

**Vollerthun v Kelly**

2009 NY Slip Op 31220(U)

May 19, 2009

Supreme Court, Nassau County

Docket Number: 006161-07

Judge: Daniel R. Palmieri

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**SHORT FORM ORDER**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU**

**Present:**

**HON. DANIEL PALMIERI  
Acting Justice Supreme Court**

-----x  
**MELIDA VOLLERTHUN,**

**TRIAL TERM PART: 47**

**Plaintiff,**

**INDEX NO.:006161/07**

**-against-**

**MOTION DATE:5-4-09  
SUBMIT DATE:5-18-09  
SEQ. NUMBER - 001**

**KATELYN KELLY and MARTIN KELLY**

**Defendant.**

-----x

**The following papers have been read on this motion:**

- Notice of Motion, dated 4-6-09.....1**
- Affirmation in Opposition, dated 5-12-09.....2**
- Reply Affirmation, dated 5-15-09.....3**

The motion by the defendant for summary judgment pursuant to CPLR 3212 on the issue of liability is denied.

This is an action for personal injuries arising as a result of an automobile accident that occurred on April 12, 2004, at the intersection of First Street and Rockaway Avenue in Nassau County. Plaintiff was traveling westbound on First, intending to go straight on

through the intersection and defendant was traveling eastbound, intending to turn left at the intersection. Plaintiff testified that the traffic signal was green in her favor and defendant testified that she had the benefit of a green left turn arrow. Neither party has submitted any evidence as to the sequence and timing of the phases of the traffic signal.

No testimony has been offered from the driver of the third vehicle which was struck by defendant's vehicle after the initial impact.

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). It is nevertheless an appropriate tool to weed out meritless claims. *Lewis v. Desmond*, 187 AD2d 797 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N. A.*, 82 AD2d 168 (3d Dept. 1981). Even where there are some issues in dispute in the case which have not been resolved, the existence of such issues will not defeat a summary judgment motion if, when the facts are construed in the nonmoving party's favor, the moving party would still be entitled to relief, *Brooks v. Blue Cross of Northeastern New York, Inc.*, 190 AD2d 894 (3d Dept. 1993).

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). Conclusory allegations are insufficient (*Zuckerman v. City of New York, supra*), and the defending party must do more than merely parrot the language of the complaint or bill of particulars. There must be evidentiary proof in support of the allegations. *Fleet Credit Corp. v. Harvey Hutter & Co., Inc.*, 207 A.D.2d 380 (2d Dept. 1994); *Toth v. Carver Street Associates*, 191 AD2d 631 (2d Dept. 1993). If a party defends a motion by resort to CPLR 3212(f), that is, the party has a defense sufficient to defeat the motion but that the facts cannot yet be stated, that party must be able to make some showing that such facts do in fact exist; mere hope that discovery may reveal those facts is insufficient. *Companion Life Ins. Co. v All State Abstract Co.*, 35 AD3d 519 (2d Dept. 2006). Nor can mere speculation serve to defeat the motion. *Pluhar v Town of Southhampton*, 29 AD3d 975 (2d Dept. 2006); *Ciccione 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), 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).

When a movant's submission in support of the motion establishes entitlement to summary judgment, the burden is shifted to the opposing party to rebut the case by submitting proof in evidentiary form showing the existence of triable issues of fact. *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Friends of Animals v. Associated Fur Manufacturers, Inc.*, 46 NY2d 1065 (1979). In this instance, defendant has failed to make a *prima facie* showing of entitlement to relief, however, even if such a showing can be said to have been attained, plaintiff has demonstrated that there are issues of fact.

The conduct of motorists at an intersection controlled by traffic signals is subject to the provisions of VTL §1111 and not the more general provisions of the vehicle and traffic Law such as those set forth in §§ 1140 and 1141 which govern the conduct of drivers at intersections that are not controlled by traffic lights. *See, Dicke v. Anci*, 31 AD3d 696 (2d Dept. 2006); *Saggio v. Ladone*, 21 AD3d 407, (2d Dept. 2005); *Rudolph v. Kahn*, 4 AD3d 408 (2d Dept. 2004); *LeClarie v. Pratt*, 270 AD2d 612 (3d Dept. 2000). Section 1111 of the Vehicle and traffic Law permits motorists approaching an intersection with a green traffic signal to proceed through the intersection provided they yield to vehicles lawfully within the intersection and exercise reasonable care under the circumstances. *See Schiskie v. Fornan*, 277 AD2d 441 (2d Dept. 2000) and *Shea v. Judson*, 283 NYS2d 393 (1940). Traffic facing a steady green arrow signal may cautiously (emphasis added) enter the intersection. Such traffic shall yield the right of way to other traffic lawfully within the intersection. VTL §1111(a)2. A motorist facing a green traffic signal usually has the right to assume that the light is red for cross traffic and that such traffic will obey the law by stopping for the red light and remaining stationary until the light has changed to green. *See, Baughman v. Libasci*, 30 AD2d 696, (2d Dept. 1968). Although a motorist proceeding under a green light is not authorized to blindly and wantonly enter the intersection without keeping a proper lookout or employing a reasonable speed, (*see Nuziale v. Paper Transport of Green Bay Incorporated*, 39 AD3d 833, [2d Dept. 2007]), there is no requirement that the motorist reduce his or her speed at every intersection as a reduction in speed is required only where

warranted by prevailing conditions. See, VTL §1180(a) (e); *Wallace v. Kuhn*, 23 AD3d 1042, (4<sup>th</sup> Dept. 2005); *Mosch v. Hansen*, 295 AD2d 717 (3<sup>rd</sup> Dept. 2002); *Barile v. Carroll*, 280 AD2d 988 (4<sup>th</sup> Dept. 2001); *Wilke v. Price*, 221 AD2d 846 (3<sup>rd</sup> Dept. 1995).

A motorist is entitled to proceed through an intersection confident that other vehicles will comport themselves with the obligations imposed on its driver by VTL §1111 and without having to anticipate any sudden movement across her lane of travel. See *Berner v. Koegel*, 31 AD3d 591 (2d Dept. 2006); *Perez v. Brux Cab Corp.*, 251 AD2d 157 (1st Dept. 1998).

There are sharp discrepancies and gaps in the accounts of the parties which preclude the grant of summary judgment. *Nuziale v. Paper Transport of Green Bay Inc.*, 39 AD3d 833 (2d Dept. 2007) and *Munter v. Hubert*, 34 AD3d 544 (2d Dept. 2006).

Thus defendant has not established a *prima facie* entitlement to judgment as a matter of law. *Cf Casanova v. New York City Transit*, 279 AD2d 495 (2d Dept. 2001); *Diasparra v. Smith*, 253 AD2d 840 (2<sup>nd</sup> Dept. 1998).

Plaintiff testified that as she was westbound on First Street, approaching the intersection, the traffic signal was green in her favor when she was at the driveway before the last house, maybe six, seven car lengths away, traveling "maybe 32, 33". She never saw the defendant's vehicle and the accident happened in the middle of the intersection. She later testified that she was approaching the intersection looking up and the light was green.

Defendant testified that she was eastbound on First Street intending to turn left at the intersection, she had a green arrow in her favor but does not recall her distance from the

intersection when she first observed the arrow and does not know her speed. She saw plaintiff's vehicle approaching the light from an undetermined distance.

Defendant has, without objection, submitted the police accident report. CPLR §4518(a) allows records made in the regular course of any business to be introduced into evidence when it was in the regular course of such business to make them. However, the Court of Appeals in *Johnson v. Lutz*, 253 NY 124 (1930) read into this rule a requirement that the person making the police report be the witness or that the person supplying the information to the entrant be under a business duty to do so (p. 128). In effect, each participant in the chain producing the record must be acting within the course of regular business conduct. *See St. Lawrence County Dept. of Social Services v. Leon RR*, 48 NY2d 117 (1979).

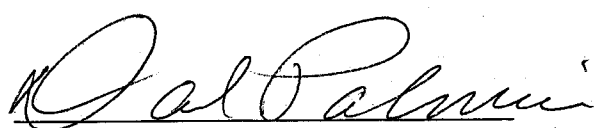
Here, the accident not having been witnessed by the police officer and there being no business duty for either plaintiff or defendant to report to the police officer, *see Cover v. Cohen*, 61 NY2d 274 (1984), the accident report as a whole is not admissible as a business record. In the alternative, the statements of the parties are admissible as admissions of a party and may be considered by this court. *Chemical Leaman Tank Lines, Inc. v. Stevens*, 21 AD2d 556 (3<sup>rd</sup> Dept. 1964); *Kelly v. Wasserman*, 5 NY2d 425 (1959); *Toll v. State*, 32 AD2d 47 (3<sup>rd</sup> Dept. 1969). The statements contained in the police report, while considered, are of questionable probative value because the statements attributed to the parties are consistent with their deposition testimony, *ie* each driver proceeded into the intersection as if they had a green signal or arrow in their favor.

Given the absence of distances to the traffic signal and lacking the timing and sequences thereof, the Court cannot say whether either or both of the drivers were free of any fault or totally responsible for the incident. Hence, summary judgment is denied.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: May 19, 2009

  
HON. DANIEL PALMIERI  
Acting Supreme Court Justice

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**ENTERED**  
MAY 22 2009  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE