At an IAS Term, Part 81 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 30th day of April, 2018.

P R E S E N T:
HON. CARL J. LANDICINO,
Justice.

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MICHELLE SCUORZO,

Plaintiff,

- against -

LUQMAN SAFDAR, FAYYAZ AHMAD, BIG APPLE CAR, INC., CITYWIDE MOBILE RESPONSE CORP., TRANSCARE AMBULANCE CORP., JOHN DOE, JANE ROE, and ABC CORPORATION

Defendants.

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Index No.:502443/2016

DECISION AND ORDER

Motion Sequence #5, #6, #7, #8

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

	Papers Numbered
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed.....	1/2, 3/4, 5/6, 7/8,
Opposing Affidavits (Affirmations).....	9, 10, 11, 12, 13, 14,
Reply Affidavits (Affirmations).....	15, 16, 17

Upon the foregoing papers, and after oral argument, the Court finds as follows:

This lawsuit arises out of a motor vehicle accident that occurred on March 11, 2010. The Plaintiff Michelle Scuorzo (hereinafter "the Plaintiff") alleges in her Complaint that on that day she suffered personal injuries as a lawful pedestrian when a vehicle operated by Defendant Luqman Safdar and owned by Defendant Fayyaz Ahmad (hereinafter the "Safdar Defendants") struck her while she stood on the sidewalk at the southwest corner of 29th Street and Lexington Avenue, in New York, N.Y.

The Plaintiff now moves (motions sequence #5 and #6) for an order pursuant to CPLR § 3212 granting summary judgment on the issue of liability, and proceeding to trial on the issue of damages as against the Safdar Defendants and Defendant Transcare Ambulance Corp. (hereinafter "Defendant Transcare"), respectively. The Plaintiff argues that the Defendants are solely liable for the incident since the Plaintiff was injured while standing on the sidewalk on the southwest corner of Lexington Avenue and 29th Street in New York County, N.Y. The Plaintiff alleges that she was struck by the Safdar Defendants' vehicle after that vehicle moved to avoid the ambulance owned by Defendant Transcare. What is more, the Plaintiff argues that no emergency condition existed and as a result neither the Safdar Defendants nor Defendant Transcare should receive the protections afforded by VTL 1104. The Plaintiff further contends that these Defendants were otherwise in violation of VTL 1110a and 1111(d)-1.[1]

Defendants Big Apple Car, Inc. (hereinafter "Defendant Big Apple"), the Safdar Defendants and Defendant Transcare all oppose the motions by the Plaintiff and argue that they should be denied. The opponents of the motion argue that while the Plaintiff may have been free from culpable conduct, the Plaintiff has not provided sufficient evidence to meet her *prima facie* burden against the Defendants at issue and as a result summary judgment should be denied. Specifically, the Safdar Defendants argue that there is at least an issue of fact related to the Safdar Defendants' vehicle and the application of the "emergency doctrine." Also, Defendant Transcare argues that it was not a proximate cause of the incident at issue, and also that at the time of the alleged incident, the ambulance proceeded through the subject intersection with its lights and sirens turned on and as a result is protected by VTL §1104.

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[1] As an initial matter, the Court denies the Plaintiff's application in both motions sequence #5, #6 for an Order that both Defendant Transcare and the Safdar Defendants are precluded or otherwise barred from raising either the defenses of "authorized emergency vehicle" or "emergency situation doctrine" at trial, without prejudice to Plaintiff making such an application before the trial judge at the time of trial.

Defendant Transcare also moves (motion sequence #8) for an order pursuant to CPLR § 3212 granting it summary judgment, and dismissing the complaint as against it. Specifically, Defendant Transcare argues that it can not be held liable for the incident at issue because their ambulance is entitled to the protection afforded by VTL §1104, since the ambulance was an "emergency vehicle" involved in an "emergency operation." Defendant Transcare also argues that even assuming that VTL §1104 does not apply, the negligence of the Safdar Defendants was the sole proximate cause of the alleged accident and as a result Defendant Transcare cannot be held liable for the Plaintiff's injuries. Defendant Transcare further argues that the presence of its ambulance in no way caused the Safdar Defendants' vehicle to drive onto the sidewalk and collide with the Plaintiff.

Both the Plaintiff and the Safdar Defendants oppose the motion by Defendant Transcare and argue that it should be denied. Both the Plaintiff and the Safdar Defendants argue that Defendant Transcare should not benefit from the immunity provided by VTL §1104 since the ambulance in question was not engaged in an "emergency operation" under VTL §114-b as it was not responding to the scene of an accident or emergency situation at the time of its involvement in the automobile accident.

Defendant Big Apple also moves (motion sequence #5) for an order pursuant to CPLR §3212 granting it summary judgment and dismissing the complaint as against it. Specifically, Defendant Big Apple argues that it can not be held liable for the incident at issue under the theory of *respondeat superior* because Defendant Big Apple did not employ the operator of the vehicle, own the vehicle, or insure the vehicle at issue. Instead, Defendant Big Apple argues that the vehicle owned and operated by the Safdar Defendants had an independent contractor/ franchisee relationship with Defendant Big Apple.

Both the Plaintiff and Defendant Transcare oppose Defendant Big Apple's motion and argue that it should be denied. The Plaintiff argues that Defendant Big Apple's franchise

agreement with the Safdar Defendants shows that Defendant Big Apple exerted a significant measure of control over the Safdar Defendants sufficient to establish as a matter of law that Defendant Big Apple should be held liable pursuant to the doctrine of *respondeat superior*. Defendant Transcare argues that there are at least issues of fact related to Defendant Big Apple's relationship to the Safdar vehicle that should lead the Court to deny the motion made by Defendant Big Apple.

"Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff,* 14 AD3d 493 [2nd Dept, 2005], *citing Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept, 2004], *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985]. However, a movant no longer must prove their freedom from comparative fault and may be granted summary judgment on the issue of liability to the extent that the opposing party is negligent and a proximate cause of the incident. Thereby leaving a comparative fault analysis for another day. *See Rodriguez v. City of New York*, No. 32, 2018 WL 1595658 [2018].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2nd Dept, 1989]. Failure to make a *prima facie* showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824

N.Y.S.2d 166, 168 [2nd Dept, 2006]; *see Menzel v. Plotnick,* 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

Emergency Doctrine Defense

Turning to the merits of the Plaintiff's motion as against the Safdar Defendants, the Court finds that sufficient evidence has been presented to establish, *prima facie*, that the Safdar Defendants were a proximate cause of the alleged incident that led to Plaintiff's injuries as a matter of law. In support of the Plaintiff's motion, the Plaintiff relies on her own deposition, the deposition of Defendant Luqman Safdar, the deposition of former Transcare employee Christian Tross, a deposition of former Transcare employee Robert Hirsch, and the deposition of Transcare employee Julia Villa. During her deposition testimony the Plaintiff stated (Plaintiff's Motion, Exhibit "E" Page 72) that "[o]nce I arrived safely on the sidewalk and went to turn left to prepare myself to cross over Lexington and right away I saw the black Town Car coming straight at me (indicating), on the sidewalk." The Plaintiff further testified at her deposition (Plaintiff's Motion, Exhibit "E" Pages 396) that "I saw it come at me, I thought oh, my God, this car is coming at me, it is going to hit me, I'm going to die, I thought that was it, and then I thought I have to get out of the way and I jumped and it struck me."

Defendant Luqman Safdar testified at his deposition (Plaintiff's Motion, Exhibit "H" Page 62) that "I turn, I applied brake and at the same time I was controlling of the steering wheel to the right there and there my car got stopped with the pole." As for the Plaintiff, Defendant Luqman Safdar testified (Plaintiff's Motion, Exhibit "H" Page 64) that "[t]he lady, the girl, she was at the back of the pole." This testimony, taken together, establishes the Plaintiff's *prima facie* burden that the Safdar Defendants were liable for the incident at issue because the Safdar Defendants' vehicle failed to come to a stop and in fact came up on to the sidewalk and struck

the Plaintiff while she was standing on the sidewalk. *See Zhu v. Natale*, 131 A.D.3d 607, 608, 15 N.Y.S.3d 204, 205 [2nd Dept, 2015].

In opposition, the Safdar Defendants have raised an issue of fact as to whether the actions of Defendant Luqman Safdar were reasonable in light of an emergency situation. In his deposition, Defendant Luqman Safdar testified (Plaintiff's Motion, Exhibit "H" Page 45) that he traveled through the intersection of Lexington Avenue and 29th Street at "[b]etween 20, 25 miles." What is more, Defendant Luqman Safdar testified (Plaintiff's Motion, Exhibit "H" Page 56) that there was a green light as he traveled through the intersection. Furthermore, Defendant Luqman Safdar testified (Plaintiff's Motion, Exhibit "H" Page 56) that "[w]hen I entered into the intersection of 29th, all of a sudden I heard a siren. I assumed it was some ambulance coming. I pulled over immediately to the right." This testimony, taken together, establishes that there is a material issue of fact as to whether Defendant Luqman Safdar acted with little or no time to think, so as to avoid an imminent collision with an emergency vehicle. "Under the emergency doctrine, 'when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context.'" *Vitale v. Levine*, 44 A.D.3d 935, 936, 844 N.Y.S.2d 105, 106 [2nd Dept, 2007], *quoting Rivera v. New York City Transit Auth.*, 77 N.Y.2d 322, 569 N.E.2d 432 [1991]. As a result, the motion as against the Safdar Defendants is denied.

Emergency Vehicle Defense

In general, pursuant to the Vehicle and Traffic Law §1104, "[t]he manner in which an authorized emergency vehicle is operated in an emergency situation may not form the basis for civil liability unless the driver acted in reckless disregard for the safety of others." *Woodard v.*

Thomas, 77 A.D.3d 738, 739, 913 N.Y.S.2d 103, 104 [2nd Dept, 2010]. "The 'reckless disregard' standard requires proof that the officer intentionally committed an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow." *Badalamenti v. City of New York*, 30 A.D.3d 452, 453, 817 N.Y.S.2d 134, 135 [2nd Dept, 2006]. However, summary judgment has been denied in relation to this defense when it can be shown that there are issues of fact regarding whether the driver of the emergency vehicle "had the right of way when he entered the intersection, whether he had activated the ambulance sirens and lights, and whether he operated his vehicle in reckless disregard for the safety of others." *Pollak v. Maimonides Med. Ctr.*, 136 A.D.3d 1008, 1009, 25 N.Y.S.3d 646, 647 [2nd Dept, 2016].

Turning to the merits of Defendant Transcare's motion, the Court finds that sufficient evidence has been presented to establish, *prima facie*, that Defendant Transcare was not liable for the alleged incident as a matter of law. In support of Defendant Transcare's motion, Defendant Transcare relies on the deposition of the Plaintiff, the deposition of Defendant Luqman Safdar, the deposition of former Transcare employee Christian Tross, the deposition of Transcare employee Leangy Matos, the deposition from former Transcare employee Robert Hirsch, and an affidavit and report from Steve Emolo, an accident reconstructionist. Defendant Transcare points to the deposition of Transcare employee Christian Tross who testified (Defendant Transcare's Motion, Exhibit 6, Page 86) that he was told by his dispatcher "[t]o head up to Madison Square Garden, you have an emergency for either player or a worker." Tross also stated (Defendant Transcare's Motion, Exibit 6, Page 94) when asked whether the lights and siren had remained on when he drove the ambulance through 29th Street, he answered "Yes." Defendant Transcare also points to the deposition of Transcare employee Leangy Matos who was present in the ambulance on the day in question. In her deposition Leangy Matos states (Defendant Transcare's Motion,

Exibit 15, Page 63) that immediately before the collision the ambulance had its lights and siren on but also regarding the Safdar Defendants' vehicle that "[o]nce we saw him that he was getting closer to the walking lane on Lexington that's when Christian honked the horn to tell him to slow down." Defendant Transcare also points to the deposition testimony of the Plaintiff. After the Plaintiff was asked if she witnessed the livery car come into contact with any other vehicle prior to it driving onto the sidewalk, she testified (Defendant Transcare's Motion, Exibit 4, Page 73) that "I didn't see anything except for the – before the car being right (indicating) in front of me." Defendant Transcare also points to the testimony of Defendant Luqman Safdar who answered "yes" (Defendant Transcare's Motion, Exhibit 5, Page 346) when asked whether he heard both the siren and the horn of the ambulance shortly after seeing the ambulance in the intersection. When asked how he responded to the ambulance approaching, Defendant Luqman Safdar (Defendant Transcare's Motion, Exhibit 5, Pages 31 and 32) testified that "I took a hard right turn." In his report, accident re-constructionist Steve Emolo states (Defendant Transcare's Motion, Exibit 15, Page 347) that it is his opinion based upon a review of the testimony and file material that Defendant Safdar had enough time and distance to yield to Defendant Transcare's ambulance and that his speed and over reaction was a proximate cause of the allege incident. This testimony, taken together, shows that Defendant Transcare's ambulance was an emergency vehicle that had activated its lights and sirens and accordingly it should benefit from the emergency vehicle protections afforded by VTL §114-b. This is because the Transcare Defendants have met their *prima facie* burden in demonstrating that, even though the ambulance proceeded into the intersection against the traffic light, the conduct of the ambulance did not rise to the level of reckless disregard for the safety of others. *See Woodard v. Thomas*, 77 A.D.3d 738, 739, 913 N.Y.S.2d 103, 104 [2nd Dept, 2010].

In opposition, the Plaintiff and the Safdar Defendants have raised a material issue of fact that would prevent this Court from granting summary judgment at this time. The Plaintiff and the Safdar Defendants argue that Defendant Transcare's ambulance should not be afforded the protection of VTL §114-b because it was not transporting a sick or injured person and also not responding to an emergency. In her opposition the Plaintiff argues (See Plaintiff Affirmation in Opposition Paragraph 4) that the motion by Defendant Transcare should be denied as "the Transcare ambulance in question was not engaged in "emergency operation" under NY VTL 114-b as they were not responding to the scene of an accident or emergency situation at the time of its involvement in the automobile accident with Plaintiff." An issue of fact can be raised preventing summary judgment if it can be shown that an ambulance was not "operating the ambulance as part of an emergency operation as contemplated by the statute." *Torres v. Saint Vincent's Catholic Med. Centers of New York*, 117 A.D.3d 717, 718, 985 N.Y.S.2d 606, 608 [2nd Dept, 2014]. In *Torres,* the Plaintiff "presented evidence that the radio call to which Stewart was responding was for the police to assist, and that Stewart sought to offer assistance in the form of 'crowd control ... until the police got there.'" *Id.* In the instant proceeding, the Plaintiff points to the deposition testimony of Defendant Transcare supervisor Julia Villa who testified that there were two ambulances at Madison Square Garden at the time of the alleged incident. When asked (Plaintiff's Motion, Exhibit "L," Page 47) "[y]ou would only call another unit if there was a second person who was injured and needed transport, correct?" Villa responded "[t]hat is correct." Villa was then asked (Plaintiff's Motion, Exhibit "L," Page 47) "[t]hat way, you would have another ambulance present in case somone else got injured?" to which Villa replied "[t]hat is correct." This testimony, raises an issue of fact as to whether Defendant Transcare's ambulance was in fact responding to an emergency or merely going to relieve or replace another ambulance. Accordingly, the Court can not grant summary judgment in favor of Defendant Transcare.

Turning to the merits of the motion made by Defendant Big Apple, the Court finds that it has established a *prima facie* showing in support of its cross-motion. In determining whether a party can be held liable under the doctrine of *respondeat superior*, the Court should assess "whether the worker (1) worked at his own convenience, (2) was free to engage in other employment, (3) received fringe benefits, (4) was on the employer's payroll and (5) was on a fixed schedule." *Barak v. Chen*, 87 A.D.3d 955, 957, 929 N.Y.S.2d 315 [2nd Dept, 2011], *quoting Bynog v. Cipriani Grp., Inc.*, 1 N.Y.3d 193, 198, 802 N.E.2d 1090 [2003]. In support of its motion, Defendant Big Apple relies primarily on the deposition of Defendant Fayyaz Ahmad, and the deposition of Diana Clemente, the principal owner of Defendant Big Apple. During his deposition testimony, Ahmad states (Defendant Big Apple Motion, Exhibit "G" Page 33) that "[t]he car belonged to me." Ahmad also stated that "I always drove my own car." When asked (Defendant Big Apple Motion, Exhibit "G" Page 238) whether Defendant Big Apple directed Ahmad to work certain hours or specified what days of the week to work, or when to take vacation, Ahmad answered "No" to each question. Defendant Big Apple also points to the testimony of Diana Clemente who when asked (Defendant Big Apple Motion, Exhibit "H" Page 207) whether Defendant Big Apples issues 1099 tax forms to drivers who transported passengers for Big Apple answered "Yes." What is more, Clemente testified at her deposition (Defendant Big Apple Motion, Exhibit "H" Page 317) that prior to accepting an assignment drivers were "permitted to reject."

In opposition, the opponents of the motion have raised a material issue of fact as to whether Defendant Big Apple had sufficient control over the Safdar Defendants in order for it to be held liable for the conduct of the Safdar Defendants pursuant to the theory of *respondeat superior*. In its Affirmation in Opposition, Defendant Transcare points to the deposition testimony of Defendant Luqman Safdar who testified (Defendant Big Apple Motion, Exhibit "F" Page 21) that " they call me, they tested me, they gave me a test, I passed the test, and I started

my work." Safdar also testified that Defendant Big Apple also managed funds from its larger contract customers, withdrawing insurance and other expenses prior to issuing payment to drivers. Both Defendant Fayyaz Ahmad and Diana Clemente also acknowledged that Defendant Big Apple enforced a dress code and provided drivers with manuals regarding proper procedure. These included, for example, Safdar testified (Defendant Big Apple Motion, Exhibit "F" Page 30) that each car have a sticker with Big Apple logo visible on the car. What is more, once a call was accepted from the dispatcher, a driver could not refuse to take the assignment. "Here, a triable question of fact exists as to whether the detailed regulations in the defendant's contract with the drivers went beyond basic standards of conduct and rules of operation, related to more than incidental matters, and constituted the exercise of more than general supervisory powers or incidental control." *Rivera v. Fenix Car Serv. Corp.,* 81 A.D.3d 622, 624, 916 N.Y.S.2d 169, 171 [2nd Dept, 2011]. Accordingly, the motion for summary judgment by Defendant Big Apple is denied.

Based on the foregoing, it is hereby ORDERED as follows:

The Plaintiff's motion (motion sequence #5) against the Safdar Defendants is denied.
The Plaintiff's motion (motion sequence #6) against Defendant Transcare is denied.
The Plaintiff is found to be free from liability in relation to the accident and her alleged injuries.
The motion (motion sequence #7) by Defendant Big Apple is denied.
The motion by Defendant Transcare (motion sequence #8) is denied.

Date: April 30, 2018

ENTER:

Carl J. Landicino
J.S.C.

FILED
2018 JUN -6 AM 7:16
KINGS COUNTY CLERK

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