At an IAS Term, City Part 22 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 31st day of July 2023.

PRESENT:
HON. GINA ABADI,
J.S.C.

VERNON NEAL,

Plaintiff,

Index No.: 518308/2018
Motion Seq: 5

-against-

DECISION/ORDER

THE CITY OF NEW YORK, et al.,

Defendants.

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

Papers	NYSCEF Numbered
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed.....	104 - 112
Opposing Affidavits (Affirmations).....	114
Reply Affidavits (Affirmations).....	115 - 119

Upon the foregoing cited papers and after oral argument, the Decision/Order on this motion is as follows:

Plaintiff Vernon Neal moves by notice of motion, sequence number five, pursuant to CPLR § 2221(d) for an order granting reargument of this court's February 22, 2023 order which denied plaintiff's motion for summary judgment on liability and upon reargument, granting plaintiff's motion. Defendants oppose this application.

This action was commenced on September 10, 2018. Plaintiff alleges that Justin Collins (hereinafter "Collins"), a New York City Police Officer, in the course and scope of his employment operated his unmarked police vehicle in a negligent manner. Specifically, plaintiff alleges that on May 4, 2018, Collins was attempting to make a U-turn across double yellow lines, in front of the

plaintiff's motorcycle. Plaintiff contends that he was operating a motorcycle within the lane of travel behind the police vehicle when the vehicles collided due to Collin's attempted U-turn.

On February 22, 2023, this court heard oral argument on motion sequences three and four wherein a short form order was entered denying both parties' motions for summary judgment. Plaintiff now moves to reargue that portion of the February 22, 2023 order, which denied his motion, and upon reargument, granting his motion for summary judgment on liability.

"A motion for leave to reargue is addressed to the sound discretion of the motion court." *Onewest Bank, FSB v N&R Family Tr.*, 200 AD3d 900 (2d Dept 2021). "Such a motion must be 'based upon matters of fact or law allegedly overlooked or misapprehended by the Court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion.'" *Id. quoting* CPLR § 2221(d)(2). "It is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented." *McGill v Goldman*, 261 AD2d 593, 594 (2d Dept 1999); *see Jaspar Holdings, LLC v Gotham Trading Partners # 1, LLC,* 186 AD3d 582, 584 (2d Dept 2020).

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 Hospital*, 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 University Medical Center*, 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 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.'" *Sapienza v Harrison*, 191 AD3d 1028 (2d Dept 2021), quoting *Tsyganash v. Auto Mall Fleet Mgt., Inc.*, 163 A.D.3d 1033 (2d Dept 2018); *see Rodriguez v. City of New York*, 31 N.Y.3d 312 (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.'" *Sapienza*, 191 AD3d at 1029, quoting *Rodriguez*, 31 NY3d at 324-325, *supra*.

"[T]he reckless disregard standard of care in Vehicle and Traffic Law § 1104(e) only applies when a driver of an authorized emergency vehicle involved in an emergency operation engages in the specific conduct exempted from the rules of the road by Vehicle and Traffic Law § 1104(b). Any other injury-causing conduct of such a driver is governed by the principles of ordinary negligence." *Kabir v County of Monroe*, 16 NY3d 217 (2011); *see Cooney v Port Chester Police Dept.*, 203 AD3d 799 (2d Dept 2022). Pursuant to Vehicle and Traffic Law § 114-b, *Emergency operation,* the "emergency operation" of an authorized emergency vehicle includes "pursuing an actual or suspected violator of the law." VTL § 114-b; *see Portalatin v City of New York*, 165 AD3d 1302 (2d Dept 2018).

In support of the instant motion, plaintiff contends that the Appellate Division, Second Department's holding in *Portalatin v City of New York* (165 AD3d 1302 [2d Dept 2018]) is analogous to the instant matter and dispositive. Moreover, plaintiff argues that neither officer could recall seeing an individual with an open container and even if such behavior was observed, following the Court of Appeals reasoning in *Kabir v County of Monroe* (16 NY3d 217 [2011]), the injury-causing conduct would be governed by the principles of ordinary negligence.

In opposition, defendants argue that *Portalatin,* 165 AD3d 1302, is distinguishable as the officer in *Portalatin* supplied an affidavit as to his suspicion of an open container, whereas in the instant matter, there is sworn testimony of an open container violation at the time of the accident. Defendants contend that the record reflects the existence of an "actual or suspected violator of the law," an open container which is a violation of NYC Admin. Code § 10-125(b). Therefore, defendants maintain that the reckless disregard standard applies as the officer's conduct in the instant matter was an emergency operation and therefore exempted pursuant to VTL § 1104(b).

At issue in the instant matter is whether the officer was engaged in an "emergency operation" at the time of the collision. VTL § 114-b describes an emergency operation as one involving an "actual or suspected violator of law." Contrary to plaintiff's contention, *Portalatin* does not stand for the proposition that an open container violation *cannot* constitute a "suspected violator of the law" for the purposes of VTL § 114-b. However, although the officers claim that they were pursuing a person with an open container neither could recall observing such a person. Officer Collins, the driver, testified that he did not observe the person but alleges to have acted on Officer Juste's observation although Collins could describe the location of the alleged individual. Officer Juste testified that he did not recall stating there was someone with an open container but believed he saw something. *See* Exhibit 3, Robin Juste Deposition, page 46, lines 10-13. In sum, defendants failed to offer testimony in admissible form that a suspected violator of the law was present and thus this court cannot conclude that the officer was engaged in an emergency operation, therefore, the principles of ordinary negligence apply.

The record reflects that Officer Collins attempted to make a U-turn across double yellow lines and "[c]rossing over a double yellow line constitutes negligence as a matter of law." *Browne v Castillo*, 288 AD2d 415 (2d Dept 2001), *see Rodriguez v Gutierrez,* 138 AD3d 964 (2d Dept

2016). Moreover, defendants' negligence was a proximate cause of the accident. Plaintiff need not demonstrate the absence of his own comparative negligence to be entitled to partial summary judgment. *See Sapienza v Harrison*, 191 AD3d 1028 (2d Dept 2021).

Accordingly, plaintiff's motion to reargue is granted and the Court's decision dated February 22, 2023 is vacated. Upon reargument, plaintiff's motion for summary judgment on liability is granted and defendant's cross-motion is denied. Comparative fault shall be determined at trial.

The foregoing constitutes the decision and order of this Court.

ENTER:

HON. GINA ABADI
J.S.C.

KINGS COUNTY CLERK
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