

**Bishudhanand v Metropolitan Transp. Auth.**

2022 NY Slip Op 34616(U)

June 30, 2022

Supreme Court, Queens County

Docket Number: Index No. 712302/2018

Judge: Mojgan C. Lancman

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**Short Form Order**

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HONORABLE MOJGAN C. LANCMAN IAS Part 20

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ROZANNA BISHUDHANAND,

Plaintiff,

Index No.: 712302/2018

Motion Seq. No.: 3

-against-

Submitted to the  
Hon. Darrell Gavrin:  
1/25/22

METROPOLITAN TRANSPORTATION AUTHORITY,  
MTA BUS COMPANY, NEW YORK CITY TRANSIT  
and EDWARD KNAPPENBERGER, JR.,

Defendants.



-----X  
The e-filed papers bearing NYSCEF document numbers 68-109 were read: (1) on the motion of the plaintiff, Rozanna Bishudhanan (the “Plaintiff”), for an Order, *inter alia*, granting summary judgment on the issue of legal liability; and (2) the cross-motion of the defendants Metropolitan Transportation Authority i/s/h/a Metropolitan Transit Authority (“MTA”) and MTA Bus (“MTA Bus”) (collectively, the “Defendants”) for summary judgment dismissing the complaint. The Court notes this motion was submitted to the Hon. Darrell Gavrin on 1/25/22 and was at some point thereafter reassigned to the undersigned.

Preliminarily, while the Plaintiff moves for partial summary judgment, only the MTA and MTA Bus interposed an answer to the amended complaint. Because a summary judgment motion may be made only against a party that has served an answer (*see OneWest Bank, FSB v Bernstein*, 196 AD3d 591 [2d Dept 2021]), the Plaintiff’s motion shall be deemed to be made against the MTA and MTA Bus. As noted, this opinion shall refer to these entities collectively as “Defendants”

This action arises out of an accident that occurred on February 17, 2018, in Queens County, New York (the “Accident”). In essence, the Plaintiff alleges that while walking in a crosswalk, she was struck by a bus operated by the defendant Edward Knappenberger, Jr., (“Knappenberger”). Knappenberger was employed by the MTA and operated an MTA Bus on the date of the Accident.

Presently before the Court are two motions: (1) the Plaintiff’s motion for summary judgment on the issue of liability and to strike affirmative defenses relative to comparative negligence; and (2) the Defendants’ cross-motion for summary judgment dismissing the complaint. For the following reasons, the motion is granted and the cross-motion is denied.

## I. The Branch of the Plaintiff's Motion for Summary Judgment on the Issue of Liability

The familiar principles applicable to summary judgment motions are set forth below.

“Summary judgment is designed to expedite all civil cases by eliminating from the Trial Calendar claims which can properly be resolved as a matter of law” (*see Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The “function of summary judgment is issue finding, not issue determination” (*see Assaf v Ropog Cab Corp.*, 153 AD2d 520, 544 [1st Dept 1989]). The role of the Court in deciding a summary judgment motion is to make determinations as to the existence of *bona fide* issues of fact and not to delve into or resolve issues of credibility (*see Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]). The facts must be viewed in the light most favorable to the non-moving party (*see Sosa v 46th Street Development LLC*, 101 AD3d 490 [1st Dept 2012]). If there is any doubt as to the existence of a triable issue of fact, the motion must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]).

To be entitled to the “drastic” remedy of summary judgment, the movant “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 from the case” (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). However, the failure to make a *prima facie* showing of entitlement to summary judgment requires the denial of the motion, regardless of the sufficiency of the opposing papers (*see id.*; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).

If the moving party meets its burden, the burden shifts to the party opposing the motion to establish, by admissible evidence, the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for the failure to do so (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). If no genuine issue of material fact exists, the grant of summary judgment is proper (*see Kornfeld v NRX Technologies, Inc.*, 62 NY2d 686 [1984]).

There is no dispute that the Plaintiff was walking in a crosswalk with the signal in her favor when Knappenberger, who was making a right turn, failed to yield the right of way and struck her. The case of *Hai Ying Xiao v Martinez*, 185 AD3d 1014, 1015 [2d Dept 2020], is dispositive on the issue of legal liability: “... the plaintiff established her *prima facie* entitlement to judgment as a matter of law on the issue of liability by [demonstrating] that she was walking within a crosswalk with the pedestrian signal in her favor when Martinez, who was attempting to make a left turn, failed to yield the right-of-way and struck her [citations omitted].” In opposition, the Defendants fail to raise a triable issue of fact. The Plaintiff is thus entitled to summary judgment on the issue of liability (*see id.*, *Rodriguez v City of New York*, 31 NY3d 312 [2018]; *Gaston v Vertsberger*, 176 AD3d 919 [2d Dept 2019]; *Rodriguez-Garcia v Bobby's Bus Co., Inc.*, 175 AD3d 631 [2d Dept 2019]; *Lazarre v Gragston*, 164 AD3d 574 [2d Dept 2018]).

## II. The Branch of the Plaintiff's Motion for Summary Judgment to Dismiss Comparative Negligence Affirmative Defenses

The Plaintiff also moves to dismiss the Defendants' affirmative defenses relative to comparative negligence. This issue is properly before the Court because: "[e]ven though a plaintiff is no longer required to establish his or her freedom from comparative negligence to be entitled to summary judgment on the issue of a defendant's liability, the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where, as here, the plaintiff moved for summary judgment dismissing a defendant's affirmative defense of comparative negligence [citations omitted]" (*Hai Ying Xiao v Martinez*, 185 AD3d 1014, 1015 [2d Dept 2020]; *see also Ng v West*, 195 AD3d 1006 [2d Dept 2021]).

The Plaintiff bears the burden of establishing *prima facie* that she is free from comparative fault (*see Higashi v M&R Scarsdale Rest., LLC*, 176 AD3d 788 [2d Dept 2019]); *Wray v Galella*, 172 AD3d 1446, 1447 [2d Dept 2019]; *Hai Ying Xiao v Martinez*, 185 AD3d 1014 [2d Dept 2020]). This burden is met for two reasons. First, the Plaintiff's submissions establish that "... she was not at fault in the happening of the accident, as [they] demonstrate[] that she exercised due care by confirming that she had the pedestrian signal in her favor and by looking for oncoming traffic in all directions before entering the crosswalk and that the collision occurred so suddenly that she could not avoid it [citations omitted]" (*Hai Ying Xiao v Martinez*, 185 AD3d 1014, 1015). Second, the Plaintiff is free from comparative negligence because Knappenberger admitted that he did not see her before the Accident (*see Ramroop v Stein*, 204 AD3d 452 [1st Dept 2022]).

The Defendants' opposition fails to raise any triable issues of fact on the issue of comparative negligence. Accordingly, the Defendants' affirmative defenses predicated upon comparative negligence are dismissed (*see Hai Ying Xiao v Martinez*, 185 AD3d 1014).

## III. The Defendants' Cross-Motion

The Defendants cross-move for summary judgment dismissing the complaint on the theory that the Plaintiff did not sustain a serious injury within the meaning of New York State Insurance Law § 5102 [d].

The Defendants bear the initial burden of establishing, through competent medical evidence, that the Plaintiff did not sustain a serious injury as a result of the Accident (*see Anteparo v Garcia*, 194 AD3d 513 [1st Dept 2021]; *Cohen v Bayer*, 167 AD3d 1397, 1398 [3d Dept 2018]). If this threshold burden is not met, the motion must be denied irrespective of the sufficiency of the opposition (*see Kellerson v Asis*, 81 AD3d 1437 [4th Dept 2011]).

On this record, the Defendants establish, *prima facie*, that the Plaintiff did not sustain a serious injury with respect to the significant limitation of use and permanent consequential limitation of use categories. Here, Dr. Cohen, a neurologist, found that the Plaintiff had normal range of motion relative to the cervical, thoracic and lumbar spines. He also opined that the neurological examination was normal. Dr. Katzman, a radiologist, opined that MRI studies taken

of the Plaintiff's right knee, lumbar spine and cervical spine did not reveal any traumatic injury related to the Accident.

However, the Plaintiff's submissions in opposition raise triable issues of fact. Here, Dr. Thomas Kolb, a radiologist, concluded that based upon his review of diagnostic studies, the following findings are causally related to the Accident: a disc bulge at C4-5 impinging upon the thecal sac; a posterior disc herniation at L5-S1 impinging upon the anterior epidural fat and the bilateral extra thecal S1 nerve roots; a tear of the free margin of the body of the medial meniscus extending anteriorly and posteriorly; a partial tear of the tibial insertion of the anterior cruciate ligament with associated joint effusion; and a grade 1-2 partial tear of the femoral origin of the medial collateral ligament, with associated soft tissue edema.

Dr. Kanter's narrative report and records reveal, *inter alia*, that the Plaintiff had losses in range of motion upon an examination conducted on February 27, 2018, which is ten days after the Accident, and upon an examination conducted on October 4, 2021, and that the subject losses are causally related to the Accident.

The Plaintiff's evidence, "viewed in a light most favorable to [her] as the nonmoving party, raise[s] a triable issue of fact as to whether [P]laintiff's [injuries] constitute[] [] serious injur[ies] under the significant limitation of use and permanent consequential limitation of use categories [citations omitted]" (*Harris v Vogler*, 187 AD3d 1392, 1394, 1395 [3rd Dept 2020]). The Defendants' motion for summary disposition with respect to the subject categories is thus denied (*see Ramirez v L-T & L. Enterprise, Inc.*, 189 AD3d 1636 [2d Dept 2020]).

As to the 90/180 category, "[t]he papers submitted by the [D]efendants fail[] to eliminate triable issues of fact as to whether the [P]laintiff sustained a serious injury under [this] category [citation omitted]" (*Jung Han v Dragonetti Landscaping*, 174 AD3d 791, 792 [2d Dept 2019]). In any event, there is a triable issue of fact with respect to the subject category because the Plaintiff missed work for 115 days immediately following the Accident.

#### IV. Conclusion

For the reasons stated above, it is hereby:

ORDERED, that the Plaintiff's motion is granted; and it is further,

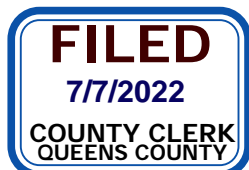
ORDERED, that the Plaintiff is granted summary judgment on the issue of liability against the defendants MTA and MTA Bus; and it is further,

ORDERED, that the affirmative defenses of comparative negligence asserted by the defendants MTA and MTA Bus against the Plaintiff are dismissed; and it is further,

ORDERED, that the cross-motion filed by the MTA and MTA Bus is denied.

This constitutes the Decision and Order of the Court.

Dated: Jamaica, New York  
June 30, 2022



MOJGAN C. LANCMAN, J.S.C.