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 19th day of August, 2020.

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

Index No.: 516629/2019

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MARITZA VEGA AYALA,

Plaintiff,

- against -

DECISION AND ORDER

BYRON WILLIAMS and HEAVY CONSTRUCTION CO, INC.,

Motion Sequence #1

Defendants.

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

	Papers Numbered (e-file)
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed.....	16-22
Opposing Affidavits (Affirmations).....	25-26
Reply Affidavits (Affirmations)(Memo of Law).....	27

After submission and a review of the submitted papers the Court finds as follows:

The instant proceeding is a claim for damages for personal injuries allegedly suffered by the Plaintiff, Maritza Vega Ayala (hereinafter referred to as the "Plaintiff"). Plaintiff allegedly suffered these injuries resulting from a motor vehicle collision between a motor vehicle operated by the Plaintiff and a motor vehicle owned by Defendant, Heavy Construction Co. Inc. (hereinafter referred to as "Heavy") and operated by Defendant, Byron Williams (hereinafter referred to as Williams) (collectively referred to as the "Defendants"). The accident occurred on February 14, 2019 at or near the intersection of Merrick Boulevard and 108th Avenue in Queens, N.Y. The Plaintiff claims that she was waiting in her vehicle for a traffic signal indicating that she could proceed on Merrick Boulevard when her vehicle was struck, in the rear, by the Defendants' Vehicle.

The Plaintiff now moves (motion sequence #1) for an order, pursuant to CPLR 3212, granting her partial summary judgment against the Defendants on the issue of liability, and striking Defendants' first, second, fourth, eighth, eleventh and fifteenth affirmative defenses. The Plaintiff argues that there

is an admission by Williams within the police report that conclusively establishes that Defendant Williams was the proximate cause of the accident. The Defendants oppose the motion and argue that (i) the motion is premature; (ii) the police report is inadmissible hearsay; and (iii) the Court should not decide the motion on liability until after discovery is complete.

The Plaintiff replied noting that the Defendants have not raised a material issue of fact that requires a trial on the issue of liability. Also, the Plaintiff disputes the inadmissibility of the police report. The Plaintiff contends that the report contains an exception to the hearsay rule; an admission by a party to the controversy. The Plaintiff argues that on that basis the police report is admissible for the Court's consideration. The Plaintiff further argues that the Defendants have failed to produce a non-negligent explanation for the *prima facie* showing that a hit in the rear carries a presumption of negligence on the part of the driver of the rear vehicle. Finally, the Plaintiff avers that the Court should not deny the motion, given that Defendants' support for prematurity of the motion is based on the Defendants' hope and speculation that there may be evidence that may be unearthed which will support a denial of this motion as being premature.

Generally, "[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 A.D.3d 493 [2d Dep, 2005], citing *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 1341, 320 N.E.2d 853 [1974]. The proponent for 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 A.D.3d 70, 74 [2d Dept, 2004], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2s 320, 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." *Graham & Han Real Estate Brokers v. Oppenheimer*, 148 A.D.2d 493 [2d 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 [2d Dept 2006]; see *Menzel v. Plotnick*, 202 A.D. 558, 558-559, 610 N.Y.S.2d 50 [2d Dept 1994]. It is true that "[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 [2d Dept, 2018]; *Rodriguez v. City of New York*, 31 N.Y.3d 312, 320, 101 N.E.3d 366, 371 [2018].

"A rear end collision with a stopped or stopping vehicle establishes a *prima facie* case of negligence on the part of the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision." *Tuminello v. City of New York*, 148 AD2d 1084 [2nd Dept 2017].

Here, the agreed facts are that the Plaintiff's vehicle was struck in the rear by Defendants' vehicle. Therefore, the Plaintiff established a *prima facie* entitlement to the presumption. In relation to the opposing arguments, there has not been any evidence to rebut this presumption. Williams deposed that he attached boxes to a loader on his vehicle and, "...I was in control of my vehicle, but because of the obstruction caused by the boxes, I did not see that there was a vehicle directly in front of me, which was operated by the Plaintiff. As a result, my vehicle ultimately struck the Plaintiff's vehicle" (see Exhibit A, Affirmation in Opposition to the Plaintiff's motion, Williams Affidavit,

paragraph 6). This is an admission that Williams proceeded without the ability to see what there was to be seen. Consequently, this is not a non-negligent explanation for the accident. Moreover, Williams did not assert any indication that the Plaintiff's actions constituted negligence which contributed to the collision. In addition, Defendants' claim that the motion is premature is without merit. Defendants have not articulated with any clarity or specificity what they would stand to learn from further discovery. Their argument is conclusory and speculative. *See Singh v. Avis Rent A Car Sys., Inc.*, 119 A.D.3d 768, 770, 989 N.Y.S.2d 302, 304 [2d Dept 2014]; *Boorstein v. 1261 48th St. Condo.*, 96 A.D.3d 703, 704, 946 N.Y.S.2d 200, 202 [2d Dept 2012]. Therefore, the Plaintiff's motion (motion sequence #1) is granted. Although the Defendants have demanded the dismissal of counterclaims numbered 1, 2, 4, 8, 11 and 15, only those related to comparative fault will be dismissed. Counterclaims 8 and 15 relate to damages. The issue of damages will be addressed at trial in that this holding does not impact the issue of damages.

It is hereby ordered that:

The Plaintiff's motion (motion sequence #1) is granted to the extent that, the Plaintiff is awarded partial summary judgment on the issue of liability, in that the Defendant driver was negligent and the sole proximate cause of the collision and the Defendants' affirmative defenses relating to comparative negligence, number 1, 2, 4, and 11, are accordingly dismissed.

The constitutes the Decision and Order of the Court.

ENTER:

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Carl J. Landicino
J.S.C.