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 27th day of September 2021.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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KIM LLOYD, Index No. 516339/2020

Plaintiff,

-against- DECISION AND ORDER

RICHARD MILLS and CHOCOLATE MOUSSE CAB CORP. Motion Sequence #1

Defendants.

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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	13-18,
Opposing Affidavits (Affirmations)	22-24,
Reply Affidavits (Affirmations)	26

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 March 11, 2020. Plaintiff Kim Lloyd (hereinafter the "Plaintiff") was allegedly injured while a rear passenger in a vehicle operated by Defendant Richard Mills and owned by Defendant Chocolate Mousse Cab Corp. (hereinafter referred to as the "Defendants") that was involved in a motor vehicle collision with a non-party vehicle.

The Plaintiff now moves (motions sequence #1) for an order pursuant to CPLR 3212 granting her summary judgment on the issue of liability, dismissing the Defendants' affirmative defenses of culpable conduct, and proceeding to trial on the issue of damages. The Plaintiff contends that summary judgment

should be granted because the driver of the Defendants' vehicle was negligent and the sole proximate cause of the collision. Specifically, the Plaintiff contends that summary judgment should be granted given that there is *prima facie* evidence that the Defendant driver was negligent and the sole proximate cause of the accident in that he rear-ended the motor vehicle of non-party, Marvin A. Mundy.

The Defendants oppose the motion and argue that the motion is premature because none of the parties have been deposed and contend that depositions are necessary to determine how the collision occurred. Additionally, the Defendants contend that there is an issue of fact concerning the Plaintiff's own culpable conduct raised by the Police Accident Report.

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 by the Plaintiff to establish, *prima facie*, that the Defendants' vehicle rear ended the non-party vehicle while the Plaintiff was a passenger in the Defendants' vehicle. In support of her application, the Plaintiff relies on her affidavit. In her affidavit, the Plaintiff states that "on March 11, 2020, at or about 6:45 p.m., I was a rearseated [sic] passenger in a yellow taxi owned by defendant, Chocolate Mousse Cab Corp., and operated by defendant, Richard Mills." She further states that her vehicle struck the rear of the Mundy vehicle. She also states that "[j]ust prior to the accident, Mr. Mills was operating his taxi in the right lane of the Belt Parkway in a dangerous and reckless manner." The Plaintiff then stated that "just prior to the accident, I observed the 2015 Nissan gradually slow his vehicle due to traffic stopping ahead. The 2015 [Nissan] did not stop or slow his vehicle in a sudden, abrupt, or unusual manner just prior to the accident." (See Plaintiff's motion, Exhibit "D", Paragraphs 2, 6, 7, 8, 13). This statement is sufficient for the Plaintiff to establish a *prima facie* showing. *See Martinez v. Allen*, 163 AD3d 951, 82 N.Y.S.3d 130 [2d Dept 2018]. 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].

In opposition to the motion, the Defendants have failed to raise a material issue of fact that would prevent this Court from granting the motion. First, it should be noted 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]. The Defendant driver was present at the time of the occurrence and as such possesses the information necessary to address the subject matter of this motion. The statement in the certified Police Report that the Defendants seek to rely upon is not admissible because it is not an admission. The statement is an exculpatory statement and therefore constitutes inadmissible hearsay. *See Yassin v. Blackman*, 188 AD3d 62, 66, 131 N.Y.S.3d 53, 56 [2d Dept 2020]. The Defendants contend that the Police Accident Report raises an issue of fact as it reflects that the Defendant Driver stated that the Plaintiff distracted him immediately prior to the collision by coughing. Although hearsay can be utilized to defeat a motion for summary judgment, it cannot be the only evidence. Such hearsay may only be used to buttress other admissible material. *See Stock v. Otis Elevator Co.*, 52 AD3d 816, 816, 861 N.Y.S.2d 722, 723 [2d Dept 2008]. As such, the Plaintiff's motion for partial summary judgment on the issue of liability, in that the Defendant driver was negligent and the sole proximate cause of the accident, is granted.

The Court also finds that the Plaintiff's application regarding striking the Defendants' affirmative defense of culpable conduct should also be granted. There were no facts that support the Defendants' affirmative defense of culpable conduct on the part of the Plaintiff. *See Jacobellis v. New York State Thruway Auth.*, 51 AD3d 976, 977, 858 N.Y.S.2d 786, 787 [2d Dept 2008]. What is more, the Defendants did not raise an issue of fact that would prevent this Court from denying the Plaintiff's application to

dismiss the Defendants' affirmative defense of culpable conduct on the part of the Plaintiff. *See Sapienza v. Harrison*, 191 AD3d 1028, 142 N.Y.S.3d 584, 588 [2d Dept 2021]; *Kwok King Ng v. West*, 195 AD3d 1006, 146 N.Y.S.3d 811, 812 [2d Dept 2021].

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

The Plaintiff's motion (motion sequence #1) for partial summary judgment on the issue of liability is granted and the Defendants' affirmative defense of culpable conduct is dismissed. The matter will proceed on the issue of damages only.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.

KINGS COUNTY CLERK
FILED
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