At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 18th day of May, 2018.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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JOEL GARCIA,

Plaintiff,

- against -

VICTORIA RAGUSA,

Defendants.

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Index No.: 513791/2016

DECISION AND ORDER

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	Papers Numbered
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed.....	1/2
Opposing Affidavits (Affirmations).....	3,
Reply Affidavits (Affirmations).....	

Upon the foregoing papers, and after oral argument, the Court finds as follows:

This lawsuit arises out of a motor vehicle accident that allegedly occurred on December 31, 2015. Plaintiff Joel Garcia (hereinafter "the Plaintiff") alleges in his Complaint that on that date he suffered personal injuries after he was struck while a pedestrian crossing the intersection of 18th Avenue and 77th Street in Brooklyn, New York. The Plaintiff alleges that he was struck by a vehicle owned and operated by Defendant Victoria Ragusa (hereinafter "the Defendants").

The Plaintiff now moves for an order pursuant to CPLR § 3212 granting summary judgment on the issue of liability, and proceeding to trial on the issue of damages. The Plaintiff argues that the Defendant is liable for the incident since the Plaintiff was walking in the

intersection with a walk signal[1] when the Defendant allegedly made a left turn and struck the Plaintiff. The Plaintiff argues that the Defendant has violated Vehicle and Traffic Law §1111(a), VTL §1146, VTL §1151(a), VTL §1163(a) and VTL §1180(a) since the vehicle allegedly struck the Plaintiff while he was a pedestrian with the right of way. In opposition, the Defendant argues that the motion should be denied as there are triable issues of fact that should prevent this Court from granting summary judgment at this time. Also, the Defendant argues that the motion is premature because discovery has not been completed.

"Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff,* 14 AD3d 493 [2nd Dept, 2005], *citing Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept, 2004], *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

In general, "[a] violation of the Vehicle and Traffic Law constitutes negligence as a matter of law." *Colpan v. Allied Cent. Ambulette, Inc.*, 97 A.D.3d 776, 777, 949 N.Y.S.2d 124, 125 [2nd Dept. 2012]. Vehicle and Traffic Law § 1146(a) provides that "[n]otwithstanding the provisions of any other law to the contrary, every driver of a vehicle shall exercise due care to avoid colliding with any bicyclist, pedestrian, or domestic animal upon any roadway and shall give warning by sounding the horn when necessary." What is more, Courts have held that a pedestrian who can show that he or she was crossing the street in a crosswalk with the traffic

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[1] The Plaintiff testified that there was no cross walk and does not testify specifically as to the area of the street he crossed. (Plaintiff's Exhibit D page 20 line 14-6)

signal in their favor has met their *prima facie* burden for summary judgment. *See Chou v. Ocean Ambulette Serv., Inc.*, 131 A.D.3d 1091, 1092, 16 N.Y.S.3d 593, 594 [2nd Dept, 2015]; *Qamar v. Kanarek*, 82 A.D.3d 860, 861, 918 N.Y.S.2d 360 [2nd Dept, 2011]; *Klee v. Americas Best Bottling Co.*, 60 A.D.3d 911, 875 N.Y.S.2d 270, 271 [2nd Dept, 2009]; *Voskin v. Lemel*, 52 A.D.3d 503, 859 N.Y.S.2d 489, 490 [2nd Dept, 2008].

Turning to the merits of the instant motion, the Court finds that sufficient evidence has been presented to establish, *prima facie*, that the Defendant was negligent and a proximate cause of the accident. In general, "[a] violation of the Vehicle and Traffic Law constitutes negligence as a matter of law." *Colpan v. Allied Cent. Ambulette, Inc.*, 97 A.D.3d 776, 777, 949 N.Y.S.2d 124, 125 [2nd Dept. 2012]. Further, a plaintiff moving for summary judgment no longer has the burden of establishing his or her freedom from comparative negligence as a matter of law in order to prevail on a motion for summary judgment. In such an event the examination of comparative fault would continue to be an unresolved issue. If the Plaintiff in addition to providing the Defendants negligence also establishes its freedom from comparative negligence the Plaintiff may be awarded partial summary judgment on the issue of liability. *See Rodriguez v. City of New York*, No. 32, 2018 WL 1595658 [2018]. The Court of Appeals recently revisted the award of summary judgment and the standard required. However, the lack of clarity of the video and the testimony regarding the crosswalk does not serve to free the Plaintiff from liability. Accordingly, the award of summary judgment on the issue of liability to the Plaintiff is still subject to a comparative negligence analysis.

In opposition, insufficient proof in admissible form has been submitted to establish an issue of fact that would prevent this Court from granting summary judgment. The Defendant seeks to have the Court deny the instant motion by addressing evidentiary issues with the Police Department documentation and the computer disk provided by the Plaintiff as supporting

evidence. In relation to the Plaintiff's testimony, the Defendant merely contends that summary judgment should be denied because the Plaintiff did not see the vehicle before impact, not that he did not look both ways. This is insufficient to raise an issue of fact. *See Hoey v. City of New York*, 28 A.D.3d 717, 717, 813 N.Y.S.2d 533, 534 [2nd Dept, 2006].

Based on the foregoing, it is hereby ORDERED as follows:

The motion for summary judgment by the Plaintiff is granted to the extent that the Defendant is negligent and a proximate cause of the accident and the issue of comparative negligence shall be addressed hereafter.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino
J.S.C.

FILED
2018 JUN -6 AM 7:15
KINGS COUNTY CLERK