At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 1st day of March 2021.

P R E S E N T:
HON. LARA J. GENOVESI,
J.S.C.

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SARAH TORRES-HERNANDEZ and,
NELSON HERNANDEZ,

Index No.: 524036/2017

Plaintiffs,

DECISION & ORDER

-against-

FLAWLESS DCN, INC., DOMINGO NOLASCO and
BRIAN J. MELTON,

Defendants.

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

	NYSCEF Doc. No.:
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed	66-68; 94, 95
Opposing Affidavits (Affirmations)	80, 86; 104
Reply Affidavits (Affirmations)	81; 107

Introduction

Defendant, Brian J. Melton, moves by notice of motion, sequence number five, pursuant to CPLR § 3212, for summary judgment, dismissing the complaint. Plaintiffs,

Sarah Torres-Hernandez and Nelson Hernandez, and defendants Flawless DCN, Inc., and Domingo Nolasco oppose this motion.

Defendants, Flawless DCN, Inc., and Domingo Nolasco, move by notice of motion, sequence number six, pursuant to CPLR § 3212, for summary judgment on the grounds that plaintiff did not sustain serious injury within the meaning of Insurance Law § 5102(d). Plaintiffs oppose this motion.

Background

This action involves a motor vehicle accident that took place on March 11, 2016, near the intersection of Fourth Avenue and Prospect Avenue in Brooklyn, New York. Fourth Avenue has six lanes, three in the southbound and three in the northbound. The intersection is controlled by a traffic signal.

Plaintiff Sarah Torre- Hernandez (Torres Hernandez) testified at an examination before trial (EBT) on September 25, 2019 (*see* NYSCEF Doc. # 75, Torres-Hernandez EBT). Plaintiff Torres-Hernandez was driving her vehicle on Fourth Avenue and turning left onto Prospect Avenue. The traffic control signal was green (*see* NYSCEF Doc. # 75, Torres-Hernandez EBT at 75). Defendant Domingo Nolasco (Nolasco) was driving southbound on Fourth Avenue in the left lane, and defendant Brian Melton (Melton) was driving in the center lane (*see* NYSCEF Doc. # 79, Melton Aff. ¶7, 9). Plaintiff testified that as she was "two-thirds" of the way through the intersection, when the front of Nolasco's vehicle hit "the middle of the right side passenger door" of her vehicle (*see* Torres-Hernandez EBT at 19-22). Plaintiff testified that there was a second impact with Melton's vehicle (*see id.* 77-78). Plaintiff further testified that she doesn't know whose

vehicle Melton struck, hers or Nolasco's (*see id.* at 26), but knows that the "left side" of Melton's vehicle ended up by the "front right wheel well" of her vehicle (*see id.* at 78). Although plaintiff testified that she never saw either vehicle prior to the collision, plaintiff states by affidavit that the defendants were "rushing into the intersection" before the accident (*see id.* at 20, 26, 78; Torres-Hernandez Aff. at 2).

Melton testified that when plaintiff turned left on to Prospect Avenue, she was "racing to make the turn" (*see* NYSCEF Doc. # 76, Melton EBT at 22). Melton saw the front of plaintiff's vehicle "strike the left front driver's side of Mr. Nolasco's vehicle" (*see* Melton Aff. at ¶ 12). Melton also testified that the "front right" of plaintiff's vehicle came into contact with the "front left side and front, more to the side" of Nolasco's vehicle (*see* Melton EBT at 26, 27). Nolasco's vehicle "swerved" from the left lane on Fourth Avenue into the center lane on Fourth Avenue and struck the front driver's side wheel area with the passenger side of his car (*see* Melton Aff. at ¶ 10). Because Nolasco's vehicle suddenly entered the center lane, Melton was unable to avoid the collision despite immediately breaking (*see* Melton Aff. at ¶ 16). Approximately two seconds elapsed between the first collision and the second collision (*see* Melton Aff. at ¶ 15).

This action was commenced by the filing of the summons and complaint on December 13, 2017 (*see* NYSCEF Doc. # 1). Issue was joined on March 23, 2018 and May 23, 2018 (*see* NYSCEF Doc. # 2, 4). The note of issue was filed on December 20, 2020 (*see* NYSCEF Doc. # 44). On December 14, 2020, defendants Flawless DCN, Inc.

and Domingo Nolasco were precluded by order of the Honorable Lawrence Knipel (*see* NYSCEF Doc. # 112).

Discussion

Summary Judgment

"[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" (*Stonehill Capital Mgmt., LLC v. Bank of the W.*, 28 N.Y.3d 439, 68 N.E.3d 683 [2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 501 N.E.2d 572 [1986]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Chiara v. Town of New Castle*, 126 A.D.3d 111, 2 N.Y.S.3d 132 [2 Dept., 2015], citing *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 965 N.E.2d 240 [2012]; *see also Lee v. Nassau Health Care Corp.*, 162 A.D.3d 628, 78 N.Y.S.3d 239 [2 Dept., 2018]). 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 (*see Fairlane Fin. Corp. v. Longspaugh,* 144 A.D.3d 858, 41 N.Y.S.3d 284 [2 Dept., 2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, *supra; see also Hoover v. New Holland N. Am., Inc.*, 23 N.Y.3d 41, 11 N.E.3d 693 [2014]).

Liability

A violation of the Vehicle and Traffic Law constitutes negligence per se (*see Vainer v. DiSalvo*, 79 A.D.3d 1023, 914 N.Y.S.2d 236 [2d Dept., 2010]). Vehicle and

Traffic Law § 1141 provides that the "driver of a vehicle intending to turn to the left within an intersection . . . shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard." Vehicle and Traffic Law § 1128(a) provides that "a vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver first ascertained that such movement can be made with safety." While a driver is required to "see that which through proper use of [his or her] senses [he or she] should have seen, a driver who has the right-of-way is entitled to anticipate that the other motorist will obey the traffic law requiring him or her to yield" (*see Vainer v. DiSalvo*, 79 A.D.3d 1023, 914 N.Y.S.2d 236 [2 Dept., 2010] (quoting *Bongiovi v. Hoffman*, 18 A.D.3d 686, 795 N.Y.S.2d 254 [2 Dept., 2005]); *see also Platt v. Wolman*, 29 A.D.3d 663, 816 N.Y.S.2d 121 [2 Dept., 2006]). "A driver with the right-of-way who only has seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision" (*see Yelder v. Walters*, 64 A.D.3d 762, 883 N.Y.S.2d 290 [2 Dept., 2009]).

In this case, Melton did not make a prima facie showing of entitlement for summary judgment. Melton avers that there was never a collision between himself and the plaintiff, and that his vehicle only came into contact with co-defendant Nolasco. However, plaintiff's affidavit and EBT indicate that there were two impact to her vehicle. At times she testified that Melton struck her vehicle and testified that she is unsure as to whether Melton's vehicle ever came into contact with her vehicle. Plaintiff thereafter testified that driver's side wheel of Melton's vehicle was located by the "front right wheel

well" of her vehicle after the second impact (*see* NYSCE Doc # 75). Furthermore, the photographs taken at the scene of the accident show the vehicles close proximity after the accident (*see* NYSCEF # 78). "'It is not the court's function on a motion for summary judgment to assess credibility'". Here, the plaintiff's testimony was not incredible as a matter of law or unworthy of belief, but rather, raised issues of credibility to be resolved by a factfinder" (*Durand v. Salvation Army*, 186 A.D.3d 1325, 128 N.Y.S.3d 898, 899 [2 Dept., 2020] [internal citations omitted]).

Insurance Law § 5102

In the bill of particulars, plaintiff alleged injuries to her cervical spine, lumbar spine, left shoulder and right shoulder (*see* NYSCEF Doc. # 97 at ¶ 11). Plaintiff further alleges that the injuries sustained meet the following categories of Insurance Law § 5102: (1) permanent loss of body function/system, (2) permanent consequential limitation, (3) a significant limitation, and (4) a non-permanent medically determined injury which prevented him from his usual and customary activities for 90 out of the first 180 days following the accident (*see id.* at ¶ 20).

Defendants met their burden and establish that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). Defendants allege that plaintiff's injuries were not causally related to the accident, as she had prior injuries to both shoulders and had previously undergone surgery to both shoulders related to the prior accident. Defendant provided the sworn medical report of Dr. Pierce J. Ferriter, M.D., who examined plaintiff on December 23, 2019 and found full range of motion in plaintiff's cervical and lumbar spine. Dr. Ferriter measured range of motion loss in plaintiffs

shoulders up to 50%. The doctor opined that "some subjective restrictions of motion in bilateral shoulders were not supported by objective clinical findings of today's examination. The examinee is capable of functional use of the examined body parts for normal activities of daily living as well as usual daily activities including regular work duties" (NYSCEF Doc. # 100). While Dr. Ferriter mentions plaintiff's prior shoulder surgery, the report is silent as to whether the injuries were causally related by the accident. However, defendants also provided the sworn report of Dr. Scott A. Springer, M.D., who reviewed plaintiff's MRI examinations taken on November 9, 2016 and opines that she had right and left shoulder tears which were degenerative and not causally related to the March 11, 2016 accident (*see* NYSCEF Doc. # 101).

With respect to the 90/180–day category of Insurance Law § 5102(d), defendants provided plaintiffs deposition transcript where she identified her daily activities before the accident as "[w]alking, occasionally jogging, attending to my household, taking care of family members, crocheting, reading, gardening, baking" (NYSCEF Doc. # 99 at 55). She testified that as of the date of the deposition, there is "not much" she is able to do besides walk and read. Interacting with her family is "pretty limited" (*id.* at 56; *cf. Reid v. Edwards- Grant*, 186 A.D.3d 1741, 129 N.Y.S.3d 798 [2 Dept., 2020]).

In opposition, while plaintiff failed to address the issue of causation related to her shoulders, plaintiff raised a triable issue of fact as to whether plaintiff sustained a serious injury to her cervical and lumbar spine as a result of the accident. Plaintiff provided the sworn report of Dr. Michael C. Gerling, M.D. whose most recent examination on September 16, 2020, shows range of motion loss up to 50% in plaintiffs cervical spine and

almost 60% in plaintiff's lumbar spine (*see* NYSCEF Doc. # 105). Gerling discussed the cervical discectomy and fusion surgery plaintiff underwent after the accident on November 6, 2016 and opined that plaintiffs cervical and lumbar injuries result in permanent disability and are directly causally related to the accident (*see id.*).

Conclusion

Accordingly, defendant Brian J. Melton's motion for summary judgment (sequence number five) and defendants Flawless DCN, Inc., and Domingo Nolasco's motion for summary judgment (sequence number six) are denied. This constitutes the decision and order of this court.

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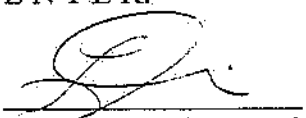

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