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| <b>McKenzie v Chacha</b>   |
| 2021 NY Slip Op 33374(U)   |
| September 24, 2021   |
| Supreme Court, Westchester County  |
| Docket Number: Index No: 53978/2019  |
| Judge: Joan B. Lefkowitz   |
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SUPREME COURT: STATE OF NEW YORK  
IAS PART WESTCHESTER COUNTY  
PRESENT: HON. JOAN B. LEFKOWITZ, J.S.C.

To commence the statutory time period 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.

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DONNETTE MORRISON MCKENZIE,

Plaintiff,

DECISION & ORDER

-against-

Index No: 53978/2019

Motion Sequence Nos. 1-4

ARIOLFO CHACHA, MADHUSDHAN C. PATEL,  
SMRITI DESAI, MIGUEL A. PENA, ROSA E.  
MARTEESPINAL, and RENE  
RONZONALMONTE,

Defendants.

-----X  
ARIOLFO CHACHA,

Third-Party Plaintiff,

-against-

MADHUSDHAN C. PATEL, SMRITI DESAI,  
MIGUEL A. PENA, ROSA E. MARTEESPINAL  
and RENE RONZONALMONTE,

Third-Party Defendants.

-----X  
The following papers (NYSCEF document nos. 53-204) were read on: (1) the motion by the defendant/third-party defendant, Miguel A. Pena, for an order granting summary judgment dismissing the complaint and all cross claims asserted against him (sequence no. 1); (2) the motion by the defendants/third-party defendants, Smriti Desai and Madhusdhan C. Patel, for an order granting summary judgment dismissing the complaint and all cross claims asserted against them (sequence no. 2); (3) the motion by the defendants/third-party defendants, Rosa E. Marteespinal and Rene Ronzonalmonte, for an order granting summary judgment dismissing the complaint and all cross claims asserted against them (sequence no. 3); and (4) the motion by the plaintiff, Donnette Morrison McKenzie, for an order granting summary judgment on the issue of liability as against the defendant, Ariolfo Chacha (sequence no. 4).

Motion Sequence No. 1

Notice of Motion-Affirmation-Exhibits (A-E)-Certificate-Statement of Facts  
Affirmation in Partial Opposition (by Desai and Patel)-Exhibits (A-D)-  
Response to Statement of Facts (by Desai and Patel)  
Affirmation in Opposition (by Chacha)-Exhibits (A-E)  
Response to Statement of Facts (by Chacha)  
Affirmation in Opposition (by McKenzie)-Exhibits (A-E)-  
Response to Statement of Facts (by McKenzie)  
Reply Affirmations (2)-Exhibit (A)-Certificates (2)

Motion Sequence No. 2

Notice of Motion-Affirmation-Exhibits (A-V)-Statement of Facts  
Affirmation in Opposition (by Chacha)-Exhibits (A-C)-Affirmation of Facts-  
Response to Statement of Facts (by Chacha)  
Response to Statement of Facts (by Desai and Patel)-  
Response to opposition filed by Chacha (by Desai and Patel)  
Affirmation in Opposition (by McKenzie)-Exhibits (A-E)-  
Response to Statement of Facts (by McKenzie)  
Response to opposition filed by McKenzie (by Desai and Patel)-Exhibit (A)

Motion Sequence No. 3

Notice of Cross-Motion-Affirmation  
Affirmation in Partial Opposition (by Desai and Patel)-Exhibits (A-C)  
Affirmation in Opposition (by Chacha)-Exhibits (A-F)-Affirmation of Facts-  
Certification  
Affirmation in Opposition (by McKenzie)-Exhibits (A-E)

Motion Sequence No. 4

Notice of Motion-Affirmation-Exhibits (1-14)-Statement of Facts  
Affirmation in Response (by Desai and Patel)-Exhibits (A-F)-  
Response to Statement of Facts (by Desai and Patel)  
Affirmation in Opposition (by Chacha)-Exhibits (A-F)-Affirmation of Facts-  
Certification  
Response to Statement of Facts (by Chacha)  
Reply Affirmation-Exhibits (A-E)-Response to Chacha's Statement of Facts  
Sur-Reply by Chacha

Upon reading the foregoing papers, it is

ORDERED the motion by the defendant/third-party defendant, Miguel A. Pena, is denied (sequence no. 1); and it is further

ORDERED the motion by the defendants/third-party defendants, Smriti Desai and Madhusdhan C. Patel, is granted (sequence no. 2), and so much of the complaint and all cross claims that assert a cause of action against Smriti Desai and Madhusdhan C. Patel are hereby severed and dismissed; and it is further

ORDERED the cross-motion by the defendants/third-party defendants, Rosa E. Marteespinal and Rene Ronzonalmonite, is denied (sequence no. 3); and it is further

ORDERED the motion by the plaintiff is denied (sequence no. 4); and it is further

ORDERED the parties to the severed action shall appear for a settlement conference in the Settlement Conference Part. The Clerk of the Settlement Conference Part shall notify the parties of the date, time, and method of the settlement conference.

Plaintiff sues to recover damages for personal injuries purportedly sustained in a multi-vehicle chain collision that occurred on December 21, 2018, at approximately 7:20 a.m., on the Sprain Brook Parkway northbound in the Village of Elmsford, New York, during heavy rainfall. The accident allegedly occurred on the three-lane parkway when the vehicle operated by the defendant/third-party plaintiff, Ariolfo Chacha (Chacha) struck the rear of the vehicle operated by the plaintiff, Donnette Morrison McKenzie (McKenzie or Plaintiff) as well as the rear of the vehicle operated by the defendant, Madhusdhan C. Patel (Patel) and owned by the defendant, Smriti Desai (Desai). As a result of the collision between Chacha and McKenzie, McKenzie's vehicle was propelled into the rear of the vehicle operated by the defendant, Miguel A. Pena (Pena). In turn, Pena's vehicle was then propelled into the vehicle operated by the defendant, Rosa E. Marteespinal (Marteespinal) and owned by the defendant, Rene Ronzonalmonite (Ronzonalmonite).

Plaintiff commenced this action on March 13, 2019, as against defendant Chacha only. Chacha subsequently commenced a third-party action against Patel, Desai, Pena, Marteespinal and Ronzonalmonite (Third-Party Defendants). Thereafter, Plaintiff amended her complaint to add the Third-Party Defendants as direct defendants to her action.

Following the completion of discovery, Pena moves for an order granting summary judgment dismissing the complaint and all cross claims asserted against him (sequence no. 1). Desai and Patel separately move for an order granting summary judgment dismissing the complaint and all cross claims asserted against them (sequence no. 2). Marteespinal and Ronzonalmonite also move separately for an order granting summary judgment dismissing the complaint and all cross claims asserted against them

(sequence no. 3). Last, Plaintiff moves for an order granting her summary judgment on the issue of liability as against defendant Chacha (sequence no. 4).

On a motion for summary judgment the court's function is to determine whether triable issues of fact exist or whether judgment can be granted to a party on the proof submitted as a matter of law (*see* CPLR 3212 [b]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). In determining the motion, the court must view the evidence in a light most favorable to the nonmovant and is obliged to draw all reasonable inferences in the nonmovant's favor (*see Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]; *Stukas v Streiter*, 83 AD3d 18, 22 [2d Dept 2011]). Such a motion may be granted only if the movant tenders sufficient evidence in admissible form demonstrating, prima facie, the absence of triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Failure to make a prima facie showing requires denial of the motion regardless of the sufficiency of the opposing papers (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the prima facie burden is met, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form establishing the existence of material issues of fact requiring a trial (*see Zuckerman*, 49 NY2d at 562). "Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it should only be employed when there is no doubt as to the absence of triable issues" (*Owens v City of New York*, 183 AD3d 903, 906 [2d Dept 2020] [internal quotation marks omitted]).

"In a multi-vehicle, chain reaction accident, when the operator of a vehicle that was propelled into another vehicle by a following vehicle presents evidence that he or she was unable to safely bring his or her vehicle to a stop behind the lead vehicle before being struck in the rear by a following vehicle, that operator has established his or her prima facie entitlement to judgment as a matter of law. Thus '[i]n chain collision accidents, the operator of the middle vehicle may establish prima facie entitlement to judgment as a matter of law by demonstrating that the middle vehicle was struck from behind by the rear vehicle and propelled into the lead vehicle' " (*Niosi v Jones*, 133 AD3d 578, 579 [2d Dept 2015], quoting *Kuris v El Sol Contr. & Constr. Corp.*, 116 AD3d 675, 675-676 [2d Dept 2014] [internal citations omitted]). Summary judgment is not appropriate in a motor vehicle action where the parties adduce conflicting versions concerning the circumstances of how the accident occurred (*see Matias v Bello*, 165 AD3d 642, 643 [2d Dept 2018]).

Motion by Pena for Summary Judgment  
Sequence No. 1

Pena failed to establish his prima facie entitlement to judgment as a matter of law on the issue of liability dismissing the complaint and all cross claims asserted against him. In support of his motion, Pena proffers, *inter alia*, the deposition testimony of

Plaintiff<sup>1</sup>, defendant Chacha, as well as the police accident report, of which Pena submits demonstrates that he was not the proximate cause of the accident thereby warranting summary judgment in his favor as a matter of law.

It is axiomatic that there can be more than one proximate cause of an accident and, in general, it is for the trier of fact to determine the issue of proximate cause (*see Hurst v Belomme*, 142 AD3d 642, 642 [2d Dept 2016]; *Kalland v Hungry Harbor Assoc., LLC*, 84 AD3d 889, 889 [2d Dept 2011]). “[T]he issue of proximate cause may be decided as a matter of law where only one conclusion may be drawn from the established facts” (*Kalland*, 84 AD3d at 889). Here, based on the evidence submitted by Pena, the court cannot find, as a matter of law, that only one conclusion may be drawn. More specifically, the evidence submitted, including the conflicting deposition testimony of Pena and Chacha as to how the accident occurred, raises a triable issue of material fact (*see Matias*, 165 AD3d at 643). Insofar as Pena failed to demonstrate his prima facie entitlement to judgment as a matter of law, the court need not consider the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

In any event, even assuming that Pena demonstrated his prima facie entitlement to judgment as a matter of law, the papers submitted in opposition raise a triable issue of material fact. Specifically, in opposition to Pena’s motion, defendant Chacha proffers the deposition testimony of Plaintiff dated September 12, 2019. During this deposition, Plaintiff testified that the Dodge operated by Pena, although stopped behind a vehicle ahead of it, suddenly swung into her lane of traffic which caused her to have to quickly apply the brakes (*see McKenzie deposition tr dated September 12, 2019*, at 44; 48-50). This testimony contradicts Plaintiff’s subsequent deposition testimony dated March 4, 2020 (*cf. McKenzie deposition tr dated March 4, 2020*, at 28-30), and Pena’s deposition testimony (*see Pena deposition tr at 22-23; 26-27; 40*) as to the manner in which Pena entered Plaintiff’s lane of travel. Thus, the conflicting evidence submitted raises an issue of fact as to whether Pena operated his vehicle improperly or engaged in any conduct which helped bring about the collision (*see Veltri v Solomon*, 107 AD3d 699, 699-700 [2d Dept 2013]; *cf. Biddy v Vanmaltke*, 67 AD3d 845, 846 [2d Dept 2009]). Accordingly, the motion by Pena is denied.

Motion by Desai and Patel for Summary Judgment  
Sequence No. 2

Desai, as vehicle owner, and Patel, as vehicle operator, established their prima facie entitlement to judgment as a matter of law dismissing the complaint and all cross

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<sup>1</sup> Pena submits only the deposition testimony of the Plaintiff dated March 4, 2020, and not Plaintiff’s earlier deposition testimony dated September 12, 2019.

claims asserted against them by demonstrating that they were not at fault in the happening of the accident and, thus, they do not bear any culpability for Plaintiff's injuries (*see Bidy*, 67 AD3d at 846). The record demonstrates that the vehicle operated by Patel was rear-ended through no fault of Patel's own making and that Patel did not strike any other vehicles. Thus, Patel demonstrated that he was not a proximate cause of the accident (*see Strickland v Tirino*, 99 AD3d 888, 890 [2d Dept 2012]). Accordingly, the burden of going forward shifted to Plaintiff and the co-defendants to raise a triable issue of material fact (*see Zuckerman*, 49 NY2d at 557).

The papers submitted in opposition failed to raise a triable issue of material fact (*see* CPLR 3212 [b]). There is no competent proof in the record that Patel operated his vehicle improperly or engaged in any conduct which helped bring about the rear-end collision involving his vehicle or any of the subsequent collisions (*see Bidy*, 67 AD3d at 846; *Matias v Blaha*, 272 AD2d 591, 592 [2d Dept 2000]; *Yusupov v Supreme Carrier Corp.*, 240 AD2d 660, 660 [2d Dept 1997]). The record further demonstrates that Patel " 'was in no position to take any steps to either reasonably foresee or avoid the rear-end collision' " (*Yusupov*, 240 AD2d at 660, quoting *Barnes v Lee*, 158 AD2d 414, 414 [1st Dept 1990]). Defendant Chacha's reliance on Plaintiff's deposition testimony dated September 12, 2019, wherein plaintiff testified that "a blue car...a Subaru or something" (McKenzie deposition tr dated September 12, 2019, at 54) was one of two cars that struck her vehicle is insufficient to raise a triable issue of material fact as to Desai and Patel's liability. Notwithstanding the speculative nature of that portion of Plaintiff's testimony upon which Chacha relies and the undisputed fact that Patel's Subaru was silver (not blue as testified by Plaintiff), but in opposition to Patel's motion, Plaintiff concedes that there was no contact between her vehicle and that of Patel's and further concedes that she has no viable cause of action against Patel (*see* Saunders affirmation in opposition at ¶ 21, NYSCEF Doc No. 175). Accordingly, the motion by Desai and Patel is granted, and the complaint and all cross claims asserted against them are dismissed.

Motion by Marteespinal and Ronzonalmonite for Summary Judgment  
Sequence No. 3

Marteespinal, as vehicle operator, and Ronzonalmonite, as vehicle owner, established their prima facie entitlement to judgment as a matter of law dismissing the complaint and all cross claims asserted against them by demonstrating that they were not at fault in the happening of the accident and, thus, they do not bear any culpability for Plaintiff's injuries (*see Bidy*, 67 AD3d at 846). Specifically, the record demonstrates that the vehicle operated by Marteespinal was struck in its rear by Pena after Marteespinal, who testified that she was driving below the speed limit at approximately 35 miles-per-hour given the weather conditions, had stopped in her lane as a result of a stopped car directly in front of her and that she was otherwise unable to

move to another lane given the traffic flow (*see* Marteespinal deposition tr., at pgs. 28-31). Accordingly, the burden of going forward shifted to Plaintiff and the co-defendants to raise a triable issue of material fact (*see Zuckerman*, 49 NY2d at 557).

In opposition, Plaintiff and the co-defendants raised a triable issue of material fact. They proffer, *inter alia*, the deposition transcript of defendant Pena, who testified that the vehicle operated by Marteespinal had suddenly stopped because two vehicles in front of Marteespinal had impacted and that Pena did not observe any brake lights (*see* Pena deposition tr at 20-22). Pena testified that as a result of the sudden stop by Marteespinal he attempted to move into the next lane of traffic, but his left-side view mirror made contact with the left rear side of Marteespinal's bumper (*see id.* at 23-25). Viewing the evidence in a light most favorable to the non-movants (*see* CPLR 3212), Pena's testimony is sufficient to raise a triable issue of fact as to whether Marteespinal operated her vehicle improperly or engaged in any conduct which helped bring about the collision (*see Tutrani v County of Suffolk*, 10 NY3d 906, 907-908 [2008]; *Baez-Pena v MM Truck & Body Repair, Inc.*, 151 AD3d 473, 476-477 [1st Dept 2017]; *Veltri*, 107 AD3d at 699-700; *cf. Matias*, 272 AD2d at 592). Accordingly, the motion by Marteespinal and Ronzonalmonite is denied.

Motion by Plaintiff for Partial Summary Judgment against Chacha  
Sequence No. 4

The motion by Plaintiff for an order granting partial summary judgment on the issue of liability as against defendant Chacha is denied.

In support of the motion, Plaintiff proffers, *inter alia*, the police accident report and only select portions of the various deposition transcripts of herself and that of defendant Chacha and State Trooper Daniel Kim. The incomplete deposition transcripts are not in admissible form (*see* CPLR 3212 [b]; *Ching Kuk Yeung v Ellis*, 38 Misc3d 1234 (A) \*3 [Sup Ct, Kings County 2013]) thereby warranting denial of the motion on this basis alone. However, insofar as this action is subject to NYSCEF and the court can readily obtain and review the full deposition transcripts omitted by Plaintiff which have been submitted in connection with the prior motions, and which the court has already reviewed in rendering its decisions on the prior motions, the court will do so herein.

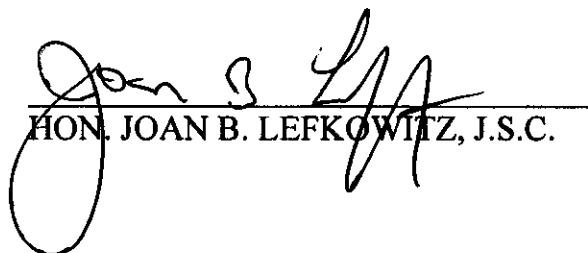
First, the court addresses the police accident report and deposition testimony of Trooper Kim. The deposition testimony of Trooper Kim, who did not witness the accident, and the related section of the police accident report prepared by Trooper Kim, in which he identified that Chacha "attempt[ed] to slow down due to traffic with negative results[]...[and] took...evasive action and moved to the right lane, but subsequently swiped the right rear of [v][ehicle]-3 [operated by McKenzie] that was in front",

constitutes inadmissible hearsay (*see Ardanuy v RB Juice, LLC*, 164 AD3d 1296, 1297 [2d Dept 2018]; *Memenza v Cole*, 131 AD3d 1020, 1021-1023 [2d Dept 2015]).

Further, in reviewing the deposition testimony of Plaintiff and that of defendant Chacha, the court finds that there exists a triable issue of material fact as to the manner in which the collision between Chacha and McKenzie occurred. At deposition, Chacha testified that an unidentified "small black car" struck his vehicle in the rear, causing his vehicle to move forward and strike the rear of plaintiff's vehicle (*see Chacha deposition tr at 23*). Viewing the evidence in the light most favorable to Chacha, as non-movant (*see CPLR 3212*), this testimony is sufficient to establish the existence of a triable issue of material fact as to whether he was at fault for the happening of the accident (*see Lutz v Defabio*, 140 AD3d 1032, 1033 [2d Dept 2016]; *Kuris*, 116 AD3d at 676). Although Plaintiff contends that such testimony constitutes an attempt by Chacha to raise a feigned issue of fact, the court cannot find, as a matter of law, Chacha's testimony to be incredible. Accordingly, the motion by plaintiff is denied.

ENTER,

Dated: White Plains, New York  
September 24, 2021

  
HON. JOAN B. LEFKOWITZ, J.S.C.