SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JUDY H. KIM** **PART** **05RCP**

Justice

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TANYA MALLORY,

Plaintiff,

- v -

THE CITY OF NEW YORK, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,VERIZON NEW YORK, INC., ROBINSON S. KASSIEM, JACOB A. RIVERS,

Defendants.

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INDEX NO. 452540/2015

MOTION DATE N/A

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents, the motion by defendant Verizon New York, Inc. ("Verizon") for an order granting it summary judgment dismissing the complaint and all cross claims asserted against it is denied.

This is an action for personal injuries allegedly sustained by the plaintiff on October 2, 2013, as a passenger in a motor vehicle owned by co-defendant Jacob A. Rivers and driven by co-defendant Kassiem Robinson that ran over a manhole improperly placed by the defendants the City of New York, Consolidated Edison Company of New York, Inc., and Verizon New York, Inc. (NYSCEF Doc. No. 1 [Compl. at ¶¶62-64]).

In motion sequence 003, plaintiff moved for an "[o]rder pursuant to CPLR §3212 granting summary judgment as to liability in favor of the plaintiff, Tanya Mallory, dismissing defendants' affirmative defenses of culpable conduct and for such other and further relief as this Court deems

just and proper" (NYSCEF Doc. No. 53 [emphasis added]). In her motion papers, plaintiff argued that

> [A] passenger of a vehicle involved in an accident with another vehicle is entitled to partial summary judgment on [the] issue of liability regardless of which driver is at fault as an innocent passenger could not possibly be found at fault under either driver's version of the accident. The right of an innocent passenger involved in a vehicle accident to summary judgment in a personal injury action is not in any way restricted by potential issues of comparative negligence as between the drivers of the vehicles. Further, an innocent passenger is entitled to dismissal of defendants' affirmative defense(s) of comparative fault. In the instant case, defendants were solely responsible for causing the accident. Plaintiffs was free from culpable conduct. No competing inferences could be drawn
>
> The testimony of plaintiff clearly establishes that she was an innocent passenger in the vehicle driven by defendant Kassiem on East 86 Street at the location and the time of the accident which, as a result of defendants' negligence, caused her [to] suffer severe injury. Defendants cannot provide a non-negligent explanation for the collision that occurred, nor can defendants offer any theory of liability that might support a finding that plaintiff was in any way responsible for and/or contributed to the instant accident.
>
> Based upon the [a]ffidavit of the plaintiff, the pleadings, the case law and statutes cited herein, there is no viable defense that defendants could present. Thus, this Court should grant plaintiffs' motion for summary judgment on the issue of liability. Based on the foregoing, it is respectfully submitted that this Court issue an Order granting partial summary judgment in favor of plaintiff on the issue of liability, dismissing any and all of the affirmative defenses pled in defendants' Answer in regard to plaintiff's culpability and for such other and further relief as this Court deems proper.
>
> (NYSCEF Doc. No. 54 [Lara Affirm. at ¶¶19-25] [emphasis added]).

In a decision and order dated August 19, 2020 (the "Prior Decision"), this Court (Hon Dakota D. Ramseur) granted plaintiff's motion, writing:

> Plaintiff moves, pursuant to CPLR §3212, for partial summary judgment on liability, arguing that "Defendants cannot provide a non-negligent explanation for the collision that occurred, nor can [D]efendants offer any theory of liability that might support a finding that plaintiff was in any way responsible for and/or contributed to the instant accident" (NYSCEF 54 ¶23). Every Defendant opposes with similar arguments: that summary judgment is premature because only Plaintiff has been deposed, and that an issue of fact exists with respect to Plaintiff's culpability as a passenger based on Plaintiff's deposition testimony that she made

> a "smart" comment which induced the driver to laugh just before the accident. For the reasons below, the Court grants the motion.
>
> Here, Plaintiff testified at an EBT that she may have distracted the driver by saying "something smart ... we were laughing" just prior to the accident (NYSCEF 66 23:25-24:10) …
>
> Recently, however, the Court of Appeals departed from earlier precedent by holding that "[t]o be entitled to partial summary judgment a plaintiff does not bear the double burden of establishing a prima facie case of defendant's liability and the absence of his or her own comparative fault" (Rodriguez v City, 31 NY3d 312, 324-325 [2018]). This is because, the majority reasoned, "comparative negligence is not a defense to the cause of action of negligence, because it is not a defense to any element ... of plaintiff s prima facie cause of action for negligence, and ... is not a bar to plaintiff's recovery, but rather a diminishment of the amount of damages" (id. at 320).
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> Pre-Rodriguez, Plaintiffs statement that she "in no way contributed to the occurrence of this accident," (NYSCEF 56 ¶6), juxtaposed against Defendants' citation to Plaintiffs "smart" remark, may have justified denial of summary judgment until discovery could be conducted to uncover facts "essential to justify opposition"; to determine, in other words, what role the "smart" remark had, if any, in causing the accident. Post-Rodriguez, however, outstanding discovery is not a barrier to partial summary judgment, particularly where the outstanding discovery would bear only on an issue that is irrelevant to Plaintiff s liability.
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> (NYSCEF Doc. No. 81 [August 19, 2020 Decision and Order] [internal citations omitted]).

Verizon now moves for summary judgment dismissing the complaint and all cross-claims against it. In support of its motion, Verizon submits the affidavit of Nai Zhang, an "Engineering Specialist-Network Engineering and Operations" attesting that:

> I am responsible for Verizon facilities for the territory of Manhattan that is composed of the area north of East 64th Street, south of East 130th Street, west of the FDR and Harlem River Drives and cast of Fifth/Lennox Avenues. This territory includes the accident location: the intersection of East 86th Street and First Avenue, in the City, County and State of New York
>
> I am familiar with the location of manholes owned by Verizon in the territory for which I am responsible, and have also consulted the records of Verizon regarding same.

> Verizon does not, nor did it at the time of plaintiff's accident on October 2, 2013, own, install or maintain any manholes within the intersection of East 86th Street and First Avenue in the City, County and State of New York

(NYSCEF Doc. Nos. 116 [Zhang Aff.]).

Verizon also submits the affidavit of Daniel Tergesen, a Construction Manager Consultant for Empire City Subway Company (Limited) ("ECS"), in which he attests that:

> I have reviewed the results of a records search for all ECS facilities and all jobs, installation, construction, excavation, paying, and/or work of any kind completed by ECS or on its behalf, at or near the location of plaintiff's accident on October 2, 2013, specifically located in the eastbound lane just east of the intersection of 86th Street and 1st Avenue in Manhattan, New York (the "Subject Location"), for a period of two years prior to and including the date of the alleged incident. ECS's search revealed no records of any ECS facilities located at the Subject Location.
> ...
>
> With regards to the Verizon permits produced by the City of New York in their 3rd Response to the Case Scheduling Order, Manhole Embargo Permits are taken out by Verizon when they need ECS to open and close a manhole to work inside the manhole or inspect the inside of the manhole. For the permits in question, no trench work, cuts into the roadway, or any other work that would have disturbed the street occurred. In addition, these Manhole Embargo Permits are in connection with the manhole located on the north side of the intersection known as 86th Street and 1st Avenue. Accordingly, ECS had no facilities, performed no work, and had no connection or involvement with the Subject Location of plaintiff's incident, which is the subject of this lawsuit.

(NYSCEF Doc. No. 117 [Tergesen Aff. at ¶¶5-6, 10-11]).

Verizon argues that these affidavits establish that "there were no Verizon or ECS facilities in [the] southern lane heading east on 86th Street" (NSYCEF Doc. No. 102 [Luckie Affirm. at ¶15) and argues that, as Verizon did not own, occupy, control or make special use of the subject roadway or create the condition at issue, it does not owe a duty to plaintiff. In opposition, plaintiff and defendants Kassiem and Rivers argue that the instant motion is precluded by the Prior Decision which, they assert, granted plaintiff's motion summary judgment against all defendants, including Verizon, on the issue of liability. They further argue, in the alternative, that the evidence Verizon

submits in support of its motion is insufficient because, inter alia, the out-of-state affidavit of Nai Zhang does not attach a certificate of conformity. Finally, they argue that defendant's motion is premature because Verizon's affiants have not been deposed.

In reply, Verizon maintains that the Prior Order granted plaintiff partial summary judgment to the limited extent that the Court determined that plaintiff was free from culpable conduct and did not determine that defendants were negligent as a matter of law.

DISCUSSION

As a threshold matter, the Court rejects the argument raised in opposition that plaintiff's failure to comply with Uniform Rule §202.8(c) mandates the denial of the motion; any such non-compliance has not prejudiced defendants (See Meserole Hub LLC v Rosenzweig, 71 Misc 3d 1222(A) [Sup Ct, Kings County 2021]).

The Court also rejects the argument that the Prior Decision granted summary judgment to plaintiff as to defendants' ultimate liability on her negligence claim. Plaintiff's motion clearly sought more limited relief, i.e., the dismissal of defendants' affirmative defenses of contributory negligence. This is demonstrated by the plain language of the motion as well as its exclusive reliance on Garcia v Tri-County Ambulette Serv., Inc., 282 AD2d 206, 207 (1st Dept 2001) and Oluwatayo v Dulinayan, 142 AD3d 113, 116-19 (1st Dept 2016). As the Oluwatayo Court noted, "the pronouncement in Garcia stands only for the proposition that in motor vehicle negligence actions, an innocent plaintiff is entitled to a determination that she had no culpable conduct on the issue of liability irrespective of the unresolved issue of a defendant driver's negligence" (Oluwatayo v Dulinayan, 142 AD3d 113, 119 [1st Dept 2016]). There is no indication in the Prior Decision that Justice Ramseur intended to grant relief greater than that sought by plaintiff.

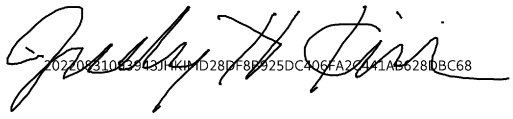
In light of the foregoing, the Court now turns to the merits of Verizon's motion. Verizon has not met its prima facie burden here. The affidavit of Nai Zhang was "notarized without the state and not accompanied by the requisite certificate of conformity" and "the technical defect was not corrected, despite … timely objection in opposition to defendant['s] motion" (E. B.-W. by Bou v New York City Hous. Auth., 185 AD3d 458, 459 [1st Dept 2020] [internal citations omitted]). Even if the Court disregarded this "technical noncomformity" and considered this affidavit it nevertheless fails to satisfy Verizon's prima facie burden on the instant motion (Id.; see also Syrko v Jertom Inc., 2015 NY Slip Op 30572[U] [Sup Ct, Bronx County 2015], affd, 2016 NY Slip Op 04448 [1st Dept 2016] ["the affidavit is not in admissible form for failure to comply with the out-of-state conformity requirement set forth in 2309(c) of the CPLR … [and] is not probative for purposes of summary judgment because it is vague and lacking sufficient facts"]). Zhang's affidavit does not establish the basis of her knowledge regarding the location of Verizon manhole covers or to explain how her role as an Engineering Specialist provides her with this knowledge (See Figueroa v City of New York, 126 AD3d 438, 439-40 [1st Dept 2015]; see also Davar v The City of New York, 2007 NY Slip Op 33826[U] [Sup Ct, Queens County 2007]). Neither does the affidavit of Daniel Tergesen establish as a matter of law that Verizon was not involved with the allegedly improper placement of the subject manhole—his affidavit fails to establish the connection between ECS and Verizon and does not establish that Verizon did not perform work at the subject manhole.

Accordingly, it is

ORDERED that Verizon's motion for summary judgment is denied; and it is further

ORDERED that plaintiff is directed to serve a copy of this decision and order, with notice of entry, on defendants within ten days of the date of this decision and order; and it is further

This constitutes the decision and order of the Court.



8/31/2022
DATE

HON. JUDY H. KIM, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE