To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
WESTCHESTER COUNTY
PRESENT: HON. SAM D. WALKER, J.S.C.

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MAXINE BENT ANDERSON and HEATHER BENT-TAMIR,

Plaintiff,

-against-

GURMEET SINGH, NISHAN SINGH, BERNARD MORCHELES, and JOHN DOES 1-5 (hereinafter "JOHN DOE") a fictitious name for the individuals or entities which hired, employed or otherwise contracted with Defendant(s) at the time of the subject incident and is responsible by way of vicarious liability, respondeat superior or otherwise for the acts and omissions alleged herein and/or negligently repaired, managed, maintained, controlled, entrusted, and/or owned the subject vehicles described below and involved in the subject incident and whose identity is presently known only to the Defendant(s),

Defendants.

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DECISION & ORDER
Index No. 58229/2016
Seq. # 11

The following papers were read and considered in deciding the present motion:

Notice of Motion/Affirmation/Exhibits A-N	1-16
Memorandum of Law/Exhibits o-q, 2-1-2-4	17-21
Affirmation in Opposition/Exhibits A-P	22-38
Reply Affirmation/Exhibits A-H	39-47

Upon the foregoing papers it is ordered that the motion is GRANTED.

FACTUAL AND PROCEDURAL BACKGROUND

The plaintiffs, Maxine Bent Anderson ("Anderson") and Heather Bent-Tamir ("Bent-Tamir") commenced this action on May 7, 2015 in New York County, to recover

monetary damages for alleged injuries sustained in a motor vehicle accident that occurred on December 8, 2013 at or near the intersection of 12th Avenue and West 57th Street in New York City. At the time of the accident, the plaintiffs were passengers in a taxi operated by the defendant, Gurmeet Singh and owned by the defendant Nishan Singh, and such taxi was struck in the rear by a vehicle owned and operated by the defendant, Bernard Morcheles ("Morcheles").

By Decision and Order entered on May 19, 2016, the New York Supreme Court transferred venue to Westchester County. Then, on or about October 20, 2016, Fiduciary Insurance Company of America A/S/O Maxine Bent-Anderson commenced a subrogation action (Index No. 19203/2016) in Queens County against Bernard Morcheles, with regard to the same accident, seeking reimbursement for Additional Personal Injury Protection benefits paid to or on behalf of Maxine Bent-Anderson. By Decision and Order dated and entered on December 7, 2018, this Court granted a motion to transfer the subrogation action to this Court and join the actions for the purposes of discovery and trial.

The plaintiffs now file the instant motion for summary judgment pursuant to CPLR 3212, in favor of both plaintiffs against Morcheles, as to liability and to strike the defendants' affirmative defenses as to the plaintiffs' alleged comparative negligence and/or that the plaintiffs' conduct as the sole proximate cause of the accident. The plaintiffs also seek summary judgment pursuant to CPLR 3212, in favor of Anderson, against all defendants, asserting that her injuries satisfy the serious injury requirement as defined under New York Insurance Law §§ 5102(d) under the 90/180 day category of serious injury and to strike the defendants' affirmative defenses, as to Anderson,

alleging failure to sustain a serious injury under Insurance Law § 5102(d).

In support of their motion, the plaintiffs rely upon deposition testimony of the plaintiffs, Gurmeet Singh, Nishan Singh, Florence Weisz (Morcheles' sister), and Andrew Morcheles (Morcheles' son, Anderson's affidavit and supplemental affidavit, employment records, the affidavit and CV of James D. Nelson, M.D., and copies of the pleadings and court documents.

The plaintiffs contend that they were passengers in the taxi, which was completely stopped when it was rear-ended by Morcheles' vehicle and a sudden stop defense cannot succeed due to Morcheles' failure to maintain a safe distance and speed behind the taxi. The plaintiffs also argue that they are entitled to summary judgment on liability against Mrocheles under the innocent passenger doctrine and that the comparative negligence and/or sole proximate cause should be stricken. Anderson argues that she has proven objectively diagnosed injuries caused by the collision, which prevented her from substantially performing activities of daily living and working for ninety of the one hundred and eighty days after the collision.

In opposition, Morcheles argues that the motion must be denied in its entirety, since Anderson failed to submit competent medical evidence in admissible form to establish a medically determined injury or impairment of a non-permanent nature that prevented her from performing substantially all of the material acts that constituted her usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the subject motor vehicle accident.

Morcheles' attorney argues that the plaintiffs have also not met their burden of

establishing their entitlement to summary judgment with regard to liability, since the deposition transcripts demonstrate the existence of triable issues of material fact, including, (a) whether the traffic light facing the drivers of the two vehicles involved in the accident was yellow or red at the time of the accident; (b) whether the taxi entered the intersection and then stopped in the middle of the intersection in violation of the Vehicle and Traffic Law § 1202(a)(1)(c), which would constitute negligence per se and in violation of the highway rules of the New York City Department of Transportation, which would constitute evidence of Gurmeet Singh's negligence; and (c) the number of impacts that occurred during the accident.

Discussion

"[T]he proponent of a summary judgment motion 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 Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers, (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

"Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324, citing to *Zuckerman v City of New York*, 49 NY2d at 562). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion (*see Mgrditchian v Donato* , 141

AD2d 513 [2d Dept 1988]).

With regard to the issue of liability, the Court has already determined that the Singhs are not liable for the accident and as passengers in the front vehicle, the plaintiffs are also not liable. The plaintiffs have made out a prima facie showing of their entitlement to summary judgment, thereby shifting the burden to Morcheles to demonstrate the existence of a factual issue requiring a trial (*see Macauley v Elrac, Inc.*, 6 AD3d 584, 585 [2d Dept 2004]) [Rear-end collision is sufficient to create a prima facie case of liability.] If the operator of the striking vehicle fails to rebut this presumption and the inference of negligence, the operator of the stopped vehicle is entitled to summary judgment on the issue of liability (*see Leonard v City of New York*. 273 AD2d 205 [2d Dept 2000]; *Longhito v Klein*. 273 AD2d 281 [2d Dept 2000]; *Velasquez v Quijada*. 269 AD2d 592 [2d Dept 2000]; *Brant v Senatobia Operating Corp.*, 269AD2d 483 [2d Dept 2000]).

New York Vehicle and Traffic Law § 1129 states in pertinent part that:

> The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway. NY VTL § 1129 (a)

In (*Leal v Wolff*), the Second Department held that "[s]ince the defendant was under a duty to maintain a safe distance between his car and [the plaintiff's] car (*see* Vehicle and Traffic Law Section 1129[a]), his failure to do so in absence of a non negligent explanation constituted negligence as a matter of law" (*Leal v Wolf*. 224 AD2d 392 [2d Dept 1996]).

Further, "[w]hen the driver of an automobile approaches from the rear, he or she

is bound to maintain a reasonably safe rate of speed and control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle" (*see Zweeres v Materi*, 94 AD3d 1111 [2d Dept 2012]). "Drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident" (*Id.*).

Here, Morcheles fails to offer any non-negligent explanation for the accident and the opposition does not create any issues of fact with regard to liability. The fact that Morcheles rear ended the Singhs' vehicle, demonstrates that he was following too closely. The testimony established that the taxi was stopped when the vehicle was struck in the rear. The issues raised by Morcheles of whether the taxi stopped in the intersection, whether the light was red or yellow, and whether there were two impacts, does not create any issue of fact as to his liability and the proximate cause of the accident.

Further,"[w]hile a nonnegligent explanation for a rear-end collision may include evidence of a sudden stop of the lead vehicle, 'vehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows, since he or she is under a duty to maintain a safe distance between his or her car and the car ahead'" (*Tumminello v City of New York*, 148 AD3d 1084, 1085 [3d Dept 2017]). Even if the taxi came to a sudden stop at the intersection's yellow or red light, Morcheles should have anticipated that it might come to a stop (*Id.*).

In addition, "[t]he right of an innocent passenger to an award of summary judgment on the issue of liability against one driver is not barred or restricted by

potential issues of comparative fault as between that driver and the driver of another vehicle involved in the accident" (*Rodriguez vFarrell*, 115 AD3d 929 [2d Dept 2014]). Here, the plaintiffs have established their freedom from fault in the accident and therefore, are entitled to summary judgment. Morcheles' affirmative defenses as to the plaintiffs' comparative negligence and/or the plaintiffs' conduct as the sole proximate cause, are also stricken.

Serious Injury

Insurance Law §5104(a) provides in pertinent part that:

> Notwithstanding any other law, in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use of operation of a motor vehicle in this state, there shall be no right to recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss....(McKinney's Insurance Law §5104[a])

Insurance Law §5102(d) defines "serious injury" as

> a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment. (McKinney's Insurance Law §5102[d])

Anderson alleges that she sustained a medically determined injury or impairment

of a non-permanent nature which prevented her from performing substantially all of the material acts which constitute her usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment and seeks summary judgment in that category.

To be granted summary judgment in this category, 'a plaintiff must present objective evidence of "a medically determined injury or impairment of a non-permanent nature"' (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 357 [2002] *quoting* Insurance Law § 5102[d]).

The plaintiffs submitted the affidavit of James D. Nelson, M.D., a New York Licensed Neurologist. Dr. Nelson opined to a reasonable degree of medical certainty, that because of Anderson's cervical and lumbar radiculopathy injuries sustained due to the subject accident, she could not perform the material acts which constituted her usual and customary activities of daily living for at least 90 out of the 180 day following the accident and disabled from working for that period of time following the accident.

Morcheles' attorney argues at length that the Court should not consider the last 7 exhibits filed by the plaintiffs, since they were filed on the day after the deadline with the last file uploaded at 12:25 a.m.. The plaintiffs' attorney states that his office experienced technical issues with NYSCEF and submitted an affidavit from the paralegal who uploaded the documents, attesting to such. The Court deems this a de minimis delay and will consider all exhibits. Morcheles was not prejudiced by the delay and Morcheles' attorney also experienced issues with her filing of one of the motions.

The attorney also argues that Dr. Nelson's affidavit/affirmation should not be

considered because it is not sworn, affirmed or otherwise in admissible form, and that the Certificate of Conformity is improper because it does not comply with Massachusetts law. However, the Court finds no merit in such assertions and finds the affidavit to be in conformance with CPLR 2309. The notary public signed the document at the bottom and the doctors states that he swore to the contents of the report. To the extent that the affidavit does not contain the signature directly after the "Sworn to before me..." statement and only in the Certificate of Conformity does not make the affidavit invalid. The affidavit is signed by the doctor and duly notarized and the attorney did not dispute the authority of the notary or the veracity of the statements in the affidavit, nor has she demonstrated any prejudice resulting from the defect (*Sparaco v Sparaco*, 309 AD2d 1029 [3d Dept 2003]).

Further, the Certificate of Conformity complies with New York law and no specific form of oath is required (*Feinman v Mennan Oil Co.*, 248 AD2d 503 [2d Dept 1998]). Also, "a notary in the absence of a showing to the contrary, is presumed to have acted within his or her jurisdiction and to have carried out the duties required by law" (*Id.*). In addition, Dr. Nelson is licensed to practice medicine in New York and swore that his report was under the penalty of perjury. Therefore, a notary public is not required.

Upon review and viewing the facts in the light most favorable to Morcheles, this Court finds that Anderson has made a prima facie showing of entitlement to judgment as a matter of law with respect to a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for

not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

In opposition, Morcheles' attorney, argues that Anderson failed to sustain her evidentiary burden and submitted the reports of Rene Elkin, M.D., a neurologist and Richard Weinstein, M.D., an orthopedic surgeon, who performed independent examinations of Anderson on May 7, 2018 and May 9, 2018 respectively. Dr. Elkin performed range of motion testing, using visual inspection, self-determination and use of a goniometer. Dr. Elkin reported normal range of motion with the exception of Anderson's of her neck lateral rotation to the left of 40 degrees and on the right to 60 degrees (normal of 80 degrees). She reported tenderness to palpation of the cervical spine and cervical musculature and the cervical compression test was negative. Her examination of the shoulders revealed restriction of elevation and abduction to 130 degrees (normal of 180 degrees, with pain and tenderness to both shoulders, but no objective inflammation.

Dr. Elkin further reported that examination of the lower back revealed restriction of forward flexion to 40 degrees (normal of 60 degrees, retroflexion to 250 degrees (normal of 15 degrees and lateral bending and lateral rotation to either side to 25 degrees (normal of 25 degrees). She reported pain in the lower back with movement and tenderness to palpation of the lumbar spine and lumbar muscles, but no palpable lumbar muscle spasm.

Dr. Elkin reported that the examination revealed no objective findings for neurological injury attributable to the accident and stated that Anderson's accident

related symptoms are musculoskeletal, rather than neurological in etiology, consistent with cervical and lumbar muscle sprain. Dr. Elkin reported that there were no objective findings to corroborate the electrodiagnostic findings for cervical or lumbar radiculopathy and no objective findings for neurological injury that would explain the persistence of her symptoms. She states that there are no objective findings for neurological injury that would prevent her from returning to her pre-accident level of function without restrictions.

Dr. Elkin stated that, based on the evidence available to her there is no evidence for acute neurological injury to the cervical or lumbar spines or to any body part resulting from the accident. There are no objective findings for cervical or lumbar radiculopathy or cervical myelopathy. Therefore no objective findings for clinical carpal tunnel syndrome or any structural neurological injury resulting from the accident and no objective findings for neurological permanency or disability.

Dr. Weinstein also performed range of motion testing by visual inspection and use of a goniometer. For Anderson's cervical spine, Dr. Weinstein reported 30 degrees of flexion (normal 45); 30 degrees extension (normal 45); 60 degrees of right and left rotation (normal 80); 30 degrees of right lateral bending and 30 degrees of left lateral bending (normal 45). For the thoracolumbar spine, Dr. Weinstein reported 60 degrees of flexion (normal 90); 10 degrees of extension (normal 30); 20 degrees of right and left rotation (normal 30); 20 degrees of right and left lateral rotation (normal 30). He reported normal range of motion for the bilateral shoulder and bilateral wrists. Dr. Weinstein concluded that Anderson's cervical sprain and lumbar sprain are resolved

with the exception of subjective complaints and subjective decreased range of motion. He opined that Anderson does not require any further treatment in relation to the accident and has no disability and can work full duty without restrictions. All her complaints are subjective with no positive objective findings.

Morcheles also submitted the vocational rehabilitation assessment report of Alan L. Getreu, MA, CAP, CPFMC, CRC, the Director of First national Rehabilitation Services, who opined that Anderson does not meet the criteria to be considered vocationally, nor industrially disabled and is capable of carrying out the essential duties and functions of her most recent employment as a safety and health inspector or if she chooses not to return to her former occupation, she continues to be employable on a full time basis.

Here, the Court finds that Morcheles has failed to produce evidence to create the existence of material issues of fact. While Morcheles' attorney addressed Anderson's degenerative conditions and her status after immediately after the accident, her affirmation has no probative value because she has no personal knowledge and is not affirming as a physician in the case. Neither physician who examined Anderson addressed the degenerative issue nor related her injuries back to the time of the accident to determine if her alleged injuries prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following her alleged injury. Also, Mr. Getreu is not a physician and performed an analysis in 2018 as to her vocational capabilities.

Anderson alleged that the accident exacerbated/aggravated her previously asymptomatic degenerative conditions and neither Dr. Elkin nor Dr. Weinstein related their findings to the 90/180 serious injury category and therefore, do not raise an issue of fact in opposition to the prima facie showing (*Refuse v Magloire*, 83 AD3d 685 [2d Dept 2011]).

The Court also does not find the social security issue to be probative of whether Anderson suffered a serious injury under the 90/180 day category. Further the application for the benefits was not made within the time period under scrutiny. With regard to Dr. Jeffrey Chase, the records were not authenticated as his records and his first examination of Anderson was on March 25, 2014, after the 180 day period. Therefore, those records do not create an issue of fact.

Accordingly, based upon the foregoing, it is

ORDERED that the plaintiffs' motion for summary judgment is GRANTED. The parties are directed to appear before the Settlement Conference Part in Courtroom 1600 on January 14, 2020 at 9:15 a.m.

The foregoing shall constitute the Decision and Order of the Court.

Dated: White Plains, New York
December 17, 2019

Sam D. Walker
HON. SAM D. WALKER, J.S.C.