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 1st day of August, 2019.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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MARK A. CRUZ,

Plaintiff,

- against -

ADELL SMITH and HIGH PERFORMANCE COOLING AND REFRIGERATION CORPORATION,

Defendants.

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Index No.: 511786/2017

DECISION AND ORDER

Motion Sequence #2

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).....	4

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 July 26, 2016. Plaintiff Mark A. Cruz (hereinafter "the Plaintiff") alleges in his Complaint that on that date he suffered personal injuries after the vehicle he was operating collided with a vehicle operated by Defendant Adell Smith and owned by Defendant High Performance Cooling and Refrigerating Corporation (hereinafter referred to collectively as the "Cooling Defendants"). The Plaintiff further alleges in his complaint that the collision occurred on 28th Street between 7th and 8th Avenue in the County of Kings, City and State of New York.

The Plaintiff moves (motions sequence #2) 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 contends that summary judgment should be granted in favor of the Plaintiff on the issue of liability given that the Plaintiff's motor vehicle was rear ended while stopped. In opposition, the Cooling Defendants argue 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. Specifically, the Cooling Defendants contend that the accident occurred after the Plaintiff collided with the car in front of him and stopped immediately prior to the accident at issue.

It has long been established that "[s]ummary 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].

Once a moving party has made a *prima facie* showing of its 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." *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2nd Dept, 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept, 2006]; *see Menzel v. Plotnick,* 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

Turning to the merits of the instant motion, the Court finds that sufficient evidence has been presented to establish, *prima facie*, that the Cooling Defendants' actions on the day in question were the sole proximate cause of the accident, as a matter of law. In support of its application, the Plaintiff relies on the Plaintiff's deposition and a Police Accident Report. When asked how long he was stopped before the accident occurred, the Plaintiff testified (Plaintiff's motion, Exhibit 5, Page 28) that he was stopped for "[a]pproximately five seconds." Even assuming, *arguendo*, that the Police Accident Report attached to the Plaintiffs' motion is not admissible, given that the Police Officer did not witness the alleged incident (*see Adobea v. Junel*, 114 A.D.3d 818, 980 N.Y.S.2d 564 [2nd Dept, 2014]), the examination before trial of the Plaintiff is sufficient for the Plaintiff to establish a *prima facie* showing. *See Martinez v. Allen*, 163 A.D.3d 951, 82 N.Y.S.3d 130 [2nd Dept, 2018]. This is because "[a] rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of negligence against the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision." *Klopchin v. Masri*, 45 A.D.3d 737, 737, 846 N.Y.S.2d 311, 311 [2nd Dept, 2007]; *see also Catanzaro v. Edery*, 172 A.D.3d 995, 996, 101 N.Y.S.3d 170, 171 [2nd Dept, 2019]; *Arslan v. Costello*, 164 A.D.3d 1408, 84 N.Y.S.3d 229 [2nd Dept, 2018]; *Tumminello v. City of New York*, 148 A.D.3d 1084, 1085, 49 N.Y.S.3d 739, 741 [2nd Dept, 2017]. This evidence is sufficient for the Plaintiff to establish Defendant's negligence and entitlement to summary judgment on the issue of liability.

In opposition to the motion, the Defendant has failed raise a material issue of fact that would show that the Defendant was not the sole proximate cause of the incident at issue. Under the circumstances, the speed of the Defendant's vehicle, by Defendant's own admission, should have permitted the Defendant to stop before hitting the Plaintiff's vehicle. Moreover, although the Defendant's version of the accident was that the Plaintiff hit the vehicle in front of him prior to the subject collision, the Defendant does not state that the stop was unexpected. The Defendant does

admit that he hit the Plaintiff's vehicle in the rear and accordingly fails to provide a non-negligent explanation. The Defendant should have considered the traffic conditions and maintained a reasonably safe distance. *See Waide v. ARI Fleet, LT*, 143 A.D.3d 975, 39 N.Y.S.3d 512 [2nd Dept, 2016].

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

Plaintiff's motion (MS #2) for summary judgment, on the issue of liability, is granted.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino
J.S.C.