At a term of the IAS Part of the Supreme Court of the State of New York, held in and for the County of Orange located at 285 Main Street, Goshen, New York 10924 on the 13th day of May, 2020.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, on all parties.

JACONIAS NASCIMENTO,

PLAINTIFF,

-AGAINST-

RONALD OLORI, and
OLORI CRANE SERVICE, INC.,

DEFENDANTS.

**DECISION & ORDER**
Index No. EF005246-2018
Motion Date: 1/31/20
Motion Seq. #1

VAZQUEZ-DOLES, J.S.C.

The following papers numbered 1- 13 were read on Plaintiff's motion for partial summary judgment on the issue of liability and to limit the trial testimony to issues of damages alone:

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| Notice of Motion(granted)/Affirmation of Sheila Rosenrauch, Esq./Exhibits 1 - 6 ..... | 1 -8 |
| Affirmation in Opposition of Stacy Gorny, Esq./Exhibits A - B ..... | 9 -11 |
| Reply Affirmation of Sheila Rosenrauch, Esq./Exhibit 7 ..... | 12 -13 |

This is an action for personal injuries sustained as a result of a three vehicle accident. Plaintiff alleges that on October 5, 2016, on Route 17M, he was rear-ended by Defendant while he was stopped at a red light, which caused Plaintiff's vehicle to be pushed into a car which was stopped in front of him. By this motion, Plaintiff seeks a partial summary judgment on the issue of liability. Defendant opposes this motion and argues that this motion should be summarily denied for Plaintiff's failure to attach the Bill of Particulars as part of the pleadings, and/or for the failure to attach signed depositions, and that there are issues of fact regarding the collision which would preclude a finding of summary judgment.

Defendant's motion to summarily deny this motion for the failure to attach Plaintiff's Bill of Particulars must be denied. CPLR §3011 defines 'pleadings' as the "... complaint and an answer." An answer is further defined to "... include a counterclaim against a plaintiff and a cross-claim against a defendant. A defendant's pleading against another claimant is an

interpleader complaint, or against any other person not already a party is a third-party complaint. There shall be a reply to a counterclaim denominated as such, an answer to an interpleader complaint or third-party complaint, and an answer to a cross-claim that contains a demand for an answer. If no demand is made, the cross-claim shall be deemed denied or avoided. There shall be no other pleading unless the court orders otherwise." McKinneys CPLR §3011. Thus the bill of particulars is not considered a pleading and the failure to attach it to this motion is irrelevant.

With regard to Defendant's request to summarily deny this motion for failing to provide a signed deposition of Plaintiff, this too must be denied. Although counsel correctly states that a deposition must be reviewed and affirmed, Plaintiff submits the signature page in his reply and that page indicates that the deposition was signed on October 9, 2019, prior to this motion, and thus was a mere ministerial error that the signature page was not included. The Court will accept the signed page submitted in reply.

As to Defendant's opposition to partial summary judgment based upon the facts of this case, this motion must be denied as well. Defendant asserts that there are bona fide issues of fact regarding Plaintiff's liability and his comparative negligence, in light of the many inconsistencies in his deposition testimony. However, even when viewing the evidence in a light most favorable to the non-moving party, there are no facts disputing that Defendant rear-ended Plaintiff's vehicle, but rather only inconsistencies as to what extent Plaintiff is comparably negligent.

The Court agrees that summary judgment is a drastic remedy, and is appropriate only when there is a clear demonstration of the absence of any triable issue of fact. (*Piccirillo v. Piccirillo*, 156 AD2d 748 [2d Dept 1989], citing *Andre v. Pomeroy*, 35 NY2d 361 [1974]). The function of the Court on such a motion is issue finding, and not issue determination. *(Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]) The Court is not to engage in the

weighing of evidence; rather, the Court's function is to determine whether "by no rational process could the trier of facts find for the non-moving party." (*Jastrzebski v. N. Shore Sch. Dist.*, 232 AD2d 677, 678 [2d Dept 1996]).

The law is clear that a rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, requiring that operator to come forward with evidence of a non-negligent explanation for the collision in order to rebut the inference of negligence (*see Tutrani v. County of Suffolk*, 10 N.Y.3d 906, 908 [2008]; *Theo v Vasquez*, 136 AD3d 795 [2d Dept 2016]). The Defendant in this case has failed to come forward with that evidence.

Here, Plaintiff has established his entitlement to judgment as a matter of law by demonstrating that his vehicle was stopped in traffic when he was struck in the rear by Defendant's vehicle (*see Prosen v Mabella*, 107 AD3d 870, 871 [2d Dept 2013]; *Strickland v. Tirino*, 99 A.D.3d 888, 890 [2d Dept 2012]). Defendant has failed to proffer any non-negligent explanation for the collision. Further, the Court of Appeals has recently held that a plaintiff does not bear the burden of establishing the absence of his own comparative negligence in order to obtain partial summary judgment in a comparative negligence case. (*See Rodriguez v. City of New York*, 31 N.Y.3d 312 [2018]).

In *Rodriguez*, the Court of Appeals reversed the finding of the Appellate Division, First Department, that affirmed the denial of plaintiff's motion for partial summary judgment, on the basis that plaintiff failed to make a *prima facie* showing that he was free of comparative negligence. (*See, Rodriguez v. City of New York*, 142 AD3d 778 [1st Dept 2016]). The Court of Appeals held that "[t]o be entitled to partial summary judgment a plaintiff 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." *Rodriguez v City of New York*, 31 NY3d 312, 324-25 [2018].

Accordingly, it is hereby

**ORDERED** that Plaintiff's motion for partial summary judgment on the issue of liability is granted, and it is further

**ORDERED** that the trial shall be limited to issues of damages which shall include any reduction of damages due to comparative negligence, and it is further

**ORDERED** that all parties are directed to appear, as previously scheduled for a pretrial conference **via SKYPE on September 14, 2020 at 11:00 a.m.** A link to the SKYPE conference will be sent prior to the date.

The foregoing constitutes the Decision and Order of the Court.

Any matters not specifically addressed were considered and denied.

Dated: May 13, 2020
Goshen, New York

Enter,

Hon. Maria S. Vazquez-Doles, J.S.C.

To: Counsel of record via NYSCEF.