SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TRIAL/IAS PART 35
NASSAU COUNTY

ANTHONY ETIENNE,

Plaintiff,

- against -

ORLANDO ROWE,

Defendant.

Index No.: 604123/17
Motion Seq. Nos.: 01, 02
Motion Dates: 09/28/17
10/26/17

The following papers have been read on these motions:

	Papers Numbered
Notice of Motion (Seq. No. 01), Affirmation and Exhibits	**1**
Notice of Cross-Motion (Seq. No. 02), Affirmation and Exhibits	**2**
Affirmation in Opposition to Cross-Motion (Seq. No. 02) and in Reply to Motion (Seq. No. 01)	**3**

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Defendant moves (Seq. No. 01), pursuant to CPLR § 3211(a)(5) and (8), for an order dismissing the Verified Complaint based upon lack of personal jurisdiction and expiration of the Statute of Limitations; or moves, in the alternative, pursuant to CPLR §3212, for a order granting summary judgment dismissing plaintiff's Verified Complaint.

Plaintiff opposes the motion and cross-moves (Seq. No. 02), pursuant to CPLR § 306-b, for an order extending the time to serve defendant. Defendant opposes the cross-motion.

This action arises from a motor vehicle accident which occurred on June 18, 2014, at approximately 10:30 p.m., on 109th Avenue, at or near its intersection with Heathcote Road,

Elmont, County of Nassau, State of New York. The accident involved two (2) vehicles, a 2003 Audi, operated by plaintiff, and a 2011 Infiniti, owned and operated by defendant. *See* Defendant's Affirmation in Support Exhibit C. Plaintiff commenced this action with the filing of a Summons and Verified Complaint on or about May 2, 2017. *See* Defendant's Affirmation in Support Exhibit A. Defendant appeared in this action by service of a Verified Answer with Affirmative Defenses dated July 7, 2017. *See* Defendant's Affirmation in Support Exhibit B. One of the Affirmative Defenses set forth in defendant's Verified Answer asserts lack of personal jurisdiction. *See id.*

In support of the motion (Seq. No. 01), defendant submits, in pertinent part, that, "I have been notified by the LAW OFFICES OF DENIS J. KENNEDY, staff counsel attorneys for USAA Insurance Company, with whom I had an automobile insurance policy on June 18th, 2014, that someone on behalf of the Plaintiff in this action claims to have served a copy of the Summons and Complaint for this lawsuit on me by delivering a copy of same to a Ms. Cain, at my home address of 62 Fieldmere Street, Elmont New York, on May 30th, 2017. That they further claim that they determined that I was not in the military service at the time of the purported service. I have reviewed a copy of the Plaintiff's Affidavit of Service, which is attached hereto which makes those claims. The Affidavit of Service is untrue. At no time did the Plaintiff or anyone on Plaintiff's behalf serve a copy on a person known as or calling herself 'Ms. Cain' at that address. More importantly, the statement that claims this Ms. Cain was asked if I was in active military service, and that there was a negative reply to that, is false. In fact, I am an active member of the United States Army. I was away on active duty service, pursuant to my Orders from the Office of the Adjutant General requiring me to appear for the period of June 1st, 2017 through June 23rd, 2017 for active duty training, the same time that the mailing upon me would have been completed. Therefore, the statement that is attributed to Ms. Cain that I was not

in the military is untrue. Thus, the Affidavit is faulty and without any legal basis. It is my understanding that there was no proper service upon me in this lawsuit. Significantly, I was not at fault for the accident that is the subject of this case against me. As I advised the responding Nassau County Police Officers, the other driver, the plaintiff Etienne, went through a stop sign at the intersection of 109th Avenue and Heathcote Road in Elmont, hitting my car and causing it to strike a sign post there. I did not have a stop sign as I traveled on 109th Avenue, but the plaintiff, traveling on Heathcote Road did." *See* Defendant's Affirmation in Support Exhibit C.

Counsel for defendant argues, in pertinent part, that, "[t]he Defendant was not served in accordance with the mandates of CPLR § 308(2). As such, the defective service constitutes a failure to obtain personal jurisdiction over Defendant, ORLANDO ROWE, and the Summons and Complaint against him should be dismissed. Furthermore, since the statute of limitations for Plaintiff's claim has expired, this dismissal should be with prejudice."

Counsel for defendant further contends that, "[T]he Plaintiff does not possess a meritorious cause of action herein. The Defendant was not at fault for this accident. Plaintiff was driving, unlicensed, when he drove through a stop sign and struck Defendant.... The unlicensed Plaintiff was traveling southbound on Heathcote Road, Elmont, New York and went through a stop sign at the intersection of 109th Avenue and Heathcote Drive (*sic*), striking Defendant's vehicle, which did not have a stop sign controlling his direction. This is further confirmed by the annexed Police Accident Report, ..., which cites the Plaintiff for both a failure to yield the right-of-way and disregarding a traffic control device.... Pursuant to Vehicle and Traffic Law § 1142(a), a driver traveling on a road controlled by a stop sign who fails to yield the right of way is in violation of said statute and is negligent as a matter of law. [citations omitted].... Defendant, ORLANDO ROWE was not at fault for the happening of the accident and Plaintiff's cause of action against him must fail." *See* Defendant's Affirmation in Support Exhibits C and D.

In opposition to the motion (Seq, No. 01) and in support of the cross-motion (Seq. No. 02), counsel for plaintiff argues, in pertinent part, that "[m]ovant erroneously claims that the plaintiff's Complaint should be dismissed due to a lack of personal jurisdiction, the expiration of the Statute of Limitations, and that no meritorious cause of action exists against the defendant.... Movant's argument fails on all three grounds and thus it is respectfully submitted that the Court must deny this motion. In the alternative, if the Court finds that service was not properly performed in this case, it is respectfully requested that the Court grant leave for the plaintiff to serve the Summons and Complaint beyond the statutory timeline. The movant incorrectly asserts that the Court lacks personal jurisdiction over the defendant because he was not properly served with a copy of the Summons and Complaint. Specifically, defendant asserts in his affidavit ... that he was away on active military service at the time when the Summons and Complaint were served, and he contests the assertions in the Affidavit of Service.... The plaintiff has no knowledge of whether or not the defendant was in fact away on active duty service from June 1, 2017 through June 23, 2017. However, the plaintiff will respect the Court's in camera inspection of the defendant's Orders from the Office of the Adjutant General. **At no point does the defendant claim that he was away on active duty service on May 30, 2017, the day the process server served the Summons and Complaint. The defendant's affidavit states that he was away on active duty service from June 1 through June 23 of 2017. The process server's sworn affidavit of service states that service of the Summons and Complaint was performed on May 30, 2017, two days before the defendant left for his active duty service.** A plaintiff is not required to have actual knowledge of whether or not a defendant is on active military service at the time of service of process. Instead, the plaintiff must establish and demonstrate facts showing that a defendant is or is not in active miliary service. In this case, the process server has sufficiently demonstrated that he performed (*sic*) adequate investigation into the defendant's military status. Specifically, the Affidavit of Service states that the process server spoke with Ms. Cain, a suitable person located at the defendant's residence address on May 30,

2017, and was told by Ms. Cain that the defendant was not in active military service. **Again, by his own admissions, the defendant was not on active duty service on the day that the process server spoke with Ms. Cain**. Additionally, the defendant's affidavit does not sufficiently dispute the process server's allegations.... Defendant asserts that nobody on plaintiff's behalf served a copy on Ms. Cain. **However, defendant does not set forth any corroborating facts in support of this statement. Specifically, defendant fails to say who Ms. Cain is or whether or not he even asked Ms. Cain of she received the complaint, nor does defendant dispute that Ms. Cain was there on the day of service. Given that nobody has asserted that defendant was present when Ms. Cain received the Summons and Complaint, and Ms. Cain has not offered any statement as to whether or not she received the Summons and Complaint, it is inappropriate for the defendant to assert that Ms. Cain did not receive the Summons and Complaint.** Likewise, the defendant claims that the process server did not ask Ms. Cain if the defendant was on active military service, and that Ms. Cain did not reply in the negative to that question. **The language of defendant's affidavit is clear - the assertion is not that he was on active military service, he is claiming that the question was never even asked.... [N]obody, including the defendant, has asserted that the defendant was present when Ms. Cain was asked about defendant's military service, nor has Ms. Cain offered any statement in contradiction of the process server's claims. It is unclear how the defendant can provide sworn testimony as to the contents of a conversation for which he was not present**." *See* Plaintiff's Affirmation in Opposition and in Support Exhibit A.

Counsel for plaintiff alternatively submits that, "if the Court finds that service was not properly performed, your affirmant respectfully requests that the plaintiff be granted leave to extend the time to serve the Summons and Complaint. The standard for when the time to serve the Summons and Complaint should be extended is when either good cause is shown or in the interest of justice. [citations omitted]. A showing of reasonable diligence is sufficient to allow for an extension on the basis of good cause. [citation omitted]. In the case at bar, the plaintiff has

clearly demonstrated reasonable diligence. Within both the Statute of Limitations and the statutory time to serve a Summons and Complaint, a process server visited the defendant's residence address and served the Summons and Complaint. The only issue was that, despite what the process server was told by the suitable person at defendant's residence, shortly after service the defendant left for active duty military service. It cannot be denied that the plaintiff has demonstrated reasonable diligence.... In the instant matter, it is also in the interest of justice that plaintiff be granted this extension. While this case was commenced within the Statute of Limitations, the Statute has since expired, and therefore the plaintiff would be barred from bringing a fresh lawsuit. The defendant has not been prejudiced at all, and indeed an answer was filed 38 days after the Summons and Complaint was served.... [T]he plaintiff's claim is meritorious, and the plaintiff exercised reasonable diligence in the initial service of the Summons and Complaint. Under both the good cause standard and the interest of justice standard, if the Court finds that service was improper in this matter, it is respectfully requested that the Court grant the plaintiff an extension of time to serve the Summons and Complaint."

Counsel for plaintiff also argues that, "[t]he movant asserts that the defendant is not at fault for this accident and therefore the plaintiff does not possess a meritorious cause of action. This claim is incorrect. As an initial matter, the police accident report, ..., is not submitted in proper form. It is well established that an uncertified police accident report, prepared by a police officer who did not witness the accident, constitutes hearsay and is thus inadmissible. [citations omitted]. In the alternative, even if the Court does consider the police report, the report itself contains no factual statement as to whether or not the plaintiff stopped at the stop sign. The fact that plaintiff was ticketed for failing to yield the right of way, by a police officer who did not witness the accident, does not establish that plaintiff actually failed to stop at the stop sign.... As plaintiff testified under oath at his EUO, he did in fact stop at the stop sign in question. This contradicts defendant's Affidavit, ..., which asserts first that the accident occurred at 109th, and second that the plaintiff did not stop. It should be noted that at present, neither party to this case

has testified at an Examination Before Trial. As such, a motion to dismiss based on the various disputed facts of this case is plainly premature." *See* Plaintiff's Affirmation in Opposition and in Support Exhibit B; Defendant's Affirmation in Support Exhibits C and D.

In opposition to the cross-motion (Seq. No. 02) and in reply to the motion (Seq. No. 01), counsel for defendant asserts, in pertinent part, that, "[t]he affidavit of Defendant Orlando Rowe, an active duty member of the US Army, sets forth that no service of process upon a person known or calling herself as 'Ms. Cain' was effected; moreover any statement in the negative implying that he was not in active military service is baseless. Merely reciting the incorrect information contained in the process server's affidavit fails to establish proper service upon the Defendant."

Counsel for defendant adds that, "there is no basis to allow a late filing of the Summons and Complaint in accordance with the pre-requisite for same that there be a meritorious cause of action sufficient to invoke the interest of justice application. The same lack of any legal liability on behalf of the Defendant which erodes any claim of a meritorious cause of action, likewise provides this Court with the justification to dismiss the action as a matter of law pursuant to CPLR § 3212."

At the outset, the Court notes that it has completed an *in camera* review of defendant's Orders from the Office of the Adjutant General, and confirm that defendant was ordered to appear for active military duty for the period of June 1, 2017 through June 23, 2017.

Notably, "[w]here a defendant moves to dismiss the complaint pursuant to CPLR 3211(a)(8) on the ground of lack of personal jurisdiction, a plaintiff 'need only make a prima facie showing' that such jurisdiction exists." *See Lang v. Wycoff Heights Medical Center*, 55 A.D.3d 793, 866 N.Y.S.2d 313 (2d Dept. 2008); *Cornely v. Dynamic HVAC Supply, LLC*, 44 A.D.3d 986, 845 N.Y.S.2d 797 (2d Dept. 2007); *Peterson v. Spartan Indus.*, 33 N.Y.2d 463, 354 N.Y.S.2d 905 (1974); *Daniel B. Katz & Assoc. Corp. v. Midland Rushmore, LLC*, 90 A.D.3d 977, 937 N.Y.S.2d 236 (2d Dept. 2011); *Marist College v. Brady*, 84 A.D.3d 1322, 924 N.Y.S.2d

529 (2d Dept. 2011); *Alden Personnel, Inc. v. David*, 38 A.D.3d 697, 833 N.Y.S.2d 136 (2d Dept. 2007). Nevertheless "[a]s the party seeking to assert personal jurisdiction, the plaintiff bears the ultimate burden of proof on this issue." *Cornely v. Dynamic HVAC Supply, LLC*, *supra* at 987. *See also Urfirer v. SB Builders, LLC*, 95 A.D.3d 1616, 946 N.Y.S.2d 266 (3d Dept. 2012); *Armouth Intern., Inc. v. Haband Co., Inc.*, 277 A.D.2d 189, 715 N.Y.S.2d 438 (2d Dept. 2000).

Based upon the arguments and evidence before it, the Court finds that defendant has failed to adequately allege and/or otherwise make a *prima facie* showing that the Court does not possess personal jurisdiction over him.

Mere denials of receipt are insufficient to rebut the presumption of proper service created by a properly-executed affidavit of service. *See De La Barrera v. Handler*, 290 A.D.2d 476, 736 N.Y.S.2d 249 (2d Dept. 2002); *Udell v. Alcamo Supply & Contracting Corporation*, 275 A.D.2d 453, 713 N.Y.S.2d 77 (2d Dept. 2000); *Morales v. Yaghoobian*, 13 A.D.3d 424, 786 N.Y.S.2d 562 (2d Dept. 2004). The Affidavit of David Lett ("Lett"), the process server, establishes, *prima facie*, that defendant was properly served pursuant to personal service rules. Lett submitted that the Summons and Verified Complaint were delivered to "MS. CAIN," who was of suitable age and discretion and whose physical description was set forth in detail, at the address that defendant admits is his residence, followed by the required mailing. *See Roberts v. Anka*, 45 A.D.3d 752, 846 N.Y.S.2d 280 (2d Dept. 2007).

Furthermore, Lett affirms that he spoke with Ms. Cain to determine "whether defendant was in active military service of the United States or of the State of New York in any capacity whatever (*sic*) and received a negative reply. *Defendant wore ordinary civilian clothes and no military uniform.*" The Court notes that, on the date of service of process, May 30, 2017, defendant was not scheduled to be on active duty pursuant to his Orders from the Office of the Adjutant General.

Accordingly, the branch of defendant's motion (Seq. No. 01), pursuant to CPLR § 3211(a)(5) and (8), for an order dismissing the Verified Complaint based upon lack of personal jurisdiction and expiration of the Statute of Limitations, is hereby **DENIED**.

Consequently, plaintiff's cross-motion (Seq. No. 02), pursuant to CPLR § 306-b, for an order extending the time to serve defendant, is hereby **DENIED as moot**.

The Court will now address the branch of defendant's motion (Seq. No. 01), pursuant to CPLR §3212, for a order granting summary judgment dismissing plaintiff's Verified Complaint.

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York, supra.* When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century-Fox Film Corp., supra.* Mere conclusions or unsubstantiated allegations are insufficient to raise a triable

issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the Court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989). It is the existence of an issue, not its relative strength that is the critical and controlling consideration. *See Barrett v. Jacobs*, 255 N.Y. 520 (1931); *Cross v. Cross*, 112 A.D.2d 62, 491 N.Y.S.2d 353 (1st Dept. 1985). The evidence should be construed in a light most favorable to the party moved against. *See Weiss v. Garfield*, 21 A.D.2d 156, 249 N.Y.S.2d 458 (3d Dept. 1964).

It is well settled that there may be more than one proximate cause of a traffic accident (*see Steiner v. Dincesen*, 95 A.D.3d 877, 943 N.Y.S.2d 585 (2d Dept. 2012); *Gause v. Martinez*, 91 A.D.3d 595, 936 N.Y.S.2d 272 (2d Dept. 2012); *Lopez v. Reyes-Flores*, 52 A.D.3d 785, 861 N.Y.S.2d 389 (2d Dept. 2008)) and "the proponent of a summary judgment has the burden of establishing freedom from comparative negligence as a matter of law." *See Antaki v. Mateo*, 100 A.D.3d 579, 954 N.Y.S.2d 540 (2d Dept. 2012); *Simmons v. Canady,* 95 A.D.3d 1201, 945 N.Y.S.2d 138 (2d Dept. 2012); *Pollack v. Margolin*, 84 A.D.3d 1341, 924 N.Y.S.2d 282 (2d Dept. 2011). "The issue of comparative fault is generally a question for the trier of facts." *See Allen v. Echols*, 88 A.D.3d 926, 931 N.Y.S.2d 402 (2d Dept. 2011); *Gause v. Martinez, supra.*

Based upon the evidence presented in the papers before it, the Court finds that there are issues of fact as to the exact cause of the subject accident and which party failed to act reasonably under the circumstances and failed to see that which he should have seen through the proper use of his senses.

Additionally, the Court finds that the facts and circumstances surrounding the subject motor vehicle accident involve determining the credibility of the parties involved in said accident and, in rendering a decision on a summary judgment motion, the Court is not to determine

matters of credibility.

Lastly, it is apparent that little, if any, discovery had been completed prior to the making of defendant's summary judgment motion. It is settled that "[a] party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment." *See Valdivia v. Consolidated Resistance Co. of America, Inc.*, 54 A.D.3d 753, 863 N.Y.S.2d 720 (2d Dept. 2008); *Venables v. Sagona,* 46 A.D.3d 672, 848 N.Y.S.2d 238 (2d Dept. 2007). *See generally Gruenfeld v. City of New Rochelle*, 72 A.D.3d 1025, 2010 WL 1716148 (2d Dept. 2010); *Gonzalez v. Nutech Auto Sales,* 69 A.D.3d 792, 891 N.Y.S.2d 910 (2d Dept. 2010); *Elliot v. County of Nassau*, 53 A.D.3d 561, 862 N.Y.S.2d 90 (2d Dept. 2008); *Fazio v. Brandywine Realty Trust*, 29 A.D.3d 939, 815 N.Y.S.2d 470 (2d Dept. 2006).

Therefore, the branch of defendant's motion (Seq. No. 01), pursuant to CPLR §3212, for a order granting summary judgment dismissing plaintiff's Verified Complaint, is hereby **DENIED with leave to renew upon completion of discovery**.

It is further ordered that the remaining parties shall appear for a Preliminary Conference on January 29, 2018, at 9:30 a.m., at the Preliminary Conference Desk in the lower level of 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this Order shall be served on all parties and on the DCM Case Coordinator. There will be no adjournments, except by formal application pursuant to 22 NYCRR § 125.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

ENTERED

DEC 19 2017

NASSAU COUNTY
COUNTY CLERK'S OFFICE

Dated: Mineola, New York
December 12, 2017