the report is made based upon the officer's personal observations and while carrying out their police duties." *Holliday v Hudson Armored Car & Courier Serv.*, 301 AD2d 392, 396 (1st Dept 2003).

Plaintiff testified that she called the police upon leaving her vehicle after it was struck. Gonzalez-Santos tr at 16. She said that the police arrived at the same time as an ambulance did, although the time interval after her call is not indicated. *Id.* at 22. One of the two photographs of the scene submitted by plaintiff – and not objected to by the defendant – shows a police officer standing next to the green Land Rover immediately behind plaintiff's vehicle. Under these circumstances, the proffered police report is competent evidence of the accident scene, and, especially, the position of the parties' vehicles. It is, thus, admissible and (1) states that the Diaz vehicle hit three parked cars, one of which was occupied, before hitting into plaintiff's rear, (2) confirms that plaintiff was double parked and hit in the rear by defendant and (3) confirms plaintiff's testimony that plaintiff was waiting for a known parking spot, as the report indicates that the occupied parked car was warming up intending to vacate the spot.

Diaz's counsel also argues that plaintiff's double parking while waiting for a parking space on West 51st Street was an act of "contributory negligence" on plaintiff's part that defeats her application for summary judgment. This position is based upon *White v Diaz* (49 AD3d 134, 139 [1st Dept 2008]), where the Court denied summary judgment because "a reasonable jury could find that a rear-end collision is a reasonably foreseeable consequence of double parking for five minutes on a busy Manhattan street."

This Court acknowledges that the facts of *White v Diaz* are similar inasmuch as a double parked car was rear-ended. *White v Diaz* seems to stand for the proposition that double parking is the exception to the rule set forth in a plethora of First Department cases that hold "a rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the driver of the rear vehicle, and imposes a duty on the part of the operator of the moving vehicle to come forward with an adequate nonnegligent explanation for the accident" *Agramonte v City of NY* 288 AD2d 75 (1st Dept 2001). It does not matter that the front car suddenly stopped (*Cabrera v Rodriguez*, 72 AD3d 553, 553 [1st Dept 2010]) or stopped in the left lane of a highway (*Golubchik v Das Trading Corp.* 62 AD3d 480 [1st Dept 2009]). Nor, if slowing traffic is obvious, does it matter that the front car's brake lights were not functioning *(Farrington v NYCTA 33 AD3d 332* [1st Dept. 2006]). Slipping on ice is no excuse either (*Williams v Kadri* 112 AD3d 442 [1st Dept 2013]). Moreover, Vehicle and Traffic Law § 1129 imposes "a duty to be aware of traffic conditions, including vehicle stoppages" (Johnson v Phillips, 261 AD2d 269, 271, 690 NYS2d 545 [1st Dept. 1999]).

This Court takes judicial notice that it is common practice in Manhattan to pull over, double park and wait for a parking spot to open up. People perch and wait even if they have no idea when or if someone will be vacating a spot; here, plaintiff knew someone was already warming up her car and signaled that she would be vacating shortly. From the case law it appears that double parking is the only exception to the rule in this Department that the stopped front car is presumed not negligent. If plaintiff was moving and stopped suddenly because, say, she thought a child was about to dart out, or because she thought the architecture was interesting, or because a bee flew into her car and frightened her, then she would be entitled to summary judgment if defendant rear-ended her because the defendant should have left enough room between the cars to stop in time. But if she was already stopped and double-parked when defendant came upon her, as here, *White v Diaz* holds that being hit from the rear may be a reasonably foreseeable consequence of double parking on a busy Manhattan street, and the determination of negligence must be left to a jury.

When Diaz failed to appear for several scheduled depositions, this Court, in an order dated August 7, 2013, gave her "one last chance to appear [on September 24, 2013, or] . . . be precluded from offering any testimony at trial." Tanenbaum reply affirmation, exhibit A. Diaz did not appear as ordered, thereby leaving plaintiff's account of events unchallenged. While it is true that Diaz is now precluded from claiming non-permissive use or disclosing the name(s) of likely drivers, it is also true that plaintiff's own description of the accident requires denial of the motion. Based upon the holding of *White v Diaz* (49 AD3d 134, 139 [1st Dept 2008]), this Court is constrained to deny the instant motion.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment on the issue of liability is denied.

This is the Decision and Order of the Court.

DATED: **April 29, 2014**
New York, New York

HON. ARLENE P. BLUTH, JSC

FILED
MAY 06 2014
NEW YORK
COUNTY CLERK'S OFFICE