Schmidt v Metropolitan Transp. Auth.
2018 NY Slip Op 34441(U)
January 19, 2018
Supreme Court, Nassau County
Docket Number: Index No. 605614/14
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

TRAVIS SCHMIDT,

Plaintiff,

- against -

METROPOLITAN TRANSPORTATION AUTHORITY, OFFICER DERRICK REVANDER, Individually and in his official capacity as an MTA Police Officer, and OFFICER ANDRE OLIPHANT, Individually and in his official capacity as an MTA Police Officer,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 605614/14
Motion Seq. No.: 02
Motion Date: 08/30/17

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits	1
Affirmation in Opposition and Exhibits and Affidavit in Opposition	2
Reply Affirmation and Exhibit	3

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

Defendants move, pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiff's Verified Complaint. Plaintiff opposes the motion.

Plaintiff commenced the instant action with the filing of a Summons and Verified Complaint on or about October 23, 2014. *See* Defendants' Affirmation in Support Exhibit A. Issue was joined on or about November 26, 2014. *See* Defendants' Affirmation in Support Exhibit B.

This action involves allegations of violations of plaintiff's rights "under 42 U.S. § 1983 ('§1983'), claiming false arrest, violation of 4th Amendment right to be free from unreasonable search and seizure, 14th Amendment right to be free from deprivation of liberty, and First Amendment right of free speech, assault and battery and negligence against Defendants. Plaintiff has also alleged a cause of action for negligent hiring, training and supervision of employees and unconstitutional custom and practice against MTA, following an incident that took place on November 7, 2013. Finally, Plaintiff also seeks to recover punitive damages from Officer Oliphant and Officer Revander." *See* Defendants' Affirmation in Support Exhibit A.

In support of the motion, counsel for defendants submits the transcript from plaintiff's Examination Before Trial ("EBT"). *See* Defendants' Affirmation in Support Exhibit C. Counsel for defendants asserts that plaintiff testified, in pertinent part, that, "on November 7, 2013, he took the LIRR to St. Joseph's Medical Center in Jamaica Queens in the early morning hours for methadone treatment.... Plaintiff began the program in 2010 and had been undergoing the treatment since he admittedly became addicted to heroin.... After completing his treatment session in Jamaica that morning, he took the LIRR back to the Hicksville train station.... Prior to November 7, 2013, Plaintiff had been taking the LIRR from (*sic*) Hicksville station for two months for his treatment in Queens.... He **knew** that outside the Hicksville train station, there was a concession stand and that (*sic*) 'no smoking sign' existed.... After Plaintiff arrived back at the Hicksville train station, between 8:00 a.m. and 8:30 a.m., Plaintiff went outside the front doors of the train station and waited to take the bus to his home in Levittown.... He began smoking a cigarette.... While standing next to the cement pole, Plaintiff smoked his cigarette while waiting for the bus." *See id.*

Counsel for defendants also submits the transcripts from defendants Officer Andre Oliphant's and Officer Derrick Revander's EBTs. *See* Defendants' Affirmation in Support Exhibits E and F. Counsel for defendants asserts that defendants Officer Andre Oliphant and Officer Derrick Revander testified, in pertinent part, that, "Officer Oliphant and Officer Revander were on patrol at District 2 located in Garden City.... Upon request of their supervisor, the two officers went to the Hicksville train station to pick up the payroll for the officers working at District 2.... Hicksville train station was part of the geographical location the two officers were patrolling during the morning hours of November 7, 2013.... The officers arrived at the Hicksville station at approximately 8:30 a.m.... Officer Oliphant exited his vehicle [to pick (*sic*) the payroll], walked around the front of the SUV and noticed Plaintiff standing in front of the glass doors of the station, smoking,.... Officer Revander was inside the police vehicle and he also saw Plaintiff standing in front of the station, smoking.... Officer Oliphant told Plaintiff to put his cigarette out, and Plaintiff admits Officer Oliphant specifically said, 'Don't you know there's no smoking here?'... Plaintiff replied 'what do you mean? There's no sign here?'... Officer Oliphant then went inside the train station to pick (*sic*) the payrolls.... Despite Officer Oliphant's directive to put the cigarette out, **Plaintiff relit his cigarette and continued to smoke, instead of throwing away his cigarette or abiding by Officer Oliphant's warning**. He specifically admitted that he walked away a few steps and re-lit his cigarette, simply because he 'figured' it was 'unfair' as he saw that two other individuals present in the area were smoking.... Officer Revander also observed while sitting in the police vehicle that Plaintiff continued to smoke after Officer Oliphant went inside the station.... Signs prohibiting smoking are posted in the vicinity in front of (*sic*) Hicksville train station, including the pillar.... Smoking is prohibited in all public

areas of the LIRR, including but not limited to the area at the front of the Hicksville train station, which makes smoking a violation of the LIRR's rules and regulations.... Furthermore, Plaintiff knew that, in addition to the platforms, smoking was not allowed near the doors of the station.... Inside the station, Officer Oliphant was told that the payroll checks were not ready to be picked up. As such, he walked out of the train station from the front (same way he had entered), and as he was approaching the door to exit the station, he saw Plaintiff was **still smoking**.... Plaintiff admits that he continued to smoke after Officer Oliphant warned him otherwise, finished smoking, and then put his cigarette out by throwing it on the ground, stepping on it and throwing it in a trash can.... Plaintiff then proceeded to enter through the set of doors located on the right side of the station, facing south, intending to go to the bathroom.... Officer Oliphant, while exiting the station, said to Plaintiff 'Didn't I tell you to put the cigarette out?' to which Plaintiff replied, '[F@*k] you, leave me alone' and then attempted to flee by retreating inside the train station.... Officer Oliphant tried to stop Plaintiff and got a hold of Plaintiff's knapsack, but Plaintiff continued to resist.... Plaintiff began yelling, cursing, screaming, and admits in his own words that he was being 'loud.'... Officer Oliphant intended to issue a summons to Plaintiff for smoking, however, when he asked Plaintiff for his ID, Plaintiff kept yelling, screaming and saying, 'leave me alone.'... Officer Revander entered the station to assist Officer Oliphant and the two officers tried to put handcuffs on Plaintiff, yet Plaintiff kept flailing his arms, resisting arrest, which caused the three individuals (Plaintiff and the two officers) to fall to the floor.... Plaintiff's behavior led the Officers to believe he was 'violent' because, as Officer Revander explained, a reasonable person would not attempt to flee and say '[f@*k] you'.... The officers told Plaintiff to put his hands behind his back, yet he did not do so and continued resisting.... After the three individuals fell, Officer Oliphant held one of Plaintiff's arms and held his shoulders down and

Officer Revander managed to place the handcuffs on Plaintiff.... According to memo book entries of both officers, prepared contemporaneously with the events transpiring, both officers specifically noted in their respective memo books that Plaintiff appeared to be an 'EDP,' was 'violent,' and was smoking in a prohibited area.... After handcuffs were placed, Plaintiff was escorted out of the train station, as Officer Oliphant took his wrist and walked out, while Officer Revander carried Plaintiff's knapsack.... Plaintiff was acting in a 'wild,' 'crazy,' 'violent' manner and was yelling, spitting, screaming and foaming at the mouth.... The officers determined that Plaintiff needed medical attention as Plaintiff's behavior led them to believe he was an 'emotionally disturbed person' or an 'EDP.'... As such, Plaintiff was taken into custody as an 'aided,' as he appeared disturbed.... He was placed inside the back of the police vehicle, and he began banging his head against the petition, and further admits that the officers did not do anything to hurt him while he [Plaintiff] was seated inside the police vehicle.... Officer Oliphant called the ambulance as he believed it was his job to make sure Plaintiff was safe, and as Officer Revander explained, officers are allowed to place handcuffs (*sic*) for 'safety' reasons, not necessarily to arrest someone.... Plaintiff was not issued a summons at any point and was not charged with any violations, misdemeanors or crimes because Plaintiff was considered an 'aided' by the officers.... **Furthermore, Plaintiff admittedly has (*sic*) prior history of experiencing panic attacks and was under a psychologist's and psychiatrist's care during certain time frames prior to November 7, 2013**." *See* Defendants' Affirmation in Support Exhibits C, E and F.

Defendants also submit the Affidavits of Deborah Downey, a ticket clerk working at the Hicksville train station at the time of the subject incident, Dave Mitchell, a Ticket Agent Supervisor for the LIRR who allegedly witnessed the subject incident, and Benjamin Butt, a

Nassau County Police Department paramedic who responded to the subject scene. *See* Defendants' Affirmation in Support Exhibits J, K and O.

Counsel for defendants argues that plaintiff's 42 U.S. § 1983 claims regarding violations of the First and Eighth Amendments by defendants must be dismissed. Counsel asserts that, "[t]he First Amendment right of free speech does not exist without any exceptions and is not absolute. Specifically, government officials are authorized to stop/disperse 'public demonstrations or protests where 'clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears.'' [citations omitted]. Here, there is simply no allegation, let alone evidence, that Plaintiff was arrested or summoned for his speech in any way.... Furthermore, a claim for excessive force during an arrest, investigatory stop or other 'seizure' is determined by using the 'objective reasonableness' standards of the Fourth Amendment. [citation omitted].... Here, there is no evidence indicating any excessive force, as both Officer Oliphant and Officer Revander fell to the ground while Plaintiff was resisting arrest. Within 31 seconds, handcuffs were placed (*sic*) and, as revealed in the surveillance footage, Plaintiff was escorted out as he is seen in the surveillance footage walking on his own with the officers.... Plaintiff further admitted that the two Officers did not hurt him in any way as he was seated in the police vehicle.... The entire incident took no more than 90 seconds, Officer Oliphant drove the ambulance to the hospital, and there's no evidence of any direct interaction between Officer Oliphant and Plaintiff or Officer Revander and Plaintiff after Plaintiff was placed inside the vehicle.... As such, Plaintiff's claims for excessive force and violation of his Eighth Amendment right should be dismissed." *See* Defendants' Affirmation in Support Exhibits C and I.

Counsel for defendants also argues that plaintiff's claim for false arrest and a violation of his Fourth Amendment right should be dismissed because defendants had probable cause to arrest plaintiff. Counsel contends that, "[h]ere, Officer Oliphant and Officer Revander observed Plaintiff smoking in front of the Hicksville train station. It is undisputed that Officer Oliphant first warned Plaintiff and asked him to put out his cigarette. It is further undisputed that Plaintiff continued to smoke, despite Officer Oliphant's warning. It is further undisputed that 'no smoking' signs are posted around the station and Plaintiff knew smoking was prohibited at the train station. As such, Officer Oliphant explained that he initially asked Plaintiff to provide his license; however, instead of complying, Plaintiff cursed, told Officer Oliphant to leave him [Plaintiff] alone and began to flee. Furthermore, Plaintiff began yelling, screaming, spitting and was foaming at the mouth. As such, Officers Oliphant and Revander took Plaintiff into custody and considered him an 'emotionally disturbed person,' in need of medical help because Officer Oliphant explained that he wanted to make sure Plaintiff is (*sic*) safe.... Furthermore, there is no dispute that Plaintiff was seen smoking in front of the Hicksville train station, within the geographical area of the Officer's patrol, and that he was taken into custody within the same area. As such, in light of CPL §140.10, summary judgment is warranted in favor of the Officers as they had probable cause to detain based upon the observations they made and the facts available to the officers at the time. Furthermore, in accordance with Mental Hygiene Law §9.41, the Officers followed standard protocol, and were allowed to take Plaintiff into custody because he appeared disturbed ... and could have harmed someone else or himself, as Officer Oliphant explained that he took Plaintiff into custody because he [Officer Oliphant] believed it was his job to make sure Plaintiff is (*sic*) safe.... In addition to the above, and specifically with regards to Officer Revander, Plaintiff's claims for false arrest should also be dismissed because **Plaintiff**

testified that Officer Revander did not do anything unprofessionally or erratically.... Furthermore, Officer Revander was not the 'arresting officer,' as he simply came inside the station to assist Officer Oliphant. *See* Defendants' Affirmation in Support Exhibits C, E, F and G.

Counsel for defendants additionally argues that plaintiff's 42 U.S. § 1983 claims based upon the theory of *respondeat superior* against defendant Metropolitan Transportation Authority ("MTA") must be dismissed because plaintiff cannot establish custom, policy and practice. Counsel asserts that, "[g]enerally, in the context of §1983 claims, there is no vicarious liability that may be applied to a public authority such as the MTA. The mere existence of (*sic*) employer-employee relationship between the MTA and Officers is insufficient to create liability on MTA's part for Plaintiff's §1983 claims, because, generally, a municipality cannot be held liable for purported violations of Plaintiff's civil rights. [citations omitted]. To recover against the MTA in the context of §1983 claims, Plaintiff must prove the existence of an official custom, policy or practice that caused the denial of Plaintiff's civil rights. [citations omitted].... Considering the factual testimony of both officers, ..., coupled with their memo book entries and memorandums, as well as MTA's protocol for 'aided cases' there is no proof of any policy, custom or practice maintained by the MTA or any directive given by a 'final policy maker' of the MTA commanding any of the acts that Plaintiff has complained of. [citation omitted]. Furthermore, even where the officer's conduct is objectionable, a single incident is not sufficient to establish implementation of custom, policy and practice that violated Plaintiff's civil rights. [citations omitted]."

Counsel for defendant further asserts that plaintiff's claim against defendant MTA for negligent hiring, retention and supervision should be dismissed. Counsel submits that, "[w]here

the employees' (*sic*) acted within the scope of employment, 'the employer is liable for the employee's negligence under the theory of respondeat superior and no claim may proceed against the employer for negligent hiring, retention or training.' [citations omitted]. Such a claim is only cognizable if punitive damages are being sought against **the employer**. [citation omitted]. Here, is it undisputed that Officers (*sic*) Oliphant and Officer Revander were acting within the scope of their employment at all relevant times.... It is further undisputed that Plaintiff's complaint only seeks punitive damages against the 'individually named Defendants' and NOT against MTA." *See* Defendants' Affirmation in Support Exhibit A.

Counsel for defendants also contends that, "[i]n matters involving alleged police misconduct, New York courts do not recognize a cause of action for general negligence. [citation omitted]. A Plaintiff seeking damages for unlawful arrest 'may not recover (*sic*) broad principles of negligence, but must proceed by way of the traditional remedies of false arrest and imprisonment.' [citation omitted]. Here, there is no dispute that Plaintiff has alleged police misconduct and is seeking recovery for an alleged unlawful arrest.... As such, his general negligence claims against the Defendants must be dismissed.... Officer Oliphant and Officer Revander had probable cause to detain Plaintiff, and therefore, Plaintiff's claims for assault and battery should be dismissed." *See id.*

In opposition to the motion, counsel for plaintiff submits, in pertinent part, that, "[o]n November 7, 2013 ('Day of Incident') the Plaintiff departed a Long Island Rail Road ('LIRR') train at the Hicksville Station ('Station') on his way to his home in Levittown, NY. As was his custom and as was the custom and practice of a number of other customers of the LIRR, he went *outside* of the Station and lit a cigarette next to two other people who were smoking, and he waited for the bus that should have taken him home. An MTA police vehicle pulled in,

containing OLIPHANT and REVANDER, who were not sent there to police the Station or otherwise protect and serve the public. Instead, these two officers were given the job of picking up paychecks.... Plaintiff was NOT standing directly in front of the Station doors, he was near the curb, away from the Station doors. In addition, there were no ticket dispensing machines in the vicinity. OLIPHANT walked passed Plaintiff and told him to 'put out that cigarette.' According to OLIPHANT, Plaintiff made no response. Plaintiff testified that OLIPHANT said, 'don't you know there's no smoking and put out your cigarette and I said, there's no sign, and what about them' referring to the other smokers. Putting aside the question of the extent of verbal interaction, Mr. Schmidt 'flicked' out his cigarette and OLIPHANT went into the Station. Thereafter, Mr. Schmidt noted that the other persons around him continued to smoke, and he subsequently relit his cigarette, finished smoking it, and then he put it out. Mr. Schmidt actually walked further away from the Station before relighting his cigarette, then he put it out and even put the extinguished cigarette into the trash can. Only after putting the cigarette out and disposing of it properly did Mr. Schmidt walk to the front doors of the Station and start walking through the front doors intending to go in to use the bathroom. Mr. Schmidt did not see OLIPHANT, but apparently OLIPHANT saw him and as Mr. Schmidt was walking into the Station, OLIPHANT grabbed the backpack Mr. Schmidt was wearing and tore it off of his back. Although there are many questions of fact regarding what occurred before Mr. Schmidt started walking towards and through the doors of the Station, it is undisputed that OLIPHANT ran after Mr. Schmidt as he was walking into the Station and ripped the backpack from his back.... Thereafter, Mr. Schmidt tried to back away from OLIPHANT and said things like 'what did I do' and the two officers of the MTA determined that they had to aid Mr. Schmidt by taking him down and placing handcuffs on him.... Defendants claim they took Mr. Schmidt down to the floor and cuffed him for his own

good because he had transformed from a mere violator of a purported no outdoor smoking rule into an emotionally disturbed person (**'EDP'**) who was somehow a danger to himself and others. The purported proof that Mr. Schmidt was an EDP is that he was attempting to back away from what appeared to be a dangerous cop.... Subsequent to being taken outside of the Station, Plaintiff was forced into the back of the police vehicle and after the arrival of Nassau County Police, a Nassau County ambulance arrived and took Plaintiff to Nassau University Medical Center ('NUMC'), where he was treated for his *physical injuries*, and released, to 'home' and 'ambulatory'. Plaintiff was NOT evaluated by any psychiatrist or psychologist for emotional disturbance because he was not irrational and did not exhibit any dangerous behavior.... Mr. Schmidt was not emotionally disturbed and his behavior was normal and appropriate.... Plaintiff was issued no tickets, summons, or violations for smoking, disturbing the peace or anything else." *See* Plaintiff's Affirmation in Opposition Exhibit A; Defendants' Affirmation in Support Exhibits C and I.

Counsel for plaintiff argues, in pertinent part, that "[b]ased upon Mr. Schmidt's testimony, there is a significant question of fact regarding whether the two sizable Defendants 'fell' to the ground or purposefully threw Mr. Schmidt to the ground. Plaintiff alleges that the only reason Plaintiff was pursued, detained, assaulted, battered, arrested, handcuffed, falsely imprisoned, etc. is that he has the temerity to talk back when OLIPHANT told him to put out the cigarette. Defendants also claim Plaintiff cursed at Defendants. Probably not a smart move if he did it, but nevertheless, protected as free speech and Plaintiff should not have been arrested and otherwise mistreated for speaking back or cursing. Citizens have a right to speak their minds and even curse under the Constitution. Defendants used excessive force pursuant to Mr. Schmidt's testimony and there is a question of fact because Plaintiff has alleged and testified that

Defendants put their knees on his back and neck.... While Defendants may dispute placing knees on Mr. Schmidt, they have testified that they held him, prone on the ground, forcing his shoulders to the floor, and handcuffed him. In addition the amount of time they took to do so, 15 to 30 seconds, appears to be unnecessarily long. Defendants claim that they had probably cause to arrest Plaintiff. Even if we assume, *arguendo*, that Defendants had a reasons to do anything to Plaintiff, which is denied, the most they had cause to do was issue Plaintiff a violation for smoking a cigarette. Notably, they did not do so.... Plaintiff violated no statute, rule or regulation and could not have done so by smoking where he was smoking.... During the deposition of Defendants they could cite no law, statute or regulation that prohibited smoking where Plaintiff was allegedly smoking.... It is undisputed that Mr. Schmidt was not smoking inside a train or inside the Station and was in fact outside of the Station, where the roadway is located, when the Defendants saw Plaintiff smoking. Thus, the only way Plaintiff could have been violating §1097.5 is if he was 'in an outdoor ticketing, boarding or platform area of a terminal or station.' Further, it is undisputed that there were no ticketing booths or machines outside where Plaintiff was smoking. Therefore, he was not smoking in an outdoor ticketing area. Further, Plaintiff was not in a boarding or platform area of a station. The boarding area is not the front area where people can obtain vehicular transportation and is generally used to refer to the area where the trains are boarded. At the Hicksville Station, the trains are upstairs, on an elevated platform. Based upon the foregoing, it is indisputable that Mr. Schmidt was NOT violating the MTA's own rule or regulation regarding smoking. Thus, Defendants' entire basis for allegedly seeking to even speak to Mr. Schmidt, to wit, to advise him that he should not be smoking where he was smoking, is invalid. Defendants had no basis to issue a summons to Mr. Schmidt and as such, no probable cause to arrest him."

Counsel for plaintiff further contends that counsel for defendants asserts "that the claims against the MTA based upon the theory of *respondeat superior* must be dismissed because Plaintiff cannot establish that custom, policy or practice caused the denial of Plaintiff's civil rights.... The case law cited by the MTA indicates that the MTA must present a *prima facie* showing that it was not a custom and practice to engage in such practices. In Bassett v. City of Rye, 104 AD3d 889 (2nd Dept. 2013) the Second Department actually reversed a Supreme Court decision and upheld and reinstated an award under §1983 on a false arrest cause of action. The Second Department noted that: Liability for a violation of 42 USA § 1983 may be predicated on 'a single act, as long as it is the act of an official authorized to decide policy in that area.' [citations omitted].... In the present action, the MTA provided no affidavits from any supervisory personnel regarding its policies.... Moreover, it appears that officers OLIPHANT and REVANDER were inadequately trained. For example, they did not know what the no smoking regulation promulgated by the MTA states, did not even know what section of the MTA regulations dealt with smoking and otherwise were ill informed regarding the law they were purportedly attempting to enforce. This alone should raise a question of fact as to whether the MTA has failed to adequately train the Defendants."

Plaintiff also provides his own Affidavit in Opposition to the motion. *See* Plaintiff's Affidavit in Opposition.

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, 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., 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).

Issue finding, rather than issue determination, is the key to summary judgment. *See In re Cuttitto Family Trust*, 10 A.D.3d 656, 781 N.Y.S.2d 696 (2d Dept. 2004); *Greco v. Posillico*, 290 A.D.2d 532, 736 N.Y.S.2d 418 (2d Dept. 2002); *Gniewek v. Consolidated Edison Co.*, 271

A.D.2d 643, 707 N.Y.S.2d 871 (2d Dept. 2000); *Judice v. DeAngelo*, 272 A.D.2d 583, 709 N.Y.S.2d 427 (2d Dept. 2000). The court should refrain from making credibility determinations (*see S.J. Capelin Assoc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 357 N.Y.S.2d 478 (1974); *Surdo v. Albany Collision Supply, Inc.*, 8 A.D.3d 655, 779 N.Y.S.2d 544 (2d Dept. 2004); *Greco v. Posillico, supra*; *Petri v. Half Off Cards, Inc.*, 284 A.D.2d 444, 727 N.Y.S.2d 455 (2d Dept. 2001)), and the papers should be scrutinized carefully in the light most favorable to the party opposing the motion. *See Glover v. City of New York*, 298 A.D.2d 428, 748 N.Y.S.2d 393 (2d Dept. 2002); *Perez v. Exel Logistics, Inc.*, 278 A.D.2d 213, 717 N.Y.S.2d 278 (2d Dept. 2000).

Summary judgment is a drastic remedy which should not be granted when there is any doubt about the existence of a triable issue of fact. *See Sillman v. Twentieth Century-Fox Film Corp., supra.* It is nevertheless an appropriate tool to weed out meritless claims. *See Lewis v. Desmond*, 187 A.D.2d 797, 589 N.Y.S.2d 678 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N.A.*, 82 A.D.2d 168, 442 N.Y.S.2d 610 (3d Dept. 1981).

Viewing the evidence in the light most favorable to plaintiff (*see Taylor v. Rochdale Village Inc.*, 60 A.D.3d 930, 875 N.Y.S.2d 561 (2d Dept. 2009); *Judice v. DeAngelo*, 272 A.D.2d 583, 709 N.Y.S.2d 427 (2d Dept. 2000); *Robinson v. Strong Memorial Hosp.*, 98 A.D.2d 976, 470 N.Y.S.2d 2398 (4th Dept. 1983)), the Court finds that there are material triable issues of fact with respect to defendants' liability in the subject incident.

Furthermore, the credibility of witnesses, the reconciliation of conflicting statements, a determination of which should be accepted and which rejected, the truthfulness and accuracy of the testimony, whether contradictory or not, are issues for the trier of the facts. *See Lelekakis v. Kamamis*, 41 A.D.3d 662, 839 N.Y.S.2d 773 (2d Dept. 2007); *Pedone v. B&B Equipment Co., Inc.*, 239 A.D.2d 397, 662 N.Y.S.2d 766 (2d Dept.1997).

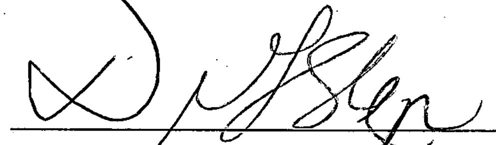
Therefore, based upon the above, defendants' motion, pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiff's Verified Complaint, is hereby **DENIED in its entirety**.

All parties shall appear for Trial, in Nassau County Supreme Court, Central Jury Part (DCM), at 100 Supreme Court Drive, Mineola, New York, on February 14, 2018, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTERED
JAN 22 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE

ENTER:



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

Dated: Mineola, New York
January 19, 2018