

Singh v BQB Car Servs. Inc
2022 NY Slip Op 31100(U)
April 4, 2022
Supreme Court, Kings County
Docket Number: Index No. 510790/2018
Judge: Debra Silber
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At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 4th day of April, 2022.

P R E S E N T:

HON. DEBRA SILBER,

Justice.

-----X

KEAN R. SINGH,

Plaintiff,

DECISION / ORDER

- against -

Index No. 510790/2018
Mot. Seq. # 2, 3, 4, 5, 6 & 7

BQB CAR SERVICES INC, UDOKA S. EZENWA ELUMELU,
KEVON N. EDWARDS and AMJAD HABIB,

Defendants

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Cross Motion and
Affidavits (Affirmations) _____

31-38; 40-45; 52-55; 57-68;
69-78; 79-98

Opposing Affidavits (Affirmations) _____

99-100; 103; 104-110; 113;
115; 117; 121-126

Reply Affidavits (Affirmations) _____

111; 112; 120; 127; 128

Upon the foregoing papers in this personal injury action, all of the defendants, Amjad Habib (Habib), Kevon N. Edwards (Edwards), BQB Car Services Inc. (BQB Car) and Udoka S. Ezenwa Elumelu (Ezenwa Elumelu) move, respectively, (in motion sequence [mot. seq.] nos. two, three, and four), pursuant to CPLR 3212, for orders granting each summary judgment and dismissing the action on the grounds that plaintiff Kean R. Singh’s

alleged injuries fail to satisfy the “serious injury” requirement established by Insurance Law § 5102 (d).

Defendant Edwards also moves (in mot. seq. no. five) for an order, pursuant to CPLR 3212, granting him summary judgment and dismissing the action as against him on the basis that he was not negligent in the happening of the accident.

Defendant Habib similarly moves (in mot. seq. no. six) for an order, pursuant to CPLR 3212, granting him summary judgment dismissing the action against him on the basis that he bears no responsibility for the accident or plaintiff’s injuries.

Plaintiff Singh cross-moves (in mot. seq. no. seven) for an order, pursuant to CPLR 3212, granting summary judgment in her favor on the issue of liability as against all defendants.

Background

Plaintiff commenced this negligence action, alleging she sustained serious injuries as a result of an automobile accident which involved three motor vehicles. On February 17, 2017, plaintiff Singh was riding on Eastern Parkway in Brooklyn, New York, as a rear-seated passenger in a 2013 Toyota, owned by BQB Car and operated by Ezenwa Elumelu. As Ezenwa Elumelu approached the intersection of St. John Place and Eastern Parkway (the “Intersection”) he caused his motor vehicle to come to a complete stop behind a 2016 Hyundai owned and operated by Habib. Habib was stopped at the intersection at a red traffic signal. The traffic signal then changed to green, but Habib did not move. After waiting 15 to 30 seconds behind Habib, Ezenwa Elumelu used his right-side view mirror and then turned to look behind him before employing his right turn signal to indicate he

was going to move his vehicle into the right lane. Prior to beginning the maneuver to change lanes, Ezenwa Elumelu observed a 2003 Chevy Tahoe, owned and operated by defendant Edwards, approaching in the right lane. Edwards was traveling straight in the lane to the right of the Ezenwa Elumelu and Habib vehicles. Ezenwa Elumelu moved right, and the front driver's side of Edwards' 2003 Chevy Tahoe came into contact with the middle passenger side of the 2013 Toyota operated by Ezenwa Elumelu and occupied by plaintiff. The impact caused the 2013 Toyota to move forward, resulting in it coming into contact with the front passenger side of Habib's 2016 Hyundai.

During and prior to the two collisions, plaintiff was seated behind Ezenwa Elumelu on the driver's side of the 2013 Toyota. She was not wearing a seatbelt. Upon the first impact, between the 2003 Chevy Tahoe and the 2013 Toyota, plaintiff claims she was propelled towards the front of her seat, resulting in her right knee coming into contact with the center console of the motor vehicle.¹ The second impact caused plaintiff to fall into the "footwell" between the rear seats and front seats. No ambulance or medical attention was provided to plaintiff immediately following the accident.

On February 19, 2017, two days after the accident, Singh sought treatment from Dr. Sayeedus Salehin (Dr. Salehin) due to, among other physical concerns, pain and movement limitations relating to her right knee. Dr. Salehin prescribed physical therapy, acupuncture, and chiropractic treatment. Dr. Salehin also directed follow-up appointments for re-examination and referred plaintiff to have MRI films of her right knee. An MRI was performed on February 23, 2017. Following the conservative treatment of Dr. Salehin,

¹ Singh testified to suffering injuries to other body parts as a consequence of the accident; however, the verified bill of particulars only alleges and seeks damages for injuries suffered to her right knee as a consequence of the accident.

plaintiff was referred to an orthopedist who recommended that Singh undergo arthroscopic knee surgery. On July 27, 2017, Dr. Stanislav Avshalumov (Dr. Avshalumov) performed arthroscopic knee surgery on plaintiff and confirmed that she had a posttraumatic dislocated radial tear coming from the posterior horn of the medial meniscus, bursitis, and synovitis. Following the surgery, plaintiff underwent a course of physical therapy and appeared for follow up examinations by Dr. Avashalumov and Dr. Salehin.

On May 24, 2018, plaintiff filed a summons and verified complaint asserting negligence causes of action against each named defendant, seeking monetary damages for her pain and suffering and economic loss resulting from the accident. Each defendant subsequently appeared with the filing of an answer asserting various affirmative defenses and cross claims against his/its co-defendants. Thereafter discovery commenced and a final pre-note order, dated January 26, 2021, included a preclusion order against Habib, precluding him from offering personal testimony. On January 26, 2021, plaintiff filed the note of issue, attesting that all discovery was complete and seeking a jury trial.

Presently before this court are six (6) motions. Three motions (mot. seq nos. two, three, and four) are brought by the defendants seeking summary judgment dismissing the action, pursuant to Insurance Law § 5104 (a), on the basis that plaintiff's injuries fail to reach the serious injury threshold within the meaning of Insurance Law § 5102 (d). Defendants Edwards and Habib also respectively move, in motion seq nos. five and six, for orders, granting each summary judgment dismissing the action on the basis that neither defendant is liable to plaintiff for the occurrence of the accident. Plaintiff also cross-

moves, in mot. seq. seven, for an order, pursuant to CPLR 3212, granting her summary judgment on the issue of liability against all defendants.

The Serious Injury Threshold Motions

The Parties' Positions

Defendants each contend that plaintiff cannot maintain the instant negligence action, as her alleged injuries fail to meet the serious injury threshold established by Insurance Law § 5102 (d).² They argue that Insurance Law § 5104 (a) provides that a plaintiff has no right of recovery for non-economic loss, except where there are serious injuries as defined by Insurance Law § 5102 (d). Defendants maintain that plaintiff's right knee injuries do not constitute a permanent loss of use, a permanent consequential limitation, or a significant limitation of use of her right knee, nor did they result in a substantial curtailment of all of her activities for 90 out of the first 180 days. As a consequence, defendants insist she fails to satisfy the serious injury requirement, necessitating dismissal of the action.

Supporting their positions, defendants proffer, among other evidence, the deposition testimony of Singh, her verified bill of particulars, and the expert evidence from Drs. Mark Decker and Dana A. Mannor. They first address the claim that plaintiff suffered a serious injury due to substantial curtailment of all activities for 90 out of the first 180 days immediately following the accident, defendants argue that plaintiff testified that she returned to work shortly after the accident. Additionally, plaintiff averred to have only missed approximately two to three weeks of work cumulatively after the accident.

² Habib submits moving papers, which are incorporated by reference and adopted by defendants Edwards, BQB Car, and Ezenwa Elumelu.

Defendants accordingly maintain that such evidence defeats any claim by plaintiff Singh that she suffered a serious injury on the basis that she was substantially curtailed from performing all of her routine activities for 90 out of the first 180 days following the accident.

Addressing Singh's allegations that she suffered a permanent, consequential, and/or significant limitation to her right knee as a result of the accident, defendants principally rely on the expert reports of radiologist Dr. Mark Decker and orthopedist Dr. Dana A. Mannor [Doc 38]. Dr. Decker's report [Doc 37] attests that on January 5, 2020, he reviewed MRI images of plaintiff's right knee taken on February 23, 2017. He averred that his review of these images allowed him to conclude that there was no evidence of any tears, fractures, or an acute traumatic injury to plaintiff's right knee. He also states that he observed, in the right knee, "patella alta with lateral subluxation and thickened medial plica," which he states is longstanding and not related to the accident.

Dr. Mannor attests that she performed an orthopedic examination of plaintiff's right knee. Dr. Mannor concluded that plaintiff's right knee had no orthopedic limitations in use and that Singh was able to have functional use of the right knee for normal activities. She determined the range of motion for both flexion and extension of plaintiff's right knee was normal and that passive range of motion was full.

Based upon the expert evidence, defendants assert that they have each established a prima facie case entitling them to dismissal of the action, as plaintiff did not sustain a permanent loss of use, a permanent consequential limitation, and/or a significant limitation to her right knee as a result of the accident. Additionally, defendants argue that evidence

of surgery to repair tears to portions of plaintiff's right knee is alone insufficient to establish that plaintiff suffered a serious injury within the meaning of Insurance Law § 5102 (d) or to rebut their prima facie showing. Accordingly, each defendant seeks dismissal of the action pursuant to Insurance Law § 5104 (a).

In opposition, Singh rejects defendants' assertions that she did not suffer a serious injury within the meaning of Insurance Law § 5102 (d). Plaintiff proffers, among other evidence, a personal affidavit and medical evidence from Dr. Salehin and Dr. Avshalumov. She contends that as a result of the accident she sustained permanent and consequential injuries to her right knee, requiring surgery to repair the injuries and causing her to experience right knee pain, limitation in movement, and impediment of her daily activities. She avers that as a consequence of the accident, she has difficulty walking up and down stairs, experiences weekly knee pain, and has limited physical mobility.

Dr. Salehin attests that based upon his physical examination and testing of plaintiff, he concludes that plaintiff's right knee condition, pain, and limitations of motion were caused by the accident. Dr. Avshalumov opines that his examination revealed tenderness and a limited range of motion. Dr. Avshalumov avers that the injuries plaintiff sustained "caused significant limitations to activities of daily living . . . [and] posttraumatic osteoarthritis" which is permanent in nature (NYSCEF Doc No. 126, Dr. Stanislav Avshalumov Affirmation, at 5). Dr. Avshalumov also concludes that these conditions are the result of the accident. He attests that Singh had "reached the point of maximal medical improvement from conservative medical treatment" before the surgery (*Id.*).

Accompanying both Dr. Salehin's and Dr. Avshalumov's affirmations are plaintiff's medical reports and diagnostic tests. Both physicians attest to relying on such medical records in rendering their opinions. Amongst the information contained in the medical reports is a notation, wherein Dr. Salehin comments that plaintiff "achieved maximum medical benefit from continuous medical intervention with physical therapy and other modalities" (NYSCEF Doc No. 123, Dr. Sayeedus Salehin's Affirmation, Annexed Medical Records, at 8-9). Dr. Avshalumov notes on two occasions (June 19, 2017 and July 17, 2017) that Singh's medical treatments, including physical therapy, were not successful in alleviating her continuing pain or improving her right knee function (*see* NYSCEF Doc No. 126, Dr. Stanislav Avshalumov's Affirmation, Annexed Medical Records, at 11 & 20). Accordingly, plaintiff maintains that defendants' summary judgment motions on the issue of serious injury must be denied as she presents competent medical evidence raising questions of fact as to whether she sustained a serious injury within the meaning of Insurance Law § 5102 (d).

In reply, Habib challenges the medical evidence presented in plaintiff Singh's opposition. Habib asserts that plaintiff's medical records reveal that after her initial period of treatment following the accident, she did not seek treatment from Dr. Salehin for a period of three and a half years. Habib argues this unexplained gap in treatment from February 26, 2018 to July 19, 2021, renders Dr. Salehin's medical opinion speculative as to the permanency and causation of Singh's alleged knee injuries. For identical reasons, Habib maintains that Dr. Avshalumov's medical opinion must be rejected as well. Habib also asserts that the accompanying medical records relied upon by Dr. Salehin and Dr.

Avshalumov do not support the conclusions presented by Drs. Salehin and Avshalumov, but, to the contrary, establish that plaintiff did not suffer a serious injury. Accordingly, Habib argues that plaintiff failed to rebut defendants' prima facie case.

Discussion

On a motion for summary judgment the court's function is issue finding, not issue determination (*see Trio Asbestos Removal Corp. v Gabriel & Sciacca Certified Pub. Accountants, LLP*, 164 AD3d 864, 865 [2d Dept 2018] [internal citations omitted]). "Summary judgment is a drastic remedy not to be used if there is any doubt that a triable issue of fact exists" (*Cunningham v Gen. Elec. Credit Corp.*, 96 AD2d 502, 502 [2d Dept 1983]). "A party moving for summary judgment must demonstrate that 'the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment' in the moving party's favor" (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014], quoting CPLR 3212 [b]). "[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" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once the movant sets forth a prima facie case, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 557 [1980]). It is well established that where there is competing expert evidence submitted by adversaries, summary judgment is not appropriate and the credibility of the experts must be resolved by the trier of fact (*see generally O'Brien v Port*

Auth. of N.Y. & N.J., 29 NY3d 27 [2017]; *see also Cummings v Brooklyn Hosp. Ctr.*, 147 AD3d 902, 904 [2d Dept 2017]; *Feinberg v Feit*, 23 AD3d 517, 519 [2d Dept 2005]; *but cf. Zimmer v Chemung County Performing Arts*, 65 NY2d 513 [1985]).

In 1973 New York adopted legislation establishing a legal regime addressing automobile insurance commonly known as the No-Fault Law (*see Comprehensive Automobile Insurance Reparations Act*, L 193, ch 13). The legislation required car owners to possess automobile insurance to compensate an injured party for “basic economic loss” in the event of an accident (Insurance Law §§ 5102 [a]; 5103; *see also Pommells v Perez*, 4 NY3d 566, 571 [2005]). The Court of Appeals has “long recognized that the legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries” (*Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 350 [2002] [internal quotation marks and citations omitted]). “Only in the event of ‘serious injury’ as defined in the statute, can a person initiate suit against the car owner or driver for damages caused by the accident” (*Pommells*, 4 NY3d at 571, quoting Insurance Law § 5104 [a]). “[M]inor, mild or slight limitation of use is classified as insignificant within the meaning of the no-fault statute” (*see Gaddy v Eyler*, 79 NY2d 955, 957 [1992] [internal quotation marks and citations omitted]). Only those injuries which result in “permanent loss of use,” “permanent consequential limitation of use,” or “significant limitation of use” of a body part are deemed to be serious injuries under No-Fault Law (Insurance Law § 5012 [d]). Additionally, serious injury is also defined as “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” (*Id.*).

“In the context of soft-tissue injuries involving complaints of pain . . . deciding what is a serious injury can be particularly vexing. Additionally, whether there has been a significant limitation of use of a body function or system . . . can itself be a complex, fact-laden determination” (*Pommells*, 4 NY3d at 571 [internal quotation marks omitted]). The mere existence of an internal tear is not evidence of a serious injury in the absence of objective evidence demonstrating the extent of any alleged physical limitations resulting from the injury and the duration of the limitation (*see McCloud v Reyes*, 82 AD3d 848, 849 [2d Dept 2011], citing *Resek v Morreale*, 74 AD3d 1043 [2d Dept 2010]; *Larson v Delgado*, 71 AD3d 739 [2d Dept 2010]; *Ciancio v Nolan*, 65 AD3d 1273 [2d Dept 2009]; *Niles v Lam Pakie Ho*, 61 AD3d 657 [2d Dept 2009]; *Cornelius v Cintas Corp.*, 50 AD3d 1085 [2d Dept 2008]).

To be entitled to summary judgment dismissing an action on the basis that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d), the defendant must proffer competent medical evidence establishing that the injuries were minor, insignificant, or not permanent in nature (*see generally Islam v Makkar*, 95 AD3d 1277, 1278 [2d Dept 2012], citing *Cantave v Gelle*, 60 AD3d 988 [2d Dept 2009]; *Morris v Edmond*, 48 AD3d 432 [2d Dept 2008]; *Rodriguez v Huerfano*, 46 AD3d 794 [2d Dept 2007]). Where a defendant has established its prima facie case, the plaintiff must submit sufficient medical evidence demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law (*see generally Haber v Ullah*, 69 AD3d

796, 797 [2d Dept 2010]). Plaintiff must present objective evidence of the injury; expert evidence merely mirroring language tailored to meet the threshold requirement of Insurance Law § 5102 (d) is insufficient (*see Holder v Brown*, 18 Ad3d 815, 816 [2d Dept 2005]). “Moreover, these verified objective medical findings must be based on a recent examination of the plaintiff. In that vein, any significant lapse of time between the cessation of the plaintiff’s medical treatments after the accident and the physical examination conducted by his own expert must be adequately explained” (*Grossman v Wright*, 268 AD2d 79, 84 [2d Dept 2000] [internal citations omitted]).

Here, questions of fact prevent this court from finding, as a matter of law, that plaintiff did not sustain a serious injury to her right knee as a result of the accident. Though defendants demonstrated a prima facie case establishing their entitlement to summary judgment dismissing the matter by presenting the expert affidavits of Drs. Decker and Mannor, plaintiff Singh’s medical evidence raises questions of fact as to whether she in fact sustained a permanent, consequential, or significant injury to her right knee. Drs. Salehin and Avshalumov each opine that, as a result of the accident, plaintiff suffers from continuing pain and limited range of motion in her right knee. Supporting these conclusions, both physicians proffer various medical reports documenting their observations and the results of diagnostic testing performed on Singh’s right knee. Among these findings are measurements reflecting that plaintiff’s right knee has a range of motion below that which is considered normal. Dr. Avshalumov further opined that based upon his observations, he determined that plaintiff is suffering from posttraumatic osteoarthritis,

another consequence of the accident, which will have longstanding and additional disabling effects over time.

Habib's assertions in reply concerning Singh's gap in treatment fails to defeat the issues of fact raised in plaintiff's doctors' submissions. While evidence of an unexplained gap in treatment may be used to establish that a plaintiff did not sustain a serious injury (*see generally Pommells*, 4 NY3d at 572; *Grossman* 268 AD2d at 84), where there is evidence that treatment was not continued due to it becoming palliative in nature, such evidence establishes a reasonable excuse for the cessation of treatment (*see Pommells*, 4 NY3d at 577-578; *see also Park v He Jung Lee*, 84 AD3d 904, 905 [2d Dept 2011]; *Paz v Wydrzynski*, 41 Ad3d 453, 453-454 [2d Dept 2007]). Singh's medical records demonstrate multiple observations by Dr. Avshalumov and Dr. Salehin and statements by plaintiff, showing that treatment of her knee had reached maximum improvement (*see generally* NYSCEF Doc No. 126, Dr. Stanislav Avshalumov's Affirmation, Annexed Medical Records, at 11 & 20; *see also* NYSCEF Doc No. 123, Dr. Sayeedus Salehin's Affirmation, Annexed Medical Records, at 8-9 ["After discussing treatment with [plaintiff] and all treating physicians, it is my opinion that [plaintiff] has achieved maximum medical benefit from continuous medical intervention with physical therapy and other modalities. Further treatment would be palliative although at the time of the final evaluation, [plaintiff] was still complaining of residual pain in the . . . right knee . . . affecting [plaintiff] activities of daily living"]). Accordingly, the proffered evidence presented by plaintiff sufficiently explained any cessation of treatment. Thus, the trier of fact must make the determination

of whether plaintiff Singh sustained a serious injury within the meaning of Insurance Law § 5102 (d).

Liability

The Parties' Positions

Defendant Edwards also seeks an order granting him summary judgment dismissing the action on the issue of liability. Edwards primarily relies on the deposition testimony of himself and defendant Ezenwa Elumelu to support his contention that he cannot be found liable for the occurrence of the accident. He maintains that the evidence establishes that the sole cause of the accident was the negligence of Ezenwa Elumelu, who darted into his lane of travel, thus entitling Edwards to summary judgment dismissing the action as against him.

Edwards argues that Ezenwa Elumelu's failure to safely change lanes caused the accident. Edwards highlights Ezenwa Elumelu's testimony wherein he states that prior to attempting to change lanes, he observed Edwards' motor vehicle approaching when it was three-car lengths away. According to Edwards, despite observing Edwards' vehicle approaching, Ezenwa Elumelu, purportedly in violation of the Vehicle and Traffic Law, continued to change lanes, causing the accident.³ Edwards relies upon his own testimony to demonstrate that he was complying with all Vehicle and Traffic Laws, traveling at 20 miles per hour, and was wholly within his lane of travel. He asserts that he did not see Ezenwa Elumelu's automobile until after the collision occurred. Based upon the foregoing, Edwards concludes that he was free of any negligence in causing the accident, that the sole

³ No party provided a police report in connection with the accident.

proximate cause of the accident was Ezenwa Elumelu's conduct, and an accelerated judgment in his favor must be granted dismissing the action.

In opposition, both plaintiff and Ezenwa Elumelu reject Edwards' assertions and maintain that he is not entitled to summary judgment dismissing the action against him. Plaintiff argues that the deposition testimony is not supportive of Edwards' claims, countering that Edwards failed to observe Ezenwa Elumelu's vehicle as it changed lanes, thus contributing to the occurrence of the accident. Singh also insists that multiple acts from separate individuals can each be found to be the proximate cause of an accident, arguing that Edwards has failed to establish a prima facie case that he was completely free of any negligence with regard to the accident.

Defendant Ezenwa Elumelu asserts that issues of fact prevent the court from finding, as a matter of law, that Edwards was completely free from liability in the instant action. He argues that there is no evidence that he unsafely changed lanes. Relying on his own testimony, Ezenwa Elumelu maintains that he used his side mirrors and looked behind him prior to attempting to change lanes and he had determined there was sufficient space and time to change lanes. He attests that he indicated the maneuver with his turn signals and that Edwards failed to observe what was in front of him. Accordingly, plaintiff and Ezenwa Elumelu argue that Edwards has not established his prima facie case, or alternatively, that questions of fact prevent the entry of summary judgment in Edwards' favor.

Defendant Habib also seeks summary judgment in his favor, likewise presenting the testimony of Ezenwa Elumelu and Edwards.⁴ He emphasizes that their testimony

⁴ He was not deposed, and is subject to a preclusion order. Therefore, his motion is based on the evidence provided by other parties.

establishes that he was stopped at a red traffic signal when he was struck from behind by Ezenwa Elumelu. He argues that New York has long standing precedent that a motorist, stopped and struck from behind, is entitled to summary judgment in his favor, absent any evidence demonstrating negligence on his/her part. He insists that there is no evidence that he was negligent in any way or that he contributed to causing the accident. Accordingly, he maintains that the undisputed evidence demonstrates his entitlement to summary judgment dismissing the complaint as against him, along with any cross claims.

Both plaintiff and Ezenwa Elumelu oppose Habib's motion, claiming that questions of fact prevent finding, as a matter of law, that Habib did not contribute to the accident. Both present photographic evidence which they claim demonstrates that the point of impact to Habib's motor vehicle was the front passenger side, thus raising a question of fact as to whether the accident constitutes a rear end collision. Further, both plaintiff and Ezenwa Elumelu maintain that New York State law prohibits disrupting and obstructing the normal flow of traffic. They each contend that Ezenwa Elumelu's deposition testimony demonstrates that the traffic signal had changed to green, so Habib's failure to progress through the intersection violated the Vehicle and Traffic Law, and he was thus negligent and was a proximate cause of the occurrence of the accident.

In reply, Habib maintains he established his prima facie case and that the opposing parties have failed to present evidence to raise any questions of fact. Defendant Habib asserts that the opposition evidence fails to demonstrate that he was obstructing traffic in violation of the law. He highlights that pursuant to Ezenwa Elumelu's deposition testimony, the traffic signal had changed from red to green for 15 to 30 seconds prior to

the occurrence of the accident. Habib argues that this evidence fails to raise any questions of fact, or are insufficient to impose liability on the basis that he caused the accident by obstructing traffic. In response to the proffered photographic evidence concerning the location of the impact to his vehicle, Habib does not contest that the impact point was the front passenger side, but emphasizes that Ezenwa Elumelu was stopped behind him, while he was stopped at the traffic signal. He insists that while he remained stopped, Ezenwa Elumelu came into contact with his motor vehicle from behind, after Edwards' motor vehicle came into contact with Ezenwa Elumelu's motor vehicle. Accordingly, he maintains that the opposing parties failed to rebut his prima facie case demonstrating his entitlement to summary judgment.

Finally, plaintiff seeks summary judgment on the issue of liability against all defendants on the ground that she was an innocent passenger bearing no liability for the occurrence of the accident. She principally relies on her deposition testimony, along with the deposition testimony of defendants Ezenwa Elumelu and Edwards. She maintains that the evidence clearly establishes that the defendants were the sole cause of the accident and that she was an innocent passenger. She argues that the accident occurred when Ezenwa Elumelu unsafely attempted to switch lanes and Edwards failed to observe the traffic conditions on the roadway. She insists that neither deposition attributes any actions to her which could be deemed to be contributory in causing the accident. Accordingly, plaintiff argues that the evidence clearly establishes that she is entitled to an accelerated judgment on the issue of liability.

In opposition, the defendants do not contest plaintiff's assertions that she was an innocent passenger, free of culpability in causing the accident, but rather maintain that she has failed to establish their fault in causing the accident. Edwards insists that the evidence, contrary to plaintiff's presentation, establishes that the sole proximate cause of the accident was the conduct of Ezenwa Elumelu. He cites his deposition testimony, wherein he attested to driving at a safe speed, traveling wholly within his lane of traffic, and not observing Ezenwa Elumelu's motor vehicle until after the accident occurred. He further relies on Ezenwa Elumelu's testimony, wherein deponent conceded that he was attempting to change lanes, despite observing Edwards' motor vehicle approaching, only three car lengths away. Edwards maintains that this evidence rebuts plaintiff's assertions that he was negligent.

Defendant Ezenwa Elumelu argues that plaintiff has failed to demonstrate he was negligent. He contends that the testimony she proffered establishes Edwards' culpability, but not his own, in the happening of the accident. He insists that the evidence presented by plaintiff supports the conclusion that Edwards was the sole proximate cause of the accident. He again relies on his and Edwards' testimony, arguing that the evidence demonstrates that he began changing lanes safely and lawfully, and it was Edwards' failure to observe his vehicle entering the lane that caused the accident. Ezenwa Elumelu claims that the disparate accounts of the accident presented in both his and Edwards' testimony results in plaintiff's failing to establish that either defendant caused the accident. Therefore, Ezenwa Elumelu maintains that, at a minimum, the court should deny Singh's

cross motion to the extent she seeks an order attributing liability to any specific defendant, as a trier of fact is required to resolve the issue of liability.

Habib's opposition argues that numerous questions of fact preclude the court from finding that either Ezenwa Elumelu or Edwards are solely, or are both, liable for causing the accident. Critically, Habib highlights that no party presents arguments or evidence that he contributed to the causing of the accident, but rather the motion papers are solely based on arguments that the other defendants were the cause of the accident. Accordingly, Habib again maintains that he is entitled to dismissal of the action and that the court should deny plaintiff's cross motion to the extent it seeks to attach liability to any defendant.

In reply, plaintiff rejects the defendants' opposition. She maintains that the evidence proffered in support of her cross motion demonstrates her entitlement to summary judgment and that the defendants' opposition fails to raise questions of fact rebutting her prima facie case. She contends that the deposition testimony establishes that Ezenwa Elumelu failed to change lanes safely, operating his vehicle in violation of the Vehicle and Traffic Law, and Edwards failed to see what there was to be seen while he was operating his motor vehicle. She argues that these facts demonstrate, as a matter of law, that all of the defendants are culpable for causing the accident. Additionally, she posits that no defendant has proffered evidence rebutting her assertions that she was an innocent passenger free from any liability. Thus, plaintiff concludes that she is entitled to summary judgment on the issue of liability.

Discussion

“A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, prima facie, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries” (*Balladares v City of New York*, 177 AD3d 942, 943 [2d Dept 2019] [internal quotation marks and citations omitted]). In context of negligence claims concerning a motor vehicle accident, a plaintiff must demonstrate “that the accident was proximately caused by any negligent conduct [by the defendants] in operating [their] motor vehicle[s]” (*see Howell v RS Cab Corp.*, 63 AD3d 1002, 1002 [2d Dept 2009]). “In order for a defendant driver to establish entitlement to summary judgment on the issue of liability in a motor vehicle collision case, the driver must demonstrate, prima facie, inter alia, that he or she kept the proper lookout, or that his or her alleged negligence, if any, did not contribute to the accident” (*Elkholy v Dawkins*, 175 AD3d 1487, 1487-88 [2d Dept 2019], quoting *Ellis v Vazquez*, 155 AD3d 694, 695 [2d Dept 2017]). “Negligence cases by their very nature do not usually lend themselves to summary judgment, since often, even if all parties are in agreement as to the underlying facts, the very question of negligence is itself a question for jury determination” (*Davis v Commack Hotel, LLC*, 174 AD3d 501, 502 [2d Dept 2019] quoting *Ugarriza v Schmieder*, 46 NY2d 471, 474 [1979]). “It is fundamental that summary judgment should only be granted where there are no material and triable issues of fact” (*Paulin v Needham*, 28 AD3d 531, 531 [2d Dept 2006] [internal quotation marks and citations omitted]).

“A plaintiff moving for summary judgment on the issue of liability must meet the

twofold burden of establishing that he or she was free from comparative fault and was, instead, an innocent passenger, and, separately, that the operator of the rear vehicle was at fault” (*Phillip v D & D Carting Co., Inc.*, 136 AD3d 18, 24 [2d Dept 2015]). However, “[t]he 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” (*Medina v Rodriguez*, 92 AD3d 850, 850 [2d Dept 2012], citing CPLR 3212 [g]; *see also Balladares*, 177 AD3d at 944). Thus, even where questions of fact remain as to the defendants’ liability to plaintiff, where a plaintiff establishes she is an innocent passenger, partial summary judgment finding the plaintiff is free from liability in causing the action is appropriate (*see Romain v City of New York*, 117 AD3d 590, 590-592 [2d Dept 2019]; *Medina*, 92 AD3d at 850-851; *Garcia v Tri-County Ambulette Serv.*, 282 AD2d 206, 206-207 [1st Dept 2001]).

Additionally, where a vehicle operator is stopped and is struck from behind, such evidence “is sufficient to create a prima facie case of liability and imposes a duty of explanation with respect to the operator of the offending vehicle” (*Itingen v Weinstein*, 260 AD3d 440, 441 [2d Dept 1999]). To rebut the first operator’s prima facie case on liability, the opponent must proffer evidence demonstrating a question of fact as to whether there is a non-negligent explanation for the occurrence of the accident or an act of negligence on the part of the struck vehicle operator (*see generally Fernandez v Babylon Mun. Solid Waste*, 117 AD3d 678 [2d Dept 2014]; *Zdenek v Safety Consultants, Inc.*, 63 AD3d 918 [2d Dept 2009]; *Jumandeo v Franks*, 56 AD3d 614 [2d Dept 2008]).

Here, the proffered evidence presented by the parties demonstrate that there are

questions of fact which precludes the entry of summary judgment, as a matter of law, against or in favor of either Ezenwa Elumelu or Edwards on the issue of liability. Their competing deposition testimony requires the trier of fact to determine their credibility and whether either or both defendants' conduct deviated from the applicable standard of care in operating their respective vehicles. Ezenwa Elumelu testified to activating his turn signal, assessing the flow of traffic, and then concluded that there was sufficient time and space to safely maneuver into the adjacent lane. Similarly, Edwards attested that he was traveling at a safe rate of speed, wholly within his lane of traffic, and did not observe defendant Ezenwa Elumelu's motor vehicle until after the automobiles came into contact with each other. This conflicting evidence requires the trier of fact to determine which driver is culpable for the occurrence of the accident, or if they both are.

However, Habib has established, through the deposition testimony of Ezenwa Elumelu, his entitlement to dismissal of the action against him. The uncontested evidence demonstrates that Habib was completely stopped at the traffic signal when he was struck from behind by Ezenwa Elumelu, after the Ezenwa Elumelu vehicle was pushed into Habib's vehicle, after contacting the Edwards vehicle. Thus, Habib has established that he is entitled to the legal presumption that he is free from liability for the occurrence of the accident, requiring the opposing or parties to present evidence of his negligence. No party presents any evidence which raise a triable issue of fact defeating this presumption.

The contention that Habib, by remaining stopped for some seconds at the traffic signal constitutes, in and of itself, negligence, is unsupported by any law or precedent. Absent evidence demonstrating erratic driving and/or an abrupt stop at a green traffic

signal, Habib's failure to immediately proceed through a green traffic signal is neither evidence of negligence nor a violation of the Vehicle and Traffic Law (*see generally Sokolowska v Song*, 123 AD3d 1004 [2d Dept 2014]; *Romero v Al Haag & Son Plumbing & Heating, Inc.*, 113 AD3d 746 [2d Dept 2014]; Vehicle and Traffic Law § 1111 [a] [1] ["Traffic, except pedestrians, facing a steady circular green signal *may* proceed straight through . . . [s]uch traffic . . . *shall* yield the right of way to other traffic lawfully within the intersection . . ."] [Emphasis added]). The Vehicle and Traffic Law does not compel a driver facing a green signal to immediately proceed through a traffic signal but does require that that, prior to any advancement through an intersection, the operator of a motor vehicle yield to the traffic with the right of way. Here, no party presents evidence that Habib was operating his car erratically and came to an abrupt stop. Rather the only evidence presented is that he was stopped at a red signal, which changed to a green signal and he did not immediately proceed through it. Such evidence does not defeat his prima facie case on liability. Perhaps a pedestrian was completing his crossing and Habib was waiting. We do not know, but it does not matter. By making an issue of the point of impact on Habib's motor vehicle, such argument is a feigned issue of fact, is not material, and does not rebut the uncontested evidence that he was struck from behind while completely stopped. While the uncontested evidence does establish that Habib's motor vehicle came into contact with Ezenwa Elumelu's on Habib's front passenger side, the mere fact that the point-of-contact to defendant Habib's motor vehicle was not his rear bumper does not create a triable issue of fact. The unrefuted evidence presented demonstrates that the origin of the impact to Habib's automobile was from behind, as he was stopped at a traffic signal at an intersection.

Accordingly, Habib's motion for summary judgment on the issue of liability is granted and the action is dismissed as against him, along with any cross claims.

Finally, turning to plaintiff's cross motion for summary judgment, that portion of the cross motion which seeks a finding that she was an innocent passenger free from liability is granted, as both unopposed and axiomatic based upon the uncontested evidence presented by all parties. Both plaintiff's and Ezenwa Elumelu's deposition testimony establish that plaintiff engaged in no conduct which contributed to the occurrence of the accident. She and he both testified that she was a rear seat passenger, evidencing that she was wholly devoid of any control over the motor vehicle, nor did she direct the conduct of Ezenwa Elumelu. However, as previously discussed, the proffered evidence fails to establish, as a matter of law, that the occurrence of the accident was the result of the conduct of either Ezenwa Elumelu or Edwards. Thus, questions of fact preclude the entry of judgment attaching liability to either remaining defendant driver.

To the extent not specifically addressed herein, the parties' remaining contentions have been considered and found to be either meritless and/or moot.

Conclusions of Law

Accordingly, it is hereby

ORDERED the defendants' motions (mot. seq. nos. two, three, and four) seeking dismissal of the action on the basis that plaintiff Singh did not sustain a serious injury are denied; and it is further

ORDERED the defendant Edwards' motion (mot. seq. no. five) seeking summary judgment on the issue of liability is denied; and it is further

ORDERED the defendant Habib's motion (mot. seq. no. six) seeking summary judgment on the issue of liability is granted and the action is hereby dismissed as against defendant Habib, along with any cross claims, and the action severed accordingly; and it is further

ORDERED that plaintiff Singh's motion (mot. seq. no. seven) seeking summary judgment on the issue of liability is granted to the extent that plaintiff Singh is found to be free from any culpable conduct on the issue of liability, and any affirmative defenses of comparative fault are stricken, but the motion is otherwise denied.

This constitutes the decision and order of the court.

E N T E R,



Hon. Debra Silber, J.S.C.