

**Wimberly v Asbestos Transp. Co., Inc.**

2024 NY Slip Op 33702(U)

October 11, 2024

Supreme Court, New York County

Docket Number: Index No. 160197/2018

Judge: James G. Clynes

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. JAMES G. CLYNES PART 22M**

*Justice*

-----X  
ERICA WIMBERLY, INDEX NO. 160197/2018  
MOTION DATE 01/04/2022  
MOTION SEQ. NO. 004  
Plaintiff,

- v -

ASBESTOS TRANSPORTATION COMPANY, INC.,  
ASBESTOS TRANSPORTATION & DISPOSAL CO. INC.,  
MICHAEL GUGEL,

**DECISION + ORDER ON  
MOTION**

Defendants.

-----X  
The following e-filed documents, listed by NYSCEF document number (Motion 004) 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 139

were read on this motion to/for SUMMARY JUDGMENT (BEFORE JOIND).

Upon the foregoing documents and following oral argument, it is ordered that the motion by defendants for summary judgment in their favor and dismissal of the complaint against them and the cross-motion by plaintiff for summary judgment on the issue of liability in plaintiff's favor and against defendants are decided as follows:

Plaintiff seeks recovery for injuries sustained as a result of an October 20, 2018 motor vehicle accident involving plaintiff a pedestrian and a truck owned and operated by defendants on October 20, 2018 at approximately 12:30 a.m. at the intersection of Lenox Avenue and 125th Street, New York, New York.

The street is a two-way roadway with one parking lane on each side, one 'Bus Only' lane on each side, and one travel lane on each side. Plaintiff was wearing a black sweater/hoodie, a black jacket, blue jeans and black sneakers at the time. The vehicle, driven by defendant Michael Gugel, an employee of defendants Asbestos Transportation Company, Inc./Asbestos Transportation and Disposal Co. Inc. (Asbestos), was a white Peterbilt tractor, approximately 35 feet in length, hauling a light blue container. The vehicle had three axles and ten tires.

Plaintiff claims that she was struck by the vehicle, and was pulled under the vehicle when it

made a right turn at the intersection. She alleges that defendants were negligent in failing to halt while she attempted to cross over in a southern direction.

Defendants move for summary judgment/dismissal on the ground that based on the evidence, plaintiff's conduct was the sole, proximate cause of the accident, and Gugel was not negligent as a matter of law. They contend that plaintiff failed to halt while Gugel was lawfully making a right turn after pausing to observe the roadway. Defendants refer to section 1151 (b) of the Vehicle and Traffic Law (VTL), which provides that a pedestrian shall not enter the path of a vehicle when its driver lacks the time to properly yield.

Defendants submit as evidence the deposition testimony of plaintiff, Gugel and a non-party eyewitness to the accident, Robenson Aupont; the Police Accident Report; and the expert report from Traffic Accident Reconstructionist Stephen Emolo.

At her deposition, plaintiff testified that she crossed on Lenox Avenue in a southbound direction over 125<sup>th</sup> Street, walking across the first parking lane, the first bus lane and the first travel lane for westbound traffic. When she was in the second travel lane, for eastbound traffic, she stated that she was struck by the vehicle a few steps before the second bus lane. Plaintiff stated that she did not see any vehicle turning into 125<sup>th</sup> Street while crossing, though she saw a truck on her right side for a second before she was struck.

At his deposition, Gugel testified that prior to the accident, he was traveling on Lenox Avenue northbound when he stopped at a red light in the right lane at the intersection with 125<sup>th</sup> Street, where he intended to make a right turn. He stopped approximately 15 feet behind the crosswalk. He first observed plaintiff standing on the southeast corner of 125<sup>th</sup> Street and Lenox Avenue. He stated that plaintiff was facing westbound rather than northbound. Gugel continued to scan the surrounding area from his side window until the light turned green. After the light turned green, Gugel pulled forward approximately 4 feet and stopped the vehicle to continue his scanning. He had his right turn signal activated. He made his vehicle turn into the eastbound lane for 20 feet, eventually making an 85 degree angle. The vehicle was halfway past the crosswalk with its rear still on the crosswalk. His rate of speed was one mile an hour. Then a bystander ran in front of the vehicle, gesturing him to stop. When he stopped, Gugel exited the vehicle and after moving alongside the vehicle, saw plaintiff under the rear of the vehicle.

Gugel stated that he was served a ticket for striking a pedestrian at a crosswalk, but the ticket was later dismissed.

Aupont testified that he was a fire fighter for the Fire Department of the City of New York. He was the individual who signaled to Gugel after plaintiff was struck down. He testified that plaintiff was crossing 125<sup>th</sup> Street from the southeast corner. She crossed the first lane of eastbound traffic while the vehicle was turning right into 125<sup>th</sup> Street. Aupont stated that the vehicle was driving at a slow speed at the time of the accident. He also testified that the vehicle's front bumper was approximately ten feet past the crosswalk.

The Police Accident Report shows a statement from Gugel. Gugel stated that the accident occurred because plaintiff walked into the side of the vehicle while he was turning right. He stated that the intersection was clear when he entered it and he did not see plaintiff. Plaintiff stated in the Report that she was crossing the street on the crosswalk when she was struck, apparently not seeing the vehicle beforehand.

Defendants submit a copy of a summons, dated October 20, 2018, issued to Gugel for violating section 19-190 (b) of the New York Administrative Code, as well an order from an Administrative Judge, dated February 6, 2019, dismissing the summons after a hearing.

The Accident Reconstruction Report from defendants' expert Emolo concludes that if plaintiff was crossing 125<sup>th</sup> Street from south to north, she could have been obstructed from his view by the mirrors of the vehicle, thus unseen prior to the accident. If plaintiff was crossing from the northside of the intersection, looking straight ahead, she would have a clear view of the vehicle. The report speculates that plaintiff was inattentive to her surroundings and specifically distracted by using her cellphone before colliding with the vehicle.

Defendants contend that had plaintiff been more attentive, she could have avoided the accident. They argue that Gugel had acted properly, was slowly turning from the crosswalk with the light in his favor, and his right turn signal was activated before the accident. Thus, defendants should be granted summary judgment in the absence of any liability that can be attributed to them.

Plaintiff opposes the motion, arguing that she was struck while the traffic light was in her favor and that the driver failed to utilize his mirrors while making a right turn at the crosswalk. She alleges that defendants acted negligently and violated several sections of the Vehicle and Traffic Law (VTL). Moreover, plaintiff cross-moves for summary judgment finding defendants' negligence the sole, proximate cause of the accident.

Plaintiff submits as evidence the deposition testimony of plaintiff, Gugel and Aupont; two sworn statements, handwritten and notarized, by Aupont, dated December 12, 2018 and January 17, 2019; an affidavit and expert report from Accident Reconstructionist Shawn Harrington; and photographs of the scene of the accident. Plaintiff argues that much of Emolo's report is inaccurate

and speculative, has not been authenticated and fails to provide the proper credentials, in comparison to Harrington's report and information.

The statements made by Aupont provide a detailed explanation of the events that occurred before, during and after the accident based on his observations and actions. Aupont saw the vehicle strike plaintiff at the front right tire, run over her until she was stuck between two double tires under the rear of the vehicle. Prior to that, he saw plaintiff walking southeast to northwest towards the crosswalk. He identifies himself as the person who notified Gugel after the accident occurred and got him to stop and exit the vehicle to discover plaintiff under the vehicle.

The expert report from Harrington provides a more detailed narrative than Emolo's report. Harrington indicates that the vehicle had more side mirrors than was previously asserted. Harrington suggests that there was a blind spot area which effected Gugel's perception at the time. As for a lack of visibility, which prevented Gugel from seeing plaintiff before the collision, Harrington concludes that Gugel failed to utilize his sightlines and mirrors properly, leading to the accident.

Plaintiff cross-moves for limited summary judgment on the issue of liability, claiming that the evidence submitted proves that Gugel's failure to yield to plaintiff was the sole, proximate cause of the accident.

In response to the opposition and the cross-motion, defendants argue that the cross-motion is untimely, filed over 230 days after the Note of Issue was filed. They contend that the Emolo report is admissible, of probative value and not speculative. They argue that the Harrington report failed to provide an accurate representation of the accident and that his suggestions lack credibility. Defendants submit a sworn and notarized copy of Emolo's report with their papers, as well as a supplemental report, also sworn and notarized. The reports include Emolo's credentials and qualifications, which were originally absent. Defendants also contend that Gugel did not violate any VTL sections, and the summons previously issued to him had been dismissed.

In reply, plaintiff argues that defendants conceded all of her statements of material facts by failing to provide any citation refuting said statements. Plaintiff contends that her cross-motion is timely and is identical to that of defendants' motion since it also concerns the issue of liability. According to plaintiff, the Emolo report is inadmissible as it was insufficient and not originally sworn when submitted and defendants cannot cure it in their opposition papers. Plaintiff also argues that this report failed to discuss the mirrors and other apparatus of the vehicle, a factor in the accident. Alternatively, plaintiff argues that expert evidence is

not necessary for the granting of summary judgment as the other evidence submitted is of probative value.

“It is axiomatic that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of factual issues” (*Birnbaum v Hyman*, 43 AD3d 374, 375 [1<sup>st</sup> Dept 2007]). “The substantive law governing a case dictates what facts are material, and [o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment” (*People v Grasso*, 50 AD3d 535, 545 [1<sup>st</sup> Dept 2008] [citation omitted]). “To prevail on a summary judgment motion, the moving party must provide evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in his or her favor” (*Kershaw v Hospital for Special Services*, 114 AD3d 75, 81 [1<sup>st</sup> Dept 2013]). “Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial” (*id.* at 82).

The primary issue in the motion and cross-motion is proximate cause. There can be more than one proximate cause in an accident like this, and the matter of proximate cause is usually a jury issue (*see Howard v Poseidon Pools*, 72 NY2d 972 [1988]). On a rare occasion, a party is entitled to summary judgment.

The court shall examine the procedural issues raised by the parties. Defendants contend that the cross-motion is untimely, as it was served over seven months after the filing of the Note of Issue. The court has discretion with respect to late motions for summary judgment. The court will decide the cross-motion on its merits. Defendants will not be prejudiced by the untimeliness of the cross-motion.

Defendants also contend that plaintiff failed to allege violations of the VTL in the complaint. However, plaintiff mentioned various violations of the VTL in her Bill of Particulars, giving notice to defendants.

Plaintiff argues that defendants conceded her statements of material facts by failing to cite anything in refuting them. Defendants constantly cited section 202.8-g of 22 New York City Rules and Regulations in response to the statements. Plaintiff refers to the summons issued to Gugel involving a violation of the Administrative Code as proof of his liability. Defendants offer proof that he was discharged from liability by an Administrative Judge. However, the discharge does not have any estoppel effect since plaintiff was not involved in the proceeding.

The court finds that the sworn and notarized copy of defendants' report from Stephen Emolo, which includes his credentials, is admissible and is not prejudicial to plaintiff. The court will determine its merits, along with the report from Shawn Harrington.

Based on the evidence, both plaintiff and Gugel assert that they did not see each other immediately before the collision, although Gugel testified that he saw plaintiff while he was waiting for the light to turn green. Both claim that the light was in their favor before the collision. Plaintiff argued that she was going north to south, while Gugel testified that she was going in the opposite direction. Gugel further testified that he was going at a speed of one mile an hour, and that the front of the vehicle was far from the crosswalk before the accident occurred. Plaintiff stated that she was struck while on the crosswalk, making contact with the front side of the vehicle.

The bystander Aupont stated that the vehicle was going slowly and struck plaintiff near the front right side. It was apparent that Gugel would have continued driving had Aupont not approached him and signaled him to halt.

The reports from the Reconstruction experts provide some theories as to the cause of the accident. Emolo concludes that plaintiff was distracted from seeing the vehicle by using her cellphone. Harrington concludes that Gugel failed to utilize his side view mirrors and sidelines in a regular manner during the time he was turning right. These are speculations based on examinations of the site and the testimony of the parties and the bystander. The court finds Harrington's conclusions more credible though not conclusive.

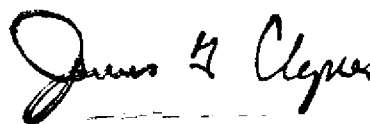
The conflict of facts among the deposed individuals indicates an issue of credibility, which should be ultimately determined by a trier of fact, precluding summary judgment. (*see Santos v Temco Serv. Indus.*, 295 AD2d 218 [1<sup>st</sup> Dept 2002]).

Accordingly, it is

ORDERED that defendants Asbestos Transportation Company, Inc., Asbestos Transportation and Disposal Co., Inc. and Michael Gugel's motion for summary judgment is denied; and it is further

ORDERED that plaintiff Erica Wimberly's cross-motion for partial summary judgment on liability is denied.

This constitutes the Decision and Order of the Court.



JAMES G. CLYNES, J.S.C.

10/11/2024  
DATE

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT		