At an IAS Term, Part 66 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 13th day of September, 2021

PRESENT:
HON. RICHARD VELASQUEZ
Justice.

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MACIE FLOWERS,

Plaintiff,

-against-

SABRINA L. KELLY, TRACIE GILLIAM, and DARNELL A. JONES,

Defendants,

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Index No.: 520292/~~2019~~2019
Decision and Order

The following *papers NYSCEF* Doc #'s 7 to 21 read on this motion:

Papers	*NYSCEF DOC NO.'s*
Notice of Motion/Order to Show Cause Affidavits (Affirmations) Annexed	30-39; 41-47; 52
Opposing Affidavits (Affirmations)	53-70; 74-75; 78; 80
Reply Affidavits	82; 83

After having heard Oral Argument on SEPTEMBER 13, 2021 and upon review of the foregoing submissions herein the court finds as follows:

Defendant, SABRINA L. KELLY move pursuant to CPLR § 3212 for an order granting defendants summary judgment, in as much as plaintiff fails to meet the serious injury threshold requirement mandated by Insurance Law § 5102 (d). (MS#3). Defendants, TRACIE GILLIAM, and DARNELL A. JONES also move pursuant to CPLR § 3212 for an order granting defendants summary judgment, in as much as plaintiff fails

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to meet the serious injury threshold requirement mandated by Insurance Law § 5102 (d). (MS#4). Plaintiff opposes both motions and cross-moves pursuant to 3212 for summary judgment on the issue of liability as an innocent passenger. (MS#5). Defendants oppose the same.

Analysis

It is well established that a moving party for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issue of fact. *Winegrad v. New York Univ. Med. Center*, 64 NY2d 851, 853 (1985). Once there is a prima facie showing, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form to establish material issues of fact, which require a trail of the action. *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986). However, where the moving party fails to make a prima facie showing, the motion must be denied regardless of the sufficiency of the opposing party's papers.

A motion for summary judgment will be granted "if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing the judgment in favor of any party". CPLR 3212 (b). The "motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." *Id.*

In a soft tissue injury case, a plaintiff alleging a "serious injury", must provide objective medical evidence of a "serious injury" within the meaning of the Insurance Law § 5102(d). A defendant seeking summary judgment on the grounds that plaintiff's injury

does not meet the threshold, the defendant must show that there is no question of fact that there is no loss of range of motion.

In the present motion defendants fail to show that there is no "serious injury" as a matter of law because defendants own evaluating doctor, Dr. Passick finds limited ranges of motion. Additionally, all evaluating doctors find differing ranges of motion. This is similar to the situation in *Knokhinov v. Murray*, 27 Misc.3d 1211(A), 2010 WL 1542529 (N.Y.Sup.), where the evaluating doctors found differing normative values. In *Knokhinov*, the court denied summary judgment because when the findings reported by one doctor are assessed by application of the standard of "normal" stated by the other doctors, the reports present "contradictory proof". *Id. See also Dettori v. Molzon*, 306 AD2d 308, 309 [2d Dept 2003]. As Judge Battaglia noted in *Knokhinov supra.,* in the Second Department, measuring a plaintiff's range of motion and comparing it to a normal range of motion has become the linchpin of determining if a soft tissue injury is a "serious injury." Therefore, in a case such as this where the ranges of motion observed by one of the doctors is less than the range of motion sworn to by another of the doctors, there are issues of fact.

Next the Court shall address plaintiffs' motion for summary judgment. It is well established "the right of an innocent passenger to summary judgment on the issue of whether he or she was at fault in the happening of an accident is not restricted by potential issues of comparative negligence as between two defendant drivers" (*see* CPLR 3212[g]; *Jung v. Glover,* 169 AD3d 782, 783, 93 NYS3d 390; *Phillip v. D & D Carting Co., Inc.,* 136 AD3d 18, 24–25, 22 NYS3d 75; *Anzel v. Pistorino,* 105 AD3d 784, 786, 962 NYS2d 700; *Medina v. Rodriguez,* 92 AD3d 850, 850, 939 NYS2d 514; *Garcia*

v. Tri–County Ambulette Serv., 282 AD2d 206, 207, 723 NYS2d 163; *Silberman v. Surrey Cadillac Limousine Serv.*, 109 AD2d 833, 833–834, 486 NYS2d 357). Here, the plaintiff made a prima facie showing of entitlement to summary judgment on their motion (*see generally Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, 501 NE2d 572). It is uncontested that the injured plaintiff was an innocent passenger. Neither driver suggested that the injured plaintiff bore any fault in the happening of the accident (*see Phillip v. D & D Carting Co., Inc.*, 136 AD3d at 25, 22 NYS3d 75), *quoting Romain v. City of New York*, 177 AD3d 590, 591, 112 NYS3d 162, 164 (2d Dep't 2019). Plaintiff in the present case is an innocent passenger is entitled to summary judgment on the issue of liability to the extent that they are not liable for the happening of the accident. As such, plaintiff is entitled only to an order finding that their absence of liability was established (*id.*; CPLR 3212[g]); quoting *Huerta-Saucedo v. City Bronx Leasing Inc.*, 147 AD3d 695, 48 NYS3d 132, 132–33 (2d Dep't 2017).

Accordingly, all Defendants motions for summary judgment, upon the ground that Plaintiff has failed to meet the "serious injury" threshold requirement mandated by Insurance Law §5102(d) is hereby denied, for the reasons stated above. (MS#3) & (MS#4). Accordingly, Plaintiff's motion for summary judgment on the issue of liability is hereby granted to the extent that they are not liable for the happening of the accident. (MS#5).

Dated: Brooklyn, New York
SEPTEMBER 13, 2021

ENTER FORTHWITH:

HON. RICHARD VELASQUEZ J.S.C.

HON. RICHARD VELASQUEZ

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