

**Bushmann v Kim**

2013 NY Slip Op 30698(U)

April 3, 2013

Sup Ct, New York County

Docket Number: 104568/10

Judge: Arlene P. Bluth

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1] FILED NY 4/9/2013  
E 4/19/13  
**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**HON. ARLENE P. BLUTH**

**PRESENT:** \_\_\_\_\_  
*Justice*

**PART** 22

Index Number : 104568/2010  
BUSHMANN, KATHARINE E.  
vs  
KIM, SOON CHONG  
Sequence Number : 001  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to 3, were read on this motion to/for pl msj hab

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ **No(s).** 1

Answering Affidavits — Exhibits \_\_\_\_\_ **No(s).** 2

Replying Affidavits \_\_\_\_\_ **No(s).** 3

Upon the foregoing papers, it is ordered that this motion is

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION/ORDER**

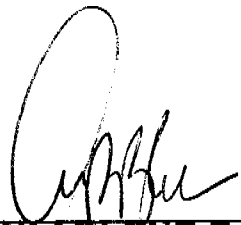
MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

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NEW YORK  
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Dated: 4/3/13

  
\_\_\_\_\_  
**HON. ARLENE P. BLUTH**, J.S.C.

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION  
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER  
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER  
 DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

**SUPREME COURT OF THE STATE OF NY  
COUNTY OF NEW YORK: PART 22**

Index No.: 104568/10  
Mot Seq 001

**Katharine E. Bushmann and Timothy J. O'Mara,**

**DECISION/ORDER**

*Plaintiffs,*

*-against-*

**HON. ARLENE P. BLUTH, JSC**

**Soon Chong Kim and Marly Building Supply Corp.,**

*Defendants.*

Plaintiffs' motion for summary judgment on the issue of liability is denied.

In this action, plaintiff Katharine Bushmann, a pedestrian, seeks damages for severe personal injuries she incurred when she was hit by defendant Marly Building Supply, a large flatbed truck which was driven by defendant Kim. The accident happened on January 5, 2010 at approximately 9:50AM when Ms. Bushmann was crossing Columbus Avenue at its intersection with West 96<sup>th</sup> Street in Manhattan and Kim was turning right onto Columbus Avenue from 96<sup>th</sup> Street. Plaintiff O'Mara, Bushmann's husband, asserts derivative claims.

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In order to prevail on its motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact. *Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 (1986). Once the movant demonstrates entitlement to judgment, the burden shifts to the opponent to rebut that prima facie showing. *Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872, 433 NYS2d 1015 (1980). In opposing such a motion, the party must lay bare its evidentiary proof. Conclusory allegations are insufficient to defeat the motion; the opponent must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact.

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*Zuckerman v City of New York*, 49 NY2d 557 at 562, 427 NYS2d 595 (1980).

In deciding the motion, the court must draw all reasonable inferences in favor of the non-moving party and must not decide credibility issues. (*Dauman Displays, Inc. v Masturzo*, 168 AD2d 204, 562 NYS2d 89 [1st Dept 1990], *lv. denied* 77 NY2d 939, 569 NYS2d 612 [1991]). As summary judgment is a drastic remedy which deprives a party of being heard, it should not be granted where there is any doubt as to the existence of a triable issue of fact (*Chemical Bank v West 95th Street Development Corp.*, 161 AD2d 218, 554 NYS2d 604 [1st Dept 1990]), or where the issue is even arguable or debatable (*Stone v Goodson*, 8 NY2d 8, 200 NYS2d 627 [1960]).

### **Factual Contentions**

Among other things, in support of her motion, plaintiff submits various deposition transcripts and her affidavit; she omits from her moving papers the transcript of a non-party witness, Tommey Hunter. Plaintiff was wearing a coat with the hood up on this cold January day; although she owned a cell phone, she claimed that she was not on it at the time of the accident (and in her reply, she submits cell phone records showing a lack of such activity). In relating her version of the accident, plaintiff states that when she reached the southwest corner of Columbus and 96<sup>th</sup>, she waited for the pedestrian signal to turn to “walk”, and after it did, she looked left, right, in front and “generally observed my surroundings” and, after not seeing any traffic approaching, she started to cross Columbus from the southwest corner to the southeast corner. After she took a few steps into the street – perhaps ten feet or so - she saw the front tires of a large truck come into her vision from the left and she stopped to wait for the truck to pass; she also reflexively put her hand up and touched the truck. The truck kept coming toward her so

she started to back away from the truck then turned to head back to the curb. Unfortunately, “the truck made contact with my back and pushed me to the ground” and then the rear wheels ran over her, causing terrible injuries. She states that at all times she remained in the crosswalk and the “walk” sign was in her favor.

Defendant Kim’s deposition transcript shows that he was a commercial truck driver and had delivered a load of bricks before this accident happened. He testified that before this accident, he was facing east on 96<sup>th</sup> Street and stopped at the light at the intersection with Columbus Avenue. As he waited to turn right onto Columbus, he saw people waiting to cross Columbus Avenue. When the light turned green, he moved forward and stopped, all the while scanning for pedestrians, and turned to the right and stopped again outside the crosswalk, still scanning for pedestrians. When he thought the coast was clear, he proceeded through the crosswalk and only knew something was wrong when he was past the crosswalk and he heard screaming. He stopped, got out of the truck, and saw plaintiff on the ground. In short, defendant Kim claims he never saw plaintiff.

There is a third witness, however, and defendants presented his deposition testimony in opposition to plaintiffs’ motion. Mr. Hunter was an independent witness listed on the police report; from the testimony, it is clear that the defendant did not prepare Mr. Hunter for the deposition, and plaintiff makes no claim that Mr. Hunter is “defendants’ witness”. Defendants’ attorney called him in for a deposition; plaintiffs’ attorney was there and questioned him, too.

Tommey Hunter testified that he was on the sidewalk near the southwest corner on 96<sup>th</sup> and Columbus; he worked at a liquor store located off the corner (at 730 Columbus) and it opened at 10AM; this accident happened before the store opened. Mr. Hunter testified that he was waiting for his manager to arrive before he could open the store (the policy was not to have

only one employee alone in the liquor store). While he waited, he was outside talking to a driver (Sylvester) who was waiting for his employer to come out of the residential part of 730 Columbus and get into the car. Apparently, the two of them often talked in the mornings while they waited for their respective employers. Mr. Hunter was on the sidewalk facing east, toward Central Park West, from where his manager would be coming; consequently, he said he had a clear view of the accident scene. He said he saw the plaintiff walking up Columbus and she was talking on her cell phone (transcript p. 17, lines 7-8). He also testified that he admires trucks and was watching this big tractor trailer turning from 96<sup>th</sup> Street onto Columbus Avenue. When the truck was almost finished with its turn - "the whole truck was on [Columbus] practically except the back" (transcript p. 20, lines 6-23), he testified that he saw plaintiff run in front of him and Sylvester then diagonally into the street. He specifically testified that she was not at the corner where people wait to cross (transcript p. 24, lines 17-19) and that she was never in the crosswalk that morning (transcript, pages 37 and 38). Rather, she entered the street between the entrance to his store and the apartment building door, near a tree. He remembered which wheel she ran into (transcript, pages 25-26). After the accident, he picked up her cell phone off the street and gave it to the police officer (transcript p. 29, lines 7-12).

After defendants' attorney finished questioning Mr. Hunter, plaintiffs' attorney started asking questions. Clearly, Mr. Hunter did not trust plaintiffs' counselor. He refused to answer three questions (which, of course, prevented follow-up questions). He refused to answer whether he has been known by any other name, whether he has been arrested/convicted and questions about his eyesight. With respect to questions about his eyesight, Mr. Hunter referred plaintiffs' lawyer to a specific attorney, and gave the telephone number; he said any questions about his eyesight should be referred to that attorney. At no point did defendants' attorney ever interfere

with plaintiffs' attorney's questioning – at some points, he even tried to help. Nevertheless, Mr. Hunter expressed his view that he was a Good Samaritan there to say what he saw that day – he wasn't there to talk about himself. Mr. Hunter said “lady got hurt, which I never seen in my life, you understand? It could have been my mother. And here it is you're asking me questions not about them, you're asking me questions about me” (transcript, pg 75, lines 16-20).

Mr. Hunter did answer all the questions posed by plaintiffs' attorney about the accident; plaintiffs' attorney's questioning runs from page 46-115 of the transcript. Mr. Hunter refused to answer just those three questions about himself.

Not surprisingly, plaintiffs' attorney, in reply, urges this Court to ignore Tommey Hunter's testimony and characterizes it as “outrageous, unreliable and uncorroborated”. Among the other things annexed to the reply are cell phone records showing plaintiff was not on the cell phone after 9:24AM (when she called her voicemail) and an affidavit from Sylvestre Ferreiras (another witness listed on the police report); Mr. Ferreiras claims to have witnessed the accident and that plaintiff was in the crosswalk.

### Analysis

The Court has been presented with three sworn versions of the circumstances surrounding the accident. At its most basic, plaintiff and Mr. Ferreiras say she was in the crosswalk at all times. Mr. Hunter claims plaintiff was never in the crosswalk and entered the street before the crosswalk and sought to cross diagonally. The driver never saw plaintiff, and so he really does not have a version, other than he kept scanning for pedestrians but obviously missed one.

If the Court considers Mr. Hunter's testimony, then because there is an issue of fact as to plaintiff's actions and possible contributory negligence, plaintiffs' motion for summary judgment

on the issue of liability must be denied. See *Odikpo v American Transit, Inc.*, 72 AD3d 568, 569, 899 NYS2d 219, 220 (1st Dept 2010) (the parties' testimony as to the manner in which each driver controlled his vehicle, the circumstances surrounding their collision, and the chain of events leading up to the collision involving plaintiff's vehicle raise questions of fact, which are best left for a jury to decide).

Without Mr. Hunter's testimony, however, as a pedestrian in the crosswalk, crossing with the light in her favor, after having checked for traffic before stepping off the curb, plaintiff would be entitled to summary judgment on liability. Therefore, the real question to this Court is whether it can ignore Mr. Hunter's testimony and grant summary judgment on liability.

The broad rule that if for any reason cross-examination becomes impossible (e.g., on account of sickness, death or wrongful refusal to answer) a witness's testimony on direct must be stricken, is accorded great deference in the law. But the rule is not without limitation. Where the refusal to answer or impossibility of cross-examination has not been due to any act or objection on the part of the party who called the witness, the testimony should not be suppressed unless it is clear that the questions to which answers were refused were material (*Calhoun v Commonwealth Trust Co.*, 124 App. Div. 633).

*Bartkowiak v St. Adalbert's Roman Catholic Church Soc.*, 40 AD2d 306, 308-309 (1973). Here, because the refusal to answer had nothing to do with defendant's counsel, the question is whether the unanswered questions are so material that plaintiff was deprived of cross-examination. Because Mr. Hunter answered all the questions relating to the accident, the Court finds that plaintiff did have effective cross-examination. The unanswered questions, those relating to him personally, are not material to what he saw that day.

While lawyers view questions about being known by any other name and other background information as routine, a witness could easily find such inquiries intrusive. People



do not trust lawyers – even adversaries do not trust each other – and Mr. Hunter may have felt attacked by personal questions which he found irrelevant to what he saw that day. The questions about aliases and criminal history were not asked to determine what he saw that day, and his (non)responses go to his credibility, which is for the jury. As for his eyesight, which could be relevant to evaluate whether what he saw that day was accurate, Mr. Hunter did give a name (Mr. Goldsberg) and phone number for plaintiffs’ attorney to contact (transcript, page 73, lines 3-5). This record shows no follow up or attempt at a follow up by plaintiffs’ counsel. This Court is unwilling to ignore Mr. Hunter’s testimony under these circumstances, and the jury must decide issues of credibility.

Accordingly, it is hereby

**ORDERED** that plaintiffs’ motion for summary judgment on liability is denied.

This is the Decision and Order of the Court.

**Dated:** April 3, 2013  
New York, New York

**FILED**  
APR 09 2013  
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*Arlene P. Bluth*  
HON. ARLENE P. BLUTH, JSC