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 S TATE OF NEW YORK
COUNTY OF WESTCHESTER

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ALEXANDER OSEI-APPIAH,

Plaintiff,

-against-

JESTINA OBRIEN and AUDLEY G. OBRIEN,

Defendants.

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Index No: 62727/2018
DECISION and ORDER
Sequence No. 1

RUDERMAN, J.

The following papers were considered in connection with plaintiff's motion for summary judgment on the issue of liability pursuant to CPLR 3212:

Papers	Numbered
Notice of Motion, Affirmation, Exhibits A - D	1
Affirmation in Opposition	2
Reply Affirmation	3

Plaintiff commenced this negligence action to recover damages for injuries he sustained on July 12, 2018 at approximately 6:30 a.m., when he was walking in the parking lot at 16 Lawton Street in the City of New Rochelle, and was struck by a vehicle owned by defendant Jestina O'Brien and operated by defendant Audley O'Brien. Plaintiff's complaint was filed on August 16, 2018. Defendants' answer includes affirmative defenses claiming comparative negligence, lack of serious injury as defined by Insurance Law 5102(d), assumption of risk and a lack of personal jurisdiction.

Plaintiff moves for summary judgment, contending that defendants' affirmative defenses

are without merit as a matter of law, and that evidence establishes as a matter of law that defendant Audley O'Brien's negligence was the proximate cause of the accident. Plaintiff relies on a certified copy of the police report concerning the accident, in which the reporting officer stated,

> "Upon arrival, I interviewed operator 1 . . . Audley Obrien who stated that while operating vehicle 1 E/B in the parking lot of 16 Lawton St. he said that he went to stop vehicle 1, when vehicle 1 accelerated in stead [sic] of stopping. Audley said that he struck a pedestrian, whom he now knows to be Alexander Oseiappiah."

Defendants oppose, protesting that the motion is premature because discovery has not yet been conducted. They also argue that the police report is inadmissible.

Analysis

Preliminarily, plaintiffs submit the affidavits of service of the summons and complaint on defendants. These documents are sufficient to create a prima facie showing of proper service, (*Deutsche Bank Natl. Trust Co. v Saketos*, 158 AD3d 610, 610 [2d Dept 2018]), and in the absence of evidence contradicting them, they establish personal jurisdiction over defendants as a matter of law, negating the jurisdictional defense.

As to the liability claim, the hearsay statement by defendant Audley O'Brien, as reported by police officer Kenneth Hudson in the certified police report, is admissible. In *Abramov v Miral Corp.* (24 AD3d 397 [2d Dept 2005]), the grant of summary judgment to the plaintiff/pedestrian was affirmed, with the explanation that the motion court "properly considered the police accident report which contained [the defendant driver's] admission immediately following the accident that he had observed the pedestrian in the intersection but was unable to stop in time" (*id.* at 398). Similarly, in *Guevara v Zaharakis* (303 AD2d 555 [2d Dept 2003]), it

was held that the motion court "properly considered the police accident report . . . which contained a statement by the plaintiff . . . that he had fallen asleep while driving and that his vehicle had crossed into oncoming traffic" (*id.* at 556). The Court there observed that "[t]he police officer who prepared the report was acting within the scope of his duty in recording Guevara's statement, and the statement was admissible as the admission of a party" (*id.*).

Here, Audley O'Brien's statement that he went to stop his vehicle but accelerated instead, is admissible as a party admission and an admission against interest, and is sufficient in itself to create a prima facie showing of his negligence. Defendants rely on the rule that the court must construe the facts in the light most favorable to the non-moving party, and draw all reasonable inferences in favor of the non-movant (*see Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 610 [2d Dept 1990]). However, there is no non-negligent inference that may be drawn from the statement; nor is there any alternate light in which to view the facts.

Since defendants have not submitted any evidentiary materials in opposition, no triable issue of fact has been presented as to defendants' liability for negligence.

This is not a case in which summary judgment on the issue of liability must be denied because the motion is premature. "A party who contends that a summary judgment motion is premature is required to demonstrate that discovery might lead to relevant evidence" (*Cortes v Whelan*, 83 AD3d 763, 764 [2d Dept 2011] [citation omitted]). "The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion" (*id.*). "Before a party can defeat a motion for summary judgment claiming ignorance of facts due to unconducted discovery, he must show

that he has made reasonable steps to discover these facts and that the facts sought would give rise to a triable issue" (*Gillinder v Hemmes*, 298 AD2d 493 [2d Dept 2002]). The record here fails to show that facts essential to justify opposition to the motion on the issue of defendants' liability may exist but cannot be stated as they are in the exclusive knowledge of the other party. Indeed, defendants have failed to show what additional facts regarding the sequence of events is not within their knowledge. The absence of discovery need not preclude summary judgment in this regard.

However, nothing in plaintiff's submissions establishes, as a matter of law, the lack of comparative negligence, or the presence of serious injury as defined by Insurance Law 5102(d). Nevetheless, these issues do not preclude a liability determination against defendants, since they are both appropriately addressed in the context of the damages determination (*see Rodriguez v City of New York*, 31 NY3d 312 [2018] [comparative negligence]; *Gore v Cardany*, __ AD3d __, 2018 NY Slip Op 08632, 2018 NY App. Div. LEXIS 8567 [2d Dept 2018] [serious injury]).

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion for summary judgment on the issue of defendants' liability is granted; and it is further

ORDERED that all parties are directed to appear in the Preliminary Conference Part on Monday, February 25, 2019 at 9:30 a.m., at the Westchester County Courthouse located at 111 Dr. Martin Luther King Jr. Boulevard, White Plains, New York, 10601.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
January 28, 2018

HON. TERRY JANE RUDERMAN, J.S.C.