[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. DEBORAH A. KAPLAN PART 22
Justice

EDUARD SEVERINO

INDEX NO. 109659/06

MOTION DATE 3/9/08

- v -

MOTION SEQ. NO. 001

MICHAEL P. MASTRODDI and JPR CONSTRUCTION, INC.

MOTION CAL. NO. 88

The following papers, numbered 1 to 2, were read on this motion by the plaintiff for partial summary judgment on the issue of liability.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits...	1
Answering Affidavits — Exhibits (Memo)	2
Replying Affidavits (Reply Memo)	

Cross-Motion: ☐ Yes ■ No

This is an action to recover damages for injuries allegedly sustained in a motor vehicle accident which occurred on July 8, 2006, at the intersection of Allen and Delancey Streets in Manhattan. Plaintiff Eduard Severino, a pedestrian, claims to have been struck by a pick-up truck operated by defendant Michael Mastroddi and owned by JPR Construction Inc. as he was crossing Allen Street in the crosswalk and with the traffic light in his favor. According to the defendant, he was able to stop before hitting the plaintiff and the only contact made was when the plaintiff placed his hands on the hood of the defendant's truck. The plaintiff now moves for partial summary judgment on the issue of liability.

To prevail on a motion for summary judgment, the moving party must produce evidentiary proof in admissible form sufficient to show the absence of any material issue of fact and the right to judgment as a matter of law. If the moving party makes the requisite showing, the burden shifts to the opposing party to come forward with proof in admissible form to raise a triable issue of fact requiring a trial. See Kosson v Algaze, 84 NY2d 1019 (1995); Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Winegrad v New York Univ.

Med Ctr., 64 NY2d 851 (1985); Zuckerman v City of New York, 49 NY2d 557 (1980). Credibility issues are for the trier of fact, and preclude the granting of summary judgment. See e.g. Binetti v Infante, 38 AD3d 210 (1st Dept. 2007); Kenna v Hudmor Corp., 37 AD3d 172 (1st Dept. 2007). "In general, questions of negligence regarding a road accident are best resolved at a jury trial."Lindgren v NYCHA, 269 AD2d 299, 302 (1st Dept. 2000).

In deciding a summary judgment motion, the court must bear in mind that issue finding rather than issue determination is the key to summary judgment. See Sillman vTwentieth Century Fox Film Corp., 3 NY2d 395 (1957). Furthermore, since summary judgment is a drastic remedy which deprives a litigant of his or her day in court, the evidence adduced on the motion must be liberally construed in the light most favorable to the opposing party. See Kesselman v Lever House Restaurant, 29 AD3d 302 (1st Dept. 2006); Goldman v Metropolitan Life Ins. Co., 13 AD3d 289 (1st Dept. 2004).

Both Vehicle and Traffic Law §1111(a)(3) and New York City Traffic Regulations §30(a) (11 RCNY 4-03[a][1][I]) grant the right of way to pedestrians walking within a crosswalk with a green light in their favor. See Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer, 8 NY3d 438 (2007); Conradi V New York City Transit Authority, 249 AD2d 436 (2nd Dept. 1988); Brito v MBSTOA, 188 AD2d 253 (1st Dept. 1992). An unexcused violation of a statutory standard of care, such as those, constitutes negligence per se. See Martin v Herzog, 228 NY 164 (1920); Holleman v Miner, 267 AD2d 867 (3rd Dept. 1999); Weiser v Dalbo, 184 AD2d 935 (3rd Dept. 1992); Cordero v City of New York, 112 AD2d 914 (2nd Dept. 1985); Pattern Jury Instructions 2:26 (1999). Moreover, "a driver is negligent if he or she has failed to see that which, through the proper use of senses, should have been seen." Berner v Koegel, 31 AD3d 591, 592 (2nd Dept. 2006); see Breslin v Rudden, 291 AD2d 471 (2nd Dept. 2002), *lv denied* 98 NY2d 605 (2002); Salamone v Barebaum, 281 AD2d 199 (1st Dept. 2001).

In support of his motion, the plaintiff submits the pleadings, his own deposition testimony, the testimony of defendant Mastroddi and a police report. It is not disputed that at the time of the incident, the plaintiff was lawfully within the crosswalk with the traffic light in his favor when the defendant, intending to make a left turn onto Delancey Street, pulled into the crosswalk. In light of the statutory and decisional authority above,

the defendant's liability would appear clear. However, defendant Mastroddi denied any contact between his truck and the plaintiff except for when the plaintiff placed his hands on the hood. He testified at his deposition that his truck traveled only three or four feet after he observed the plaintiff in front of him and applied the brakes. According to Mastroddi, he did not hit the plaintiff but came close enough so that the plaintiff put both hands on the hood and then raised one hand to him in a "New York salute." Mastroddi further testified that he got out of the truck and asked the plaintiff is he was okay. The plaintiff replied that he was fine, but then walked a few steps away and laid himself down on the street in front of the truck, prompting Mastroddi to call 911.

Construing it in the light most favorable to the defendant, the plaintiff's proof fails to establish the absence of material issues of fact so as to entitle him to judgment as a matter of law on the issue of liability. Specifically, the deposition testimony presents a triable issue, *inter alia*, as to whether the defendant's truck made contact with the plaintiff as he alleges. See Williams v Harbor Freight Transport Co., 43 AD3d 919 (2nd Dept. 2007). The parties conflicting deposition testimony presents an issue of credibility which must be determined by a trier of fact.

The plaintiff has also submitted an uncertified police report which includes a statement, attributed to defendant Mastroddi, that he struck the plaintiff while turning. However, a police report which contains hearsay statements regarding the ultimate issues of fact may not be admitted into evidence for the purpose of establishing the cause of the accident. See Stankowski v Kim, 286 AD2d 282 (1st Dept. 2001); Figueroa v Luna, 281 AD2d 204 (1st Dept. 2001); Aetna Casualty & Surety Co. v Island Transportation, 233 AD2d 157 (1st Dept. 1996); Sansevere v United Parcel Service, Inc., 181 AD2d 521 (1st Dept. 1992). In any event, as stated above, the parties' conflicting deposition testimony alone raises a triable issue as to whether the defendant's truck struck the plaintiff at all.

Since the plaintiff has failed to meet his burden in the first instance, the court need not consider the defendant's proof in opposition which, in any event, consists of his own deposition testimony. Accordingly, the plaintiff's motion for partial summary judgment on the issue of liability must be denied.

For these reasons and upon the foregoing papers, it is,

ORDERED that the plaintiff's motion for partial summary judgment on the issue of liability is denied.

This constitutes the Decision and Order of the Court.

Dated: March 26, 2008

Deborah A. Kaplan J.S.C.

DEBORAH A. KAPLAN
J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**