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 11th day of May, 2023.

PRESENT:
CARL J. LANDICINO, J.S.C.

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RAUL SANTILLAN,

Plaintiff,

- against -

THE NEW WORLD SERVICE INC. and MANA M. WAIBA,

Defendants.

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Index No.: 519867/2018

DECISION AND ORDER

Motion Sequence #5

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	105-115,
Opposing Affidavits (Affirmations)	117,
Reply Affidavits (Affirmations)	118

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

This action concerns a motor vehicle accident that occurred on May 6, 2018. The Plaintiff, Raul Santillan (hereinafter the "Plaintiff"), claims that he was injured when his vehicle was involved in a collision with a vehicle owned by Defendant The New World Service, Inc. and operated by Defendant Mana W. Waiba (hereinafter "the Defendants"). The Plaintiff alleges that the collision occurred at the intersection of Wyckoff Avenue at or near Eldert Street in Brooklyn, New York. This Court issued a Decision and Order dated May 26, 2022 that provided that "[t]he Plaintiff's motion (motion sequence #3) for summary judgment on the issue of liability is granted to the extent that the Defendant driver was negligent and a proximate cause of the accident."

The Plaintiff now moves (motion sequence #5) for an order pursuant to CPLR 3211(b) striking Defendants' Second Affirmative Defense alleging Plaintiff's culpable conduct and striking Defendants'

Fourth Affirmative Defense alleging Plaintiff's lack of use of seat belt. The Plaintiff argues that these affirmative defenses have no merit and should be stricken. The Plaintiff argues that it inadvertently failed to make this application as part of motion sequence #3 but that the Court has discretion to hear this application. The Plaintiff provides an affidavit in support of this motion and also points the Court to the fact that the Defendant has been precluded by the order of the Honorable Lawrence Knipel dated March 8, 2021. That Order stated that "[f]ailure to comply with this order will result in the non-complying party being precluded from offering evidence without the need for further motion pursuant to CPLR 3126(2) without further order of the court."

The Defendants argue that this motion should be denied as it is essentially a motion to reargue the Court's prior decision. The Defendants point to this Court's prior Decision and Order that states that "[t]he issue of Plaintiff s comparative negligence, if any, shall be addressed at trial." The Defendant also argues that the Plaintiff has failed to show that he was free from comparative fault.

As an initial matter, the Court finds that the instant application is timely and should be addressed on the merits. The motion is not brought as a motion to reargue pursuant to CPLR 2221, and is not untimely given that it is not made pursuant to CPLR 3212. Instead, the instant application has been made pursuant to CPLR 3211(b). As such, the motion is not subject to the Kings County Supreme Court Uniform Civil Term Rules, that provide that motions for summary judgment may be made no later than sixty (60) days after the filing of a Note of Issue. *See McNally v. Beva Cab Corp.*, 45 A.D.3d 820, 821, 846 N.Y.S.2d 328, 329 [2nd Dept, 2007]. Moreover, this motion made pursuant to CPLR 3211, may be made at any time and "CPLR 3212 (a)'s requirement of demonstrating good cause for the delay does not apply." *M & E 73-75, LLC v. 57 Fusion LLC*, 189 AD3d 1, 6, 128 N.Y.S.3d 200 [1st Dept 2020].

In support of the Plaintiff's application, he relies on his own affidavit. The Plaintiff states in his affidavit that "[o]n 5/6/18 at approximately 12:00 a.m. I was wearing my shoulder harness seat belt and was operating my 2008 Nissan motor vehicle southbound in the travel lane on Wyckoff Avenue at or near Eldert Street in the County of Kings, State of New York." The Plaintiff also states that "[j]ust as I came to the intersection with Eldert Street and was about to pass the Defendant's vehicle, the Defendant's vehicle suddenly, without any signal or warning, pulled away from the curb and began making a U-turn in the middle of the roadway, striking my vehicle." The Plaintiff also states that "I was driving in the travel lane when Defendant's vehicle suddenly, without any signal or warning, pulled away from the curb and began making a U-turn, striking my vehicle." (See NYSCEF Doc. 107).

In general, "the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where the plaintiff moves for summary judgment dismissing a defendant's affirmative defense alleging comparative negligence and culpable conduct on the part of the plaintiff." *Kwok King Ng v. West*, 195 AD3d 1006, 1008, 146 N.Y.S.3d 811, 812 [2d Dept 2021]; see also *Marangoudakis v. Suniar*, 208 AD3d 1233, 1235, 175 N.Y.S.3d 263, 265 [2d Dept 2022]; *Cui v. Hussain*, 207 AD3d 788, 789, 173 N.Y.S.3d 44, 45 [2d Dept 2022]. Pursuant to CPLR 3211(b), "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." "In reviewing a motion to dismiss an affirmative defense, the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference." *Fireman's Fund Ins. Co. v. Farrell,* 57 AD3d 721, 721, 869 N.Y.S.2d 597, 598 [2d Dept 2008]; *see also Chestnut Realty Corp. v. Kaminski*, 95 AD3d 1254, 1254, 945 N.Y.S.2d 708, 708 [2d Dept 2012]. "On a motion pursuant to CPLR 3211 (b), the court should apply the same standard it applies to a motion to dismiss pursuant to CPLR 3211 (a) (7), and the factual assertions of the defense will be accepted as true." *Shah v. Mitra*, 171 AD3d 971, 974, 98 N.Y.S.3d 197 [2d Dept 2019], quoting *Wells Fargo Bank,*

N.A. v. Rios, 160 AD3d 912, 913, 74 N.Y.S.3d 321, 323 [2d Dept 2018]. "Moreover, if there is any doubt as to the availability of a defense, it should not be dismissed." *Wells Fargo Bank, N.A. v. Rios*, 160 AD3d 912, 913, 74 N.Y.S.3d 321, 323 [2d Dept 2018]. "[A]ffidavits submitted by a defendant will almost never warrant dismissal under CPLR 3211 unless they establish conclusively that [the plaintiff] has no cause of action" *Phillips v Taco Bell Corp.,* 152 AD3d 806, 60 N.Y.S 3d 67 [2d Dept 2017] quoting *Bokhour v. GTI Retail Holdings, Inc.,* 94 AD3d 682, 941 N.Y.S 2d 675 [2d Dept 2012].

In the instant proceeding, the Plaintiff did not seek to dismiss the Defendants' affirmative defenses as part of the prior motion for summary judgment. As a result, the standards set forth by CPLR 3211(b) apply. Accordingly, the Court finds that since this application was made as part of a motion pursuant to CPLR 3211(b), the Plaintiff has failed to establish that that the Defendants have not sufficiently plead their Second Affirmative Defense alleging culpable conduct and their Fourth Affirmative Defense alleging a failure to use a seatbelt or that these affirmative defenses are meritless. Moreover, the fact that defendants may be precluded does not prevent them from examining the Plaintiff at trial as to the facts surrounding the subject accident.

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

The Plaintiff's motion (motion sequence #5) for an order pursuant to CPLR 3211(b) is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.