At an IAS Term, Part 83 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 14th day of May, 2024.

P R E S E N T: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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DESIREE MATHIS AND NAKIVA IVEY,

Plaintiff,

-against-

Index No.: 519956/2020

DECISION AND ORDER

ROSA J. EVANS AND LAUREN KEMP,

Defendants.

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The following e-filed papers read herein:	NYSCEF Doc. Nos.:
Motion Seq. No. 5	
Notice of Motion/Affirmation in Support/Exhibits.....	69 – 79
Motion Seq. No. 6	
Notice of Cross-Motion/Affirmation in Support/Exhibits.....	80 – 90
Affirmation in Opposition/Exhibits.....	142 – 159
Reply Affirmation/Exhibits.....	163
Motion Seq. No. 7	
Notice of Motion/Affirmation in Support/Exhibits.....	108 – 110
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Affirmation in Opposition/Exhibits.....	160 – 162

In this matter, Desiree Mathis ("Plaintiff Mathis") and Nakiva Ivey ("Plaintiff Ivey") seek to recover for personal injuries allegedly sustained as a result of a two-car motor vehicle collision that occurred on March 12, 2019, at the intersection of Powell Street and Newport Street in Brooklyn, New York. At the time of the incident, Plaintiff Ivey was the owner and operator of the car, with Plaintiff Mathis in the passenger seat. Defendant Lauren Kemp ("Defendant Kemp") was

driving a car owned by Defendant Rosa J. Evans, who was not present at the time of the collision. Plaintiffs aver that they were stopped at a stop sign on Powell Street when their vehicle was struck from behind by the car driven by Defendant Kemp.

Plaintiffs commenced this action by filing a summons and complaint on or around October 15, 2020. On or about November 4, 2020, Defendants Rosa J. Evans and Lauren Kemp (collectively "Defendants") answered and interposed a counter-claim against Plaintiff Ivey for negligence resulting in Plaintiff Mathis' injuries.

Plaintiff Ivey moves, pursuant to CPLR § 3212, for summary judgment dismissing the counter-claim asserted against her on the grounds that the undisputed evidence establishes that she bears no liability for the accident (Motion Seq. 5). Defendants have no opposition to this motion. Defendants move, pursuant to CPLR § 3212, for partial summary judgment dismissing Plaintiff Mathis' complaint on the grounds that she fails to meet the "serious injury" threshold required by New York State Insurance Law §§ 5102(d) and 5104(a) (Motion Seq. 6). Plaintiff Ivey cross-moves for summary judgment to dismiss the first cause of action of the Plaintiff Mathis' complaint on the grounds that Plaintiff Mathis fails to meet the "serious injury" threshold pursuant to New York State Insurance Law §§ 5102(d) and 5104(a) (Motion Seq. 7). Plaintiffs have opposed Defendants' motion (Motion Seq. 6), and have cross-moved for summary judgment pursuant to CPLR § 3212, on the issue of liability against Defendants and to strike their first, second, third, sixth, seventh, eight, eleventh, twelfth, thirteenth, and fifteenth affirmative defenses (Motion Seq. 8). Plaintiffs admit in their motion (Motion Seq. 8) that the deadline to file summary judgment has passed and aver that it is a cross-motion against a timely summary judgment motion, seeking the same relief as Plaintiff Ivey's timely summary judgment motion on liability (Motion Seq. 5), and thus should be granted. Defendants oppose the cross-motions on grounds that they are procedurally defective and untimely.

Before the Court addresses the merits of the parties' motions, it must first determine whether they are procedurally proper. As an initial matter, "the court may set a date after which no [summary judgment] motion may be made" (CPLR 3212 [a]). In Kings County, unless a defendant is the City of New York, motions for summary judgment must be made within 60 days of the filing of the Note of Issue and this deadline "may only be extended *by the Court* upon good cause shown" (Kings County Supreme Court Uniform Civil Term Rules, Part C, Rule 6 [emphasis added]; *see also* CPLR 3212 [a]). The movant must proffer a "good cause for the delay in making

the motion—a satisfactory explanation for the untimeliness—rather than simply permitting meritorious, nonprejudicial filings, however tardy" (*Brill v City of New York*, 2 NY3d 648, 652 [2004]). Accordingly, without a showing of "good cause for the delay, an untimely summary judgment motion must be denied without consideration of the merits" (*Kuyenova v R & M Supermarket*, 215 AD3d 940, 941 [2d Dept 2023] [internal citations omitted]). However, an untimely cross-motion for summary judgment may be considered where a timely motion was made on nearly identical grounds (*Snolis v Clare*, 81 AD3d 923 [2d Dept 2011]). Nonetheless, under CPLR 2215, a cross-motion is "an improper vehicle for seeking affirmative relief from a nonmoving party (*see* CPLR 2215; *see also Mango v Long Is. Jewish-Hillside Med. Ctr.*, 123 AD2d 843 [2d Dept 1986]).

Here, a Note of Issue ("NOI") was filed by Plaintiff on April 29, 2022. The Defendants moved to vacate this order on May 9, 2022. Plaintiff Ivey filed her motion for summary judgment on liability on May 17, 2022, and the Defendants filed their motion for summary judgment dismissing the complaint as to Plaintiff Mathis for failing to meet the "serious injury" threshold on May 25, 2022. An order, dated June 9, 2022, was issued by Justice Lawrence Knipel denying the motion to vacate the NOI, stating that the movants already filed motions for summary judgment, and requests for extensions were moot. Thereafter, Plaintiff Ivey filed her cross-motion for summary judgment on December 9, 2022 and Plaintiffs filed their cross-motion on July 27, 2023.

The Court finds that Plaintiff Ivey's motion for summary judgment dismissing the counter-claim (Motion Seq. 5) and Defendant's motion for summary judgment on the issue of Plaintiff Mathis' threshold injury (Motion Seq. 6) were both made timely based on the filing of the NOI, and are thus procedurally proper. With regards to Plaintiff Ivey's cross-motion seeking summary judgment against Plaintiff Mathis for failing to meet the serious injury threshold (Motion Seq. 7), the motion is not procedurally proper. "The express language of CPLR 2215 is clear that cross-motions are solely for seeking relief against the initial moving party" (*Pizzo v Lustig*, 216 AD3d 38 [2d Dept 2023]). Plaintiff Ivey's motion is in essence a "me too" motion made in support of Defendant's motion for summary judgment against Plaintiff Mathis (Motion Seq. 6). Thus, Plaintiff Ivey does not seek relief against the moving Defendants, but instead seeks affirmative relief against Plaintiff Mathis, a non-moving party. Therefore, Plaintiff Ivey's motion (Mot. Seq. 7) is denied as being untimely and procedurally improper.

Plaintiffs' cross-motion seeking summary judgment on the issue of liability (Motion Seq. 8) is procedurally improper for the same reasons. This motion is purportedly a cross-motion to Plaintiff Ivey's summary judgment motion on the counter-claim (Motion Seq. 5), yet it seeks affirmative relief from Defendants, a non-moving party. As a result, Plaintiffs Motion Seq. 8 is also denied as untimely and procedurally improper.

Turning to the merits of the timely filed motions, it is well established that, "[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" (*Ayotte v. Gervasio,* 81 NY2d 1062, 1063 [1993], *citing Alvarez v. Prospect Hospital,* 68 NY2d 320, 324 [1986]; *Zapata v. Buitriago*, 107 AD3d 977 [2d Dept 2013]). Failure to make such a showing requires the denial of the motion, regardless of the sufficiency of the papers in opposition (*see Alvarez*, 68 NY2d at 324). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v. City of New York,* 49 NY2d 557 [1980]). Summary judgment is a drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable (*Elzer v. Nassau County*, 111 AD2d 212 [2d Dept 1985]). When deciding a summary judgment motion, the Court must construe facts in the light most favorable to the non-moving party (*Marine Midland Bank N.A. v. Dino & Artie's Automatic Transmission Co.,* 168 AD2d 610 [2d Dept 1990]).

New York Vehicle and Traffic Law § 1129(a) states that "the driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway." A rear-end collision with a stopped or stopping vehicle creates a prima facie case of liability with respect to the operator of the rearmost vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision (*Chapel v Meyers*, 306 AD2d 235, 237 [2d Dept 2003]). While a non-negligent explanation for a rear-end collision may include evidence of a sudden stop of the lead vehicle, vehicle stops which are foreseeable under the prevailing traffic conditions must be anticipated by the driver who follows, since he or she is under a duty to maintain a safe distance between his or her vehicle and the vehicle ahead (*Waide v. ARI*

Fleet, LT, 143 AD3d 512, 514 [2d Dept 2016], quoting *Theo v. Vasquez*, 136 AD3d 795 [2d Dept 2016]).

In failing to oppose Plaintiff Ivey's motion seeking summary judgment as to the counter-claim (Motion Seq. 5), the court finds that the Defendants have failed to proffer a non-negligent explanation for the rear end collision or to raise any material questions of fact as to the issues of liability or culpable conduct on the part of the Plaintiff Ivey. While Defendants assert affirmative defenses in their answer as to the negligence claims,[1] the Defendants have not proffered any additional information to substantiate their defenses, and the emergency doctrine does not apply to typical accidents involving rear-end collisions because trailing drivers are required to leave a reasonable distance between their vehicles and vehicles ahead (*see Capuozzo v Miller*, 188 AD3d 1137, 1138 [2d Dept 2020]). A bare allegation that the lead vehicle stopped short is insufficient to rebut the inference of negligence on the part of the driver of the following vehicle (*Cheow v. Lin Jin*, 121 AD3d 1058 [2d Dept 2014]).

The Defendants have failed to rebut Plaintiff Ivey's prima facie showing of entitlement to summary judgment, and as a result they have abandoned their counter-claim asserting that Plaintiff Ivey was negligent. Accordingly, Plaintiff Ivey's motion (Motion Seq. 5) for summary judgment on the counter-claim is granted. Assuming arguendo that Plaintiff's Motion Seq. 8 had been a proper motion on the issue of liability, the motion would be denied as moot, since the court has dismissed the counter-claim against Plaintiff Ivey on grounds that she is not liable for causing the collision, the Defendants have made no allegation that Plaintiff Mathis, the passenger, was liable for the rear-end collision, and the Defendants have not offered a non-negligent explanation for the rear-end accident.

As to the Defendants' motion for summary judgment demonstrating lack of serious injuries sustained by Plaintiff Mathis (Motion Seq. 6), conflicting medical reports in support of the motion raise triable issues of fact (*see Cariddi v Hassan*, 45 AD3d 516 [2d Dept 2007]; *Garcia v Long Is. MTA*, 2 AD3d 675 [2003]; *Wilcoxen v Palladino*, 122 AD3d 727 [2d Dept 2014]). The Defendants retained three doctors, Dr. Reuben D. Burshtein, Dr. Dana A. Mannor, and Dr. Sheldon P. Feit, and submitted their reports in support of their motion. Dr. Burshtein, a neurologist, examined

[1] These affirmative defenses include allegations that: the accident was caused by Plaintiffs own negligence, there was a superseding act, the Plaintiffs failed to exercise due care, and the accident arose out of an emergency situation (Defendants' Answer, NYSCEF Doc No. 3).

Plaintiff Mathis in December 2021, and concluded that there is no permanent impairment, but there was a causal relationship between the accident of record and Ms. Mathis' injuries as diagnosed.[2] Dr. Mannor, an orthopedic surgeon, examined Plaintiff Mathis in April 2022, and concluded that while there was no permanency or impairment, there is a causal relationship between the accident of record and Plaintiff Mathis' injuries as diagnosed.[3] However, Dr. Mannor also stated that there was some evidence of a pre-existing degenerative condition. Dr. Feit, a radiologist, in a report dated November 2021, examined the cervical and lumbar MRI's of Plaintiff Mathis, taken approximately a month after the accident on April 16, 2019. His report concludes that the images reveal pre-existing degenerative changes, and that there are no posttraumatic changes or abnormalities causally related to the accident.[4] The reports submitted by Defendants thus contain differing medical opinions as to whether Plaintiff Mathis' injuries were causally related to the accident, and create triable issues of fact. The Defendants have thus failed to establish a prima facie case entitling them to partial summary judgment due to lack of serious injuries to Plaintiff Mathis.

Further, as to the 90/180-day category under Insurance Law § 5102(d), Defendants submit Plaintiff Mathis' deposition testimony in support of their motion.[5] Plaintiff Mathis' testified in part that she was confined to her home for a period of approximately four months following the accident.[6] The testimony fails to fully explore the usual and customary daily activities impacted under the 90/180-day category, and thus do not eliminate triable issues of fact related to Plaintiff's claim (*see Reid v Edwards-Grant*, 186 AD3d 1741 [2d Dept 2020]; *Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept 2011]).

Accordingly, Defendant's motion for summary judgment on the issue of Plaintiff Mathis' threshold injury (Motion Seq. 6) is denied. Assuming arguendo that Plaintiff Ivey's cross-motion seeking partial summary judgment against Mathis for failing to meet the serious injury threshold (Motion Seq. 7) was procedurally proper, it would be denied on the same grounds, since her motion relied on the findings of the Defendants' experts, which this Court has found did not establish a prima facie case entitling the Defendants to summary judgment.

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[2] Defendants' Exhibit F, NYSCEF Doc. No. 87.
[3] Defendants' Exhibit G, NYSCEF Doc. No. 88.
[4] Defendants' Exhibit H, NYSCEF Doc. No. 89.
[5] Defendants' Exhibit E, NYSCEF Doc. No. 86.
[6] *Id.* at 90, line 44.

Accordingly, it is hereby

ORDERED, that Plaintiff Ivey's motion (Motion Seq. 5) for summary judgment on the counter-claim on the grounds that the undisputed facts establish no liability against her is granted without opposition; and it is further

ORDERED, that Defendant's motion seeking partial summary judgment as to Plaintiff Mathis' serious injury (Motion Seq. 6) is denied; and it is further

ORDERED, that Plaintiff Ivey's cross-motion seeking partial summary judgment as to Plaintiff Mathis' serious injury (Motion Seq. 7) is denied as untimely and procedurally defective; and it is further

ORDERED, that Plaintiff's cross-motion seeking summary judgment on liability (Motion Seq. 8) is denied as untimely and procedurally defective.

All other issues not addressed herein are without merit or moot.

This constitutes the decision and order of the Court.

Hon. Ingrid Joseph, J.S.C.
Hon. Ingrid Joseph
Supreme Court Justice