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 24th day of September, 2020.

PRESENT:
CARL J. LANDICINO, J.S.C.

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SALVATOR SMART,
Plaintiff,

Index No.: 513439/2017

DECISION AND ORDER

-against-

SALAAM PHARMACY INC., MUJJAHID HUQ, AHSAN HABIB, YOLANDA RODRIGUEZ, and JOSE RODRIGUEZ

Motion Sequence #3

Defendants.

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

	Papers Numbered (NYSCEF)
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	41-60
Opposing Affidavits (Affirmations)	61-62, 66
Reply Affidavits (Affirmations)	65, 69

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 October 14, 2016. Plaintiff Salvator Smart (hereinafter "the Plaintiff") alleges in his Complaint that on that date he was operating a vehicle owned by his employer, non-party Auto-Chlor Systems, and that he suffered personal injuries after his vehicle was involved in a motor vehicle collision. Plaintiff further alleges that this vehicle was hit after a vehicle operated by Defendant Ashan Habib, and owned by Defendant Mujjahid Huq, while Habib was in the employ of Defendant Salaam Pharmacy, Inc. (hereinafter referred to as the "Pharmacy Defendants") and a vehicle operated by Defendant Yolanda Rodriguez and owned by Defendant Jose Rodriguez (hereinafter the "Rodriguez Defendants") collided. The Plaintiff further

alleges that the collision occurred on Liberty Avenue at its intersection with Crystal Street in Brooklyn, New York.

The Plaintiff now moves (motions sequence #3) for an order pursuant to CPLR 3212 granting him summary judgment on the issue of liability, dismissing the Pharmacy and Rodriguez Defendants' affirmative defense of culpable conduct, and proceeding to trial on the issue of damages. The Plaintiff also makes an application for an order pursuant to CPLR 3126, striking the answer of the Pharmacy Defendants for the alleged repeated failure of Defendant Huq to appear for deposition, despite numerous Court Orders requiring his appearance. The Plaintiff contends that summary judgment should be granted because the Plaintiff's vehicle was fully and completely stopped at the intersection of Liberty Avenue and Crystal Street when his vehicle was impacted due to the negligence of the Defendants.

Both the Pharmacy Defendants and the Rodriguez Defendants oppose the motion and argue that it should be denied. The Rodriguez Defendants contend that the Plaintiff's application for an order pursuant to CPLR 3212 should be denied as there is conflicting testimony by the Plaintiff regarding how the alleged incident occurred. As to the Plaintiff's application relating to CPLR 3126 the Pharmacy Defendants argue that it should be denied as they have attempted to comply with the previous Court orders relating to discovery.

As an initial matter the Court denies that aspect of the Plaintiff's motion that relates to striking the answer of the Pharmacy Defendants pursuant to CPLR 3126. The moving party on a motion seeking to resolve a discovery dispute has the burden of demonstrating that they have satisfied the requirements of 22 NYCRR §202.7[c].

> The affirmation of the good faith effort to resolve the issues raised by the motion shall indicate the time, place and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held. 22 NYCRR §202.7[c].

The purpose of the rule requiring an affirmation of good faith is to ensure that the parties can attempt to resolve disputes prior to the Court's involvement, so as to narrow the focus of the dispute and potentially eliminate the Court's involvement. In the instant proceeding, the Plaintiff has failed to provide an Affirmation of Good Faith that makes reference to any communication between the parties relating to (1) what discovery was outstanding and (2) what steps were taken to resolve the discovery dispute at issue. Instead, the Plaintiff merely states that the Pharmacy Defendants have failed to comply with several Court Orders. This is insufficient, and the lack of a good faith showing on the Plaintiff's part. While the Plaintiff does attach letters related to discovery requests made of the Defendants, there is no indication that communication occurred between the parties, after the Final Pre-Note Order dated April 12, 2019. As a result, the instant motion is procedurally defective. *See Quiroz v. Beitia*, 68 AD3d 957, 960, 893 N.Y.S.2d 70, 74 [2d Dept 2009]; *Hegler v. Loews Roosevelt Field Cinemas, Inc.*, 280 AD2d 645, 646, 720 N.Y.S.2d 844 [2d Dept 2001]. Also, the Court finds that the Plaintiff has properly failed to show that Pharmacy Defendants acted in a manner that required striking their answer. "[T]he drastic remedy of striking an answer is inappropriate absent a clear showing that the defendant's failure to comply with discovery demands was willful or contumacious." *Hoi Wah Lai v. Mack*, 89 AD3d 990, 991, 933 N.Y.S.2d 712, 713–14 [2d Dept 2011]. Accordingly, that aspect of the Plaintiff's motion is denied. However, the Court does recognize that the deposition of Defendant Mujjahid Huq should occur. Accordingly, the Defendant Mujjahid Huq is compelled to appear for a deposition within forty five (45) days of the date of entry of this Decision and Order.

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 a triable issues of material fact.'" *Kolivas v. Kirchoff,* 14 AD3d 493 [2d 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 [2d 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 [2d 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 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick*, 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dep 1994].

Turning to the merits of the instant motion, the Court finds that sufficient evidence has been presented to establish, *prima facie*, that the Plaintiff's actions on the day in question were not a proximate cause of the accident, as a matter of law. In support of the Plaintiff's motion, the Plaintiff relies on his deposition, the deposition of Defendant Ahsan Habib, the deposition of Defendant Yolanda Rodriguez and a Police Accident Report. The Plaintiff testified during his deposition that he witnessed the Pharmacy Defendants' vehicle collide with the Rodriguez Defendants' vehicle which then collided with his vehicle. Plaintiff further states that his vehicle was stopped at a red light, at the intersection with heavy traffic. (See Plaintiff's Motion, Exhibit Q, Pages 11-17, 77-78). The testimony of Defendants Ahsan Habib and Yolanda Rodriguez support this testimony. 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

[2d Dept 2014]), the depositions referenced are 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 [2d Dept 2018].

"Vehicle and Traffic Law § 1129 imposes 'a duty to be aware of traffic conditions, including vehicle stoppages.' (*Johnson v Phillips*, 261 AD2d 269, 271 [1999]). The law creates a presumption that a collision with a stationary vehicle gives rise to a *prima facie* case of negligence…" (*id.*, citing *Mascitti v Greene*, 250 AD2d 821 [1998])." *Rodriguez v. Budget Rent-A-Car Sys., Inc.*, 44 A.D.3d 216, 223–24, 841 N.Y.S.2d 486 [2d Dept 2007]. Moreover, both Defendant drivers allege that they were proceeding with a green traffic light in their favor at the time of the first collision. (See Plaintiff's Motion, Exhibit "R", Deposition of Defendant Habib, Page 38 and 41 and Exhibit "S" Deposition of Defendant Rodriguez, Pages 18 and 25) Accordingly, the Plaintiff's motion for partial summary judgment on the issue of liability is granted, solely to the extent that the Plaintiff is free from liability, and the respective fault of the Defendant drivers, if any, is subject to a comparative negligence analysis at trial. Further, the Defendants' affirmative defense of culpable conduct is dismissed.

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

The application for partial summary judgment pursuant to CPLR 3212 by the Plaintiff is granted, solely to the extent that Plaintiff is free from liability and the respective fault of the Defendant drivers if any, is subject to a comparative negligence analysis at trial, and the affirmative defense of "culpable conduct" alleged by each of the Defendants is dismissed.

The application made pursuant to CPLR 3126 is denied except that Defendant Mujjahid Huq shall appear for a deposition within forty five (45) days of the date of this Decision and Order.

The foregoing constitutes the Decision and Order of the Court.

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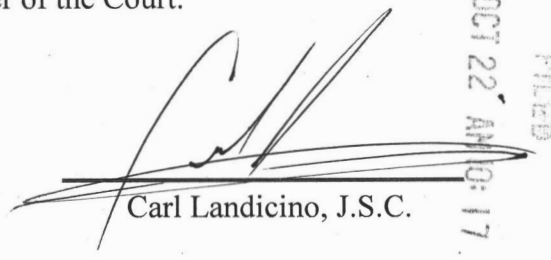

Carl Landicino, J.S.C.