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 October, 2021.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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NATALLIA STARAVOITAVA,
*Plaintiff,*

-against-

HELEN DERVICH,
*Defendant.*

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Index No.: 517585/2019

DECISION AND ORDER

Motion Sequence #1

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

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and
Affidavits (Affirmations) Annexed ..... 10-17,
Opposing Affidavits (Affirmations)..... 27,
Reply Affidavits (Affirmations) .....



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

The instant action is a claim for personal injuries arising from a motor vehicle collision that allegedly occurred on *August 21, 2018*. *Plaintiff*, Natalia Staravoitava (hereinafter the "Plaintiff") alleges in her Complaint that on that date she suffered personal injuries after the vehicle she was operating was struck by a vehicle owned and operated by Defendant Helen Dervich (hereinafter "the Defendant"). The Plaintiff further alleges in her complaint that the collision occurred while her vehicle was at a complete stop at Brighton Beach Avenue near its intersection with "13th or 14th Street," Brooklyn, New York.

The Plaintiff now moves (motions sequence #1) for an order pursuant to CPLR 3212 granting her summary judgment on the issue of liability and dismissing defendant's affirmative defense of comparative

negligence. The Plaintiff contends that summary judgment should be granted because the Driver was negligent and the sole proximate cause of the collision. Specifically, the Plaintiff contends that while her vehicle was stopped at a traffic light, it was hit in the rear and right side by the Defendant's vehicle.

The Defendant opposes the motion and argues that the motion should be denied as there are issues of fact that should be decided at trial. Specifically, the Defendant contends that there is a dispute as to whether the collision occurred while the Plaintiff was stopped and an issue as to whether the Plaintiff was comparatively negligent in as much as the Defendant claims that the Plaintiff moved as the Defendant attempted to pass her vehicle.

Summary 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 NY2d 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 the 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 NY2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986], *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985]. "In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inference must be resolved in favor of the nonmoving party." *Adams v. Bruno*, 124 AD3d 566, 566, 1 N.Y.S.3d 280, 281 [2d Dept 2015] citing *Valentin v. Parisio*, 119 AD3d 854, 989 N.Y.S.2d 621 [2d Dept 2014]; *Escobar v. Velez*, 116 A.D.3d 735, 983 N.Y.S.2d 612 [2d Dept 2014].

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]. 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 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 Defendant's actions on the day in question were negligent and a proximate cause of the accident, as a matter of law. The Plaintiff contends that the Defendant's vehicle struck the Plaintiff's vehicle while it was stopped at a traffic signal. In support of her application, the Plaintiff relies on her deposition, the deposition of the Defendant, and photographs of the Plaintiff's damaged vehicle. During her deposition, when asked if her vehicle was moving at the time of the collision, the Plaintiff stated that "[n]o, completely stopped." When asked how long she had been stopped the Plaintiff stated "[m]aybe 20 seconds, 30 seconds." When asked why she was stopped, the Plaintiff replied "[b]ecause there was the red light." (See Plaintiff's motion, Exhibit "E", Pages 14-15). When asked what indication she had that she had been in a collision she stated that "somebody hit me really, really, really, really hard, and I moved forward really hard, and then back really hard, and I was shaking, I start crying, and, like, it was -- I can't even describe it." (See Plaintiff's motion, Exhibit "E", Pages 19). When asked what she told the Police officer at the scene, the Plaintiff stated that "I said that I was sitting on top on a red light, waiting for the light to get green and suddenly something hit me very, very, very, very hard, and

I went -- I don't know how you call it, whiplash -- and I went back and forth, and then I saw this woman -- like I didn't even know if it was a woman -- did a U-turn." The Plaintiff also stated that "because police [sic], they did not understand why I was telling that I was going this direction, but when they arrived, we were facing completely opposite direction." (See Plaintiff's motion, Exhibit "E", Pages 35-36). These statements are sufficient for the Plaintiff to establish a *prima facie* showing. This is because "[a] rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of negligence against the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision." *Klopchin v. Masri*, 45 A.D.3d 737, 737, 846 N.Y.S.2d 311, 311 [2nd Dept, 2007].

However, there is an issue of fact as to whether the Plaintiff was comparatively negligent. The Defendant contends that the accident happened at a green light when plaintiff moved from a double parked position. The Defendant relies primarily on the Plaintiff's deposition, and her own deposition testimony. The Defendant points to the Plaintiff's testimony where she is asked if the Defendant's vehicle side swiped her as she purportedly stated in the Police Accident Report and she answered "[y]es, I agree." (See Plaintiff's motion, Exhibit "E", Pages 38).[1] The Defendant contends that this supports her position that she was moving at the time of the collision. In any event, when asked how the collision occurred the Defendant stated "[s]o I was driving straight, and it was red light. She was before me. And then the light turned to green, she didn't move. I assumed she's double parked, so I went ahead to cut her, and then she moved, and we bumped." As such, the Plaintiff's motion is granted to the extent that the Defendant is negligent and a proximate cause of the accident, subject to a comparative negligence analysis of Plaintiff's fault, if any, at the time of trial.

[1] While the Defendant's Affirmation in Opposition refers to the Police Accident Report, it does not rely on the Police Report directly and instead relies on the Plaintiff's sworn testimony.

The Court also finds that the Plaintiff's application regarding striking the Defendant's affirmative defense of comparative negligence is denied. Pursuant to CPLR 3211(b) "when moving to dismiss or strike an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is 'without merit as a matter of law.'" *Greco v. Christoffersen*, 70 AD3d 769, 771, 896 N.Y.S.2d 363, 366 [2d Dept 2010], quoting *Albin v. First Nationwide Network Mortg. Co.*, 248 AD2d 417, 670 N.Y.S.2d 42 [2d Dept 1998]. As stated above, there is a question of fact as to whether the Defendant was the sole proximate cause of the accident. As a result, the Defendant's affirmative defense related to the Plaintiff's comparative negligence is not dismissed.

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

Plaintiff's motion (motion sequence #1) for summary judgment on the issue of liability is granted in that the Defendant was negligent and a proximate cause of the accident, subject to a comparative negligence analysis of Plaintiff's fault, if any, at the time of trial. The Plaintiff's application made pursuant to CPLR 3211(b) is denied.

The foregoing constitutes the Decision and Order of the Court.

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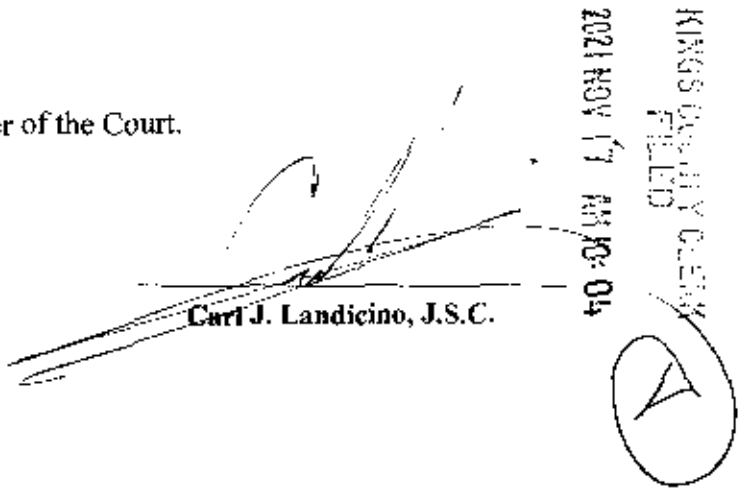


**Carl J. Landicino, J.S.C.**