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| <b>Martinez v Field View Transp.</b>   |
| 2022 NY Slip Op 32273(U)   |
| January 19, 2022   |
| Supreme Court, Bronx County  |
| Docket Number: Index No. 27794/2020E   |
| Judge: Bianka Perez  |
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX, PART 14**

-----X  
IVELISSE MARTINEZ,

Plaintiff,

Index No. 27794/2020E

-against-

Hon. BIANKA PEREZ

Justice Supreme Court

FIELD VIEW TRANSPORTATION, RAEDELL  
ADAMS, UBER TECHNOLOGIES, INC., and  
IBRAHIMA DOUKOURE,

Defendants.  
-----X

The following read on this motion and cross-motion (Seq 2) submitted on **August 9, 2021**.

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| Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed | No(s). 39-47                   |
| Cross-Motion – Affirmation with Exhibits and Affidavit                   | 51-58                          |
| Answering Affidavits- Exhibits   | No(s). 48-50, 51, 60-68, 72-75 |
| Replying Affidavit and Exhibits  | No(s). 69-71                   |

Upon the foregoing papers, defendant, IBRAHIMA DOUKOURE moves for summary judgment on the issue of liability against plaintiff and co-defendants and plaintiff cross-moves for summary judgment on the issue of liability against all the defendants pursuant to CPLR 3212. Plaintiff and co-defendants oppose the motion and defendants oppose the cross-motion.

This action is for personal injuries allegedly sustained by plaintiff in a motor vehicle accident which occurred on August 16, 2018 on West Fordham Road at or near the Major Deegan Expressway, Bronx, New York. Plaintiff was a passenger in a vehicle owned by defendant, UBER TECHNOLOGIES, INC. and operated by defendant IBRAHIMA DOUKOURE which was involved in a collision with a vehicle owned by defendant FIELD VIEW TRANSPORTATION and operated by defendant, RAEDELL ADAMS. This action was commenced on July 22, 2020. Defendant UBER TECHNOLOGIES INC., served a Verified Answer on August 17, 2020; defendant FIELD VIEW TRANSPORTATION served a Verified Answer on October 19, 2020; defendant RAEDELL ADAMS served a Verified Answer on October 19, 2020 and Defendant IBRAHIMA DOUKOURE served a Verified Answer on or about October 29, 2020. Depositions have not been held.

**Defendant, IBRAHIMA DOUKOURE Motion**

In support of the motion, defendant IBRAHIMA DOUKOURE only submits the uncertified police report and the MV 104 form arguing through his attorney's affirmation that on August 16, 2018 while he was stopped waiting to make a left turn he was struck by co-defendant's vehicle. Thus, he was not at fault for the collision.

The court's function on this motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden of production" (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e., with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet its burden. 300 East 34th Street Co. v. Habeeb, 683 N.Y.S.2d 175 (1st Dept. 1997).

Here, the police report and MV 104 forms are unsworn and uncertified and do not constitute evidence in admissible form (Astudillo v. Zinaba, 2020 WL 6386904 (Brigantti, J., 2020) (citing Rue v. Stokes, 191 A.D.2d 245, 246 [1st Dept 1993], Johnson v. Phillips, 261 A.D.2d 269, 270 [1st Dept 1999])). In addition, a mere "attorney's affirmation that is not based upon personal knowledge is of no probative or evidentiary significance," (see, Warrington v Ryder Truck Rental, Inc., 35 AD3d 455, 456 [2d Dept 2006])). Since defendant has failed to establish his prima facie burden on the motion it is not necessary to determine whether the papers

submitted by the opposition raise a triable issue of fact. Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 (1985). Thus, the defendant's motion for summary judgment is denied.

### **Plaintiff's Cross-Motion**

Plaintiff alleges in her affidavit that she bears no liability in this matter as a seatbelt wearing passenger in defendant Doukoure's vehicle. Plaintiff's affidavit does not mention how the accident occurred or who was 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" (*Tsyganash v. Auto Fleet Mall Mgt., Inc.*, 163 A.D.3d 1033, 1033–1034, 83 N.Y.S.3d 74; see *Rodriguez v. City of New York*, 31 N.Y.3d 312, 76 N.Y.S.3d 898, 101 N.E.3d 366). "To be entitled to partial summary judgment a plaintiff does not bear the ... burden of establishing ... the absence of his or her own comparative fault" (*Rodriguez v. City of New York*, 31 N.Y.3d at 324–325, 76 N.Y.S.3d 898, 101 N.E.3d 366; see *Odetalla v. Rodriguez*, 165 A.D.3d 826, 826, 85 N.Y.S.3d 560; *Outar v. Sumner*, 164 A.D.3d 1356, 1356, 81 N.Y.S.3d 751; *Edgerton v. City of New York*, 160 A.D.3d 809, 811, 74 N.Y.S.3d 617).

Even though a plaintiff is no longer required to establish his or her freedom from comparative negligence, the issue of plaintiff's comparative negligence may be decided in the context of a summary judgment motion. The plaintiff can move for summary judgment dismissing a defendant's affirmative defense of comparative negligence (see *Poon v. Nisanov*, 162 A.D.3d 804, 808, 79 N.Y.S.3d 227). Here, it is uncontested that plaintiff was an innocent passenger that was free of comparative fault, (*Anzel v Pistorino*, 105 AD3d 784, 786 [2013], quoting *Medina v Rodriguez*, 92 AD3d 850, 850 [2012]), the court may exercise its discretion pursuant to CPLR 3212(g) and issue an order narrowing the issues that remain in dispute by specifying that plaintiff is free from comparative fault (see *Phillip v D & D Carting Co.*, 136 at 24-25).

Thus, the plaintiff is entitled to the issuance of an order pursuant to CPLR 3212(g) specifying that she was a passenger with her seat belt fastened, when the accident occurred, and as such was free from comparative fault in the happening of the accident. Defendants failed to

submit any evidence contradicting that plaintiff was an innocent passenger and free from fault. Defendants' prematurity arguments are unavailing as they have identified nothing that discovery will yield to overturn plaintiff's claim of being an innocent passenger. As to the issue of each defendants liability, the plaintiff has failed to meet their prima facie burden on that branch of the motion. Thus, that branch of plaintiff's cross-motion is denied.

Accordingly, it is hereby

ORDERED, that the defendant, IBRAHIMA DOUKOURE's motion is denied, it is further

ORDERED, that the plaintiff's cross-motion for summary judgment is granted to the extent of dismissing all affirmative defenses of comparative fault; and it is further

ORDERED, that the other branches of plaintiff's cross-motion are denied as their still exists questions of fact as to the liability and/or negligence of each of the defendants herein.

This constitutes the Decision and Order of this Court.

**Dated: January 19, 2022**

Hon. *BP*  
**BIANKA PEREZ, J.S.C.**

1. CHECK ONE.....

CASE DISPOSED IN ITS ENTIRETY       CASE STILL ACTIVE

2. MOTION IS.....

GRANTED       DENIED       GRANTED IN PART       OTHER

3. CHECK IF APPROPRIATE.....

SETTLE ORDER APPEARANCE       SUBMIT ORDER       SCHEDULE

FIDUCIARY APPOINTMENT       REFEREE APPOINTMENT