

**Beukelaer v Whitely**

2010 NY Slip Op 33577(U)

December 20, 2010

Sup Ct, Nassau County

Docket Number: 1267/10

Judge: Denise L. Sher

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**SHORT FORM ORDER**

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER  
Acting Supreme Court Justice

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CATHERINE BEUKELAER,  
  
Plaintiff,  
  
- against -  
  
JEANETTE WHITELY, LUISA M. WILLIAMS and  
DOUGLAS J. WILLIAMS,  
  
Defendants.

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TRIAL/IAS PART 32  
NASSAU COUNTY  
  
Index No.: 1267/10  
Motion Seq. No.: 01  
Motion Date: 11/23/10

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

	<u>Papers Numbered</u>
<u>Notice of Motion, Affirmation and Exhibits</u>	<u>1</u>
<u>Affidavit in Opposition and Exhibit</u>	<u>2</u>
<u>Affirmation in Opposition and Exhibits</u>	<u>3</u>
<u>Reply Affirmation</u>	<u>4</u>
<u>Reply Affirmation</u>	<u>5</u>

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendants Luisa M. Williams and Douglas J. Williams (collectively "L & D Williams")  
move, pursuant to CPLR § 3212, for an Order granting them summary judgment dismissing the  
Complaint of plaintiff and all cross-claims asserted against them on the grounds that no liability  
for the occurrence of the subject motor vehicle accident could be attributed to any negligence on  
their part. Plaintiff and defendant Jeanette Whitely ("Whitely") oppose the motion.

This action arises from a motor vehicle accident which occurred on December 22, 2009,  
at approximately 12:50 p.m., at Westbury Avenue, Carle Place, Nassau County, New York. The

accident involved a 1997 Nissan Sentra owned and operated by defendant Whitely (in which plaintiff was a passenger in the front seat) and a 2002 Chevrolet Suburban owned by defendant Douglas J. Williams and operated by defendant Luisa M. Williams. Plaintiff commenced the action by the filing and service of a Summons and Verified Complaint on or about January 13, 2010. Issue was joined by defendant Whitely on or about February 2, 2010. Issue was joined by defendants L & D Williams on or about March 11, 2010.

Briefly, it is defendants L & D Williams' contention that the accident occurred when defendant Whitely, with plaintiff as a passenger in the front seat of her vehicle, was exiting from a Waldbaums parking lot, attempting to make a left-hand turn onto Westbury Avenue when the collision with defendants L & D Williams' vehicle occurred. Defendant Luisa M. Williams testified at her Examination Before Trial that she was traveling eastbound on Westbury Avenue in the left-hand lane at approximately twenty-five to thirty miles per hour. As defendant Luisa M. Williams approached the entrance/exit to the Waldbaums supermarket, there was another vehicle ahead of her, to her right, also traveling eastbound. At some point defendant Luisa M. Williams observed defendant Whitely's vehicle moving into the left-hand eastbound lane facing the double yellow line separating traffic traveling east and westbound on Westbury Avenue. She indicates that she observed defendant Whitely's vehicle from approximately one car length away and immediately applied her brakes, but was unable to avoid the ensuing collision. Defendants L & D Williams argue that "[u]nder the circumstances surrounding the subject accident as testified to by the parties, it is clear that the co-defendant, Jeanette Whitely, was in violation of § 1143 of the Vehicle and Traffic Law when she attempted to execute a left-hand turn from the parking lot of the Waldbaums supermarket." They further argue that defendant Whitely failed to yield the

right of way to defendant Luisa M. Williams.

In opposition, defendant Whitely contends that the Court must deny defendants L & D Williams' summary judgment motion on the issue of liability as there are genuine issues of fact that should be presented before a trier of fact. Defendant Whitely submits that, at her Examination Before Trial, defendant Luisa M. Williams testified that, at the time of the accident, there were "piles of snow" on the sidewalks and she was unable to see the driveway on approach to the Waldbaums' parking lot because of the vehicle that was traveling in front and to the right of her vehicle. She further testified that she does not remember if she was able to see vehicles coming out of the area of the Waldbaums' parking lot. Defendant Luisa M. Williams also testified that defendant Whitely's car was approximately one car length away when she first saw it and, when she first saw said vehicle, her foot was on the accelerator, but subsequently moved to the brake before the impact. She cannot recall if she took any other evasive action before the accident occurred.

Defendant Whitely argues that there is certainly a question of fact as to whether "piles of snow" on the sidewalk that defendant Luisa M. Williams described obstructed her view of vehicles exiting the Waldbaums' parking lot since defendant Luisa M. Williams' testified that she does not recall if she was able to see vehicles coming out of said area. Defendant Whitely submits that "[c]ertainly, summary judgment cannot be granted in a case where defendant Williams had a duty to see what was there to be seen." She further argues that "defendant Williams had sufficient knowledge and the duty to exercise due diligence with regard to the operation of her vehicle to drive in a cautious manner in the vicinity where the accident occurred and to maintain a view of the roadway, as well as vehicles that had the potential to enter onto

the roadway of Westbury Avenue from Waldbaum's (*sic*) parking lot. Whether defendant Williams exercised care and due diligence in seeing what was there to be seen is a question for a trier of fact, and as such, this Honorable Court must deny the motion of the defendants, Williams, in its entirety."

Defendant Whitely adds that defendant Luisa Williams indicated in her Examination Before Trial that defendant Whitely had already traversed across one lane of eastbound Westbury Avenue and "the first front half" of defendant Whitely's vehicle was in the lane in which defendant Luisa M. Williams was traveling before the accident occurred. Defendant Whitely also adds that, even if defendant Luisa Williams had the right-of-way, she may still be "found partially at fault for an accident if that driver fails to use reasonable care to avoid a collision with another vehicle....The issue of comparative negligence is generally a question for the Jury."

Plaintiff also opposes defendants L & D Williams' motion. Plaintiff joins in all the arguments made by defendant Whitely in her opposition papers. Plaintiff adds "it should be noted that while Defendants, Luisa M. Williams and Douglas J. Williams motion for summary judgment clearly establishes the negligence of Defendant, Jeanette Whitely, it fails to exonerate their own comparative negligence in the happening of this two car intersection accident." Plaintiff adds that, as can be seen from defendant Luisa M. Williams own testimony, the issue of comparative fault on behalf of defendant Luisa M. Williams is very much at issue. "The mere fact that she testified that she did not see the other vehicle until it was only 1 car length away from her vehicle and it was already in the left lane of Westbury Ave. when she saw it for the first time raises the issue of whether she used reasonable care to avoid the accident." Plaintiff submits that defendants L & T Williams failed to demonstrate that they were free from fault thus

a reasonable jury could conclude that their actions bear some responsibility in the happening of this accident.

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See CPLR § 3212 (b); Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980), *supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957), *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989). It is the existence of an issue, not its relative strength that is the critical and controlling consideration. *See Barrett v. Jacobs*, 255 N.Y. 520 (1931); *Cross v. Cross*, 112 A.D.2d 62, 491 N.Y.S.2d 353 (1<sup>st</sup> Dept. 1985).

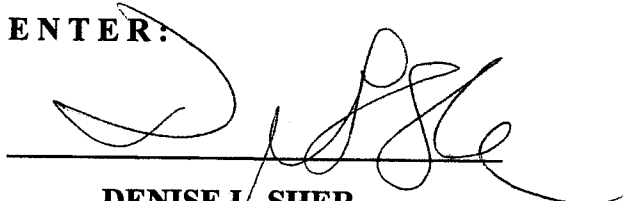
After applying the law to the facts in this case, and construing the evidence in a light most favorable to the plaintiff and defendant Whitely, the Court finds that there exist material questions of fact concerning the causes and circumstances of the accident, as well as the issue of comparative negligence on the part of defendants L & D Williams.

Therefore, based upon the foregoing, defendant L & D Williams' motion for summary judgment on the issue of liability is hereby denied.

All parties shall appear for Trial in Nassau County Supreme Court, DCM Trial Part on February 1, 2011 at 9:30 a.m.

This constitutes the decision and order of this Court.

ENTER:



DENISE L. SHER  
A.J.S.C.

Dated: Mineola, New York  
December 20, 2010

**ENTERED**

DEC 29 2010

NASSAU COUNTY  
COUNTY CLERK'S OFFICE