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 29th day of September, 2021.

PRESENT:

CARL J. LANDICINO, J.S.C.

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TANASIA ANDERSON,

Plaintiff,

-against-

ANTHONY REED and TECOGEN INC.,

Defendants.

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Index No.: 516095/2019

DECISION AND ORDER

Motion Sequence #2

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	36-48,
Opposing Affidavits (Affirmations)	51-53,
Reply Affidavits (Affirmations)	55-59

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

This lawsuit arises out of a motor vehicle accident which allegedly occurred on January 18, 2019. Plaintiff, Tanasia Anderson (hereinafter the "Plaintiff") alleges in her Complaint that she suffered personal injuries when the vehicle operated by Defendant Anthony Reed and owned by Defendant Tecogen, Inc. (hereinafter the "Defendants") collided with her as she crossed the street as a pedestrian. The collision apparently occurred at the intersection of Woodhaven Boulevard at or near Myrtle Avenue, in Queens, State of New York.

The Plaintiff now moves (Motion Sequence #2) for an order pursuant to CPLR 3212 granting partial summary judgment against the Defendants on the issue of liability and "an inquest

or an assessment of damages." The Plaintiff relies primarily on her affidavit, photographs, and a certified Police Report to establish that she was not liable for the accident at issue and that the Defendants were negligent and the sole proximate cause of the accident.

The Defendants oppose the motion and contend that it should be denied as the Plaintiff has not met her *prima facie* burden. The Defendants further argue, in the alternative, that there are material questions of fact relating to the culpable conduct on the part of the Plaintiff.

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 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 Dept 1994]; *see also Tsyganash v. Auto Mall Fleet Mgmt., Inc.,* 163 AD3d 1033, 1034, 83 N.Y.S.3d 74, 75 [2d

Dept 2018]. It is true that "[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 AD3d 1033, 1034, 83 N.Y.S.3d 74, 75 [2d Dept 2018]; *Rodriguez v. City of New York*, 31 N.Y.3d 312, 320, 101 N.E.3d 366, 371 [2018].

Turning to the merits of the instant motion, the Court finds that sufficient evidence has been presented to establish, *prima facie*, that Defendants' driver's (Reed) actions on the day in question were negligent and the sole proximate cause of the accident as a matter of law. In support of the Plaintiff's motion, the Plaintiff relies primarily on her own affidavit, and a certified Police Accident Report. In her affidavit, the Plaintiff stated that "[a]fter waiting a few seconds, the pedestrian sign indicator granted me permission to cross the road." She then stated that "I looked both ways to ensure the road was safe and clear, and then I stepped off the sidewalk area and into the crosswalk." She also states that "I walked within the crosswalk and into the roadway an [sic] began crossing from once [sic] corner to the other when I was unexpectedly struck by the defendant vehicle [sic] as it was turning left." The Plaintiff also stated that "[t]he defendant's vehicle hit me almost immediately and straight on as it turned left, and therefore, I did not have an opportunity to avoid the accident." (See Plaintiff's Motion, Exhibit G, Paragraphs 3 through 5). The certified Police Accident Report indicates that "Driver of Vehicle 1 further states that there was a truck in front of him limiting his view when he didn't see the pedestrian crossing accidentally clipping the pedestrian on the right side of her body." This statement in the report is admissible both because the report is certified, and the statement constitutes an admission. *See Yassin v. Blackman*, 188 AD3d 62, 64, 131 N.Y.S.3d 53, 55 [2d Dept 2020]. Even assuming, *arguendo*, that the statement in the Police Accident Report was not admissible, given that the statement attributed to the

Defendant could arguably not be considered an admission, the Plaintiff's affidavit is sufficient to meet his *prima facie* burden. See *Gooden v. EAN Holdings, LLC*, 189 AD3d 1552, 1552, 135 N.Y.S.3d 303, 304 [2d Dept 2020]; *Hai Ying Xiao v. Martinez*, 185 AD3d 1014, 126 N.Y.S.3d 369, 1015 [2d Dept 2020]; *Abramov v. Miral Corp.,* 24 A.D.3d 397, 398, 805 N.Y.S.2d 119, 120 [2d Dept 2005]. As such the Plaintiff established that the Defendant driver was negligent and the sole proximate cause of the incident at issue. *See Benedikt v. Certified Lumber Corp.,* 60 AD3d 798, 875 N.Y.S.2d 526 [2d Dept 2009]; *Voskin v. Lemel,* 52 AD3d 503, 859 N.Y.S.2d 489 [2d Dept 2008]; *Voskin v. Lemel*, 52 AD3d 503, 859 N.Y.S.2d 489 [2d Dept 2008].

In opposition, the Defendants have failed to raise a material issue of fact, that would prevent the Court from granting the Plaintiff partial summary judgment on the issue of liability. As an initial matter, the Court notes that "the plaintiff's motion was not premature since the defendant[s] failed to demonstrate that discovery might lead to relevant evidence or that facts essential to justify opposition to the motion were exclusively within the knowledge and control of the plaintiff." *Turner v. Butler*, 139 AD3d 715, 716, 32 N.Y.S.3d 174, 175 [2d Dept 2016]. In his affidavit Defendant driver Anthony Reed states that "without warning or time to react, the plaintiff while on her cellphone and not looking ahead, walked into my left front fender after stepping through the median area." The mere allegation by the Defendant that the Plaintiff was not looking where she was going did not directly or adequately address his admission in the Police Accident Report that his own visibility was obscured, that he hit the Plaintiff, and he did not see the Plaintiff prior to impact. He does not explain how if he did not see the Plaintiff he could state that Plaintiff was not looking and was on her cell phone. Therefore Defendant's affidavit constitutes "a belated attempt to avoid the consequences of his earlier admission by raising a feigned issue which was insufficient to defeat the motion." *Abramov v. Miral Corp.*, 24 AD3d 397, 398, 805 N.Y.S.2d 119,

120 [2d Dept 2005]; *see also Rosenblatt v. Venizelos*, 49 AD3d 519, 520, 853 N.Y.S.2d 578 [2d Dept 2008]. Although the Plaintiff did not specifically request dismissal of the Defendants' affirmative defenses relating to comparative negligence, the Plaintiff sought by motion to proceed to inquest or assessment of damages thereby raising the issue of her own comparative negligence. Plaintiff did show that she was free from comparative negligence and that the case should proceed on the issue of damages. *See Kwok King Ng v. West*, 195 AD3d 1006, 1007, 146 N.Y.S.3d 811 [2d Dept 2021]; *Wray v. Galella*, 172 AD3d 1446, 1447, 101 N.Y.S.3d 401 [2d Dept 2019].

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

Plaintiff's motion (motion sequence #2) for partial summary judgment on the issue of liability is granted, and the matter shall proceed on the issue of damages.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

KINGS COUNTY CLERK
FILED
2021 OCT 15 AM 8:05

Carl J. Landicino, J.S.C.