

**Xenarios v Isshak**

2008 NY Slip Op 32989(U)

October 27, 2008

Supreme Court, New York County

Docket Number: 117061/06

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN  
Justice

PART 22

ELENA XENARIOS,

Plaintiff,

- v -

SAMUEL ISSHAK and ATIF JAVED,

Defendants.

INDEX NO. 117061/06

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. 104

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for Summary Judgment.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo) \_\_\_\_\_

Replying Affidavits (Reply Memo) \_\_\_\_\_

Cross-Motion:  Yes  No

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NEW YORK

BACKGROUND

Plaintiff was allegedly struck by a taxi cab owned by defendant Samuel Isshak and driven by defendant Atif Javed (Javed). The accident occurred on May 6, 2005 at 6:30 p.m., in the rain, on the corner of East 56th Street and Fifth Avenue in New York City. Plaintiff alleges that she entered the crosswalk when the traffic signal was in her favor and after she had checked for traffic in both directions. Once in the pedestrian crosswalk, the plaintiff was struck by the taxi driven by Javed.

The plaintiff commenced this action on November 15, 2006. The parties have completed discovery and note of issue was filed on February 28, 2008. Plaintiff now moves for partial summary judgment pursuant to CPLR § 3211 on the issue of liability.

## SUMMARY JUDGMENT STANDARD

The proponent of a motion for summary judgment is required to make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*JMD Holding Corp. v Congress Fin. Corp.*, 795 NY2d 502 [2005]; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Medical Center*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Santiago v Filstein*, 35 AD3d 184, 185-186 [1<sup>st</sup> Dept 2006]; *Thomas v Holzberg*, 751 NY2d 433, 434 [1<sup>st</sup> Dept 2002]; *Silverman v. Perlbinde*, 762 NY2d 386 [1<sup>st</sup> Dept 2003]).

The failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Medical Center, supra*). The motion must be supported "by affidavit...from a person having knowledge of the facts, by a copy of the pleadings and by other available proof . . ." (CPLR § 3212 [b]). A conclusory affidavit, expressions of hope, unsubstantiated allegations or an affidavit by an individual without personal knowledge of the facts does not establish the proponent's *prima facie* burden (*Winegrad v New York Univ. Medical Center, supra*). A party may also demonstrate a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman v City of New York, supra*; *Prudential Securities Inc. v Rovello*, 692 NYS2d 67 [1<sup>st</sup> Dept 1999]).

Where the proponent of the motion has made a *prima facie* showing, the burden then shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a triable issue of fact (*Vermette v Kenworth Truck Co.*, 68 NY2d 714 [1986]; *Zuckerman v City of New York, supra*; *Mazurek v Metropolitan Museum of Art*,

27 AD3d 227, 228 [1<sup>st</sup> Dept 2006]; *Forrest v Jewish Guild for the Blind*, 765 NY2d 326 [1<sup>st</sup> Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in to sufficiently establish the existence of a "serious injury," which mandate's resolution by trial. If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978].

### DISCUSSION

In support of her motion, plaintiff submitted her affidavit in which she affirms that she was in the pedestrian cross-walk with the pedestrian signal in her favor when she was struck by defendants' taxi cab. The motion papers also include an uncertified copy of the police accident report and photographs of the intersection referenced in plaintiff's affidavit. The uncertified police accident report normally has little or no probative value to indicate evidence of a party's liability. They are inadmissible because the police officer who prepared the report was not an eyewitness to the accident, (See *Ann Connors v. Duck's Cesspool Services, Ltd.*, 144 AD 2d 329, [1<sup>st</sup> Dept 1988]; *Figueroa v Luna*, 721 NY2d 635[1 Dept 2001]; *Murray v Donlan*, 433 NY2d 184 [1 Dept 1980]), However, a report can have some probative value if it falls into a hearsay exception, where a party makes an admission to the police officer that the officer records on the report. In this instance, the hearsay exception is met. According to the uncertified police report the defendant driver Atif Javed stated " he had a green light southbound on 5<sup>th</sup> Avenue and was making a left on 56<sup>th</sup> Street eastbound when he hit the pedestrian who had the right of way in the cross walk".

Thus, the plaintiff's evidence establishes that she had the right of way while in the crosswalk. It is well settled that New York City Traffic Rules and Regulations dictate whether a pedestrian or a motorist has the right of way at an intersection. 34 RCNY § 4-04(b)(1) provides that "the operator of a vehicle shall yield the right of way to a pedestrian crossing a roadway within a crosswalk when the pedestrian is in the path of the vehicle or is approaching so closely thereto as to be in danger."

In opposition, defendants submit an unsworn and uncertified transcript of Javed's EBT. In this transcript, Javed states that he had a green light and that he looked before he made a left turn to enter the crosswalk. Prior to turning into the crosswalk, Javed asserts that he first let several pedestrians cross. Javed further says that it was raining and plaintiffs lost control of her umbrella, which hit his windshield, blocking his view. Javed states that he did not see plaintiffs until after the taxi hit her.

Defendants have failed to oppose this motion with evidentiary proof in admissible form. The only support provided by defendants is the unsworn, unelected deposition testimony of Javed, which was submitted to Javed not more than 60 days prior to the submission of the opposition. Unsworn, unelected deposition transcripts cannot be considered by the court. See *McDonald v Mass*, 38 AD3d 727 (2d Dept. 2007). Further, defendants do not make any argument that would permit the court to consider Javed's deposition testimony under the provisions of CPLR § 3117 (a) (3) [witness is dead, more than 100 miles from the place of trial, unable to attend because of sickness, infirmity or imprisonment, or that the party seeking to use the deposition has been unable to procure the witness' attendance or there are exceptional circumstances permitting the use of the deposition].

Additionally, defendants do not dispute that plaintiff was in the pedestrian crosswalk with the light in her favor at the time of the accident. Defendants only argue that plaintiff was comparatively negligent in not maintaining hold of her umbrella, but fail to make that argument with legally admissible evidence. See *Beamud v Gray*, 45 AD3d 257 (1<sup>st</sup> Dept 2007); *Hoey v City of New York*, 28 AD3d 717 (2d Dept 2006).

Although defendants have attempted to rectify the lack of legally admissible evidence in their opposition by the submission of a sur-reply, the court declines to consider sur-reply papers, which are not permitted under CPLR § 2214 (b). See *Graffeo v Paciello*, 46 AD3d 613 (2d Dept 2007).

Since the evidence submitted by plaintiff is sufficient to establish her entitlement to summary judgment, and defendants' opposition papers are without admissible evidentiary value, the court grant's plaintiff's motion for summary judgment with respect to liability. *Zabusky v Cochran*, 234 AD2d 542 (2d Dept 1996).

Based on the foregoing, it is

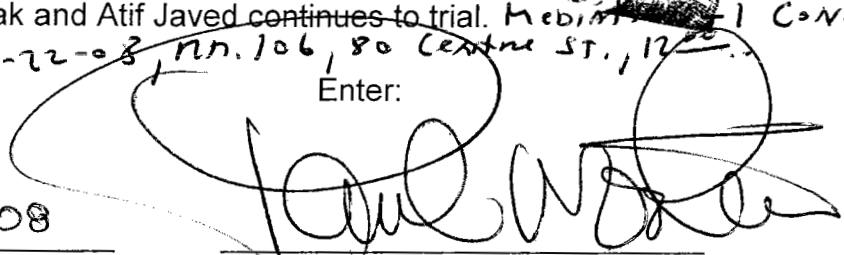
ORDERED that plaintiff's motion for partial summary judgment with respect to liability is granted; and it is further

ORDERED that the action with respect to ~~interim~~ damages against defendants Samuel Isshak and Atif Javed continues to trial. ~~Meeting~~ CONFERENCE DATE 12-22-08, Rm. 106, 80 Centre St., 12/22/08

**FILED**  
NOV 05 2008

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OCT 27 2008

Paul Wooten

**Paul Wooten**  
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