At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 26th day of August 2020.

P R E S E N T:
HON. LARA J. GENOVESI,
J.S.C.

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JOHAN BELTRE,

Plaintiff,

-against-

CARLOS MUOZ AND MERCY HOME FOR CHILDREN, INC.,

Defendants.

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Index No.: 515073/2018

DECISION & ORDER

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	NYSCEF Doc. No.:
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed	12-18
Opposing Affidavits (Affirmations)	20-21
Reply Affidavits (Affirmations)	24-26

Introduction

Plaintiff, Johan Beltre, moves by notice of motion, sequence number one, pursuant to CPLR § 3212 for summary judgment in favor of plaintiff, to strike defendant's affirmative defense of comparative negligence and for such other and further relief that this Court deems just. Defendants, Carlos Munoz and Mercy Home for Children, Inc., oppose this application.

Background & Procedural History

Plaintiff allegedly sustained personal injuries on July 10, 2018, as a result of an automobile accident at the intersection of Bath Avenue and Bay 13th Street, in Brooklyn, New York. Plaintiff alleges that he drove on Bath Avenue towards the intersection with Bay 13th Street, which had no traffic control device. The accident occurred as he entered the intersection and was struck on the rear portion of the driver's side of his vehicle by another vehicle, owned by defendant Mercy Home for Children, Inc., and operated by defendant Carlos Munoz. Plaintiff alleges that there is a stop sign on Bay 13th before the intersection with Bath Avenue. Plaintiff stated that he looked left before proceeding into the intersection and did not see any vehicles at or approaching the stop sign on Bay 13th Street. He did not notice defendants' vehicle until impact (*see generally,* NYSCEF Doc. # 17, Plaintiff Deposition; NYSCEF Doc. # 18, Plaintiff Affidavit).

In his affidavit, defendant Carlos Munoz stated that he stopped his vehicle at the stop sign on Bay 13th Street.

> 4. After coming to a stop, I then proceeded into the intersection, when the vehicle operated by the plaintiff, John Beltre, sped up his motor vehicle and struck my vehicle when it was already proceeding through the intersection.
>
> 5. Johan Beltre's actions in allowing his vehicle to speed up while approaching the intersection, when my vehicle was already going through it, was the sole cause of this accident

(NYSCEF Doc. # 21, Affidavit of Carlos Munoz).

Pursuant to the Final Pre-Note Order, dated February 14, 2020, defendant's deposition was to be held on or before March 3, 2020. In this order, the Hon. Lisette

Colon further stated that "To extent not already provided all parties shall respond to all outstanding discovery [on or before] 2/29/20. Failure to comply – precluded or waived" (NYSCEF Doc. # 25). To date, defendant has not been deposed. Plaintiff filed the note of issue and certificate of readiness on March 6, 2020.

Discussion

"[T]he proponent of a summary judgment motion 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" (*Stonehill Capital Mgmt., LLC v. Bank of the W.*, 28 N.Y.3d 439, 68 N.E.3d 683 [2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 501 N.E.2d 572 [1986]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Chiara v. Town of New Castle*, 126 A.D.3d 111, 2 N.Y.S.3d 132 [2 Dept., 2015], citing *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 965 N.E.2d 240 [2012]; *see also Lee v. Nassau Health Care Corp.*, 162 A.D.3d 628, 78 N.Y.S.3d 239 [2 Dept., 2018]). 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 (*see Fairlane Fin. Corp. v. Longspaugh,* 144 A.D.3d 858, 41 N.Y.S.3d 284 [2 Dept., 2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, *supra; see also Hoover v. New Holland N. Am., Inc.*, 23 N.Y.3d 41, 11 N.E.3d 693 [2014]).

"A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, prima facie, that the defendant breached a duty owed to the

plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries" (*Sanders v. Sangemino*, -- A.D.3d --, 124 N.Y.S.3d 820 [2 Dept., 2020], quoting *Tsyganash v. Auto Mall Fleet Mgt., Inc.,* 163 A.D.3d 1033, 83 N.Y.S.3d 74 [2 Dept., 2018]; *see Rodriguez v. City of New York,* 31 N.Y.3d 312, 76 N.Y.S.3d 898 [2018]).

> Even though a plaintiff is no longer required to establish his or her freedom from comparative negligence to be entitled to summary judgment on the issue of liability, 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

(*Hai Ying Xiao v. Martinez*, -- A.D.3d --, 2020 N.Y. Slip Op. 04295 [2 Dept., 2020], citing *Higashi v. M & R Scarsdale Rest., LLC*, 176 A.D.3d 788, 111 N.Y.S.3d 92 [2 Dept., 2019]).

"A driver who fails to yield the right of way after stopping at a stop sign controlling traffic is in violation of Vehicle and Traffic Law § 1142(a) and is negligent as a matter of law" (*Balladares v. City of New York*, 177 A.D.3d 942, 114 N.Y.S.3d 448 [2 Dept., 2019], quoting *Laino v. Lucchese,* 35 A.D.3d 672, 827 N.Y.S.2d 249 [2 Dept., 2006]). "Although a driver with a right-of-way also has a duty to use reasonable care to avoid a collision, ... a driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision" (*Enriquez v. Joseph*, 169 A.D.3d 1008, 94 N.Y.S.3d 599 [2 Dept., 2019], quoting *Yelder v. Walters,* 64 A.D.3d 762, 883 N.Y.S.2d 290 [2 Dept., 2009]).

Here, plaintiff met his burden and established entitlement to summary judgment as a matter of law on the issue of defendant's negligence and the absence of his own comparative negligence by providing his deposition testimony and affidavit which stated

that he had the right of way as he proceeded through the intersection, he looked before entering the intersection and did not see any vehicles at or approaching the stop sign on Bay 13th Street. He stated that defendant failed to yield the right of way after stopping at the stop sign and that plaintiff did not notice defendant's vehicle until the moment of impact and therefore had no time to take evasive action.

In opposition, defendants failed to raise a triable issue of fact. Defendants contend that the motion should be denied as premature as the parties have not taken the deposition of defendant Carlos Munoz. Defendants provided the affidavit of Carlos Munoz, wherein he stated that he did stop at the stop sign, and the accident was caused by plaintiff speeding through the intersection. Although under normal circumstances, this affidavit would be sufficient to raise a triable issue of fact, in the instant case, defendant failed to address the February 14, 2020 order of the Hon. Lisette Colon which stated that defendants are precluded or any outstanding discovery is waived upon the parties' failure to comply.

> "A conditional order of preclusion requires a party to provide certain discovery by a date certain, or face the sanctions specified in the order" (*Naiman v. Fair Trade Acquisition Corp.*, 152 A.D.3d 779, 780, 59 N.Y.S.3d 414). "If the party fails to produce the discovery by the specified date, the conditional order becomes absolute" (*id.* at 780, 59 N.Y.S.3d 414; *see Gibbs v. St. Barnabas Hosp.*, 16 N.Y.3d 74, 82–83, 917 N.Y.S.2d 68, 942 N.E.2d 277). "To be relieved of the adverse impact of the conditional order of preclusion, a party is required to demonstrate a reasonable excuse for the failure to comply with the order and the existence of a potentially meritorious" cause of action (*Naiman v. Fair Trade Acquisition Corp.*, 152 A.D.3d at 780, 59 N.Y.S.3d 414; *see Gibbs v. St. Barnabas Hosp.*, 16 N.Y.3d at 80, 917

N.Y.S.2d 68, 942 N.E.2d 277).

(*McIntosh v. New York City P'ship Dev. Fund Co., Inc.*, 165 A.D.3d 1251, 87 N.Y.S.3d 637 [2 Dept., 2018]).

Here, the conditional preclusion order dated February 14, 2020, became absolute when the parties failed to comply with the discovery deadlines. To date, defendants have not moved the court for relief from that order and their opposition herein is silent. Accordingly, as this Court cannot consider the affidavit of Carlos Munoz, defendants failed to raise a triable issue of fact.

Conclusion

Accordingly, the plaintiff's motion for summary judgment as against defendants and dismissing defendant's affirmative defense of contributory negligence is granted. The foregoing constitutes the decision and order of this Court.

ENTER:

Hon. Lara J. Genovesi
J.S.C.

To:

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