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 16th day of March, 2020.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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JEAN DOUYON,

Plaintiff,

- against -

LIONEL POWELL and M & G TRUCKING LLC,

Defendants.

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Index No.: 502839/2018

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/Motion and Affidavits (Affirmations) Annexed.....	1/2,
Opposing Affidavits (Affirmations)	3
Reply Affirmation	4

After a review of the papers and oral argument the Court finds as follows:

The Plaintiff, Jean Douyon (hereinafter referred to as the "Plaintiff"), moves for summary judgment, on the issue of liability (motion sequence #2) and the dismissal of Lionel Powell's and M & G Trucking LLC's (hereinafter collectively referred to as the "Defendants"), affirmative defenses asserting the issue of comparative negligence. This matter relates to the alleged physical injuries and property damage the Plaintiff sustained as a result of Defendant Lionel Powell driving his tractor trailer into an overpass which was too low for him to pass under, causing him to hit into that overpass, creating post-impact debris, which allegedly hit the Plaintiff's vehicle and landed upon the roadway, which debris the Plaintiff claims he hit. The occurrence took place on the

Hutchinson River Parkway, in the Bronx, New York on December 31, 2017 at or about 8:00 p.m.

The Plaintiff contends that he was traveling on the subject roadway when the Defendant hit into an overpass, causing debris to fall on her vehicle and the roadway. He claims that he suffered injuries and property damage when the debris hit his vehicle and he ran over the debris. The Plaintiff further contends "that this accident was entirely the fault of the Defendant for operating his vehicle in an unauthorized manner." The Plaintiff proffers a Police Report (see Plaintiff's Motion, Exhibit A) wherein the officer responding to the occurrence indicated that Defendant Lionel Powell was "not authorized to drive on Parkway collided with the low bridge causing damage to the bridge, debris from [the Defendants' vehicle] struck [the Plaintiff's vehicle] causing damage."

The Defendants oppose the motion, with the affirmation of counsel. No testimony, by affidavit or otherwise, is provided by the Defendants. Moreover, although the Defendants challenge the Plaintiff's claim of injury based on the Police Officer's general statement in the Police Report that there were "no injuries," the Defendants do not challenge the admissibility of the Police Report. The Defendants do not contend that their vehicle was authorized to be on the subject roadway.

As an initial matter, any issue in relation to damages is not at issue in the this application. An application, on the issue of liability, does not impact the question of damages. See *Van Nostrand v. Froehlich*, 44 A.D.3d 54, 844 N.Y.S.2d 293 [2d Dept, 2007].

Generally, "[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 A.D.3d 493 [2d Dept, 2005], citing *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 1341, 320 N.E.2d 853 [1974]. The proponent for 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 A.D.3d 70, 74 [2d Dept, 2004], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2s 320, 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." *Graham & Han Real Estate Brokers v. Oppenheimer*, 148 A.D.2d 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 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept, 2006]; see *Menzel v. Plotnick*, 202 A.D. 558, 558-559, 610 N.Y.S.2d 50 [2d Dept, 1994]. However, "[a] plaintiff is no longer required to show freedom from comparative fault in establishing his or her *prima facie* case..." if they can show "...that the defendant's negligence was a proximate cause of the alleged injuries." *Tsyganash v. Auto Mall Fleet Mgmt., Inc.*, 163 A.D.3d 1033, 1034, 83 N.Y.S.3d 74, 75 [2nd Dept, 2018]; *Rodriguez v. City of New York*, 31 N.Y.3d 312, 320, 101 N.E.3d 366, 371 [Ct App, 2018].

In this case, it is clear that Defendant Powell was negligent and a proximate cause of the accident. His vehicle should not have been on the Hutchinson River Parkway, as reflected in the Police Report. Moreover, and in any event, a driver is charged with the duty to see what there was to be seen, including the road condition, the height of the overpass, and his inability to clear it in light of the dimensions of his vehicle. These were all factors that the Defendant Powell, as a driver, should have observed. As such, his failure to stop, prior to proceeding under the overpass, made his conduct negligent and a proximate cause of the accident. The Defendant fails to show a non-negligent explanation for Defendant driver's conduct.

Notwithstanding the above, the Plaintiff has failed to show that his actions were free from comparative negligence. The Plaintiff's statement that the accident was entirely the Defendant driver's fault was conclusory and unsupported. See *Behar v. Ordover*, 92 A.D.2d 557, 558, 459 N.Y.S.2d 304 [2d Dept 1983], *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 [Ct App. 1980], *Cabrera v. Rodriguez*, 72 A.D.3d 553, 900 N.Y.S.2d 29 [1st Dept, 2010]. Therefore, although the Defendant driver was negligent and a proximate cause of the incident, the Plaintiff has failed to establish that he is free from culpable conduct and therefore, has not established that the Defendant Powell was the sole proximate cause of the incident.

Accordingly, the Plaintiff's application is granted to the extent that the Plaintiff is granted partial summary judgment on the issue of liability (motion sequence #2), subject to a comparative negligence analysis at trial.

This constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.

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