SHORT FORM ORDER **INDEX NO. 601585/2020**

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

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

MARCY C. SHARP,

Plaintiff,

-against-

SUZANNE V. MARTIN and JACOB M. SLOBIN,

Defendants.

ORIG. RETURN DATE: July 13, 2020
FINAL RETURN DATE: July 13, 2020
MOT. SEQ. #: 001 MotD

PLTF'S ATTORNEY:
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DEFTS' ATTORNEY:
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Upon the following e-filed motion for summary judgment: Notice of Motion/Order to Show Cause and supporting papers filed by the plaintiff on June 15, 2020; Answering Affidavits and supporting papers filed by the defendants on June 29, 2020; Replying Affidavits and supporting papers filed by the plaintiff on June 29, 2020; Other _____; it is

ORDERED that the plaintiff's motion for partial summary judgment and for the dismissal of certain affirmative defenses is granted to the extent set forth and is otherwise denied; and it is further

ORDERED that a preliminary conference shall be held on January 21, 2021.

The plaintiff, Marcy C. Sharp, commenced this action to recover for personal injuries she allegedly sustained on February 7, 2018, when her vehicle was struck in the rear by a vehicle driven by defendant Jacob Slobin ("defendant driver") and owned by defendant Suzanne Martin. The plaintiff alleges that she gradually brought her vehicle to a stop at a red traffic light at or near the intersection of Portion Road and Ackerly Lane in the Town of Brookhaven, New York. She further alleges that after being stopped for about 20 to 30 seconds, she felt an impact to the rear of her vehicle. According to the plaintiff, upon impact, her body struck various parts of the interior of her vehicle, causing her to be seriously injured.

The plaintiff now moves, pursuant to CPLR 3212, for summary judgment on the issue of liability and for dismissal of the defendants' affirmative defenses of comparative negligence and the emergency doctrine. The plaintiff also seeks an order directing that discovery proceed on the issue of damages only and setting this case down for trial on the assessment of damages. In support of the motion, the plaintiff submits, *inter alia*, the pleadings, a police accident report, and her affidavit. In opposition, the

defendants argue that the motion is premature since the parties have yet to conduct depositions. They further maintain that the plaintiff has failed to demonstrate that she is not at fault for the collision.

"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]). "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]). A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator and owner of the rear vehicle, "thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision" (*see Hasan v City of New York*, 183 AD3d 572, 573, 121 NYS3d 653 [2d Dept 2020]; *see also Trombetta v Cathone*, 59 AD3d 526, 526, 874 NYS2d 169, 179 [2d Dept 2009]). "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]). In considering a motion for summary judgment, 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]).

Although 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]), "[t]he issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where, as here, 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]).

Here, the plaintiff failed to establish her prima facie entitlement to judgment as a matter of law on the issue of liability. Annexed as Exhibit C to the plaintiff's motion is a copy of an uncertified police accident report ("the report"). According to the affirmation of plaintiff's counsel, the report contains a statement by the defendant driver that the collision was caused when the driver "looked down at change [*sic*] the radio channel when he rear ended V2 [plaintiff's vehicle]." The Court has reviewed the report attached to the plaintiff's motion and it contains no such statement. Instead, the report indicates that the defendant driver "report[ed]" to the officer that he braked when he saw the plaintiff's vehicle but was unable to stop in time due to "brake failure and road conditions."[1] The report demonstrates the existence of a triable issue of fact as to whether the defendant driver has a nonnegligent explanation for striking the plaintiff's vehicle (*see Orcel v Haber*, 140 AD3d 937, 938, 33 NYS3d 429, 430 [2d Dept 2016]). "Since the plaintiff submitted the police report in support of [her] motion, [s]he waived any objection to

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[1] The Court further notes that according to counsel's affirmation, the report states that the accident occurred on 12/21/2017 at 5:30 p.m. and that the plaintiff was facing eastbound at the time of the collision. The report actually provides, however, that the incident occurred on 2/7/2018 at 5:20 p.m. and that the plaintiff was facing westbound. It appears counsel may have been referring to a report related to a matter that is different from the one at issue here.

its admissibility" (*id.*; *see Grant v Carrasco*, 165 AD3d 631, 632, 84 NYS3d 235, 236 [2d Dept 2018]; *see also Kadashev v Medina*, 134 AD3d 767, 19 NYS3d 898 [2d Dept 2015]). Although the defendants do not assert brake failure as an affirmative defense in their answer, the defense should not come as a surprise to the plaintiff since it is set forth in the report that was submitted with the plaintiff's motion (*see* CPLR 3018 [b]). By failing to eliminate all triable issues of fact as to the defendants' liability, the plaintiff did not meet her prima facie burden and the portion of the plaintiff's motion seeking summary judgment as to liability is denied.

In addition to seeking summary judgment on the issue of liability, the plaintiff also seeks dismissal of the defendants' affirmative defenses of comparative negligence and the emergency doctrine. 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]; *see also Poon v Nisanov*, 162 AD3d 804, 808,79 NYS3d 227, 231[2d Dept 2018]). The defendants did not submit an affidavit from a person with personal knowledge of the facts disputing the plaintiff's account. Rather they rely solely on counsel's affirmation, which lacks probative value (*Sirico v Beukelaer*, 14 AD3d 549, 549, 787 NYS2d 662, 663 [2d Dept 2005]). Counsel sets forth various questions that he believes need to be answered before a finding can be made as to the plaintiff's comparative negligence. A number of these questions are directed at determining whether the plaintiff had the opportunity to take evasive action to avoid the collision and whether such action was taken. However, speculation that the plaintiff may have failed to take "some unspecified measures to avoid the accident" does not defeat the plaintiff's motion (*see id.*). The remainder of the questions–whether the plaintiff can describe how she came to a stop and for how long the plaintiff was stopped prior to the accident–were already answered by the plaintiff in her affidavit, and the defendants failed to introduce admissible evidence contradicting the plaintiff's representations. "The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion" (*Figueroa v MTLR Corp.*, 157 AD3d 861, 863, 69 NYS3d 359, 360 [2d Dept 2018] [internal quotation marks omitted]). In view of the above, the defendants' comparative negligence affirmative defense is hereby stricken.

The plaintiff also seeks dismissal of the defendants' emergency doctrine affirmative defense. Under the emergency doctrine, "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" (*Pacelli v Intruck Leasing Corp.*, 128 AD3d 921, 924, 10 NYS3d 149,153 [2d Dept 2015]). "In general, however, the emergency doctrine does not apply to typical accidents involving rear-end collisions because trailing drivers are required to leave a reasonable distance between their vehicles and vehicles ahead of them" (*Shehab v Powers*, 150 AD3d 918, 919–920, 54 NYS3d 104, 106–107 [2d Dept 2017]). Here, the Court cannot render a determination as to whether this particular defense is without merit as a matter of law since it is unclear, at this juncture, what circumstances the defendant driver was faced with prior to the collision. As such, this portion of the plaintiff's motion is denied.

In view of the holdings set forth above, the portion of the plaintiff's motion seeking an order directing that discovery proceed on the issue of damages only and setting this case down for trial on the assessment of damages is denied.

Dated: 1/4/21

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