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 November, 2021.

PRESENT:

CARL J. LANDICINO, J.S.C.

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KA WAI TERENCE FUNG,

Plaintiff,

-against-

JOANN PICCARELLI,

Defendant.

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Index No.: 501472/2018

DECISION AND ORDER

Motion Sequence #3

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	27-35,
Opposing Affidavits (Affirmations)	37-38,
Reply Affidavits (Affirmations)	40

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 December 4, 2017. Plaintiff, Ka Wai Terence Fung, (hereinafter the "Plaintiff") alleges in his Complaint that he suffered personal injuries when the vehicle owned and operated by Defendant Joan Piccarelli (hereinafter the "Defendant") collided with him as he crossed the street as a pedestrian. The collision apparently occurred at the intersection of Bay Parkway at 72nd Street in Brooklyn, New York.

The Defendant now moves (Motion Sequence #3) for an order pursuant to CPLR 3212 granting summary judgment as against the Plaintiff and dismissing the complaint. The Defendant

contends that summary judgment should be granted as she is free from comparative negligence as a matter of law. Specifically, the Defendant contends that the collision occurred because the Plaintiff crossed the street against the traffic signal. The Defendant relies on her own deposition, a Police Accident Report, and two other affidavits.

The Plaintiff opposes the motion and contends that it should be denied. The Plaintiff contends that the Defendant turned into the intersection at issue after the Plaintiff had already begun crossing the street. The Plaintiff contends that there are at least issues of fact regarding the Defendant's comparative negligence which should lead the Court to deny summary judgment at this time. The Plaintiff relies on her own deposition and the deposition of the Defendant.

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 Defendant's actions on the day in question were not a proximate cause of the accident, as a matter of law. In support of the Defendant's motion, the Defendant relies on her own deposition, a Police Accident Report, and two affidavits from non-parties.[1] As part of the Police Accident Report, the Plaintiff stated that "while crossing from SW corner of 72 Street to SE corner without the right of way or without having the cross signal collided with MV1." As part of her deposition, the Defendant, when asked what the color of the traffic signal was as she entered the intersection at 72nd Street, answered "[g]reen." (See Defendant's motion, Exhibit "E", Page 25). When asked how far she was from the intersection when she notice this she stated "[h]alf a block away as I was approaching." When asked approximately how fast

[1] In general, admissions made within uncertified Police Accident Reports are inadmissible hearsay. *See Yassin v. Blackman*, No. 2019-04138, 2020 WL 5648349 [2d Dept 2020]. However, the Plaintiff has failed to raise any objection to this issue in his Affirmation in Opposition to the motion. *See Boereau v. Scott*, 140 A.D.3d 687, 688, 33 N.Y.S.3d 340 [2d Dept 2016]. Courts have long held that deficiencies that may exist with evidence such as this are waived if not raised in opposition. *See Gilmore v. Mihail*, 174 A.D.3d 686, 688, 105 N.Y.S.3d 504, 507 [2d Dept 2019]; *Carey v. Five Bros.*, 106 A.D.3d 938, 940, 966 N.Y.S.2d 153 [2d Dept 2013]; *Scudera v. Mahbubur*, 299 A.D.2d 535, 535, 750 N.Y.S.2d 644, 645 [2d Dept 2002]; *Sam v. Town of Rotterdam*, 248 A.D.2d 850, 670 N.Y.S.2d 62 [3d 1998].

she was travelling at the time she stated "[a]pproximately 20 miles an hour." When asked when she first became aware of the Plaintiff, the Defendant stated "[w]hen he ran in front of the car." (See Defendant's motion, Exhibit "E", Page 22).

In support of his opposition, the Plaintiff relies on his own deposition and the deposition of the Defendant. The Plaintiff testified in his deposition that he was struck as he crossed the road when he was near the middle of the road but that "I never crossed to the lane of that car at that time it was driving." (See Defendant's Motion, Exhibit D, Page 28). The Plaintiff then stated that "[i]t's like that car – the car started to escalate the speed and then stabilize slightly, drove across with the double yellow line, and then crashed into me." (Page 33). In addition, the Plaintiff points to the deposition testimony of the Defendant that indicates that she may have been comparatively negligent. In her deposition, when asked if she saw the pedestrian prior to impact the Defendant answers "[n]o." (See Defendant's Motion, Exhibit E, Page 22). The Defendant also confirmed the Plaintiff's statement regarding where the collision occurred. The Defendant answered yes, when she was asked whether she first noticed the pedestrian "a split second prior to the accident, and you swerved to the left, would that be swerving across the double yellow lines or the left side of your vehicle?" (See Defendant's Motion, Exhibit E, Page 32). As a result, a material issue of fact exists as to whether the Defendant driver failed to exercise due care in operating her vehicle in failing to keep a proper lookout and seeing what there was to be seen under the circumstances presented. See *Topalis v. Zwolski*, 76 AD3d 524, 525, 906 N.Y.S.2d 317, 318 [2d Dept 2010] and *Sage v. Taylor*, 195 AD3d 971, 972, 146 N.Y.S.3d 496 [2d Dept 2021]; *see also Ryan v. Budget Rent a Car*, 37 AD3d 698, 699, 830 N.Y.S.2d 731, 732 [2d Dept 2007]; *and Charles v. Ball*, 291 A.2d 367, 368, 737 N.Y.S.2d 116, 116 [2d Dept 2002]. As such, there remains a question as to

whether the Defendant was free from comparative fault for the accident. Accordingly, the Defendant's motion for summary judgment is denied.

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

Defendant's motion (motion sequence #3) for summary judgment is denied.

The foregoing constitutes the Decision and Order of the Court.

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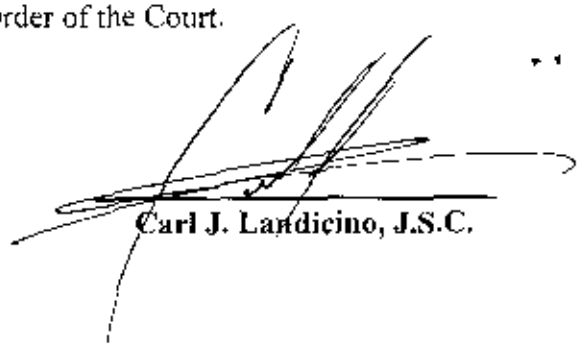

Carl J. Landicino, J.S.C.