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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LORI LAMB and ROBERT D. LAMB, JR.,

Plaintiffs,

Amended
DECISION AND ORDER
Motion Sequence #1
Index No. 51751/2019

-against-

MICHELE HERBST,

Defendants.

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COLANGELO, J.

The following papers were considered on Plaintiffs' Motion for Summary Judgment pursuant to CPLR §3212 on the issue of liability and setting the matter down for a trial on damages:

	NYSCEF
Notice of Motion-Affirmation-Exhibits A-D	8-13
Affirmation in Opposition-Exhibits 1& 2	17-19
Reply Affirmation	20

Upon the foregoing papers it is ORDERED that the motion is disposed of as follows:

Background

This is an action to recover damages for alleged serious personal injuries sustained by Plaintiff Lori Lamb ("Plaintiff") as a result of a motor vehicle accident that occurred on December 29, 2016 in the parking lot of Club Fit in Briarcliff Manor, New York. At the time of the accident, as Plaintiff was stopped and waiting to exit the parking lot, her vehicle was struck

on the driver's side by the vehicle owned operated by Defendant Michelle Herbst ("Defendant") who had turned into the parking lot into Plaintiff's lane. (Pl. Exh. D).

According to the certified copy of the Police Accident Report, Defendant stated that she was turning into the parking lot and did not see Plaintiff's vehicle and collided with it. (Pl. Exh. A).

In opposition, Defendant takes the position that Plaintiff has failed to meet her initial burden of proof, and the motion must therefore be denied.

CPLR §3212(b) states in pertinent part that a motion for summary judgment "shall be granted if, upon all of papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party."

In *Andre v Pomeroy*, 35 N.Y.2d 361, 364 (1974), the Court of Appeals held that:

> [s]ummary judgment is designed to expedite all civil cases by eliminating from the Trial Calendar claims which can properly be resolved as a matter of law . . . when there is no genuine issue to be resolved at trial, the case should be summarily decided, and an unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated.

Moreover, if summary judgment is granted, plaintiff is entitled to an immediate trial on the issue of damages pursuant to CPLR§ 3212(c), after completion of the outstanding discovery.

CPLR § 3212(c) states in pertinent part:

> Immediate trial. If it appears that the only triable issues of fact arising on a motion for summary judgment relate to the amount or extent of damages . . . the court may . . . order an immediate trial of such issues of fact raised by the motion, before a referee, before the court, or before the court and jury, whichever may be proper.

On a motion for summary judgment, the moving party has the burden to 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." *Voss v. Netherlands Ins Co.*, 22 N.Y.3d 728 (2014), *quoting Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986); *see also Winegrad v New York University Medical Center*, 64 N.Y.2d 851, 853 (1985), *Ayotte v Gervasio*, 81 N.Y.2d 1062, 1063 (1993), *S.J. Capelin Associates, Inc. v. Globe Manufacturing Corp.*, 34 N.Y.2d 338, 341(1974), *Finkelstein v. Cornell University Medical College*, 269 A.D.2d 114, 117 (1st Dept. 2000).

Once the moving party has sustained his or her burden of making a prima facie showing of entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). The failure of the proponent of a motion for summary judgment to make a prima facie showing of entitlement requires denial of the motion, regardless of the sufficiency of the opposing papers. *Winegrad v New York University Medical Center*, 64 N.Y.2d 851, 853 (1985).

This Court finds that based upon the foregoing, Plaintiff has tendered sufficient evidence to establish her *prima facie* entitlement to judgment as a matter of law on the issue of liability. While a Plaintiff is no longer required to demonstrate the absence of her own comparative negligence to be entitled to summary judgment on the issue of liability, and does not bear the double burden of establishing a prima facie case of defendant's liability and the absence of his or her own comparative fault, (*Harrinarain v. Sisters of St. Joseph,* 173 A.D.3d 983, 984 [2d Dept. 2019]; *Rodriguez v. City of New York*, 31 N.Y.3d 312, 325 [2018]), a plaintiff still must establish

a defendant's liability as a matter of law. In *Harrinarain v. Sisters of St. Jospph,* 173 A.D.3d 983, the Second Department found that the plaintiff had established her *prima facie* entitlement to judgment as a matter of law on the issue of liability by demonstrating that the defendant driver negligently drove into the intersection on a street controlled by a stop sign without yielding the right-of -way to the plaintiff's vehicle (see Vehicle and Traffic Law § 1142[a]) through her own affidavit and a copy of a police accident report which contained defendant driver's admission that she failed to stop at the stop sign before entering the intersection. A similar situation is present here given Plaintiff's Affidavit which states that as she was at a complete stop waiting to exit the Club Fit parking lot, Defendant's vehicle turned into her lane and struck the driver's side of her vehicle (Pl. Exh. D) which is corroborated by Defendant's statement to the responding officer that she was turning into parking lot and didn't see Plaintiff's vehicle and collided with it.

In opposition, Defendant has failed to raise an issue of fact requiring a trial of this action on the issue of liability. The contention that the instant motion is premature as discovery has not yet occurred is rejected. As the Second Department made clear in *Deleg v. Vinci,* 82 A.D.3d 1146 (2d Dept. 2011), a motion of this nature is not premature where a defendant failed to demonstrate that discovery might lead to relevant evidence or that facts essential to justify opposition to the motion were exclusively within the knowledge and control of the plaintiff. The court recognized that "[t]he defendants' purported need to conduct discovery did not warrant denial of the motion since they already had personal knowledge of the relevant facts" (*Abramov v Miral Corp.*, 24 A.D.3d 397, 398 [2d Dept. 2005]). "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" (*Lopez v WS Distrib., Inc.*, 34 A.D.3d 759, 760 [2d

Dept.l 2006]) *see Corwin v Heart Share Human Servs. of N.Y.*, 66 A.D.3d 814 [2d Dept. 2009]; *Monteleone v Jung Pyo Hong*, 79 A.D.3d 988 [2d Dept. 2010]).

Accordingly and based upon the foregoing, Plaintiff's motion for summary judgment on the issue of liability is granted. The second branch of Plaintiff's motion which seeks to strike Defendant's Second Affirmative Defense of culpable conduct and comparative negligence is granted since it is undisputed based upon the foregoing, that Plaintiff was at a complete stop at the time of the accident and did not contribute to the happening thereof; and it is hereby

ORDERED that all parties and counsel shall appear in the Settlement Conference Part, courtroom 1600 on November 12, 2019 at 9:15 am.

The foregoing constitutes the Decision and Order of this Court.

Dated: September 20, 2019
White Plains, New York

HONORABLE JOHN P. COLANGELO, J.S.C.