At an IAS Term, Part 57 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 26th day of October, 2020.

PRESENT:

HON. LAWRENCE KNIPEL,
Justice.

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ANDREW FEARON,

Plaintiff,

- against -

IRON HORSE EXPRESS CORP., BRAUN USA, LLC, and JOSE F. PAZ,

Defendants.

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DECISION AND ORDER

Index No. 511481/18

Mot. Seq. No. 2

The following e-filed papers read herein: NYSCEF #:

Notice of Motion, Affidavits (Affirmations), and Exhibits Annexed	34-45
Opposing Affidavit (Affirmation) and Exhibits Annexed	67-82
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In this action to recover damages for personal injuries, plaintiff Andrew Fearon (plaintiff) moves for leave to renew his prior motion for partial summary judgment on the issue of liability as against defendants Braun USA, LLC and Jose F. Paz (collectively, defendants) and, upon renewal, granting his prior motion. Defendants oppose.

On Dec. 27, 2017, plaintiff's 2007 Jeep Liberty was involved in an accident with a 2005 Kenworth T600 tractor, attached to which was a 52-foot-long trailer, owned by defendant Braun USA, LLC and operated by defendant Jose F. Paz (Paz), while both vehicles were making a left turn on Belmont Avenue, at its intersection with Alabama Avenue, in Brooklyn. Plaintiff commenced this action against defendants, among others, to recover damages for personal injuries.[1]

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[1] Plaintiff has stipulated to the dismissal of his claims as against the remaining defendant, Iron Horse Express Corp. (NYSCEF #14).

By order, dated June 6, 2019, the Court denied plaintiff's motion, made prior to depositions, for partial summary judgment on the issue of liability (NYSCEF #27). Subsequently, depositions of plaintiff and Paz were conducted. Following the filing of a note of issue and certificate of readiness, plaintiff has renewed his prior motion on the basis of the subsequent depositions. But that is not the only new information the Court has received after deciding the prior motion. Defendants' opposition to plaintiff's renewed motion now includes an affidavit of their previously undisclosed expert, a board-certified traffic accident reconstructionist named Stephen Emolo (Emolo) (NYSCEF #80). Emolo's affidavit, though notarized out of state, is not accompanied by a certificate of conformity.

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination" (CPLR 2221 [e] [2]), and "shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e] [3]). Plaintiff's instant motion is based on new evidence not previously before the Court. The new evidence includes a transcript of plaintiff's and defendant Paz's deposition testimony, which was not submitted to the Court on the prior motion, as these depositions were not taken until after the prior motion had been decided (*see Donovan v Rizzo*, 149 AD3d 1038, 1039 [2d Dept 2017]; *Morales v Coram Materials Corp.*, 64 AD3d 756, 758 [2d Dept 2009], *lv denied* 14 NY3d 708 [2010]).

Upon renewal, the Court adheres to its original determination as reflected in the prior order. It is correct, as a general matter, that a driver is deemed negligent when he or she fails to drive "as nearly as practicable entirely within a single lane" (Vehicle and Traffic Law § 1128 [a]). "However, there can be more than one proximate cause of an accident" (*Kaur v Demata*, 123 AD3d 772, 773 [2d Dept 2014]). Emolo's affidavit, which reconstructs the accident as having happened in a manner wholly different from plaintiff's theory, raises triable issues of fact as to how the accident occurred and whether plaintiff (rather than Paz)

caused it (*see Singh v Thomas*, 113 AD3d 748, 749 [2d Dept 2014]; *Francis v J.R. Bros. Corp.*, 98 AD3d 940, 941 [2d Dept 2012]).[2] Broadly stated, this is not a case which properly lends itself to summary resolution. "Because the issue of negligence and the reasonableness of the parties' conduct are questions of fact to be determined at a trial, negligence cases [like the instant case] are rarely subject to being decided by motion for summary judgment" (*LaRose v Amazon Assoc., Inc.*, 139 AD2d 568, 568 [2d Dept 1988]).

"Although CPLR 3101 (d) (1) (i) requires a party, upon request, to identify the expert witnesses the party expects to call at trial, it does not require a party to respond to a demand for expert witness information at any specific time" (*Begley v City of New York*, 111 AD3d 5, 36 [2d Dept 2013] [internal quotation marks omitted], *lv denied* 23 NY3d 903 [2014]). "The preclusion of an expert's . . . affidavit submitted in the context of a motion for summary judgment based solely on a party's failure to disclose the expert pursuant to CPLR 3101 (d) (1) (i) prior to the filing of a note of issue and certificate of readiness does not necessarily advance the court's role of determining the existence of a triable issue of fact" (*Rivers v Birnbaum*, 102 AD3d 26, 42 [2d Dept 2012]).

Under the circumstances of this case, it is appropriate for the Court to consider Emolo's affidavit, since there is no evidence that defendants' failure to disclose him as their expert was intentional or willful, and plaintiff has showed no prejudice (*see Yampolskiy v Baron*, 150 AD3d 795, 795-796 [2d Dept 2017]; *Augustin v Grand Prix NY Racing, LLC*, 138 AD3d 902, 903 [2d Dept 2016]).[3]

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[2] *Compare Neryaev v Solon*, 6 AD3d 510, 510 (2d Dept 2004) (where "the plaintiff established that while driving southbound in the center lane on Woodhaven Boulevard in Queens, the defendant's vehicle strayed from the adjacent left lane, entered the center lane in violation of Vehicle and Traffic Law § 1128 [a], and collided with the plaintiff's car") (cited by plaintiff).

[3] *Compare Kozlowski v Oana*, 102 AD3d 751, 752 (2d Dept 2013) (the lower court properly precluded defendants from offering an expert affirmation in support of their motion for summary judgment where "their failure to disclose was wilful") (cited by plaintiff).

Contrary to plaintiff's contention, Emolo's affidavit is admissible, notwithstanding that it was subscribed and sworn to out of state, and not accompanied by a certificate of conformity as required by CPLR 2309 (c), as such a defect is not fatal, and no substantial right of plaintiff is prejudiced by disregarding the defect (*see* CPLR 2001; *Moore v DL Peterson Trust*, 172 AD3d 1058, 1059-1060 [2d Dept 2019]).

Accordingly, it is

ORDERED that the branch of plaintiff's motion which is for leave to renew is granted, and, *upon renewal*, the remaining branch of plaintiff's motion which is for partial summary judgment on the issue of liability is *denied*; and it is further

ORDERED that to reflect the prior stipulated dismissal of Iron Horse Express Corp. as a party defendant, the caption is amended to read in its entirety as follows:

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ANDREW FEARON,

Plaintiff,

- against -

Index No. 511481/18

BRAUN USA, LLC and JOSE F. PAZ,

Defendants.
----------X

; and it is further

ORDERED that defendants' counsel is directed to electronically serve a copy of this decision and order with notice of entry on plaintiff's counsel and to electronically file an affidavit of service thereof with the Kings County Clerk.

This constitutes the decision and order of the Court.

E N T E R,

J. S. C.

Justice Lawrence Knipel