To commence the statutory time period 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 WESTCHESTER

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KERRON P. WALKER and TANGARI T. WALKER,

Plaintiffs,

-against-

TOTAL TURF, INC., and JOSE P. CRESPO,

DECISION & ORDER
Index No.: 54601/2012
Sequence No. 1

Defendants.

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WOOD, J.

The following documents numbered 1- 8 were read in connection with the summary judgment motion by plaintiff Tangari T. Walker:

Plaintiff Tangari T. Walker Notice of Motion, Counsel's Affirmation, Exhibits.	1-7
Plaintiffs' Counsel's Affirmation.	8

Plaintiffs commenced this action by filing the summons and verified complaint with the Westchester County Clerk on March 28, 2012. Issue was joined by defendants by service of a verified answer, asserting a counterclaim against plaintiff Tangari T. Walker ("Tangari") on or about May 11, 2012. Plaintiff Tangari served a verified answer to the counterclaim of defendants on or about November 7, 2012. A Note of Issue and Certificate of Readiness was served on February 11, 2014. According to the plaintiffs, the accident which gives rise to this action occurred on January 20, 2012, at approximately 7:00 a.m. on Spring Street at its intersection with Waller Avenue in Ossining. On the day of the accident, plaintiff Kerron P. Walker ("Kerron")

was a front seat passenger in a car which she owned ("the Walker vehicle), and Tangari, (who is Kerron's daughter), was the driver of the Walker vehicle. Tangari had pulled the Walker vehicle over to the curb in a parking lane to let a back seat passenger out of the Walker vehicle, and was stopped for about 2 seconds when defendants' truck was to the left of the Walker vehicle began to make a right turn and struck the Walker vehicle. Plaintiffs claim that at the time of the accident, no one in the car was speaking, texting or talking on the cell phone nor was the radio on. Defendant Jose P. Crespo ("Crespo") testified at his deposition that on the date of the accident he was the driver of a vehicle owned by his employer defendant Total Turf, Inc ("Total Turf"). The vehicle was a dump truck with a plow attached to the front and salt/sander in the back. Crespo's version of the accident was that he was traveling along Spring Street when he turned on his right turn signal. He saw the Walker vehicle, and at one point in his testimony he said the Walker Vehicle was stopped, and later he testified that he saw the Walker Vehicle move a little like it wanted to come out while defendant was passing it (Plaintiffs Exh E at 60). There is no traffic control device governing the intersection of Waller Avenue and Spring Street. As Crespo was going to make a right turn onto Waller Avenue he heard a sound, looked in his mirror, and he saw the Walker vehicle with a fallen bumper. Defendants have not interposed opposition papers to the instant motion. Plaintiff Kerron supports the motion for summary judgment.

Upon the foregoing papers, the motions are decided as follows:

It is well settled that a proponent of a summary judgment motion must make a "prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hospital, 68 NY2d

320, 324 [1986]; see Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; see also Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Moreover, failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the motion papers (Jakabovics v Rosenberg, 49 AD3d 695 [2d Dept 2008]; see also Menzel v Plotkin, 202 AD2d 558, 558-559 [2d Dept 1994]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (see Zuckerman v New York, 49 NY2d 557, 562 [1980]; see also Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). In deciding a motion for summary judgment, the court is required to view the evidence presented "in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion" (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; see Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). Although the requirement that evidentiary proof be submitted in admissible form is "more flexible" when applied to a party opposing a motion for summary judgment than it is when applied to the moving party, the nonmoving party must nevertheless "demonstrate [an] acceptable excuse for his [or her] failure to meet the strict requirement of tender in admissible form" (Wynne v Diaz, 102 AD3d 862, 864 [2d Dept 2013]). It is well settled that Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (Alvarez v. Prospect Hospital, 68 NY2d 320,324 [1986]). Thus, summary judgment is an extremely rare event when dealing with issues in a personal injury negligence action with its potential of possible contributory negligence, since the granting of such relief is possible only in the most clear cut of cases (O'Callaghan v. Flitter, 112 AD2d 1030, (2d Dept 1985). Even in cases where the facts are conceded, there is often a

question of whether the plaintiff or defendant acted reasonably under the circumstances of the accident.

Plaintiff Kerron's Motion for Summary Judgment

Generally, Vehicle and Traffic Law §1129(a) generally imposes a duty on all drivers to drive at a safe speed and maintain a safe distance between vehicles, always compensating for any known adverse road conditions (Ortega v. City of New York, 281 AD2d 466 [2d Dept 2000]). Drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident (Baldducci v. Velasquez, 92 AD3d 626 [2d Dept 2012]; Fillippazzo v. Santiago, 277 A.D.2d 419, [2000]).

In the case at bar, Tangari, (the driver of the Walker vehicle) has not demonstrated her prima facie entitlement to judgment as a matter of law, inasmuch as all doubt is not eliminated by the record submitted by plaintiffs, and plaintiffs' evidentiary proof should be considered at trial due to the factual issues presented in the moving papers (Ugarriza v. Schmieder, 46 N.Y.2d 471 [1979]).

Tangari argues that she has met her burden of establishing a prima facie case of negligence against defendants as the Walker vehicle was completely stopped at the curb, with its right turn signal and headlights on, when it was struck by defendant's vehicle. Tangari further claims that defendants' truck was the proximate cause of the accident because the Walker vehicle was properly stopped in a parking lane. However, the record shows that at Crespo's deposition, he testified that he did not know if the Walker vehicle was legally parked (Plaintiffs' Exh E). Moreover, he testified that the Walker vehicle was coming out of the parking area:

"Q: So between the time that you saw the car last and you heard the sound, do you have any knowledge as to whether the car moved in any way?
A: Yes, I saw that it moved a little like it wanted to come out" (Plaintiffs Exh E at 62).

Based upon the record, triable issues of fact exist as to whether the Walker vehicle merely furnished the condition or occasion for the occurrence of the event, and/or was it a proximate cause of plaintiffs' damages or the accident. It is for the jury to determine whether the defendant was driving in a manner which was reasonable under the circumstances. Moreover, a jury might properly infer that both parties were at fault for the subject accident and their respective failures to exercise good judgment in the operation of their respective vehicles. That is why summary judgment is seldom appropriate in negligence actions for this very reason. Therefore, in view of the conflicting testimony, these questions of fact should be left for the jury (Pironti v Leary, 42 AD3d 487 [2d Dept 2007]).

Although this motion is unopposed, in the instant matter, plaintiff Tangari has failed to present a prima facie entitlement to summary judgment. In their Answer, defendants have included affirmative defenses to plaintiffs' allegations which raise viable questions of fact. Tangari has failed to sufficiently address these affirmative defenses or offer any proof to demonstrate that there exists no material issue of fact with respect to her right to recover herein. Accordingly, plaintiff Tangari's motion for summary judgment is hereby denied.

Plaintiffs' Request to Search the Record and Grant Summary Judgment to Plaintiffs

CPLR 3212(b), provides that if "it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion." It is well settled, that a court should not award summary judgment in favor of a nonmoving party on an issue unaddressed in the summary judgment motions before the court

(Dunham v Hilco Const. Co., Inc., 89 NY2d 425, 430 [1996]).

Plaintiffs' request that absent a cross motion, and in the event that this court dismisses defendants' counterclaims against plaintiff Tangari, the court to search the record and grant summary judgment in favor of plaintiffs (CPLR 3212 b]), and against defendants on the issue of fault and to set this matter down for a trial on damages. They claim that the factual and legal issues raised by Tangari in support of her motion are the same as those applicable to Tangari and Kerron Walker as plaintiffs. Based upon the adduced testimonies and evidentiary proof, and in searching the record, summary judgment is denied on the issue of liability. Plaintiffs have not established their entitlement to summary judgement as a matter of law.

Accordingly, it is

ORDERED, ADJUDGED and DECREED that upon searching the record, summary judgment pursuant to CPLR § 3212(b) is hereby denied;

All matters not herein decided are denied. This constitutes the decision and order of the court.

ORDERED, that the parties are directed to appear on August 18 **, 2014, at** 9:15 **a.m, in courtroom 1600, the Settlement Conference Part of the Westchester County Courthouse.**

Dated: **July 2, 2014**

White Plains, New York

HON. CHARLES D. WOOD
Justice of the Supreme Court