SCAN

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

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

JAMES E. BRANDT,

Plaintiff,

- against -

RELI ZAHNER,

Defendant.

TRIAL/IAS PART 31
NASSAU COUNTY

Index No.: 3670/11
Motion Seq. No.: 01
Motion Date: 02/08/12
XXX

The following papers have been read on this motion:

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

Defendant moves, pursuant to CPLR § 3212, for an order granting her summary judgment due to plaintiff's failure to prove a *prima facie* case of liability against her. Plaintiff opposes the motion.

This action arises out of a motor vehicle accident that occurred on December 22, 2010, at approximately 6:30 p.m., on I.U. Willets Road, approximately one hundred fifty (150) feet east of Campbell Parkway, Town of North Hempstead, Nassau County, New York. The accident involved a 2004 Mercedes owned and operated by defendant and plaintiff, who was a pedestrian at the time of the incident. Plaintiff commenced the action by the filing and service of a Summons and Verified Complaint on or about February 28, 2011. Issue was joined on or about

April 8, 2011.

It is alleged that the accident occurred when plaintiff, a pedestrian, entered the roadway of I.U. Willets Road in the middle of the block, from in between parked vehicles, and walked in front of defendant's vehicle. Defendant contends that, at the time of the accident, her vehicle had just begun moving from a stopped position at the railroad crossing located near the accident location and that said vehicle had reached a maximum of approximately twenty miles per hour while traveling approximately one car length behind the motor vehicle located in front of her vehicle. Defendant testified at her Examination Before Trial ("EBT") that she saw plaintiff take approximately one to two steps into the roadway and she applied her car brakes before the impact occurred. Defendant argues that the actions of plaintiff placed defendant in an emergency situation since said situation "was not of her own making as it was unexpected and unanticipated that Mr. Brandt would enter the roadway from the middle of the block, and enter into the travel lane where Ms. Zahner was operating her vehicle." Defendant further contends that "[t]here are no issues of fact to inculpate the defendant, RELI ZAHNER, in any way as responsible parties (*sic*) for this loss, as the plaintiff, JAMES E. BRANDT, cannot recall how the subject accident occurred. Furthermore, the actions of Mr. Brandt placed Ms. Zahner in an emergency situation which she could not avoid the contact with his body, due to the fact that he entered the roadway from the middle of the block from in-between parked cars after having exited the train station in Albertson."

In opposition to defendant's motion, plaintiff's counsel argues that "[t]he description of the accident scene by counsel for defendant leaves the court with a highly mistaken impression....Earlier in the day Mr. Brandt had taken the Long Island Railroad from the

Albertson station to a Court appearance in Manhattan, and was returning at about 6:30 p.m....In the vicinity where the accident occurred the train tracks proceed in a north south direction heading towards Oyster Bay. I.U. Willets Road crosses the tracks in an east west direction....there is a sidewalk on the north side of I.U. Willets Road for pedestrians to safely walk east from the station or west to the station. On the south side of I.U. Willets there is no sidewalk, so that a pedestrian seeking to walk east from the tracks on the south side would be jeopardizing his safety by walking in the roadway and past cars who enter and exit from several parking lots....Mr. Brandt had parked his car on the south side of I.U. Willets facing east...Therefore the only safe way for him to get from the station to the car would have been to walk eastbound along the sidewalk on the north side until he was opposite his car and then to cross I.U. Willets. This is what he did...The place where he parked his car is east of and past the parking lots. There is nothing legally or practically which prevented him from crossing directly to his car....A pedestrian is entitled to cross in mid block and is not restricted to crossing at an intersection."

Plaintiff's counsel also submits that the place where defendant's vehicle struck plaintiff is approximately four hundred (400) feet from the location where defendant's vehicle had been stopped waiting for the train to pass. Plaintiff's counsel adds that "[a]nother misconception one might get from reading the moving papers was that the plaintiff walked right out in front of her vehicle from the near curb without warning. However, the defendant's vehicle was traveling eastbound...and the plaintiff Mr. Brandt was crossing from north to south. That means he was coming from her left and before he could have come into her path he would have had to traverse the parking lane on the north side of I.U. Willets, the westbound lanes of travel, and that portion of the east bound lane which would have taken him to the passenger side of her vehicle which

struck him, and where his head made a hole in her windshield....This is not the case of a step out into the immediate path of a vehicle."

Plaintiff's counsel also asserts that defendant testified at her EBT that she did not see plaintiff at any time before actual contact between her car and him.

With respect to defendant's argument that plaintiff, himself, cannot recall how the subject accident occurred, plaintiff's counsel states that, plaintiff testified at his EBT that he has no memory of the accident as a result of the head injury that he sustained from said accident. Said head injury affects his ability to remember the accident.

Plaintiff's counsel contends that there are serious factual issues as to the negligence of the parties and the relative degree of their negligence, if any, which must await determination by a jury.

In reply to plaintiff's opposition, defendant argues that "plaintiff's own testimony cannot establish that the defendant, RELI ZAHNER was negligent as a matter of law....Although Mr. Brandt was entitled to cross the street in the middle of the roadway, he was required to yield the right of way to motor vehicles already moving on the roadway, specifically, the defendant's vehicle. Since he did not yield the right of way, and improperly crossed the roadway, he violated Vehicle and Traffic Law §1152(a), and created the emergency situation the defendant was faced with....since the plaintiff cannot offer any testimony which would demonstrate that the defendant operated her vehicle in a negligent matter, he has failed to rebut the defendant's *prima facie* showing of entitlement to summary judgment as a matter of law. Since the plaintiff cannot recall the facts and circumstances surrounding the subject accident, the plaintiff is unable to rebut the fact that the accident occurred in the middle of the roadway, not near an intersection, where the plaintiff was required to yield the right of way to the motor vehicles already traveling on the

roadway....Further, the plaintiff cannot contradict the testimony of the defendant that she was proceeding on the roadway in a non-negligent manner, at a reasonable rate of speed when the plaintiff failed to yield the right of way."

Defendant further states that plaintiff has failed to submit expert evidence which establishes that plaintiff actually lost his memory and the causal connection of that the defendant's conduct. Defendant argues that the annexed hospital records submitted by plaintiff's counsel are uncertified and, therefore, inadmissible. Defendant argues that "since plaintiff cannot offer any testimony which would demonstrate that the defendant operated her vehicle in a negligent matter, he was failed to rebut the defendant's *prima facie* showing of entitlement to summary judgment as a matter of law."

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 (1st Dept. 1985). The evidence should be construed in a light most favorable to the party moved against. *See Weiss v. Garfield*, 21 A.D.2d 156, 249 N.Y.S.2d 458 (3d Dept. 1964).

Defendant, in her motion, has demonstrated *prima facie* entitlement to summary judgment on the issue of liability against plaintiff. Therefore, the burden shifts to plaintiff to demonstrate an issue of fact which precludes summary judgment. *See Zuckerman v. City of New York, supra*.

After applying the law to the facts in this case, the Court finds that plaintiff has failed to meet his burden and demonstrate and issue of fact which preclude summary judgment. While the

Court is cognizant of the *Noseworthy* charge as set forth in plaintiff's opposition, defendant is correct in her assertion that plaintiff's request that the *Noseworthy* doctrine be applied in the instant matter must fail since plaintiff failed to submit expert evidence which establishes that plaintiff actually lost his memory and the causal connection of that to defendant's conduct. The hospital records annexed as Exhibit A to plaintiff's Affirmation in Opposition were uncertified and, therefore, inadmissable. *See* CPLR § 4518. Plaintiff's counsel's Affirmation in Opposition, therefore, is uncorroborated and speculative.

The Court finds that plaintiff is unable to rebut defendant's EBT testimony that she was proceeding on the subject roadway at the time of the accident in a non-negligent manner, at a reasonable rate of speed and that it was plaintiff who failed to yield the right of way to defendant's oncoming vehicle.

Accordingly, defendant's motion, pursuant to CPLR § 3212, for an order granting her summary judgment due to plaintiff's failure to prove a *prima facie* case of liability against her is hereby **GRANTED**.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.
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Dated: Mineola, New York
April 10, 2012