SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

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

PAMELA DOLENGEWICZ,

Plaintiff,

- against -

COUNTY OF NASSAU and LOUIS A. FLORISSANT,

Defendants.

TRIAL/IAS PART 35
NASSAU COUNTY

Index No.: 608035/16
Motion Seq. No.: 01
Motion Date: 03/15/17

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits	1
Affirmation in Opposition and Exhibit	2
Affirmation in Reply	3

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

Plaintiff moves, pursuant to CPLR § 3212, for an order granting partial summary judgment against defendants on the issue of liability; and moves for an order directing that discovery proceed on the issue of damages only; and moves for an order directing a trial on the issue of damages only. Defendants oppose the motion.

This action arises from a motor vehicle accident that occurred on May 27, 2016, at 8:55 p.m., eastbound on Sunrise Highway, at or near its intersection with Broadway, Massapequa, County of Nassau, State of New York. The accident involved three (3) vehicles, an 2008 Nissan, owned and operated by plaintiff, a 2008 Bus, owned by defendant County of Nassau ("Nassau") and operated by defendant Louis A. Florissant ("Florissant"), and a 2003

Honda, owned and operated by non-party Allison Lima ("Lima"). *See* Plaintiff's Affirmation in Support Exhibit D. Plaintiff commenced the action with the filing of a Summons and Verified Complaint on or about October 18, 2016. *See* Plaintiff's Affirmation in Support Exhibit A. Issue was joined by defendants on or about December 1, 2016. *See* Plaintiff's Affirmation in Support Exhibit B.

Counsel for plaintiff submits that "[t]his is an action to recover damages for severe personal injuries sustained by plaintiff, **PAMELA DOLENGEWICZ** (*sic*) the first motor vehicle involved in a three (3) vehicle rear end chain collision accident. At the time of the collision, Plaintiff was stopped at a traffic light. The motor vehicle directly behind her operated by non-party witness Allison Lima was also stopped. The defendant **LOUIS A. FLORISSANT**, operating a **COUNTY OF NASSAU** motor vehicle, was the sole cause of the accident when his vehicle struck the rear of the Lima vehicle which then struck the rear of Plaintiff's vehicle.... Both Plaintiff and Allison Lima, a non-party witness and victim of Defendant's negligence, state that the accident occurred on May 27, 2016 at approximately 9 pm on Sunrise Highway at the intersection of Broadway in Massapequa. They were both stopped at a light, with Plaintiff being first in line and Ms. Lima, right behind her. Suddenly and without warning, the Defendant vehicle crashed into the Lima vehicle which then struck the Plaintiff's vehicle causing Plaintiff to sustain serious and severe personal injuries including but not limited to a traumatic brain injury. When there is no question as to the facts or circumstances as to how an accident occurred, summary judgment should be granted as a matter of law. There are no facts from any source that would indicate any contributory negligence on the part of the plaintiff. The defendants cannot offer a scintilla of evidence during the discovery in this matter to raise a question of fact sufficient to deny plaintiff summary judgment on the issue of liability."

In support of the motion, plaintiff submits her own affidavit. *See* Plaintiff's Affirmation

in Support Exhibit E. In further support of the motion, plaintiff submits the affidavit of non-party witness Lima. *See* Plaintiff's Affirmation in Support Exhibit F.

Counsel for plaintiff argues that, "[p]laintiff has put forth evidence in admissible form to warrant the granting of summary judgment. The defendants are unable to offer evidence to the contrary and as such, are not able to raise a question of fact as to how this accident occurred. Defendants cannot raise any question of fact as to the happening of this accident as the plaintiff's host vehicle was properly and lawfully stopped and struck in the rear by the SHEA (*sic*) vehicle and the accident occurred when the defendant driver negligently failed to make proper observations and negligently failed to maintain a safe distance behind the plaintiff's host vehicle and struck it in the rear. There are no facts from any source that would indicate any contributory negligence on the part of the plaintiff or any third person or entity not a party to this action."

Counsel for plaintiff further contends that defendant Florissant was the negligent party in that he failed to maintain a safe distance behind non-party witness Lima's vehicle, as well as failed his duty to exercise reasonable care under the circumstances to avoid an accident. Counsel for plaintiff additionally claims that defendants cannot come up with a reasonable excuse or a non-negligent explanation for their vehicle striking non-party witness Lima's vehicle in the rear, which in turn struck plaintiff's vehicle in the rear.

In opposition to the motion, counsel for defendants argues that, "[p]laintiff's motion should be denied based on the evidence in the record, including but not limited to the Affidavit of Defendant LOUIS A. FLORISSANT, which establishes a non-negligent explanation for this rear-end collision that FLORISSANT was cut off by the middle vehicle which executed an illegal lane change immediately prior to the collision.... Florissant was traveling east in the right or south lane of Sunrise Highway in Massapequa. As he neared the intersection of Sunrise Highway and Broadway, there was a black Honda traveling in the lane immediately to his left or center

lane, which he later came to find out was operated by Allison Lima. Without signaling, the Lima vehicle abruptly changed lanes from the center into the right lane where he was traveling. The Lima vehicle stopped short as the traffic stopped at the light. Florissant braked when he observed the Lima vehicle cutting in front of him, but the bus is too heavy to stop on a dime and skidded into the Lima vehicle. The Lima vehicle struck plaintiff's vehicle. Lima's abrupt attempt to merge into defendant's lane, without yielding and without signaling, violated (*sic*) Vehicle and Traffic Law 1128(a) and 1163, was a proximate cause of the accident, and raises triable issues of fact as a matter of law under controlling appellate precedent. [citations omitted]. Lima failed to grant the right of way or observe defendants' bus with the reasonable use of her senses. [citation omitted]. Defendant's affidavit also raises issues of fact regarding the emergency doctrine defense. Defendant Florissant was faced with an emergency not of his own making, to which he reasonably reacted by applying the brakes, but was unable to avoid a collision. [citation omitted]. A driver's reaction to an emergency must be viewed within that context and is an issue for the jury to determine. [citation omitted]. Since this accident involved multiple vehicles, there is also a triable issue of fact as to whether defendants' negligence was the proximate cause of plaintiff's injuries."

Counsel for defendants adds that, "[i]n view of the foregoing, plaintiff's motion should be denied as premature under CPLR 3212(f). Party depositions and document discovery remain outstanding. This accident involved three vehicles. Depositions of nonparty witnesses need to be conducted in order to assess liability and particularly the sequence of events. A motion for summary judgment should be denied as premature where, as here, the evidence demonstrates that further discovery and depositions will likely raise issues of fact requiring a trial."

Defendant Florissant submits his own affidavit in support of the opposition. *See* Defendants' Affirmation in Opposition Exhibit A.

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).

When the driver of an automobile approaches another automobile from the rear, he or she is bound to maintain a reasonably safe rate of speed and control over his or her vehicle and to exercise reasonable care to avoid colliding with the other vehicle pursuant to New York State Vehicle and Traffic Law ("VTL") § 1129(a). *See Krakowska v. Niksa*, 298 A.D.2d 561, 749 N.Y.S.2d 55 (2d Dept. 2002); *Bucceri v. Frazer*, 297 A.D.2d 304, 746 N.Y.S.2d 185 (2d Dept. 2002).

A rear end collision with a vehicle establishes a *prima facie* case of negligence on the part of the operator of the offending vehicle. *See Tutrani v. County of Suffolk*, 10 N.Y.3d 906, 861 N.Y.S.2d 610 (2008). Such a collision imposes a duty of explanation on the operator. *See Hughes v. Cai*, 55 A.D.3d 675, 866 N.Y.S.2d 253 (2d Dept. 2008); *Gregson v. Terry*, 35 A.D.3d 358, 827 N.Y.S.2d 181 (2d Dept. 2006); *Belitsis v. Airborne Express Freight Corp.*, 306 A.D.2d 507, 761 N.Y.S.2d 329 (2d Dept. 2003).

As noted, a rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of liability with respect to the operator of the rearmost vehicle, thereby requiring the operator to rebut the inference of negligence by providing a non-negligent explanation for the collision. *See Francisco v. Schoepfer*, 30 A.D.3d 275, 817 N.Y.S.2d 52 (1st Dept. 2006); *McGregor v. Manzo*, 295 A.D.2d 487, 744 N.Y.S.2d 467 (2d Dept. 2002).

Vehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows, since the following driver is under a duty to maintain a safe distance between his or her car and the car ahead. *See Shamah v. Richmond County Ambulance Service, Inc.*, 279 A.D.2d 564, 719 N.Y.S.2d 287 (2d Dept. 2001).

Drivers must maintain safe distances between their cars and the cars in front of them and this rule imposes on them a duty to be aware of traffic conditions including stopped vehicles. *See* VTL § 1129(a); *Johnson v. Phillips*, 261 A.D.2d 269, 690 N.Y.S.2d 545 (1st Dept. 1999).

Drivers have a duty to see what should be seen and to exercise reasonable care under the

circumstances to avoid an accident. *See Filippazzo v. Santiago*, 277 A.D.2d 419, 716 N.Y.S.2d 710 (2d Dept. 2000).

In the context of a rear end collision, conclusory assertions that the driver of the lead vehicle made a sudden unexpected stop, stranding alone, is insufficient to rebut the presumption of negligence. *See Bryne v. Calogero*, 96 A.D.3d 704, 945 N.Y.S.2d 737 (2d Dept. 2012); *Hearn v. Manzolillo*, 103 A.D.3d 689, 959 N.Y.S.2d 531 (2d Dept. 2013); *Campbell v. City of Yonkers*, 37 A.D.3d 750, 833 N.Y.S.2d 101 (2d Dept. 2007); *Ayach v. Ghazal*, 25 A.D.3d 742, 808 N.Y.S.2d 759 (2d Dept. 2006); *Rainford v. Han*, 18 A.D.3d 638, 795 N.Y.S.2d 645 (2d Dept. 2005); *Vecchio v. Hildebrand*, 304 A.D.2d 749, 758 N.Y.S.2d 666 (2d Dept. 2003); *McGregor v. Manzo, supra; Dileo v. Greenstein*, 281 A.D.2d 586, 722 N.Y.S.2d (2d Dept. 2001); *Shamah v Richmond County Ambulance Services, Inc., supra*; *Geschwind v Hoffman*, 285 A.D.2d 448, 727 N.Y.S.2d 155 (2d Dept. 2001).

Thus, a sudden stop coupled with other evidence, such as a failure to comply with the VTL with respect to proper signaling (*see Purcell v. Axelsen*, 286 A.D.2d 379, 729 N.Y.S.2d 495 (2d Dept. 2001)), or stopping in high speed traffic (*see Mundo v. City of Yonkers*, 249 A.D.2d 522, 672 N.Y.S.2d 128 (2d Dept. 1998) or in response to an emergency created by a non-party (*see Kienzle v. McLoughlin*, 202 A.D.2d 299, 610 N.Y.S.2d 771 (1st Dept. 1994)) can all constitute a non-negligent explanation for the rear-end collision.

Plaintiff, in her motion, has demonstrated *prima facie* entitlement to summary judgment on the issue of liability against defendants. Therefore, the burden shifts to defendants to demonstrate an issue of fact which precludes summary judgment. *See Zuckerman v. City of New York, supra.*

After applying the law to the facts in this case, the Court finds that defendants have met their burden to demonstrate an issue of fact which precludes summary judgment. Defendants' argument that, without signaling, non-party Lima's vehicle abruptly changed lanes from the center into the right lane where defendants' vehicle was traveling and then stopped short at the

traffic light, thereby violating Vehicle and Traffic Law 1128(a) and 1163, is sufficient to establish a non-negligent explanation for defendants' vehicle striking non-party witness Lima's vehicle in the rear, which caused her vehicle to strike plaintiff's vehicle in the rear, and to rebut the presumption of negligence.

The Court also finds that defendants have raised a triable issue of fact with respect to the application of the emergency doctrine – which would constitute a complete defense to the claims raised if subsequently established at trial. *See generally Lifson v. City of Syracuse*, 17 N.Y.3d 492, 934 N.Y.S.2d 38 (2011); *Rivera v. New York City Transit Authority*, 77 N.Y.2d 322, 567 N.Y.S.2d 629 (1991); *Ferrer v. Harris*, 55 N.Y.2d 285, 449 N.Y.S.2d 162 (1982); *Majid v. New York City Transit Authority*, 128 A.D.3d 648, 8 N.Y.S.3d 432 (2d Dept. 2015); *Wemyss v. Ruszczyk*, 126 A.D.3d 888, 5 N.Y.S.3d 506 (2d Dept. 2015); *Vargas v. Akbar*, 123 A.D.3d 1017, 999 N.Y.S.2d 844 (2d Dept. 2014).

In substance, 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 A.D.3d 58, 783 N.Y.S.2d 648 (2d Dept. 2004). *See also Lifson v. City of Syracuse*, *supra* at 496-497; *Rivera v. New York City Transit Authority*, *supra* at 327; *Ferrer v. Harris*, *supra* at 293; *Pacelli v. Intruck Leasing Corp.*, 128 A.D.3d 921, 10 N.Y.S.3d 149 (2d Dept. 2015). "A person in such an emergency situation 'cannot reasonably be held to the same accuracy of judgment or conduct as one who has had full opportunity to reflect, even though it later appears that the actor made the wrong decision.'" *Rivera v. New York City Transit Authority*, *supra* at 327 *quoting* PROSSER AND KEETON, TORTS § 33, at 196 (5th ed). *See also Caristo v. Sanzone*, 96 N.Y.2d 172, 726 N.Y.S.2d 334 (2001). However, "[t]his is not to say that an emergency automatically absolves one from liability for his [or her] conduct. The standard then still remains

that of a reasonable [person] under the given circumstances, except that the circumstances have changed." *Ferrer v. Harris*, *supra* at 293; *Vargas v. Akbar*, *supra* at 1019; *Pawlukiewicz v. Boisson*, 275 A.D.2d 446, 712 N.Y.S.2d 634 (2d Dept. 2000). *See also Kuci v. Manhattan and Bronx Surface Transit Operating Authority*, 88 N.Y.2d 923, 646 N.Y.S.2d 788 (1996).

With these principles in mind, the Court finds that there are questions of fact as to the events which immediately preceded defendants' vehicle's impact with non-party Lima's vehicle; the resolution of said fact intensive issues falls within the province of the finder of fact. *See Takle v. New York City Transit Authority*, 14 A.D.3d 608, 787 N.Y.S.2d 904 (2d Dept. 2005); *Pawlukiewicz v. Boisson*, *supra* at 447; *Gildersleeve v. Leo*, 274 A.D.2d 547, 274 N.Y.S.2d 547 (2d Dept. 2000). *See also Kuci v. Manhattan and Bronx Surface Transit Operating Authority*, *supra* at 924; *Rivera v. New York City Transit Authority*, *supra* at 326-327; *Hendrickson v. Philbor Motors, Inc.*, 101 A.D.3d 812, 954 N.Y.S.2d 898 (2d Dept. 2012); *Crawford-Dunk v. MV Transp., Inc.*, 83 A.D.3d 764, 920 N.Y.S.2d 672 (2d Dept. 2011). Questions have been presented with respect to whether defendant Florissant was "faced with a sudden and unexpected circumstance" within the meaning of the emergency doctrine. *See Pavane v. Marte*, 109 A.D.3d 970, 971 N.Y.S.2d 562 (2d Dept. 2013); *Martinez v. Academy Bus LLC*, 51 A.D.3d 401, 856 N.Y.S.2d 614 (1st Dept. 2008); *Tossas v. Ponce*, 24 A.D.3d 224, 804 N.Y.S.2d 919 (1st Dept. 2005); *Pawlukiewicz v. Boisson*, *supra* at 447; *Trevino v. Castro*, 256 A.D.2d 6, 680 N.Y.S.2d 517 (1st Dept. 1998). *See also Levy v. Braman Motorcars*, 119 A.D.3d 530, 990 N.Y.S.2d 45 (2d Dept. 2014); *Singh v. MTA Bus Co.*, 88 A.D.3d 865, 931 N.Y.S.2d 518 (2d Dept. 2011). It is settled that where "there is some reasonable view of the evidence that establishes that an actor was confronted by a sudden and unforeseen occurrence not of the actor's own making, then the reasonableness of the conduct in the face of the emergency is for the jury." *Kuci v. Manhattan and Bronx Surface Transit Operating Authority*, *supra* at 924. *See also Pelletier v. Lahm*, 111 A.D.3d 807, 975 N.Y.S.2d 135 (2d Dept. 2013) *aff'd* 24 N.Y.3d 966, 994 N.Y.S.2d 565 (2014); *Caristo v. Sanzone*, *supra* at 175; *Rivera v. New York City Transit Authority*, *supra* at 326-327;

Mohr v. Carlson, 120 A.D.3d 1206, 992 N.Y.S.2d 321 (2d Dept. 2014); *Pavane v. Marte*, *supra* at 972. Relatedly, "[r]esolving questions of credibility, assessing the accuracy of witnesses, and reconciling conflicting statements are tasks entrusted to the trier of fact." *Bravo v. Vargas*, 113 A.D.3d 579, 978 N.Y.S.2d 307 (2d Dept. 2014). The record does not otherwise establish plaintiff's entitlement to judgment as a matter of law. *See Levy v. Braman Motorcars*, *supra*; *Williams v. City of New York*, 88 A.D.3d 989, 931 N.Y.S.2d 656 (2d Dept. 2011).

Additionally, it is apparent that little, if any, discovery had been completed prior to the making of plaintiff's 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).

Accordingly, based upon all of the above, plaintiff's motion, pursuant to CPLR § 3212, for an order granting partial summary judgment against defendants on the issue of liability; and for an order directing that discovery proceed on the issue of damages only; and for an order directing a trial on the issue of damages only, is hereby **DENIED**.

All parties shall appear for a Compliance Conference in IAS Part 35, Nassau County Supreme Court,100 Supreme Court Drive, Mineola, New York, on August 1, 2017, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTERED
JUN 08 2017
NASSAU COUNTY
COUNTY CLERK'S OFFICE

ENTER:

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

Dated: Mineola, New York
June 6, 2017