SHORT FORM ORDER **INDEX NO. 605807/2019**

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:
Hon. Paul J. Baisley, Jr., J.S.C.

CONSTANTINOS BRAKATSELOS,

Plaintiff,

-against-

MALIHA M. ALI and MOHSIN ALI, M.D.,

Defendants.

ORIG. RETURN DATE: July 25, 2019
FINAL RETURN DATE: August 22, 2019
MOT. SEQ. #: 001 MD

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Upon the following papers read on this motion for partial summary judgment: Notice of Motion and supporting papers by the plaintiff, dated June 24, 2019; Answering Affidavits and supporting papers by the defendants, dated August 13, 2019; Replying Affidavits and supporting papers by the plaintiff, dated August 20, 2019; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiff Constantinos Brakatselos for, inter alia, partial summary judgment in his favor on the issue of defendants' liability is denied; and it is further

ORDERED that the parties shall appear for a preliminary conference at 10:00 a.m. on November 8, 2019, at the DCM-J Part of the Supreme Court, One Court Street, Riverhead, New York.

This action was commenced by plaintiff Constantinos Brakatselos to recover damages for injuries he allegedly sustained on September 18, 2018, when his motor vehicle collided with a vehicle owned by defendant Mohsin Ali and operated by defendant Maliha Ali.

Plaintiff now moves for partial summary judgment in his favor as to defendants' negligence, arguing that defendants' actions were the sole proximate cause of his alleged injuries. Plaintiff also seeks an order striking defendants' affirmative defense of comparative negligence. In support of his motion, plaintiff submits, among other things, his own affidavit and a certified copy of an MV-104A police accident report. Initially, the Court notes that "[i]nformation in a police accident report is admissible as a business record so long as the report is made based upon the officers personal observations and while carrying out police duties" (*Shehab v Powers*, 150 AD3d 918, 919, 54 NYS3d 104 [2d Dept 2017] [internal quotation marks omitted], quoting *Memenza v Cole*, 131 AD3d 1020, 1021, 16 NYS3d 287 [2d Dept 2015]). Here, there is no evidence that the police officer drafting the subject accident report actually observed the actions of the parties and, therefore, the statements contained in that section entitled "Accident Description/Officer's Notes" will not be considered (*see*

Wynn v Motor Veh. Acc. Indem. Corp., 137 AD3d 779, 26 NYS3d 558 [2d Dept 2016]).

In his affidavit, plaintiff indicates that on the date in question, he was operating his motor vehicle westbound in the right lane of the Southern State Parkway approximately 500 feet east of Exit 38 in the Town of Babylon, New York. He states that he observed defendant driver traveling in the left lane "at an excessive speed" when she "lost control of her vehicle and improperly veered out of her lane of travel, struck the center median, crossed over the middle lane, and struck the driver's side of [his] vehicle." Plaintiff further states that after striking the center median, defendants' vehicle "spun around as it crossed over the middle lane of traffic." In conclusion, plaintiff avers that he was "lawfully operating [his] vehicle within [his] own lane of traffic" and "did nothing to contribute to the happening of the collision."

A party moving for 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, 324, 508 NYS2d 923 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]). Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient to raise a triable issue (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*see Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339, 937 NYS2d 157, 159 [2011]).

A plaintiff "is no longer required to show freedom from comparative fault in order to establish his [or her] prima facie entitlement to judgment as a matter of law on the issue of liability" (*Merino v Tessel*, 166 AD3d 760, 760, 87 NYS3d 554 [2d Dept 2018]; *see Rodriguez v City of New York*, 31 NY3d 312, 76 NYS3d 898 [2018]). Also, "the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where, as here, the plaintiff moved for summary judgment dismissing a defendant's affirmative defense of comparative negligence" (*Poon v Nisanov*, 162 AD3d 804, 808, 79 NYS3d 227 [2d Dept 2018]).

The Vehicle and Traffic Law establishes standards of care for motorists, and an unexcused violation of such standards of care constitutes negligence per se (*see Shui-Kwan Lui v Serrone*, 103 AD3d 620, 959 NYS2d 270 [2d Dept 2013]; *Barbieri v Vokoun*, 72 AD3d 853, 900 NYS2d 315 [2d Dept 2010]). Vehicle and Traffic Law § 1128 (a) provides, in relevant part:

> Whenever any roadway has been divided into two or more clearly marked lanes for traffic the following rules in addition to all others consistent herewith shall apply:
>
> (a) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has

first ascertained that such movement can be made with safety.

Moreover, an operator of a motor vehicle has a "common-law duty to see that which [he or she] should have seen through the proper use of [his or her] senses" (*Botero v Erraez*, 289 AD2d 274, 275, 734 NYS2d 565, 566 [2d Dept 2001]; *see also Ferrara v Castro*, 283 AD2d 392, 724 NYS2d 81 [2d Dept 2001]). Nevertheless, while "the driver with the right-of-way is entitled to assume that other drivers will obey the traffic laws requiring them to yield, the driver with the right-of-way also has an obligation to keep a proper lookout and see what can be seen through the reasonable use of his or her senses to avoid colliding with other vehicles" (*Miron v Pappas*, 161 AD3d 1063, 1064, 77 NYS3d 163 [2d Dept 2018][internal citation omitted]).

Plaintiff's submissions established a prima facie case of entitlement to judgment in his favor on the issue of defendants' liability for his alleged injuries (*see Marks v Rieckhoff*, 172 AD3d 847, 101 NYS3d 63 [2d Dept 2019]; *see generally Alvarez v Prospect Hosp.*, *supra*). Plaintiff's affidavit demonstrated that a motor vehicle operated by defendant Maliha Ali unsafely left its lane of travel and struck plaintiff's vehicle. In addition, as to defendant Mohsin Ali, Vehicle and Traffic Law § 388 (1) provides that "[e]very owner of a vehicle used or operated in this state shall be liable and responsible for . . . injuries to person or property resulting from negligence in the use or operation of such vehicle . . . by any person using or operating the same with the permission, express or implied, of such owner." As to that branch of plaintiff's motion seeking an order striking defendants' affirmative defense of comparative negligence, however, plaintiff has failed to establish a prima facie case therefor. Namely, plaintiff's affidavit does not contain a statement that there was nothing he could have done to avoid the collision with defendants' vehicle (*see Bermejo v Khaydarov*, 155 AD3d 597, 63 NYS3d 107 [2d Dept 2017]; *Beres v Terranera*, 153 AD3d 483, 60 NYS3d 207 [2d Dept 2017]; *cf. Kadashev v Medina*, 134 AD3d 767, 19 NYS3d 898 [2d Dept 2015]). The burden then shifted to defendants to raise a triable issue (*see generally Vega v Restani Constr. Corp.*, *supra*).

In opposition, defendants argue that they are not liable for the happening of the subject accident pursuant to the emergency doctrine. Defendants submit an affidavit of defendant driver, Maliha Ali. In her affidavit, Maliha Ali states that immediately prior to the collision in question, she was operating a motor vehicle owned by her father, Mohsin Ali, in the left lane of the Southern State Parkway. She indicates that she was driving at a speed below the 55 mile per hour speed limit on that roadway because it was raining. Ms. Ali avers that her vehicle reached a point on the roadway where there was a "deep" puddle, or "accumulation of water" in the lane, and that a "very strong crosswind" caused her to lose control of her vehicle. She states that her vehicle struck the concrete center median, spun, went across the middle lane of the Southern State Parkway, and made contact with plaintiff's vehicle. In conclusion, Ms. Ali indicates that her vehicle crossed over the middle lane of the Southern State Parkway "involuntarily" following its collision with the concrete median, that she was not changing lanes in the ordinary meaning of that phrase, and that she was merely "trying to bring [her] car under control in an emergency situation."

"Under the emergency doctrine, when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative

courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context" (*Freder v Costello Indus., Inc.*, 162 AD3d 984, 985-986, 80 NYS3d 371 [2d Dept 2018] [internal quotations omitted]). Here, defendant driver's affidavit is sufficient to raise triable issues regarding the applicability of the emergency doctrine which, if so found, could exempt defendants of all liability (*see Freder v Costello Indus., Inc.*, *supra*). Accordingly, the motion by plaintiff Constantinos Brakatselos for, inter alia, partial summary judgment in his favor on the issue of defendants' liability is denied.

Dated: 10/10/19

HON. PAUL J. BAISLEY, JR., J.S.C.