At the term of the Supreme Court of the State of New York, held in and for the County of Dutchess, at 10 Market Street, Poughkeepsie, 12601 on May 7, 2021.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

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ZACHARY R. HIGGINS

Plaintiff(s)

INDEX NO.: 2020-53087

DECISION AND ORDER
(Motion Sequence1)

v.

VINCENT I. STELMACH and
HELEN C. STELMACH

Defendant(s)

----------x

Greenwald, J.

The following papers numbered 1-3 were considered by the Court in deciding Plaintiff's Notice of Motion for Partial Summary Judgment

Papers	Numbered
Plaintiff's Notice of Motion/Affirmation of Michael Greenspan, Esq. /Memorandum of Law/Exhibits 1-11 Affidavit of Patrick Austin/ Exhibits A-G	1
Affirmation of Melissa Foti, Esq. in Opposition/Exhibits A-C	2
Reply Affirmation of Michael Greenspan, Esq.	3

RELEVANT BACKGROUND

On or about June 13, 2020, the parties were involved in a motor vehicle accident. Plaintiff commenced an action for negligence and claims that he has sustained a serious injury pursuant to Insurance Law §5102(d) and sustained an economic loss greater than basic economic loss as defined in Insurance Law § 5104 and seeks monetary damages. Plaintiff argues that the Defendant,

Vincent Stelmach negligently, carelessly and recklessly operated the motor vehicle and was the direct and proximate cause of Plaintiff's injuries.

Thereafter, Plaintiff filed the instant motion for partial summary judgment on the issue of liability. Plaintiff contends that the evidence submitted in support of its motion provides proof that eliminates any genuine issue of material fact as to liability, thus judgment should be granted in its favor. Plaintiff also argues that the affirmative defenses declared by Defendants have no merit or are inapplicable in the instant matter and should all be dismissed.

In opposition, Defendants withdraw the Second through Sixth Affirmative Defenses, the Ninth Affirmative Defense, and the Eleventh Affirmative Defense. Defendants argue that Plaintiff's motion is premature as discovery has not been completed and contends that the First Affirmative Defense (Culpable Conduct); Seventh Affirmative Defense (Doctrine of Avoidable Consequences); Eighth Affirmative Defense (Mitigate); and Tenth Affirmative Defense (Emergency Doctrine), should be preserved as there is still evidence to be obtained in support of these defenses. Defendants contend that in the absence of discovery and in light of the evidence presented, Plaintiff has not met its burden of proof, and demonstrated the absence of any triable issue of fact as to liability and therefore is not entitled to summary judgment.

DISCUSSION

The 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 eliminate any material issues of fact from the case. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See,* Winegrad v New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985).

It is well settled that a motion for summary judgment will be deemed premature when there has been almost no discovery, depositions are not complete, and the movant's own unchallenged account of the facts in an affidavit is the crux of the evidence presented. Especially where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion. *See,* Churaman v C&B Elec., Plumbing & Heating, Inc., 142 A.D.3d 485, 486-87 (2nd Dept. 2016); *see also,* Blake v City of New York, 148 A.D. 3d 1101, 1107 (2nd Dept. 2017). A party opposing summary judgment is entitled to obtain further discovery when it appears that facts

supporting the opposing party's position may exist but cannot then be stated. Moreover, where the plaintiff's evidence raises issues that demonstrates a need for deposition testimony from witnesses presented, such summary judgment motions have been denied as premature. *See,* Malester v Rampil, 118 A.D. 3d 855, 856 (2nd Dept. 2014).

The unchallenged witness statements of the Plaintiff and Mr. Lane, as well as the unauthenticated photographs are insufficient to grant summary judgment in Plaintiff's favor and demonstrate the need for further discovery in the pending matter. *See,* Coleman v Maclas, 61 A.D.3d 569, 569 (1st Dept. 2009). While there is some merit to Plaintiff's argument that Defendants fail to offer any evidentiary basis to its opposition, Plaintiff must first meet its own burden of proof, eliminating any triable issues of fact prior to considering the sufficiency of the opposition.

Plaintiff's claim that its proof demonstrates the negligence and liability of Defendant, and the absence of any triable issue related to such, lacks merit. The review of the statements of Plaintiff and Mr. Lane does not eliminate all triable issues of fact as to negligence or liability in the instant matter. In addition to being unauthenticated, there is no foundation laid to support what the photographs are to convey in furtherance of Plaintiff's claim. In viewing the evidence in the light most favorable to the non-moving parties, it is well settled that the court's function on summary judgment is to avoid the determination of issues and credibility but when issues are found as to proximate cause or negligence, as here, summary judgment on liability must be more thoroughly and thoughtfully evaluated before granting such motion. *See,* Deliz v Davis, 66 Misc. 3d 299, 310 (Sup. Ct. 2019).

Plaintiff asserts that the motion is not premature as some discovery has been exchanged between the parties. However, there is not sufficient evidence presented to support Plaintiff's position, and to meet Plaintiff's burden of proof. Further discovery appears necessary, to flesh out all triable issues of fact. Since summary judgment deprives the litigant of his day in court it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues of fact. *See,* Andre v Pomeroy, 35 N.Y.2d 361, 364 (1974). Based on the foregoing, Plaintiff's application for partial summary judgment on the issue of liability is **denied.**

As to the Defendants remaining affirmative defenses (First, Seventh, Eighth and Tenth Affirmative Defenses), the Court in its discretion the Court reserves its decision on this issue as it may be addressed more thoroughly after further discovery.

Lastly, Plaintiff's assertion that it is entitled to approximately $209.00 as costs for service of process pursuant to CPLR §312-a also lacks merit. It is noted that Plaintiff includes, postage, motion and RJI fees in its costs, which would have to be paid by Plaintiff even if Defendants returned the form to Plaintiff to effectuate service, so there is no basis for these fees to be included in the costs asserted. Plaintiff alleges that the cost of service by the County Sheriff was approximately $63.00 but there is no invoice in support of the cost or allegation. As such the Court **denies** the application for service of process costs.

Accordingly, it is hereby,

ORDERED, that Plaintiff's motion for partial summary judgment on the issue of liability in its favor is denied; and it is further

ORDERED, that Plaintiff's application for costs for service of process is denied; and it is further

ORDERED, that the Defendant's Second through Sixth Affirmative Defenses, the Ninth and Eleventh Affirmative Defenses are withdrawn by Defendants, and it is further

ORDERED, that the parties shall complete and submit a preliminary conference stipulation order to the Court on or before July 9, 2021.

Any relief not specifically granted herein is denied.
The foregoing constitutes the decision and order of this Court.

Dated: May 7, 2021
Poughkeepsie, New York

ENTER:

Hon. Hal B. Greenwald, J.S.C.

CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

When submitting motion papers to the Honorable Hal B. Greenwald's Chambers, please do not submit any copies. Please submit only the original papers.