At an IAS Term, Part 70 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 15th day of September, 2022.

P R E S E N T:

HON. WAVNY TOUSSAINT,
Justice.

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SILVINA RAMIREZ,
Plaintiff,

-against-

ROLLING FRITO LAY SALES LP and
LEROY A. PROUDFOOT,
Defendants.

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DECISION AND ORDER

Index No. 519421/19

Mot. Seq. No. 4-5

The following e-filed papers read herein:	NYSCEF Doc Nos.:
Notice of Motion/Cross Motion, Affidavits (Affirmations), and Exhibits Annexed	60-69; 72-88
Affidavits (Affirmations) in Opposition and in Reply with Exhibits Annexed	90; 91; 92-93

In this action to recover damages for personal injuries, plaintiff Silvina Ramirez (plaintiff), moves for an order: (1) pursuant to CPLR 3212, granting her partial summary judgment on the issue of liability against defendants Rolling Frito-Lay Sales, LP (Frito-Lay) and Leroy A. Proudfoot (Proudfoot and, collectively with Frito-Lay, defendants); and (2) pursuant to CPLR 3211 (b), striking the first affirmative defense of comparative negligence, as pleaded in ¶ 4 of the Verified Answer [Seq 4]. Defendants oppose, in part, and cross-move for an order, pursuant to CPLR 3212, granting them summary judgment dismissing all claims

as against them, or in the alternative, for leave, in effect, pursuant to CPLR 3025 (b),[1] to serve their amended answer to add the affirmative defenses of the emergency doctrine, assumption of risk, and third-party comparative negligence (the sixth, sevenths, and eighth affirmative defenses, respectively) [Seq 5]. Because defendants do not oppose the remaining branch of plaintiff's motion which is for dismissal of the first-party comparative-negligence affirmative defense, it is unnecessary to address that point further.

Background

On August 9, 2019, plaintiff was a passenger on a "Super Ninja" moped (the moped)[2] owned and operated by her common-law husband, nonparty Daniel Moran-Baez (Moran), when, at or near 222 Morgan Avenue in Brooklyn, New York, the moped collided with a box-delivery truck owned by defendant Frito-Lay and operated by defendant Proudfoot (the truck). Before the accident, the moped had been traveling northbound in the designated bike lane in the proper traffic direction on Morgan Avenue, while the truck had been traveling from the opposite (southbound) direction. A videotape of the accident scene at the one-minute mark preceding the accident showed that the northbound traffic on Morgan Avenue was stopped, while the southbound traffic was moving. As the moped approached Frito

[1] Defendants' reference to CPLR 3022 ("Remedy for Defective Verification") is obviously incorrect.

[2] The reference to the "moped" is for convenience only. No determination is made herein as to the classification of the vehicle which plaintiff was riding at the time of the accident.

Lay's driveway at 222 Morgan Avenue, it collided with the truck, which, at the time, was turning left (or eastward) into the driveway.

On September 4, 2019, plaintiff filed a summons and complaint. On November 18, 2019, defendants joined issue. After discovery was completed but before a note of issue/certificate of readiness was filed, the instant motion and cross motion were served. On March 2, 2022, the Court heard oral argument and reserved decision.

The Parties' Contentions

Plaintiff's Contentions

Plaintiff contends that defendant Proudfoot (and vicariously Frito-Law) violated Vehicle & Traffic Law (VTL) §§ 1141 ("Vehicle turning left") and 1110 (a) ("Obedience to and required traffic-control devices"), and that such violations, either individually or collectively, proximately caused her injuries. With respect to VTL 1141, plaintiff argues defendant Proudfoot quickly turned his truck to the left and across multiple lanes of oncoming traffic, while Moran, who had the right of way, justifiably anticipated that Proudfoot would yield to his moped. With respect to VTL 1110 (a), plaintiff argues that defendant Proudfoot disobeyed the Morgan Avenue signage which directed that turning vehicles must yield to vehicles traveling in the bike lane.

In support of her motion, plaintiff proffers four items of evidence. The *first* item is surveillance video of the accident, which according to plaintiff's interpretation shows that defendant Proudfoot's truck did not come to a complete

stop before turning left, but, rather, had only slowed down before it quickly cut across Morgan Avenue into the driveway. Plaintiff also provides a Google Maps Street View snapshot of the accident location, showing the posted traffic warnings, "Turning vehicles [must] yield to Bicycles." Additionally, the plaintiff submitted copies of the examination before trial transcripts for defendant Proudfoot. In this regard, plaintiff points out that Proudfoot testified at his pretrial depositions that: (1) there was no traffic control device at the point where he turned left into the driveway; (2) before turning, he had received a go-ahead sign (a hand wave) from the driver of a northbound vehicle; (3) before making his left turn, he had checked the bike lane, but did not see the bike when he started turning; (4) he had stopped for two to five minutes before making his left turn; and (5) by the time Proudfoot saw the moped, "it was [already] too late" to avoid the collision.

Plaintiff points out that Proudfoot's pretrial testimony that the bike lane was clear when he had checked it before turning his truck was inherently self-contradictory because, as the events unfolded, the moped, by then, had been traveling in the bike lane and could not have avoided colliding with the turning truck. Plaintiff further points out that Proudfoot's pretrial testimony that he had stopped for 2 to 5 minutes before making his left turn is at odds with the aforementioned videotaped evidence. The *fourth* and final item of plaintiff's proffered evidence is Moran's pretrial testimony in the related (and since-settled) action which he separately commenced against the same defendants (*see Moran v Rolling Frito Lay Sales LP and Leroy A. Lightfoot*, Index No. 519657/19 [Sup Ct,

Kings County]. In the related action, Moran testified that: (1) he had been traveling on his moped at approximately 20 miles per hour for about two blocks before the accident, when Proudfoot's truck moved directly in front of him after making a sudden left turn across Morgan Avenue; (2) he first saw Proudfoot's truck when it was turning; and (3) as Proudfoot's truck was only two seconds away from his moped, he could not avoid striking Proudfoot's truck.

Defendants' Contentions

Defendants contend that the plaintiff has failed to establish a prima facie case that Proudfoot violated VTL 1141 ("Vehicle turning left"),\; that Proudfoot's operation was negligent; and/or that he was the sole proximate cause of the accident. Defendants argue that even assuming that Proudfoot violated VTL 1141, summary judgment to plaintiff must still be denied because there may be more than one proximate cause of the accident, including Moran's own negligence. More specifically, defendants contend that plaintiff's motion must be denied, inasmuch as she has failed to demonstrate, prima facie, that Moran was free from comparative negligence.

In support of that argument, defendants advance *three* major contentions. *First*, defendants contend that the moped was an illegal "motorized scooter" as defined by NYC Administrative Code § 19-176.2 (b); more particularly, a "Class B moped" because it: (1) weighed over 100 pounds; (2) had a speed capability over 30 miles per hour; and (3) could not be operated by human power. Defendants maintain that, as a Class B moped, Moran's vehicle should have been (but was not)

registered with the New York State Department of Motor Vehicles (DMV), with its operator possessing a valid driver's license and requisite insurance. Defendants moreover argue that the moped at issue was incapable of registration with DMV – and thus was not "street legal" – because it lacked a Vehicle Identification Number. Defendants further note that as a result of the accident, Moran was issued a traffic ticket for operating an unregistered motorcycle.

Second, defendants point out that, aside from its registration irregularities, the moped (being in Class B) is required to follow two additional rules when in operation: first, it may *not* travel in a bike lane; and second, it must have its headlight *on*, pursuant to VTL 1281 (3) ("Traffic laws apply to persons operating electric scooters; local laws"). Contrary to these rules, however, the moped at issue *was* traveling in the bike lane with its headlight *off* at the time of the accident. *Third* and finally, defendants maintain that Moran violated general traffic laws, in that: (1) he was traveling in the bike lane at 30 miles per hour which was in excess of the 25-mile-per-hour posted speed limit for vehicles and at twice the 15-miles-per-hour legal speed limit for bicycles traveling in bike lanes; and (2) he failed to observe various road and traffic signs in the form of: (a) the break in the pavement lines demarcating the separation of the bike lane from the traffic lane; (b) the dashed white lines indicating that vehicle traffic was permitted across the bike lane to enter a driveway at 222 Morgan Avenue; and (c) two prominently posted yellow diamond-shaped "Active Driveway" warning signs ahead of the driveway at issue.

Further, defendants submit the accident-reconstruction report of Bradford R.T. Silver. With respect to the operation of the *moped*, the report concludes that: (1) immediately before the impact, the moped slowed down from its original speed of 30 miles per hour to approximately 18 miles per hour; (2) plaintiff and Moran were thrown off the moped when (in order to avoid a collision with defendant Proudfoot's truck) Moran either turned too abruptly or over-braked the rear wheel; and (3) Moran failed to sufficiently detect or react to the presence of Proudfoot's truck to reduce his moped speed or to take some other evasive action. With respect to the operation of the *truck*, the accident-reconstruction report concludes that Proudfoot: (1) made a legal left turn at less than 8 miles per hour and was traveling at less than 2 miles per hour when the collision happened; (2) was nearly across the northbound line and within several feet of the bike line when he was first able to observe the moped; and (3) braked to a stop in less than 1.19 seconds, which was generally faster than a typical reaction time of 1.5 seconds.

In the alternative, defendants contend that if their cross motion is denied, they should be granted leave to add the affirmative defenses of: (1) the emergency doctrine; (2) assumption of risk; and (3) third-party comparative negligence. Defendants maintain that Moran's travel on an illegal Class B moped in a bike lane, at an excessive rate of speed, and with its headlight off, created a sudden and unexpected circumstance not of Proudfoot's own making, and that the latter's actions were prudent in light of the emergency situation. Defendants also argue that plaintiff, by riding on the back of Moran's speeding moped, effectively

assumed the risk of suffering an accident. Defendants lastly contend that the affirmative defense of third-party comparative negligence is supported by the record, in that defendants had brought a third-party action (albeit since settled) against Moran for the apportionment of liability. Defendants contend that leave to amend may be sought at any time and should be freely granted, absent prejudice or surprise to plaintiff, where, as here, the proposed amendments are not palpably insufficient or devoid of merit.

Plaintiff's Reply and Opposition

Plaintiff emphasizes that Proudfoot's failure to come to a full stop before making an abrupt left turn into the oncoming traffic lane and adjacent bike lane to enter the driveway, constituted negligence per se. In plaintiff's view, therefore, Moran could not have been the sole proximate cause of the accident.

Plaintiff further contends that the accident-reconstruction report should be discounted for numerous reasons. Initially, plaintiff argues that the report author failed to recite his qualifications and failed to visit the accident scene until at least one year after the accident. Additionally, and equally important, the report author has submitted two nearly identical reports, with the second report propounding additional conclusions which in plaintiff's view, are at odds with the videotaped evidence.

Plaintiff next points out that defendants' cross motion advances no new arguments (aside from their opposition to her motion) in support of their own motion for summary judgment. With respect to the remaining branch of

defendants' cross-motion which is for leave to amend their answer, plaintiff contends that not one of the proposed additional affirmative defenses is meritorious.

Defendants' Reply

In reply, defendants contend VTL 1141 does not require a driver to come to a complete stop, but only to yield his or her right of way. According to defendants, the videotaped evidence demonstrates that Proudfoot nearly came to a complete stop prior to turning left. Defendants further contend that the accident-reconstruction expert listed his qualifications on his resume, and that the facts underlying the accident-reconstruction report were independently gathered and evaluated. Lastly, defendants reiterate their contentions that the moped was "street illegal" and that Moran violated the VTL, thus making him negligent per se and the sole proximate cause of the accident.

Discussion

Standard of Review

A party moving for summary judgment bears the burden of making a prima facie showing of entitlement to judgment as a matter of law and must tender sufficient evidence in admissible form to demonstrate the absence of any material factual issues (*see* CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Failure to make this prima facie showing requires denial of the motion (*see Alvarez*, 68 NY2d at 324; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this

showing has been made, the burden shifts to the party opposing the motion to produce evidence in admissible form sufficient to establish an issue of material fact requiring a trial (*see* CPLR 3212; *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562).

"[A]verments merely stating conclusions, of fact or of law, are insufficient to defeat summary judgment" (*Banco Popular N.A. v Victory Taxi Mgt., Inc.*, 1 NY3d 381, 383 [2004] [internal quotations omitted]). The court must view the totality of evidence presented in the light most favorable to the nonmoving party and accord that party the benefit of every favorable inference (*see Fortune v Raritan Building Servs. Corp.*, 175 AD3d 469, 470 [2d Dept 2019]; *Emigrant Bank v Drimmer*, 171 AD3d 1132, 1134 [2d Dept 2019]). Summary judgment is a "drastic remedy" that "should not be granted where there is any doubt as to the existence of such issues or where the issue is 'arguable'; issue-finding, rather than issue-determination, is the key to the procedure" (*Sillman v Twentieth Century-Fox Film Corp*, 3 NY2d 395, 404 [1957] [internal citations omitted], *rearg denied* 3 NY2d 941 [1957]). "The court's function on a motion for summary judgment is to determine whether material factual issues exist, not resolve such issues" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010] [internal quotation marks omitted]).

"A plaintiff moving for summary judgment on a cause of action asserted in a complaint generally has the burden of establishing, prima facie, all of the essential elements of the cause of action" (*Poon v Nisanov*,162 AD3d 804, 806 [2d Dept 2018] [internal quotation marks omitted]). "By contrast, a defendant moving for

summary judgment dismissing one of the plaintiff's causes of action may generally sustain his or her prima facie burden 'by negating a single essential element' of that cause of action" (*id.*).

"With respect to the plaintiff's motion, a plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, prima facie, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries" (*Poon v Nisanov*, 162 AD3d 804, 807 [2d Dept 2018]; *see also Rodriguez v City of New York*, 31 NY3d 312, 319 [2018]). "To be entitled to partial summary judgment a plaintiff does not bear the burden of establishing . . . the absence of his or her own comparative fault" (*Rodriguez*, 31 NY3d at 324-325; *Poon*, 162 AD3d at 807).

Discussion

As stated, plaintiff moves for partial summary judgment on liability based on Proudfoot's (and vicariously Frito-Lay's) alleged violation of VTL 1141 and VTL 1110 (a). Initially, VTL 1141 provides that "[t]he driver of a vehicle intending to turn to the left within an intersection or into an alley, private road, or driveway shall *yield* the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard" (emphasis added). Next, VTL 1110 (a) provides that "[e]very person shall obey the instructions of any official traffic-control device applicable to him placed in accordance with the provisions of this chapter, unless otherwise directed by a

traffic or police officer, subject to the exceptions granted the driver of an authorized emergency vehicle in this title."

Here, plaintiff has failed to meet her prima facie burden of demonstrating that Proudfoot (and vicariously Frito-Lay) was negligent in operating his truck under either VTL 1141 or VTL 1110 (a). As defendants correctly point out, VTL 1141 did not require Proudfoot to come to a complete stop before turning, but only required him to *yield* the right of way. Assuming the truth of Moran's pretrial testimony that he was traveling within the speed limit shortly before the accident, Proudfoot's pretrial testimony that he had visually scanned the bike lane prior to turning and had not observed the moped must also be accepted as true at this stage of litigation. Contrary to plaintiff's contention, Proudfoot's admission in his pretrial testimony that he did not observe the moped before turning his truck does not mean, as a categorical imperative, that he failed to observe what was there to be seen. It might well be reasonable for the jury to find on the current record that Proudfoot could not have seen the moped speeding in the bike lane as he was turning his truck.

Contrary to plaintiff's interpretation, the videotaped evidence does not unequivocally show that Proudfoot failed to yield the right of way. Although the videotaped evidence shows that Proudfoot did not come to a complete stop before making his left turn, his failure to do so is not negligence per se. To reiterate, all that VTL 1141 requires is for a turning driver to *yield* his or her right of way. Additionally, the videotape evidence fails to unequivocally support plaintiff's

alternative position that Proudfoot failed to obey the traffic signs under VTL 1110 (a). Accordingly, the branch of plaintiff's motion which is for partial summary judgment on the issue of liability is denied.

While defendants state in their notice of cross motion that they are independently seeking summary judgment dismissing all claims as against them, they advance no additional arguments in support of their cross motion. Rather, the summary judgment portion of their counsel's affirmation concludes with the broadly worded statements that "[t]he motion of Plaintiff Ramirez for summary judgment must be denied," and that "[t]he cross motion of Defendants Proudfoot and Rolling Frito Lay Sales for summary judgment, should be granted and the Verified Complaint should be dismissed" (*id.* ¶¶ 67-68). In any event, Moran's pretrial testimony precludes summary judgment in defendants' favor as issues of fact remain as to (among other things) Proudfoot's operation of the truck and whether he was able to timely observe the moped and to yield the right of way prior to turning his truck. Accordingly, the branch of defendants' cross motion which is for summary judgment dismissing all claims as against them is denied.

Defendants' Request for Leave to Amend

Defendants also cross-move for leave to amend their answer to add the affirmative defenses of: (1) the emergency doctrine, (2) assumption of risk, and (3) the third-party comparative negligence (the sixth, seventh, and eighth affirmative defenses, respectively).

Standard of Review

A party may amend its pleading by setting forth additional or subsequent transactions or occurrences, at any time by leave of the court or by stipulation of the parties (*see* CPLR 3025 [b]; *Cullen v Torsiello*, 156 AD3d 680, 681 [2d Dept 2017]). "Leave shall be freely given upon such terms as may be just" (CPLR 3025 [b]; *see also Cullen*, 156 AD3d at 681). As a general rule, "a court hearing a motion for leave to amend will not examine the merits of the proposed amendment" (*Ricca v Valenti*, 24 AD3d 647, 648 [2d Dept 2005]). A court has broad discretion to grant a motion to amend the pleadings . . . when there is no actual prejudice or surprise to the opposing party (*see Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 411 [2014]; *Murray v City of New York*, 43 NY2d 400, 405 [1977], *rearg denied* 45 NY2d 966 [1978]; *Cullen*, 156 AD3d at 681).

"Courts should grant leave to amend '[i]n the absence of prejudice or surprise resulting directly from the delay in seeking leave . . . unless the proposed amendment is palpably insufficient or patently devoid of merit'" (*National Recruiting Group, LLC v Bern Ripka LLP*, 183 AD3d 831, 832 [2d Dept 2020], quoting *Lucido v Mancuso*, 49 AD3d 220, 222 [2d Dept 2008]). "The passage of time alone, without a further showing of prejudice, is insufficient to deny leave to amend a pleading" (*see Eng v DiCarlo*, 79 AD2d 1018 [2d Dept 1981]; *see also JBGR, LLC v Chicago Title Ins. Co.*, 195 AD3d 604, 606 [2d Dept 2021]). "The burden of demonstrating prejudice or surprise, or that a proposed amendment is

palpably insufficient or patently devoid of merit, falls upon the party opposing the motion" (*National Recruiting Group*, 183 AD3d at 832).[3]

Emergency Doctrine:

"The emergency doctrine holds that those faced with a sudden and unexpected circumstance, not of their own making, that leaves them with little or no time for reflection or reasonably causes them to be so disturbed that they are compelled to make a quick decision without weighing alternative courses of conduct, may not be negligent if their actions are reasonable and prudent in the context of the emergency" (*Bello v Transit Auth. of N.Y. City*, 12 AD3d 58, 60 [2d Dept 2004]). Here, the emergency doctrine defense is inapplicable under any view of the evidence. As stated, plaintiff contends that Proudfoot did not yield the right of way to Moran prior to turning left. There are no allegations that Proudfoot quickly swerved to avoid the moped, or otherwise took action without weighing any other alternative courses of conduct that could conceivably support the applicability of the emergency doctrine. Accordingly, the emergency doctrine affirmative defense is palpably insufficient and devoid of merit.

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[3] A motion to amend must be accompanied by the proposed amended pleading clearly showing the changes or additions made to the pleading (*see* CPLR 3025 [b]; *Drice v Queens County District Atty.*, 136 AD3d 665, 666 [2d Dept 2016]; *Codrington v Wendell Terrace Owners Corp.*, 118 AD3d 844, 845-846 [2d Dept 2014]). Here, defendants have substantially complied with this requirement by submitting a proposed amended answer, which the Court has compared with the original answer. The proposed amended answer is identical to the original answer, with the exceptions of the aforementioned affirmative defenses, the addition of the word "Proposed" in the title, and the change in the document date.

Assumption of Risk:

Proceeding to the next proposed affirmative defense of the assumption of risk, the Court finds that this affirmative defense lacks merit because it has been subsumed in the already stricken first-party comparative-negligence defense.

Third-party Comparative Negligence:

The Court notes that plaintiff has failed to advance any specific arguments against this defense. The fact that such amendment is sought several years after the filing of the complaint does not (absent a showing of prejudice) render it untimely (*see JBGR*, 195 AD3d at 606). Equally important, plaintiff has demonstrated no surprise or prejudice by the proposed amendment.

The court has considered the parties' remaining contentions and finds them to be without merit.

Conclusion

Based on the foregoing and after oral argument, it is

ORDERED that plaintiff's motion for summary judgment (Seq. No. 4) is *granted to the extent* that defendants' first affirmative defense of first-party comparative negligence is stricken, and is otherwise denied; and it is further

ORDERED that defendants' cross motion for, inter alia summary judgment (Seq. No. 5) is *granted to the extent* that, pursuant to CPLR 3025 (b), defendants are granted leave to amend their answer to assert third-party comparative negligence as their eighth affirmative defense, and is otherwise denied; and it is further

ORDERED that plaintiff's counsel shall electronically serve a copy of this decision and order with notice of entry on defendants' counsel and shall electronically serve an affidavit of service thereof with the Kings County Clerk; and it is further

ORDERED that within ten days after service of this decision and order with notice of entry on defendants' counsel, defendants shall electronically file their amended answer.

This constitutes the Decision and Order of the Court.

E N T E R,

J. S. C.

2022 SEP 19 AM 10:36
COUNTY CLERK
FILED

HON. WAVNY TOUSSAINT
J.S.C.