SHORT FORM ORDER **INDEX NO.: 624972-2018**

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE OF THE SUPREME COURT

Motion Submit Date: 06/20/19
Mot Seq 001 MG

PLAINTIFF'S COUNSEL:
Edmond C. Chakmakian, PC
200 Motor Parkway, Ste A3
Hauppauge, New York 11788

DEFENDANT'S COUNSEL:
Gambeski & Frum
565 Taxter Rd., Ste 220
Elmsford, New York 10523

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KEITH A. MCCORMACK &
MARGARET MCCORMACK

Plaintiff,

-against-

D. CASTILLO TRUCKING LLC,

Defendant.

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In this electronically filed personal injury action, on plaintiff's motion for partial summary judgment on liability pursuant to CPLR 3212, the following papers were considered: NYSCEF Docket Entries ## 6 – 17 & 19; and upon due deliberation and full consideration of all of the foregoing, it is

ORDERED that plaintiff's motion seeking partial summary judgment as to liability pursuant to CPLR 3212 against defendant is **granted** as follows; and it is further

ORDERED that plaintiff's counsel is hereby directed to serve a copy of this decision and order with notice of entry on defense counsel electronically and via email; and it is further

ORDERED that, if applicable, within 30 days of the entry of this decision and order, that defendant's counsel is also hereby directed to give notice to the Suffolk County Clerk as required by CPLR 8019(c) with a copy of this decision and order and pay any fees should any be required.

BACKGROUND & POSTURE

On December 19, 2018, plaintiffs commenced this personal injury negligence action against defendant arising out of an alleged motor vehicle collision which occurred on December 7, 2018 on Route 111 at or near its intersection with Maple Avenue in Smithtown, Suffolk County, New York. By the pleadings filed, plaintiffs seek damages for alleged personal injuries sustained premised on defendant's negligence as a proximate cause of the underlying motor vehicle collision . Defendant joined issue filing an answer to the complaint on January 31, 2019. Discovery commenced with the entry of a preliminary conference order on April 16,

2019 and the matter has since appeared before this Court on the compliance conference calendar for the purpose of monitoring pretrial disclosure. Presently, plaintiff moves for an award of partial summary judgment on liability.

In support of the application, plaintiff submits a sworn affidavit; a certified copy of the police accident investigation report; and a copy of the pleadings. By his affidavit, plaintiff Keith McCormack testifies that on December 7, 2018 at approximately 4:40 a.m. he operated his 2018 Honda CRV vehicle travelling southbound on Route 111 on his morning commute to his job in Bethpage, New York. While proceeding in that fashion, plaintiff further stated that suddenly and without warning a truck owned by defendant travelling in the opposite northbound direction on Route 111 crossed over the double yellow line and struck his vehicle head on, leaving plaintiff with no time to take any evasive action to avoid the collision. As a result of the collision, plaintiff was transported to the hospital where he was treated for related injuries.

Plaintiff further relies upon a certified copy of the police accident investigation report. Therein, the investigating officer noted that plaintiff and defendant were involved in a head-on collision, but moreover that the non-party operator of defendant's vehicle advised on scene that he had "started to fall asleep and drifted out of his lane" prior to colliding with the plaintiff's vehicle.

Relying on his affidavit and the certified police accident report, plaintiffs now seeks an order entering partial summary judgment on liability in their favor arguing that defendant is liable to them for violation of Vehicle & Traffic Law § 1126 as proximate cause for their damages.

Defendant by counsel's affirmation, opposes plaintiff's application arguing that it is premature, having been filed prior to any pretrial depositions of any party or operator in the matter. Each of the parties' contentions and respective arguments are addressed below.

STANDARDS OF REVIEW

The motion court's role on review of a motion for summary judgment is issue finding, not issue determination (***Trio Asbestos Removal Corp. v Gabriel & Sciacca Certified Pub. Accountants, LLP***, 164 AD3d 864, 865, 82 NYS3d 127, 129 [2d Dept 2018]). The court should refrain from making credibility determinations (***Gniewek v Consol. Edison Co.***, 271 AD2d 643, 643, 707 NYS2d 871 [2d Dept 2000]).

It is well settled that summary judgment is a drastic remedy which should not be granted when there is doubt as to the existence of a triable issue of fact. Where, however, one seeking summary judgment tenders evidentiary proof in admissible form establishing its defense sufficiently to warrant the court as a matter of law in directing judgment in its favor, the burden falls upon the opposing party to show, also by evidentiary proof in admissible form, that there is a material issue of fact requiring a trial of the matter (*see* ***Zuckerman v. City of New York,*** 49 NY2d 557, 562, 427 NYS2d 595 [1980]). The evidence presented on a motion for summary judgment must be scrutinized in the light most favorable to the party opposing the motion (*see* ***Goldstein v. Monroe County,*** 77 AD2d 232, 236, 432 NYS2d 966 [1980]).

The proponent on a motion of summary judgment 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 Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985];]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

If the moving party fails in meeting this burden, the motion must be denied. If, however, this burden is satisfied, then the burden shifts to the opposing party to establish the existence of material issues of fact requiring a trial (*see* ***Zuckerman***, *supra*). The function of the court in determining a motion for summary judgment is issue finding, not issue determination (***Pantote Big Alpha Foods, Inc. v Schefman,*** 121 AD2d 295, 503 NYS2d 58 [1st Dept. 1986]).

The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289AD2d 557, 735 NYS2d 197 [2d Dept. 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept. 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept. 1987]). The law is well-established that summary judgment is a drastic remedy to be granted only when there is clearly no genuine issue of fact to be presented at trial (*see* ***Andre v Pomeroy,*** 35 NY2d 361, 362 NYS2d 131 [1974]; ***Benincasa v Garrubo,*** 141 AD2d 636, 529 NYS2d 797 [2d Dept. 1988]).

However, whereas here, the non-movant fails to oppose a motion for summary judgment, there is, in effect, a concession that no question of fact exists, and the facts as alleged in the moving papers may be deemed admitted (***Kuehne & Nagel v Baiden***, 36 NY2d 539, 369 NYS2d 667 [1975]).

DISCUSSION

The plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, *prima facie*, that the defendants breached a duty owed to the plaintiff and that the defendants' negligence was a proximate cause of the alleged injuries (***Montalvo v Cedeno***, 170 AD3d 1166 [2d Dept 2019]; *accord* ***Buchanan v Keller***, 169 AD3d 989, 991, 95 NYS3d 252, 254 [2d Dept 2019][holding that plaintiff-movant seeking summary judgment on liability is no longer required to show freedom from comparative fault in order to establish prima facie entitlement to judgment as a matter of law]; *quoting* ***Rodriguez v. City of New York***, 31 NY3d 312 [2018]).

As regards a head-on collision or a vehicle crossing over, movant establishes entitlement to judgment as a matter of law on liability with submission of evidence of defendant's violation of Veh. & Traf. L. § 1126(a) showing that "by [defendant's] crossing over the median and entering the opposite lane of traffic in which the injured plaintiff's vehicle had been traveling was a proximate cause of the initial impact in [the] ... accident" (***Gute v Grease Kleeners, Inc.***, 170 AD3d 676, 677, 96 NYS3d 70, 72 [2d Dept 2019]; *see also* ***Pearson v Northstar Limousine, Inc.***, 123 AD3d 991, 991, 999 NYS2d 478, 479 [2d Dept 2014]).

Here, having reviewed his moving papers, the Court finds that plaintiffs have met their *prima facie* burden for entitlement to summary judgment on liability based on the submission of the sworn affidavit and the certified police accident report, which taken together, demonstrates a *prima facie* case of negligence against the defendant. Thus, the burden has shifted to defendant

to come forward with a non-negligent explanation for the incident.

Arguing in opposition to an award of partial summary judgment on liability, defendant's counsel argues that plaintiff's motion is premature under CPLR 3212(f), since none of the parties or operators have yet to be deposed. This argument is unpersuasive and, more importantly, within the context of the parties' instant dispute, is legally insufficient to preclude entry of summary judgment in plaintiffs' favor.

A summary judgment motion coming before the close of pretrial disclosure may be determined premature and thus denied (***Adrianis v Fox***, 30 AD3d 550, 550–51, 817 NYS2d 374, 375 [2d Dept 2006][holding that a motion court properly denies a partial liability summary judgment motion as premature where at least one party's deposition was still outstanding, and the parties had previously stipulated to hold that deposition only seven days after the motion was made]). Put differently, defendant's argument that she has been unfairly deprived the opportunity to fully probe and pursue the merits of affirmative defenses without the benefit of party depositions may warrant denial of a premature application (*see* ***Amico v Melville Volunteer Fire Co., Inc.***, 39 AD3d 784, 785, 832 NYS2d 813 [2d Dept 2007][resolving that a party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment]).

By the same token, the Second Department is clear that defendant's mere hope or speculation that additional discovery might lead to or create a triable fact issue is insufficient to preclude the entry of summary judgment on liability in this negligence motor vehicle action (*see e.g.* ***Rodriguez v Farrell***, 115 AD3d 929, 931, 983 NYS2d 68, 70 [2d Dept 2014][appellate court determining that summary judgment not premature where defendant failed to demonstrate that discovery would lead to relevant evidence or that facts essential to justify opposition to the motions were exclusively within the knowledge and control of the plaintiffs]; ***Medina v Rodriguez***, 92 AD3d 850, 851, 939 NYS2d 514, 515 [2d Dept 2012]; ***Kimyagarov v Nixon Taxi Corp.***, 45 AD3d 736, 737, 846 NYS2d 309, 310–11 [2d Dept 2007]; ***Hill v Ackall***, 71 AD3d 829, 829–30, 895 NYS2d 837, 838 [2d Dept 2010]).

Therefore, a party opposing summary judgment is entitled to obtain further discovery when it appears that facts supporting the opposing party's position may exist but cannot then be stated." ***Chmelovsky v. Country Club Homes, Inc.***, 106 AD3d 684, 964 NYS2d 245, 246 [2d Dept 2013]; ***Martinez v. 305 W. 52 Condo.***, 128 AD3d 912, 914, 9 NYS3d 375, 377 [2d Dept 2015]["A party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment"]). The non-movant should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment (*see* ***Video Voice, Inc. v. Local T.V., Inc.,*** 114 AD3d 935, 980 NYS2d 828; ***Bank of Am., N.A. v. Hillside Cycles, Inc.,*** 89 AD3d 653, 932 NYS2d 128; ***Venables v. Sagona,*** 46 AD3d 672, 673, 848 NYS2d 238). Further, non-movant is also entitled to obtain further discovery when it appears that facts supporting the opposing party's position may exist but cannot then be stated (*see* CPLR 3212[f]; ***Nicholson v. Bader,*** 83 AD3d 802, 920 NYS2d 682; ***Family-Friendly Media, Inc. v. Recorder Tel. Network,*** 74 AD3d 738, 739, 903 NYS2d 80; ***Juseinoski v. New York Hosp. Med. Ctr. of Queens,*** 29 AD3d 636, 637, 815 NYS2d 183). ***Malester v. Rampil***, 118 A.D.3d 855, 856, 988 N.Y.S.2d 226, 227-28 [2d Dept 2014]).

Under CPLR 3212(f), "where facts essential to justify opposition to a motion for

summary judgment are exclusively within the knowledge and control of the movant, summary judgment may be denied.... This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion" (***Juseinoski v. New York Hosp. Med. Ctr. of Queens***, 29 AD3d 636, 637, 815 NYS2d 183, 184-85 [2d Dept 2006]; ***Baron v. Inc. Vil. of Freeport,*** 143 AD2d 792, 92-93; 533 NYS2d 143, 148 [2d Dept 1998]).

Here, defendant's mere conclusions are insufficient to warrant denial of summary judgment. Moreover, defendant's opposition consists solely of its counsel's affirmation in opposition. The law in this regard is settled. Defendant's reliance on its attorney's affirmation, without further submission of sworn testimony by any competent witness with direct personal or firsthand knowledge of the facts and circumstances underlying the subject accident, is insufficient to establish triable issues of fact warranting denial of summary judgment. The Second Department has repeatedly cautioned counsel on this point (***Huerta v Longo***, 63 AD3d 684, 685, 881 NYS2d 132, 133 [2d Dept 2009]; ***Collins v Laro Serv. Sys. of New York, Inc.***, 36 AD3d 746, 746–47, 829 NYS2d 168, 169 [2d Dept 2007][attorney's affirmation, together with inadmissible hearsay documents insufficient to warrant denial of the motion]; ***Cordova v Vinueza***, 20 AD3d 445, 446, 798 NYS2d 519, 521 [2d Dept 2005][attorney's affirmation offering speculation unsupported by any evidence insufficient to raise a triable issue of fact]).

Thus, defendant fails to carry its shifted burden of rebutting plaintiffs' *prima facie* case of negligence against her by competent or admissible proof raising a triable question of fact meriting a liability trial and precluding judgment as a matter of law on liability for the plaintiffs.

Accordingly, because defendant has failed to come forward with competent and admissible proof demonstrating triable issues of fact or non-negligent explanations for the collision here, necessitating a trial on its liability, this Court **grants** plaintiffs partial summary judgment on liability against defendant under CPLR 3212.

The foregoing constitutes the decision and order of this Court.

Dated: December 2, 2019
Riverhead, New York

WILLIAM G. FORD, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**