SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

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

JENNA WINSTON,

Plaintiff,

- against -

MAXWELL DOUGLAS DAVID and JEFFREY DAVID,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 10493/11
Motion Seq. No.: 01
Motion Date: 10/24/11

The following papers have been read on this motion:

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

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

Plaintiff moves, pursuant to CPLR § 3212, for an order granting partial summary judgment against defendants on the issue of liability upon the ground that there are no triable issues of fact. Defendants oppose the motion.

This action arises from a motor vehicle accident which occurred on May 28, 2011, at approximately 3:54 a.m. The accident involved a 2009 Nissan operated by defendant Maxwell Douglas David and owned by defendant Jeffrey David, in which plaintiff was a passenger, on SR 17 in an eastbound direction in the Town of Goshen, County of Orange, State of New York. Plaintiff commenced the action by the filing and service of a Summons and Verified Complaint on or about July 12, 2011. Issue was joined on or about September 23, 2011.

Briefly, it is plaintiff's contention that, on the evening of May 27, 2011, she attended a concert in Bethel, New York with defendant Maxwell Douglas David. Plaintiff states that she and defendant Maxwell Douglas David decided that, after the concert, they would sleep in the car in a hotel parking lot since there were no hotel rooms available. After the concert, defendant Maxwell Douglas David drove the vehicle to a nearby hotel parking lot and told plaintiff that she should get in the back seat where she would be more comfortable and sleep as they would stay there for the evening. Plaintiff agreed to do so and fell asleep. Plaintiff states that at some time later, while she was still sleeping in the back seat of the vehicle, she was awakened by a crash. Plaintiff alleges that, at some time after the crash, when she was in the hospital, she spoke to defendant Maxwell Douglas David as to what had happened on the date of the accident and he allegedly told her that he had called and found a vacancy in a hotel and decided not to wake plaintiff until they arrived at said hotel. Defendant Maxwell Douglas David also allegedly told plaintiff that, while driving to the hotel, he lost control of the vehicle and went into a ditch along an exit ramp striking a guard rail. Plaintiff claims defendant Maxwell Douglas David apologized profusely for the happening of the accident and stated that it was all his fault.

Plaintiff further submits the Police Accident Report in support of her motion. The Accident Description/Officer's Notes in said report read, "[v]ehicle was traveling eastbound on State Route 17 at 0356 hours, and attempted to merge right onto exit 124. Vehicle lost control and went into the ditch along the exit ramp, striking the guardrail. Property damage to approximately 75 feet to the guardrail on the east side of the exit ramp. Driver stated that he was tired and unfamiliar with the roadway."

In opposition to the motion, defendants argue that plaintiff's motion should be denied because there are questions of fact as to the happening of the accident. According to defendant Maxwell Douglas David, while he and plaintiff were parked in the hotel parking lot, he woke

plaintiff to inform her that he would be driving to another hotel and plaintiff responded that she did not care if they went to the other hotel but she wanted to remain in the back seat to sleep. Thus, plaintiff was aware that defendant Maxwell Douglas David would be moving the vehicle to drive to the hotel with the vacancy. This is in contravention to plaintiff's assertion that defendant Maxwell Douglas David never woke her to tell her that he was driving to another hotel and that she only woke up when the accident occurred. Defendants argue that, based upon the conflicting affidavits from defendant Maxwell Douglas David and plaintiff, there are questions of fact regarding the circumstances of the surrounding accident, particularly with respect to the comparative negligence of plaintiff.

Defendants also argue that plaintiff's summary judgment motion should be denied as premature because limited discovery has been conducted and Examinations Before Trial have not yet taken place.

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).

Plaintiff, in her motion, has demonstrated *prima facie* entitlement to summary judgment on the issue of liability against defendants. Therefore, the burden shifts to defendants to demonstrate an issue of fact which precludes summary judgment. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980).

After applying the law to the facts in this case, the Court finds that defendants have meet their burden to demonstrate an issue of fact which precludes summary judgment. As previously stated, in rendering a decision on a summary judgment motion, the Court is not to resolve issues of fact or determine matters of credibility. The Court finds that the facts and circumstances

surrounding the motor vehicle accident do indeed involve determining the credibility of the parties involved in said accident. The Court holds that the parties' conflicting versions of the accident raise triable issues of fact.

Therefore, based upon the foregoing, plaintiff's motion, pursuant to CPLR § 3212, for an order granting partial summary judgment on the issue of liability is hereby **DENIED**.

It is further ordered that the parties shall appear for a Preliminary Conference on January 23, 2012, at 9:30 a.m., at the Preliminary Conference Desk in the lower level of 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this Order shall be served on all parties and on the DCM Case Coordinator. There will be no adjournments, except by formal application pursuant to 22 NYCRR § 125.

This constitutes the Decision and Order of this Court.

ENTER:

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

Dated: Mineola, New York
December 8, 2011