SHORT FORM ORDER **INDEX NO. 609207/2018**

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:
Hon. Paul J. Baisley, Jr., J.S.C.

ANNETTE LAGREGA-HALL and
TIMOTHY HALL,

Plaintiffs,

-against-

SHAKIM J. BERRY and KATE M. CONROY,

Defendants.

ORIG. RETURN DATE: July 9, 2018
FINAL RETURN DATE: October 9, 2018
MOT. SEQ. #: 001 MG

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Upon the following papers read on this motion for partial summary judgment : Notice of Motion/ Order to Show Cause and supporting papers by plaintiffs, dated June 21, 2018 ; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers by defendant Shakim Berry, dated October 5, 2018, by Kate M. Conroy, dated October 2, 2018 ; Replying Affidavits and supporting papers by plaintiffs, dated October 8, 2018 ; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiff for partial summary judgment in her favor is granted; and it is

ORDERED that the parties shall appear for a preliminary conference at 10:00 a.m. on January 8, 2019 at the DCM-J Part of the Supreme Court, 1 Court Street, Riverhead, New York.

This is an action to recover damages for injuries allegedly sustained by plaintiff Annette Lagrega-Hall as a result of a motor vehicle collision that occurred on August 20, 2017, on Mastic Road, in Mastic Beach, New York. The accident allegedly occurred when a motor vehicle owned by defendant Kate M. Conroy and operated by defendant Shakim J. Berry crossed a double yellow line and struck the vehicle operated by Lagrega-Hall, causing it to spin out and strike a utility pole. Issue has been joined and defendants are represented by separate counsel.

Plaintiff now moves for partial summary judgment in her favor on the issue of liability. In support of her motion, plaintiff submits, among other things, copies of the pleadings, a certified police accident report, and her own affidavit. In opposition, defendant Berry submits his own affidavit and

defendant Conroy submits an affirmation of counsel and an unverified answer.

It is well settled that the proponent of a summary judgment motion bears the initial burden of establishing his or her entitlement to judgment, as a matter of law, in his or her favor by offering admissible evidence sufficient to eliminate any material issues of fact from the case (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v City of New York,* 49 NY2d 557, 427 NYS2d 595 [1980]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of any opposition thereto (*Winegrad v New York Univ. Med. Ctr., supra*). Once the movant has made the requisite showing, the burden then shifts to the opposing party, requiring him or her to present admissible evidence and facts sufficient to require a trial on any issue of fact (CPLR 3212 [b]; *Alvarez v Prospect Hosp., supra*; *Zuckerman v City of New York*, *supra*). On such a motion, the Court is charged with determining whether issues of fact exist while viewing any evidence in a light most favorable to the nonmoving party; the court is not responsible for resolving issues of fact or determining matters of credibility (*see Chimbo v Bolivar*, 142 AD3d 944, 37 NYS3d 339 [2d Dept 2016]; *Pearson v Dix McBride, LLC*, 63 AD3d 895, 883 NYS2d 53 [2d Dept 2009]; *Kolivas v Kirchoff*, 14 AD3d 493, 787 NYS2d 392 [2d Dept 2005]). A motion for summary judgment should be denied where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (*see Chimbo v Bolivar*, *supra*; *Benetatos v Comerford*, 78 AD3d 730, 911 NYS2d 155 [2d Dept 2010]).

A driver of a motor vehicle is not required to anticipate that a motor vehicle traveling in the opposite direction will cross over into oncoming traffic (*see Barbaruolo v DiFede*, 73 AD3d 957, 900 NYS2d 671 [2d Dept 2010]; *DiSena v Giammarino*, 72 AD3d 873, 898 NYS2d 664 [2d Dept 2010]; *Koch v Levenson*, 225 AD2d 592, 638 NYS2d 785 [2d Dept 1996]). Crossing official markings into the opposing lane of traffic is a violation of Vehicle and Traffic Law § 1126 (a) and constitutes negligence as a matter of law, unless there is a justified emergency situation not of the driver's own making (*see Sullivan v Mandato*, 58 AD3d 714, 873 NYS2d 96 [2d Dept 2009]; *Hazelton v D.A. Lajeunesse Bldg. & Remodeling, Inc.*, 38 AD3d 1071, 832 NYS2d 114 [2d Dept 2007]; *Koch v Levenson*, *supra*).

Plaintiff has made a prima facie case of entitlement to summary judgment in her favor on the issue of liability (*see Ramirez v Konstanzer, supra*). Plaintiff's affidavit states that she was a seat-belted operator of a 2009 Ford and she was traveling southbound on Mastic Road. She avers that, suddenly and without warning, her vehicle was sideswiped on the driver's side by the vehicle operated by defendant Shakim Berry. According to plaintiff, Berry was traveling northbound on Mastic Road "when he had swerved over a double yellow line that separated [her] lane of travel and his lane of travel, and struck [her] vehicle." The police accident report indicates that plaintiff stated Berry side swiped her vehicle, causing her to hit a utility pole, and that Berry stated he swerved to avoid a parked vehicle and, in doing so, side swiped plaintiff's vehicle, causing her to hit a utility pole. While the police report is a certified copy, there is no evidence that the police officer witnessed the accident, therefore, the conclusions contained therein are not admissible (*see Conners v Duck's Cesspool Serv.*, 144 AD2d 329, 533 NYS2d 942 [2d Dept 1988]). However, the party admissions contained in the report are admissible herein (*see Jackson v Donien Trust,*103 AD3d 851, 962 NYS2d 267 [2d Dept 2013]; *Scott v Kass*, 48 AD3d 785,

851 NYS2d 649 [2d Dept 2008]; *Kemenyash v McGoey*, 306 AD2d 516, 762 NYS2d 629 [2d Dept 2003]; *Guevara v Zaharakis*, 303 AD2d 555, 756 NYS2d 465 [2d Dept 2003]; *Ferrara v Poranski*, 88 AD2d 904, 450 NYS2d 596 [2d Dept 1982]). Based upon her affidavit, plaintiff has demonstrated, prima facie, that she is entitled to summary judgment on the issue of liability (*see Lewis v City of New York*, 157 AD3d 879, 66 NYS3d 916 [2d Dept 2017]; *Cortese v Pobejimov*, 136 AD3d 635, 24 NYS3d 405 [2d Dept 2016]).

Having made the requisite prima facie showing of entitlement to summary judgment, the burden shifts to the defendants to rebut the presumption of negligence or raise a triable issue of fact or offer a non negligent explanation (*see Cortes v Whelan*, 83 AD3d 763, 922 NYS2d 419 [2d Dept 2011]; *Balducci v Velasquez*, *supra*). In opposition defendant Conroy submits the affirmation of her attorney, who contends that summary judgment is a drastic remedy and that the motion is premature because discovery has not been conducted. "[S]ummary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence" (*Williams v D & J School Bus*, 69 AD3d 617, 893 NYS2d 133 [2d Dept 2010]; *Panasuk v Viola Park Realty*, 41 AD3d 804, 939 NYS2d 520 [2d Dept 2007]; *Gasis v City of New York*, 35 AD3d 533, 828 NYS2d 407 [2d Dept 2006]). This is especially true when the facts which would support a non-negligent explanation for the accident lie within the exclusive knowledge of this defendant. The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered as a result of discovery is an insufficient basis for denying the motion (*see generally Lauriello v Gallotta,* 59 AD3d 497, 873 NYS2d 690 [2d Dept 2009]; *Kimyagarov v Nixon Taxi Corp.,* 45 AD3d 736, 846 NYS2d 309 [2d Dept 2007]). Here, it is determined that summary judgment is not premature, as there is no evidentiary basis offered to suggest that discovery could lead to relevant evidence. Conroy's position that she denies giving co-defendant permission or consent to operate the vehicle, a 2014 Maserati, on the date of the accident is not supported by an affidavit or any admissible evidence.

Defendant Berry avers in his opposition to the motion that as he "was driving northbound on Mastic Road, a truck was driving on the opposite side of the road and suddenly came into [his] lane. To avoid hitting the truck, [he] swerved to the right and lost control of the vehicle, which subsequently swerved back and hit Ms. Lagrega-Hall's vehicle when [he] tried to regain control." He avers that he was presented with an emergency situation and that there was "simply not enough time to react better than [he] did." The emergency doctrine recognizes that when a driver is confronted with an emergency situation which leaves little or no time for thought, deliberation or consideration, he or she may not be negligent if the actions taken were reasonable and prudent in the emergency context (*Jacobellis v New York State Thruway Auth.*, 51 AD3d 976, 858 NYS2d 786 [2d Dept 2008]). The emergency doctrine applies only to circumstances where a party is confronted by a sudden and unforseen occurrence not of his own making (*see Cascio v Metz*, 305 AD2d 354, 759 NYS2d 502 [2d Dept 2003]; *Muye v Liben*, 282 AD2d 661, 723 NYS2d 510 [2d Dept 2001]). Although the existence of an emergency and the reasonableness of the response to it generally present issues of fact (*see Makagon v Toyota Motor Credit Corp.*, 23 AD3d 443, 444, 808 NYS2d 120 [2d Dept 2005]), those issues "may in appropriate circumstances be determined as a matter of law"(*Bello v Transit Auth. of N.Y. City*, 12 AD3d 58, 60, 783 NYS2d 648 [2d Dept 2004]; *see Huggins v Figueroa*, 305 AD2d 460, 462, 762 NYS2d 404 [2d Dept 2003]). Here, Berry's affidavit does not sufficiently raise the defense. Moreover, defendant Berry's

affidavit does not establish any fault on behalf of plaintiff, and it does not establish that defendants were completely without fault. As an operator of a motor vehicle Berry had a "common-law duty to see that which [he or she] should have seen through the proper use of [his or her] senses" (*Botero v Erraez*, 289 AD2d 274, 275, 734 NYS2d 565 [2d Dept 2001]; *see also Ferrara v Castro*, 283 AD2d 392, 724 NYS2d 81 [2d Dept 2001]).

Accordingly, as defendants have not raised a triable issue of fact, the motion by plaintiff for summary judgment in her favor on the issue of liability is granted.

Dated: 12/19/18

HON. PAUL J. BAISLEY, JR., J.S.C.