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 7th day of November, 2019.

P R E S E N T:

HON. CARL J. LANDICINO,
Justice.

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DAE H. KIM,

Plaintiff,

- against -

MV TRANSPORTATION, INC., and JASON J. CORNWALL,

Defendants.

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Index No.: 502323/2018

DECISION AND ORDER

Motions Sequence #1

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,
Opposing Affidavits (Affirmations).....	3,
Reply Affidavits (Affirmations).....	4,

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

This lawsuit arises out of a motor vehicle accident that allegedly occurred on November 7, 2017. Plaintiff, Dae H. Kim (hereinafter "the Plaintiff") alleges in his Complaint that on that date he suffered personal injuries after he was struck, by a motor vehicle, while standing behind his own parked vehicle accessing its hatch back, in the street at or near 345 East 24th Street, New York, New York. The Plaintiff alleges that he was struck by a vehicle owned by Defendant MV Transportation, Inc. ("Defendant MV") and operated by Defendant Jason J. Cornwall ("Defendant Cornwall") (collectively hereinafter "the Defendants").

The Plaintiff now moves (motion sequence #1) for an order pursuant to CPLR 3212, granting partial summary judgment on the issue of liability. The Plaintiff argues that the Defendants are liable for the accident since the Plaintiff was struck by Defendants' vehicle while he was standing behind his parked vehicle while removing food that he was preparing to deliver from his vehicle. The Defendants oppose the motion. The Defendants argue that the motion should be denied as the testimony that the Plaintiff relies upon is not admissible pursuant to CPLR 3116(a).

It has long been established that "[s]ummary 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].

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 such a 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]. What is more, "[a] plaintiff is no longer required to show freedom from comparative fault in establishing his or her *prima facie* case..." if they can show "...that the

defendant's negligence was a proximate cause of the alleged injuries." *Tsyganash v. Auto Mall Fleet Mgmt., Inc.*, 163 A.D.3d 1033, 1034, 83 N.Y.S.3d 74, 75 [2nd Dept, 2018]; *Rodriguez v. City of New York*, 31 N.Y.3d 312, 320, 101 N.E.3d 366, 371 [2018].

Turning to the merits of the instant motion, the Court finds that sufficient evidence has been presented to establish, *prima facie*, that Defendant Cornwall's actions on the day in question were the sole proximate cause of the accident, as a matter of law. In support of the motion, the Plaintiff relies on the transcript from the public authorities hearing of the Plaintiff, the deposition of the Plaintiff, and the Deposition of Defendant Cornwall. The public authorities hearing transcript is signed by the Plaintiff, the Plaintiff's deposition transcript is unsigned but certified, and the deposition of Defendant Cornwall is also unsigned but certified. Both the Plaintiff's testimony made as part of the public authorities hearing and the Plaintiff's deposition are admissible, "...since the transcript was submitted by the party deponent himself and, therefore, was adopted as accurate by the deponent." *David v. Chong Sun Lee*, 106 A.D.3d 1044, 1045, 967 N.Y.S.2d 80, 82 [2nd Dept, 2013].

In each instance, the Plaintiff testified that he was standing behind his vehicle with the hatch back open, while he was retrieving items from his vehicle, when he was struck without warning by the Defendants' vehicle. This testimony, alone, is sufficient for the Plaintiff to meet his *prima facie* burden. As a result, "this proof was sufficient to establish the plaintiff's *prima facie* entitlement to judgment as a matter of law on the issue of liability, including [his] freedom from comparative fault." *Martinez v. Kreychmar*, 84 A.D.3d 1037, 1038, 923 N.Y.S.2d 648, 648–49 [2nd Dept, 2011]; *Azeem v. Cava*, 92 A.D.3d 821, 938 N.Y.S.2d 817 [2nd Dept, 2012]; *Garcia v. Lenox Hill Florist III, Inc.*, 120 A.D.3d 1296, 1297, 993 N.Y.S.2d 86, 88 [2nd Dept, 2014]. In opposition to the motion, the Defendant has failed raise a material issue of fact that would show that the Defendant was not the sole proximate cause of the accident at issue.

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

The Plaintiff's motion (motion sequence #1) is granted and Plaintiff is awarded summary judgment on the issue of liability as against the Defendants and the matter shall proceed on the issue of damages.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino
J.S.C.