SHORT FORM ORDER

SUPREME COURT-NEW YORK STATE-NASSAU COUNTY

PRESENT:

HON. ANTHONY L. PARGA

JUSTICE

----------X PART 4

SHONDA D. HOLLEY,

Plaintiff,

INDEX NO. 607003/16

-against-

MOTION DATE: 3/25/19
SEQUENCE NO. 003, 004
XXX

MELALIA HERNANDEZ a/k/a S M LOPEZDEHERNANDEZ and AGAPITO QUINTANILLA a/k/a AGAPITO QUINTANILLA-CANAS,

Defendants.

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Notice of Motion, Affs. & Exs. 1
Affirmation in Opposition 2
Affirmation in Opposition 3
Affirmation in Reply 4
Reply Affirmation 5
Notice of Cross-Motion, Affs. & Exs 6

Upon the foregoing papers, the motion by defendants, Menalia Hernandez a/k/a S M Lopezdehernandez and Agapito Quintanilla a/k/a Agapito Quintanilla-Canas, for an order pursuant to CPLR §3212, granting them summary judgment dismissing the complaint on the ground that there is no material issue of fact regarding their liability; or in the alternative, for an order, pursuant to § 5102(d) of the Comprehensive Motor Vehicle Insurance Reparations Act of the State of New York, McKinney's Insurance Law Sections 5101 et. seq, dismissing the complaint on the ground that the injuries allegedly sustained by plaintiff do not satisfy the "serious injury" threshold requirement of Insurance Law §5104 (a), and the cross-motion by the plaintiff, Shonda D. Holley, for an order pursuant to CPLR §3025(b) granting her leave to amend her Bill of Particulars in order to specify her alleged "serious injuries" as defined by Insurance Law §5102 are determined as follows.

The plaintiff in this action seeks to recover damages for personal injuries she allegedly

suffered in a motor vehicle accident on September 10, 2013. At the time of the accident, the plaintiff was traveling on the loop roadway around Roosevelt Field mall in a 2005 Nissan owned by her husband. She was traveling behind a 1998 Chevrolet, owned by defendant Agapito Quintanilla a/k/a Agapito Quintanilla-Canas, which was being operated by his wife, defendant Menalia Hernandez. Defendants seek summary judgment dismissing the complaint on two grounds: They allege that there is no evidence that their vehicle was being operated negligently. In the alternative, they maintain that the complaint must be dismissed on the ground that the plaintiff did not sustain a "serious injury" as required by Insurance § 5104 (a).

The plaintiff opposes the defendants' motion and cross-moves for leave to amend her complaint to specify injuries which she maintains satisfy the "serious injury" requirement of the Insurance Law.

"A defendant moving for summary judgment in a negligence action has the burden of establishing, prima facie, that he or she was not at fault in the happening of the subject accident (quotations and citations omitted)" (*Jaber v Todd*, __ AD3d__ 2019 WL 1549563[2d Dept Apr. 10, 2019]; see also, *Jeong Sook Lee-Son v Doe*, 170 AD3d 973 [2d Dept 2019]).

At her examination-before-trial, defendant, Hernandez ('the defendant"), testified that as she was traveling on the loop road around Roosevelt Field mall, she slowed her truck to a stop at a crosswalk to let pedestrians cross. The roadway was one lane in each direction and was only wide enough for one vehicle to pass in each direction. Defendant testified that there was only about a foot and a half between the right side of her truck and the sidewalk. When she stopped, there were no cars in front of her and she observed only one car behind her, the plaintiffs. The defendant testified that while she was stopped, the plaintiff attempted to pass her truck on the right; she testified that she thought that the plaintiff "even went over the sidewalk." Defendant testified that the plaintiff's car's bumper got "stuck with the front" of the defendant's truck.

At her examination-before-trial, the plaintiff described the accident similar to the defendant. She testified that the defendant was stopped in front of her car as she was allowing pedestrians to cross. Two to three seconds after the pedestrians had crossed, she honked her horn at the defendant since she remained stopped. Plaintiff testified that about two seconds later, she proceeded to go around the defendant's truck on the right side. While the defendant's truck's wheels were turned to the left at about 50-75 degrees, her truck remained completely

stopped the entire time including when the plaintiff was driving around her. The plaintiff testified that when her car was parallel to the defendant's truck, she felt and heard an impact. In addition, to the parties deposition testimony the defendants seek to rely, in part, on the police report to establish the responding officer's conclusion regarding "apparent contributing causes" of the accident.

Without considering the police report, the evidence indicates that the defendant's truck was stopped and that the plaintiff's car was moving when the collision occurred. It also establishes that the plaintiff was passing the defendant's stopped vehicle in an area that was not fit for traffic as it was not a lane.

As such, the defendants have established their entitlement to summary judgment dismissing the complaint against them based upon a lack of evidence that their conduct was negligent or a cause of the subject accident (*Jaber v Todd,* supra). The burden accordingly shifts to the plaintiff to establish the existence of a material issue of fact.

Plaintiff in an attempt to establish the existence of a material issue of fact, seeks to rely on information in the police report which indicates that the plaintiff's and the defendants' cars had stopped to let pedestrians cross in front of the defendant's car and that *as the defendant's car started moving*, the defendants' car was in a collision with the plaintiff's car which was passing her on her right (emphasis added).

A police report is admissible under CPLR §4518 (c) to prove the facts recorded therein only if "it bears a certification or authentication by the head of ... the [police] department ... or by an employee delegated for that purpose." The MV–104A which the parties seek to rely on is not certified and therefore does not qualify for admission under CPLR §4518 (c) (*Nationwide Gen. Ins. Co. v Linwood Bates III*, 130 AD3d 795, 796 [2nd Dept 2015] [citations omitted]). Nor has "an affidavit or other sworn evidence from someone with personal knowledge establishing its authenticity or accuracy" been submitted (*Clear Water Psychological Services PC v Am. Tr. Ins. Co.*, 54 Misc3d 915, 917 [Civ Ct 2016]). Moreover, "[f]acts stated in a police report that are hearsay are not admissible unless they constitute an exception to the hearsay rule (quotations and citations omitted)" (*Memenza v Cole*, 131 AD3d 1020, 1021 [2d Dept 2015]). The police report was not made upon the officer's personal observation of the accident nor is there any indication that the information therein came from a person who was under a duty to provide it (*Memenza v*

Cole, 131 AD3d at 1021-22) or that the information constituted an admission (*Pivetz v Brusco*, 145 AD3d 806, 807 [2d Dept 2016]).

As the information in the police report was not recorded based upon the police officer's personal observations nor is there any indication as to where the information in it came from any alleged statements in it cannot be consider an admission, and as such it is inadmissible and cannot be relied upon by either party on these motions.

The plaintiff also relies on the affidavit of a non-party witness, her daughter Mashari Reed. Mashari, a passenger in the plaintiff's car at the time of the accident, described the accident like both the plaintiff and the defendant did at their depositions. However, in addition, she attests that when her mother, i.e., the plaintiff, "was almost completely passed the other vehicle, [she] observed the other vehicle move forward and to the right, striking [their] vehicle in the driver's side towards the rear."

Mashari's "self-serving affidavit[]" which has been submitted by plaintiff in opposition and executed some five years after the subject accident "clearly contradict[s] plaintiff's own deposition testimony and can only be considered to have been tailored to avoid the consequences of her earlier testimony." It is accordingly insufficient to raise a triable issue of fact (*Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318, 320 [1st Dept 2000]; see also, *Stancil v Supermarkets Gen.*, 16 AD3d 402, 403 [2d Dept 2005]).

Accordingly, the defendants' motion, pursuant to CPLR §3212, for summary judgment dismissing the complaint against them on the issue of liability, is granted and the complaint is dismissed.

In view of the foregoing, the branch of the defendants' motion to dismiss the plaintiff's complaint pursuant to Insurance Law §§ 5104 (a) and 5102 (d) is irrelevant and moot, and the plaintiff's cross-motion pursuant to CPLR 3025 (b), is moot and denied.

This concludes this action.

This constitutes the decision and Order of this Court. Any request for relief not expressly granted herein is denied.

Dated: April 22, 2019

ENTERED
APR 24 2019
NASSAU COUNTY
COUNTY CLERK'S OFFICE

Anthony L. Parga, J.S.C.

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