[* 1]

SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,
Justice.

TRIAL/IAS PART 2
NASSAU COUNTY

SHARON WEISS and WILLIAM WEISS,

Plaintiff,

ORIGINAL RETURN DATE:11/22/2011
SUBMISSION DATE: 11/22/11
Index No. 24693/09

-against-

METROPOLITAN SUBURBAN BUS AUTHORITY d/b/a MTA LONG ISLAND BUS and JUDE DUCHEINE,

MOTION SEQUENCE # 03

Defendants.

The following papers read on this motion:

Notice of Motion.....	1
Affirmation in Opposition.....	2
Reply Affirmation.....	3

Motion by defendants for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint is denied.

Plaintiffs commenced this action to recover damages for personal injuries allegedly sustained by plaintiff Sharon Weiss on March 3, 2009 as a result of an accident, which occurred on Hempstead Turnpike at or near its intersection with Newbridge Road, East Meadow, New York. Plaintiff alleges that she was "a lawful pedestrian at said location, when a bus, owned by defendant MTA Long Island Bus and operated by its agent, servant or employee, Jude Ducheine, struck [her]." (¶ 3 Movant's Ex. A).

The police accident report states that:

> "Veh #1 had a collision with a pedestrian, as she was crossing Hempstead Tpke. *** Driver of veh #1 stated that the pedestrian was looking in the opposite direction when she was struck and she did not hear the horn." (Movants" Ex. L)

The Bus Operator Accident Report signed by Jude Ducheine states:

> "going Eastbound, (approaching) on Hempstead in the left turning lane, I observed a female walking across stopped traffic looking E/bound toward moving bus, her head turn E/bound, I applied my brakes and steady use of horn moving all way left as she walked into the R (front of bus)." (Pl's Ex. E)

In the Supervisor's Accident/Crime Investigation Report, Greg Maher, states as follows:

> "I Disp Maher was following Oper Ducheine on a 19A. I observed Oper move over 3 lanes from the bus stop at Hemp Tpke & Prospect Ave. I then observed Oper approaching the double L/turning lanes to make a left turn onto Newbridge Rd. I observed Oper apply his brakes and move to he left slightly and stop. Suddenly, I then went around to the front of the bus, I then observed a female sitting upright on the ground holding her l\L/arm and trying to make a cell phone call. I asked her what hurt. She stated her L/arm and had a headache. I then called command for assistance. I then started my investigation.
>
> Oper Ducheine stated to me that he was in the L/turning lane. he observed a female walking across Hemp Tpke. in front of car's that was stopped facing E/B- Oper had the green light, this female kept walking looking e/b away from his moving bus. Oper stated that he applied his brakes and all the time he was on the horn. The female kept coming and walking into the front of my bus." (Pl's Ex. I)

Defendant moves for summary judgment claiming, *inter alia*, that plaintiff's negligence was the sole proximate cause of the accident. Sharon Weiss testified that she intentionally stepped out from behind two vehicles while jaywalking and into the path of an immediately approaching bus in such a manner that the subject accident could not be prevented by the driver of the bus.

In support thereof, defendants raise the following two points of law: plaintiff's violations of Sections 1151 and 1152 of Vehicle and Traffic Law constitute negligence as a matter of law; and Mr. Decheine's response to plaintiff's negligence

was a reasonable reaction to an emergency situation.

Vehicle and Traffic Law § 1152(a): provides that "Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway." Defendants maintain that it is undisputed that plaintiff Sharon Weiss did not cross at a crosswalk and did not yield the right of way to the bus that was upon the roadway she sought to cross.

Section 1151(b) of New York's Vehicle and Traffic Law provides that: "No pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close that it is impractical for the driver to yield."

"By Sharon Weiss' own account of the subject accident, she stepped out from a place of safety (the point where she was standing between two stopped vehicles) and entered the path of a bus that she estimated to be traveling at a speed of 20 mph, despite also knowing that it was definitely less than two car lengths away from her and possibly as little a[s] just half a car length away from her when she stepped out into th path of the bus. Bus Operator Jude Ducheine has confirmed that Sharon Weiss emerged from in front of a stopped van in an adjacent lane where contact with the bus could not have occurred if Sharon Weiss had simply remained there. Bus Operator Jude Ducheine further confirmed that Sharon Weiss emerged from that place of safety between two vehicles in a separate lane and put herself into the path of the bus when the front of the bus was just ten feet away from her." (Leiter Aff., ¶ 46).

In opposition, plaintiff asserts that based on all the testimony, accident reports, photographs and documents that have been exchanged and marked for identification at depositions regarding this accident, which are detailed below, genuine issues of fact exist including:

> whether there was a stopped van in the roadway obstructing the bus driver's vision;
>
> where exactly the impact occurred upon the roadway as there is a discrepancy based upon the testimony and marked photographs;
>
> whether the bus driver gestured to the plaintiff indicating he observed her upon the roadway and was allowing her to safely cross in front of his bus;

> whether or not an emergency situation existed confronting the bus driver;
>
> whether the bus driver was keeping a proper lookout while his bus was in motion on a major thoroughfare (Hempstead Turnpike) 24 hours after a major snowstorm;
>
> whether the bus driver observed what there was to be seen on the roadway, in clear view of anyone who took appropriate time to look and observe; and
>
> whether the bus driver was negligent in the operation of his bus at the time of the accident. (Messinger Aff., ¶ 6)

On a motion for summary judgment, it is incumbent upon the movant to make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The failure to make that showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*Mastrangelo v Manning*, 17 AD3d 326 [2d. Dept 2005]; *Roberts v Carl Fenichel Community Servs., Inc.*, 13 AD3d 511 [2d. Dept 2004]). Issue finding, as opposed to issue determination is the key to summary judgment (*see Kriz v Schum*, 75 NY2d 25 [1989]). Indeed, "[e]ven the color of a triable issue forecloses the remedy" (*Rudnitsky v Robbins*, 191 AD2d 488, 489 [2d Dept 1993]). Moreover, summary judgment is often inappropriate in negligence actions (*Ugarriza v Schmieder*, 46 NY2d 471, 475 [1979]), even where the relevant facts are uncontested, since the issue of whether defendant or plaintiff acted reasonably under the circumstances is generally a question for jury determination (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Davis v Federated Department Stores, Inc.*, 227 AD2d 514 [2d Dept 1996]).

" '[T]he emergency doctrine holds that those faced with a sudden and unexpected circumstance, not of their own making, that leaves them with little or no time for reflection or reasonably causes them to be so disturbed that they are so compelled to make a quick decision without weighing alternative courses of conduct, may not be negligent if their actions are reasonable and prudent in the context of the emergency' " (*Yavkina v New York City Police Dept.*, 84 AD3d 791 [2d Dept 2011], quoting *Evans v Bosl*, 75 AD3d 491, 492 [2d Dept 2010], quoting *Bello v Transit Auth. of N.Y. City*, 12 AD3d 58, 60 [2d Dept 2004]; *see Miloscia v New York City Bd. of Educ.*, 70 AD3d 904, 905 [2d Dept 2010]; *Tsai v Zong-Ling Duh*, 79 AD3d 1020 [2d

Dept 2010]. The existence of an emergency and reasonableness of the response to it generally present issues of fact (*Tsai v Zong-Ling Duh, supra; see Makagon v Toyota Motor Credit Corp.*, 23 AD3d 443, 445 [2d Dept 2005]).

Viewing the evidence in the light most favorable to the non-moving party, plaintiff herein (*Stukas v Streiter*, 83 AD3d 18 [2d Dept 2011]; *Judice v DeAngelo*, 272 AD2d 583 [2d Dept 2000]; *Makaj v Metropolitan Transportation Authority*, 18 AD3d 625 [2d Dept 2005]), the court concludes that a triable issue of fact exists as to whether plaintiff was comparatively negligent in light of the evidence that she did not look to her left as she crossed the street. Thus, under the circumstances of this case, the issue of comparative negligence should be referred for trial. *Yi Min Feng, v Jin Won Oh*, 71 AD3d 879 [2d Dept 2010]; *see Lopez v Garcia*, 67 AD3d 558 [1st Dept 2009]; *Gideon v Flatlands Beverage Distributors, Inc.*, 59 AD3d 596 [2d Dept 2009]; *Cator v Filipe*, 47 AD3d 664 [2d Dept 2008].

In view of the foregoing, the motion is denied.

This constitutes the order and judgment of this Court.

Dated: January 27, 2012

HON THOMAS P. PHELAN

THOMAS P. PHELAN, J.S.C.

Attorneys of Record:

Weinstein, Chase, Messinger & Peters, P.C.
Attention: Jules G. Messinger, Esq.
Attorneys for Plaintiff
26 Court Street
Brooklyn, NY 11242

Zakukiewicz, Puzo & Morrissey, LLP
Attention: Eric Z. Leiter, Esq.
Attorneys for Defendants
2701 Sunrise Highway, Suite 2
P.O. Box 389
Islip Terrace, NY 11752