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 9th day of May, 2023.

PRESENT: HON. CARL J. LANDICINO,
Justice.

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ASTERIO SANDOVAL VARGAS,

Plaintiff,

-against-

VEHUDOR OIZ and SHOLOM LEIFER,

Defendants.

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Index No.: 508155/2020

DECISION AND ORDER

Motion Sequence #1

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

	Papers Numbered (NYSCEF)
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	34-45,
Opposing Affidavits (Affirmations)	48-51,
Reply Affidavits (Affirmations)	52.

After a review of the papers and oral argument, the Court finds as follows:

The instant action concerns a claim for personal injuries arising from a motor vehicle collision that allegedly occurred on June 18, 2018. Plaintiff Asterio Sandoval Vargas (the "Plaintiff") contends that he was injured when his vehicle was struck on the mid-to-rear passenger side by a vehicle owned by Defendant Vehudor Oiz (the "Defendant Owner") and operated by Defendant Sholom Leifer (the "Defendant Driver") (collectively the "Defendants"). Plaintiff alleges that Defendant's vehicle was pulling out of a parking space at the time of the impact. The incident purportedly occurred on 18th Avenue, between 51st and 52nd Streets, in Brooklyn, New York.

The Plaintiff moves (motion sequence #1) for an order pursuant to CPLR 3212 granting him summary judgment on the issue of liability and dismissing the Defendants' 5th, 7th, and 8th

affirmative defenses[1]. The Plaintiff contends that summary judgment should be granted because the Defendants were negligent and the sole proximate cause of the collision. Specifically, the Plaintiff contends that summary judgment should be granted given that there is *prima facie* evidence that Plaintiff's vehicle was struck by the Defendant Driver while Plaintiff was proceeding with the right of way, below the speed limit, and wholly within his lane. The Defendants oppose the motion and contend that Plaintiff's application for summary judgment should be denied as there is an issue of fact regarding whether Plaintiff was negligent in failing to see the defendants' vehicle at any time prior to the accident.

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, 787 N.Y.S.2d 392 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 NY2d 361, 364, 362 N.Y.S.2d 1341 [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 the absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74, 778 N.Y.S.2d 98 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324, 508 N.Y.S.2d 923 [1986], *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 N.Y.S.2d 316 [1985]. "In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inference must be resolved in favor of the nonmoving party." *Adams v. Bruno*, 124 AD3d 566, 566, 1 N.Y.S.3d 280, 281 [2d Dept 2015] citing *Valentin v. Parisio*, 119 AD3d 854, 989 N.Y.S.2d 621 [2d Dept 2014]; *Escobar v. Velez*, 116 AD3d 735, 983 N.Y.S.2d 612 [2d Dept 2014].

[1] Although Plaintiff seeks relief that the matter should proceed on the issue of damages, Plaintiff does not ask for dismissal of the Defendants' 1st affirmative defense relating to comparative fault. Although in reply, Plaintiff specifies the 1st affirmative defense and not the 5th, he does not explain the inconsistency or the possible error, and the Defendants raised the issue in their opposition papers.

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, 538 N.Y.S.2d 837 [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 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick,* 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994]. However, "[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 AD3d 1033, 1034, 83 N.Y.S.3d 74, 75 [2d Dept 2018]; *Rodriguez v. City of New York*, 31 NY3d 312, 320, 101 N.E.3d 366, 371 [2018].

Turning to the merits of the instant motion, the Court finds that the Plaintiff has satisfied his *prima facie* showing. In support of his motion, Plaintiff relies on his Affidavit, his deposition testimony, and a certified Police Accident Report. In his affidavit, Plaintiff states that, at the time of the accident, "[he] was driving straight ahead, within the confines of my lane of traffic, when I felt an impact to the passenger side of my vehicle, in the area of the back passenger door." As to this impact, he states, "[t]he impact was caused by the defendants' vehicle which, I believe, came out of the parking spot. The impact moved my vehicle to the left." Plaintiff also states that "[a]s [he] was driving on [18th Avenue], the speed of [his] vehicle was no more than 20 to 23 miles per hour." Plaintiff also proffers a certified Police Accident Report, however, the statement(s) relating to the description of the accident is not attributed to either driver. Finally, when asked in his deposition whether Plaintiff saw the Defendant Driver's vehicle prior to making contact with it,

the Plaintiff stated, "[n]o." (Page 29). Plaintiff also alleges that Defendant Driver violated New York Vehicle and Traffic Law (VTL) Sections 1143 and 1162.

> VTL §1143. The driver of a vehicle about to enter or cross a roadway from any place other than another roadway shall yield the right of way to all vehicles approaching on the roadway to be entered or crossed.
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> VTL §1162. No person shall move a vehicle which is stopped, standing, or parked unless and until such movement can be made with reasonable safety.

In opposition, the Defendants rely on the deposition testimony of the Plaintiff and the Defendant Driver. Defendants contend that an issue of fact remains. Defendants contend that the Defendant Driver slowly moved out of the parking spot and looked to his rear and left for oncoming traffic. Additionally, Defendant Driver contends that a vehicle was double parked behind him at the time of the accident, however he concedes that he was able to pull out of the parking space. (Page 41). When asked how much time had passed from when he began to pull out of the parking spot and the moment that contact with Plaintiff's vehicle was made, Defendant Driver stated, "[l]ike right away." (Page 40). Defendant Driver also testified that, on account of the double-parked vehicle behind him, he pulled out of the spot slowly. (Page 41). Defendant also states that if he was not entirely out of the parking space on impact, "[t]here is a possibility that it was still a little bit in the parking space." (Page 47). Also, when asked what rate of speed his vehicle was traveling upon making impact with Plaintiff's vehicle, Defendant Driver stated, "I mean, I'm not sure 100 percent. Like very – maybe two, three miles. I don't know, maybe, five miles." (Page 52). Defendant Driver's testimony indicates that his alleged precautious attempt to pull out of the parking spot should have successfully enabled him to see the Plaintiff's vehicle and yield to it before entering the traffic lane in violation of VTL 1162 and 1143. Even assuming that a double-parked car was present behind him, the undisputed points of contact reflect that Plaintiff's vehicle was passing Defendants' vehicle at the time of the accident. Accordingly, Defendant Driver was negligent and a proximate cause of the accident.

However, the Court finds that there is an issue of fact as to Plaintiff's comparative negligence based upon Defendant Driver's testimony of the position of his vehicle at the time of contact. Although he is not certain how far, Defendant Driver does state that he was at least mostly out of the parking space at the time of impact. This does raise an issue of whether Plaintiff failed to see what there was to be seen and could have avoided the collision. In any event, insofar as Plaintiff did not specifically seek dismissal of the Defendant's 1st affirmative defense of culpable conduct in the motion papers, he cannot receive a finding of sole proximate cause. As such, the Plaintiff's motion is granted to the extent that the Defendant is negligent and a proximate cause of the accident, subject to a comparative negligence analysis of Plaintiff's fault, if any, at the time of trial. See *Rodriguez v. City of New York*, 31 NY3d 312, 320, 101 N.E.3d 366, 371 [2018]; *Kwok King Ng. v. W.*, 2021 NY Slip Op. 04125 [2d Dept 2021]; *Maliakel v. Morio,* 185 AD3d 1018, 29 N.Y.S.3d 99 [2d Dept 2019] and *Wray v. Galella*, 172 AD3d 1446, 1448, 101 N.Y.S.3d 401, 403 [2d Dept 2019], and *Sapienza v. Harrison*, 191 AD3d 1028, 142 N.Y.S.3d 584, 588 [2d Dept 2021].

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

The Plaintiff's motion (motion sequence #1) for summary judgment on the issue of liability is granted to the extent that the Defendant was negligent and a sole proximate cause of the accident, and the Defendants' 5th, 7th, and 8th affirmative defenses are dismissed. The issue of whether Plaintiff was comparatively negligent will be addressed by the jury.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.