SHORT FORM ORDER **INDEX NO. 623560/2019**

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:
Hon. Paul J. Baisley, Jr., J.S.C.

AMY ROSSI,

Plaintiff,

-against-

LARA CHIATTO and ROBERT V. CHIATTO,

Defendants.

ORIG. RETURN DATE: June 29, 2020
FINAL RETURN DATE: June 29, 2020
MOT. SEQ. #: 001 MG

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DEFTS' ATTORNEY:
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Upon the following papers read on this e-filed motion for summary judgment: Notice of Motion/Order to Show Cause and supporting papers filed by the plaintiff on May 29, 2020; it is

ORDERED that plaintiff Amy Rossi's motion for an order (1) granting summary judgment in her favor on the issue of defendant Lara Chiatto and Robert Chiatto's liability, (2) holding that the defendants were the sole proximate cause of the collision, and (3) holding that the plaintiff is free from comparative fault, is granted; and it is further

ORDERED that the defendants' comparative negligence affirmative defense is stricken; and it is further

ORDERED that a preliminary conference shall be held on October 26, 2020.

Plaintiff Amy Rossi commenced this action to recover for personal injuries she allegedly sustained on January 14, 2019, when her vehicle was struck in the rear by a vehicle operated by defendant Lara Chiatto and owned by defendant Robert V. Chiatto. According to the plaintiff, at the time of the collision, she was traveling westbound in the left lane of Northern State Parkway between exits 41 and 42, in Dix Hills, New York. The plaintiff's vehicle gradually came to a complete stop due to heavy traffic conditions. The plaintiff's vehicle was struck twice in the rear by the vehicle driven by defendant Lara Chiatto. The plaintiff alleges that as a result of the impact she sustained severe and permanent personal injuries.

The plaintiff now moves for an order (1) granting summary judgment on the issue of the defendants' liability, (2) holding that the defendants were the sole proximate cause of the collision, and (3) holding that the plaintiff is free from comparative fault. In support of the motion, the plaintiff

submits, *inter alia*, her affidavit, the police report of the incident and her response to the defendants' demand for a bill of particulars. The defendants have not filed an opposition to the plaintiff's motion.

"A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, prima facie, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries" (*Hasan v City of New York*, 183 AD3d 572, 121 NYS3d 653, 654 [2d Dept 2020]). In determining whether the moving party has satisfied this burden, the evidence must be viewed in the light most favorable to the non-moving party (*Richardson v Cablevision Sys. Corp.*, 173 AD3d 1083, 1084, 104 NYS3d 655 [2d Dept 2019]). The movant's failure to make such a showing requires denial of the motion regardless of the opposing papers (*id.*). Where prima facie entitlement to judgment as a matter of law is established, the burden shifts to the non-movant to present evidence that gives rise to a genuine issue of material fact as to the movant's comparative fault (*Bien-Aime v Clare*, 124 AD3d 814, 814, 2 NYS3d 557, 558 [2d Dept 2015]).

"A driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle" (*Perez v Persad*, 183 AD3d 771, 123 NYS3d 683, 684 [2d Dept 2020] [internal quotation marks omitted]). "A rear-end collision with a stopped vehicle creates a prima facie case of negligence against the [driver and the owner of] the moving vehicle and imposes a duty of explanation on its driver" (*Trombetta v Cathone*, 59 AD3d 526, 526, 874 NYS2d 169, 179 [2d Dept 2009]; *see Sooklall v Morisseav-Lafague*, ___ AD3d ___, 2020 NY Slip Op 04339, *2 [2d Dept 2020]). "A nonnegligent explanation may include evidence of a mechanical failure, a sudden stop of the vehicle ahead, an unavoidable skidding on wet pavement, or any other reasonable cause" (*Grant v Carrasco*, 165 AD3d 631, 632, 84 NYS3d 235 [2d Dept 2018] [internal quotation marks omitted]).

A plaintiff is no longer required to show freedom from comparative fault to establish prima facie entitlement to judge as a matter of law on the issue of liability (*Rodriguez v City of New York*, 31 NY3d 312, 324, 76 NYS3d 898, 905 [2d Dept 2018]). However, "[t]he issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where [ ] the plaintiff seeks summary judgment dismissing an affirmative defense alleging comparative negligence" (*Yayoi Higashi v M & R Scarsdale Rest., LLC*, 176 AD3d 788, 789, 111 NYS3d 92, 93 [2d Dept 2019]).

The plaintiff has established prima facie entitlement to judgment as a matter of law on the issue of the defendants' liability. The plaintiff represents in her affidavit that her vehicle gradually came to a complete stop on Northern State Parkway due to heavy traffic. While stopped, the plaintiff's vehicle was struck in the rear twice by the vehicle driven by defendant Lara Chiatto. The plaintiff further alleges that from the time her vehicle came to a stop to the time of the collision, her vehicle did not move. These allegations establish prima facie entitlement to judgment as a matter of law on the issue of the defendants' liability (*see Kimyagarov v Nixon Taxi Corp.*, 45 AD3d 736,736, 846 NYS2d 309, 310 [2d Dept 2007]; *see also Niyazov v Hunter EMS, Inc.*,154 AD3d 954, 955, 63 NYS3d 457, 459 [2d Dept 2017]).

The plaintiff has also submitted a copy of a certified police accident report, setting forth, *inter alia*, a description of how the collision occurred and a diagram of the damages the vehicles sustained. However, there is no entry on the report or testimony establishing the source of this information nor is there any evidence that the reporting police officer witnessed the collision or personally observed the resulting damages (*Battista v Rizzi*, 228 AD2d 533, 644 NYS 2d 332, 333 [2d Dept 1996]; *Gagliano v Vaccaro*, 97 AD2d 430, 431, 467 NYS2d 396, 397 [2d Dept 1983]). The description of how the collision occurred and the diagram of damages therefore constitute inadmissible hearsay and as such shall not be relied on by the Court (*Noakes v Rosa*, 54 AD3d 317, 318, 862 NYS2d 573 [2d Dept 2008]). The Court would be entitled to consider this information, however, if it would defeat the plaintiff's prima facie case since the plaintiff submitted the report and any argument as to its admissibility would therefore be deemed waived (*see Orcel v Haber*, 140 AD3d 937, 938, 33 NYS 3d 429, 430 [2d Dept 2016]). The fact that the police report provides that the plaintiff's vehicle "slowed" yet the plaintiff represents in her affidavit that her vehicle came to a complete stop, does not defeat the plaintiff's prima facie case. Regardless of whether the plaintiff's vehicle was stopped or was in motion at the time of impact, defendant Lara Chiatto's alleged failure to maintain a safe distance between her vehicle and that of the plaintiff establishes a prima facie case of negligence as to the defendants (*see Inzano v Brucculeri*, 257 AD2d 605, 684 NYS 2d 260 [2d Dept 1999]); *see also Gelo v Meehan*, 177 AD3d 707, 708, 110 NYS3d 333 [2d Dept 2019]).

The defendants have not opposed the plaintiff's motion and have therefore failed to raise a triable issue of material fact to rebut the inference of negligence established by the plaintiff's affidavit.

In addition to seeking summary judgment on the issue of the defendants' liability, the plaintiff also seeks an order finding that the defendants were the sole proximate cause of the collision and that the plaintiff is free from comparative fault. The defendants assert comparative negligence as an affirmative defense, arguing that any damage the plaintiff is alleged to have sustained was caused in whole or in part by the plaintiff's culpable conduct. Although the plaintiff does not explicitly request dismissal of the defense, she is, in substance, seeking that relief and has submitted evidence in support thereof. Moreover, the defendants have had an opportunity to rebut the plaintiff's evidence. The Court shall therefore construe the plaintiff's motion as seeking dismissal of the defendants' comparative negligence affirmative defense pursuant to CPLR 3211. CPLR 3211 provides that a party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit. "[W]hen moving to dismiss or strike an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is 'without merit as a matter of law'" (*Greco v Christoffersen*, 70 AD3d 769, 771, 896 NYS2d 363 [2d Dept 2010]). In considering a request to dismiss an affirmative defense, the Court must liberally construe the pleadings in favor of the non-movant and give the non-movant the benefit of every reasonable inference (*id.*). The plaintiff has demonstrated that the defendant's first affirmative defense is without merit as a matter of law. The plaintiff's affidavit establishes, prima facie, that the plaintiff did not contribute to the happening of the accident and the defendant failed to raise a triable issue of fact as to the plaintiff's comparative fault (*see Balladares v City of New York*, 177 AD3d 942, 944, 114 NYS3d 448, 451 [2d Dept 2019]; *Poon v Nisanov*, 162 AD3d 804, 808,79 NYS3d 227, 231[2d Dept 2018]).

In view of the above analysis, the plaintiff's motion for summary judgment on the issue of the defendants' liability and for dismissal of the affirmative defense of comparative negligence is granted.

Dated: 10/1/20

HON. PAUL J. BAISLEY, JR., J.S.C.