SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:

HON. DANIEL PALMIERI
Acting Justice Supreme Court

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SUSAN OLLIVIER,

Plaintiff,

-against-

CATHERINE VASSALLO and RALPH VASSALLO,

Defendants

----------x

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

----------x

CATHERINE VASSALLO,

Plaintiff,

-against-

SUSAN OLLIVIER,

Defendant.

----------x

TRIAL TERM
PART 48

Action No. 1
INDEX NO.:003618/06

MOTION DATE:11-29-07
SUBMIT DATE:1-8-08
SEQ. NUMBER - 003

MOTION DATE: 1-8-08
SUBMIT DATE: 1-8-08
SEQ. NUMBER - 004 & 005

Action No. 2
Index No. 16836/06

The following papers have been read on this motion:

Order to Show Cause (pltf. Vassallo [action # 2]), dated 11-21-07..... 1
Affirmation in Opposition (def. Ollivier [action #2]), dated 12-10-07.....2
Notice of Cross Motion (pltf. Ollivier [action # 1]), dated 12-14-07.....3

The cross motion by the plaintiff Susan Ollivier (action #1) pursuant to CPLR 3212 for summary judgment on the issue of liability is granted; the cross motion by defendant Susan Ollivier (action #2) pursuant to CPLR 3212 dismissing the complaint of Catherine Vassallo is granted and action #2 is dismissed; the motion by plaintiff Catherine Vassallo (action #2) for an order limiting juror *voir dire,* and evidence or inquiry at trial regarding her statements about the happening of the accident, and for a unified trial, is denied as academic.

In this two vehicle, two witness intersection collision case (Catherine Vassallo and Susan Ollivier were the sole occupants of their respective vehicles), Ollivier, as both plaintiff and defendant, moves for summary judgment on the issue of liability. The plaintiff Catherine Vassallo moves for an order *in limine* limiting certain questions and evidence because of a loss of memory allegedly caused by the accident. This effectively raises the *Noseworthy* [1] doctrine, which if applied by the trial court lightens a plaintiff's burden in proving a defendant's negligence. Because the cross motions for summary judgment are dispositive in nature, they will be addressed first.

Initially, the Court notes that all these applications were made pursuant to a schedule entered into before its Law Secretary, with no objection as to timeliness made by any party. This effectively constituted an extension of time by the Court to file such motions, which

[1] *Noseworthy v City of New York,* 298 NY 76 (1948).

included summary judgment motions, under the time frames established in such schedule. Counsel for Vassallo as plaintiff now complains of untimeliness of the cross motion for summary judgment by Ollivier as plaintiff. Her attorney concedes that the motion was served two days late, but has presented a sufficient explanation of a family emergency such that it may be forgiven, especially in the absence of any prejudice to any other party. CPLR 2004; *Vento v City of New York,* 247 AD2d 535 (2d Dept. 1998). Counsel for Ollivier as defendant acknowledges that this cross motion, served later, was untimely as well. However, given the fact that the issues and bases of both such cross motions are identical, the Court may address it. *See, Gande v Peteroy,* 39 AD3d 590 (2d Dept. 2007).

It is well settled that summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue of fact. *Sillman v Twentieth Century-Fox Film Corp.,* 3 NY2d 395 (1957); *Bhatti v. Roche,* 140 AD2d 660 (2d Dept. 1988). Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's affirmation. *Olan v Farrell Lines,* 64 NY2d 1092 (1985). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, however, the burden then shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring

a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. *Mgrditchian v. Donato*, 141 AD2d 513 (2d Dept. 1988). Nor can mere speculation serve to defeat the motion. *Pluhar v Town of Southhampton,* 29 AD3d 975 (2d Dept. 2006); *Ciccone v Bedford Cent. School Dist.,* 21 AD3d 437 (2d Dept. 2005).

However, the court must draw all reasonable inferences in favor of the nonmoving party. *Nicklas v Tedlen Realty Corp.,* 305 AD2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner Corp.,* 215 AD2d 546 (2d Dept. 1995). The role of the court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but simply to determine whether such issues of fact requiring a trial exist. *Dyckman v. Barrett,* 187 AD2d 553 (2d Dept. 1992); *Barr v County of Albany*, 50 NY2d 247, 254 (1980); *James v. Albank*, 307 AD2d 1024 (2d Dept. 2003); *Heller v. Hicks Nurseries,* Inc., 198 AD2d 330 (2d Dept. 1993). The Court need not, however, ignore the fact that an allegation is patently false or that an issue sought to be raised is merely feigned. *See Village Bank v Wild Oaks Holding, Inc.,* 196 AD2d 812 (2d Dept. 1993); *Barclays Bank of N. Y. v Sokol,* 128 AD2d 492 (2d Dept. 1987), and may discount facts alleged in opposition, such as when the affidavit in opposition clearly contradicts earlier deposition testimony. *Central Irrigation Supply v Putnam Country Club Assocs., LLC,* 27 AD3d 684 (2d Dept. 2006).

In this case, the plaintiff Susan Ollivier has made out a *prima facie* case of entitlement to summary judgment on the issue of liability. Admissible proof by way of EBT testimony, an affidavit submitted on this cross motion, and a police report containing an admission by the defendant Vassallo, indicates that Ollivier was proceeding eastbound on the south service

road to the Long Island Expressway, and as she approached the intersection with Route 111 she had a green light in her favor. Defendant Catherine Vassallo's vehicle was stopped in a northbound lane, and Ms. Vassallo herself was looking down. She then looked up and proceeded into the intersection against the red light, where her car was struck by Ms. Ollivier's, which had entered the intersection with a green light still in her favor. This is sufficient to shift the burden to Vassallo. *Hegy v Coller,* 262 AD2d 606 (2d Dept. 1999) [plaintiff's testimony that the light was green when she entered intersection sufficient as *prima facie* proof that defendant solely responsible for accident]; *see also, Diasparra v Smith,* 253 AD2d 840 (2d Dept.1998); *Salenius v Lisbon,* 217 AD2d 692 (2d Dept. 1995); Vehicle and Traffic Law §§ 1110, 1111.

In response, Ms. Vassallo as defendant offers her testimony at her examination before trial, at which she testified that she did not stop at the intersection, but rather was moving forward and proceeded into the intersection after looking up and noting that the light was green in her favor. This testimony contradicts the police report offered by the plaintiff Susan Ollivier, in which Vassallo is stated to have told the responding police officer that she was stopped at the intersection, looked up, saw the light was red and then proceeded into the intersection. Vassallo denies any memory of having made or signed this statement, but does not attack its admissibility on this motion. Rather, in an affidavit as plaintiff submitted in support of her motion to limit testimony or jury questioning about statements she may have made, she states that "My memory of the events leading upon the accident and the accident itself have never returned although I do get snap shot impressions of things I believe to be related to the accident. It has always been my expressed statements [sic] about the accident that I did not know what happened."

Ms. Vassallo cannot have it both ways. The EBT testimony is no bar to summary judgment in view of the her affidavit directly denying any recollection of the accident, as it eviscerates the deposition testimony as creating any issue of fact regarding Ollivier's proof. Accordingly, summary judgment must be granted to Ollivier. *See, Patti v New York City Trans. Auth.,* 296 AD2d 484 (2d Dept. 2002) ["Since the plaintiff did not recall how the accident occurred, his deposition testimony was insufficient to refute the bus driver's account of the incident or to raise a triable issue of fact."]. More generally, the presence of a *Noseworthy* issue does not relieve Vassallo from her burden on summary judgment. *Blanco v Oliveri,* 304 AD2d 599, 600 (2d Dept. 2003); *Jose v Richards,* 307 AD2d 279 (2d Dept. 2003); *see also, Humphrey v Ka Choya's, Inc.,* 16 AD3d 1029 (4th Dept. 2005).

Accordingly, as Ollivier's proof is uncontradicted, the cross motions are both granted. Action #2, in which Catherine Vassallo is a plaintiff, is dismissed. Action #1, in which Ollivier is the plaintiff, shall proceed on the issue of damages, which will include the issue as to whether she sustained a "serious injury" as that term is defined by the Insurance Law.

This determination renders the plaintiff Vassallo's motion academic, as her role is now solely that of a defendant in a damages trial. The Court notes, however, that for purposes of a possible appeal it would not have issued an order *in limine* nor granted a unified trial in any event.

Her claim of amnesia would have required a decision as to whether a *Noseworthy* charge should be given, which has the effect of lightening the plaintiff's burden of proof in view of an established memory loss. However, the presence of a *Noseworthy* issue in a case would not result in any limitation on evidence, nor any argument based on such evidence, that may be advanced by a defendant. Those are matters of admissibility, not burdens of

proof, and are for the trial court. Rather, if a *Noseworthy* issue exists this means no more or less than that a trial court may be asked to charge the jury that, if it finds that the plaintiff has made the requisite showings, it is given greater latitude in inferring negligence on the part of the defendant from all the evidence in the case. PJI 1:62.

Granting the plaintiff this favorable charge must be based on clear and convincing evidence, including medical proof, that the memory loss exists and was caused by the accident. *See, Sawyer v Dreis & Krump Mfg. Co.,* 67 NY2d 328 (1986); *Schechter v Klanfer,* 28 NY2d 228 (1971); *Nahvi v Urban,* 259 AD2d 740 (2d Dept. 1999). Further, some proof of the adverse party's negligence is also required. *Smith v Stark,* 67 NY2d 693 ((1986). Such an application should not be decided without giving the other parties an opportunity to put that proof to the test at trial. *See, Wahid v Long Island R.R.,* 15 Misc 3d 1120(A) (Sup Ct Queens County 2007).

That branch of the plaintiff Catherine Vassallo's motion that is for a unified trial based upon the alleged memory loss would also have been denied, without prejudice to renewal before the trial court. There appears to be no appellate authority directly addressing an application for a unified trial on the ground of amnesia alone, and the Appellate Division recently declined to reach the question. *Pechersky v Queens Surface Corp.,* 18 AD3d 842 (2d Dept. 2005). However, there is a Unified Rule and a great deal of supporting case authority in the Second Department for the proposition that in personal injury negligence cases a bifurcated trial is preferred, and that a unified trial should be held only where the medical evidence has an "important bearing" on the question of fault – or, put more plainly, that medical evidence is important in understanding how an accident occurred. 22 NYCRR

202.42(a); *see, e.g., Van Nostrand v Froehlich,* 44 AD3d 54 (2d Dept. 2007); *Pasquaretto v Cohen,* 37 AD3d 440 (2d Dept. 2007).

In that regard, the requirements for a *Noseworthy* charge turns the question of what is needed for a unified trial on its head. Instead of using medical proof of amnesia to determine how the accident occurred, the circumstances of the accident are needed to determine if the amnesia was caused thereby. This is a fundamentally different analysis, and therefore the Court cannot find, *ipso facto,* that the plaintiff's need to prove a connection between the accident and the alleged memory loss for purposes of a *Noseworthy* charge will require a jury to hear *all* the medical evidence, as it would in a unified trial. *See, Dittmer v Terzian,* 6 Misc 3d 590 (Sup Ct Rockland County 2004).

Finally, in view of this decision and correspondence from plaintiff Ollivier's counsel that he and counsel for Vassallo as defendant have agreed that further discovery is required regarding additional medical treatment, and that the trial should be adjourned, the Court hereby adjourns the trial of this matter until **Monday, February 25, 2008.**

This shall constitute the Decision and Order of this Court.

ENTER

DATED: January 18, 2008

HON. DANIEL PALMIERI
Acting Supreme Court Justice

ENTERED

JAN 23 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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