

**Wemyss v Rusczyk**

2013 NY Slip Op 33319(U)

December 10, 2013

Sup Ct, Suffolk County

Docket Number: 09-1141

Judge: Daniel Martin

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 9 - SUFFOLK COUNTY

**PRESENT:**

Hon. DANIEL MARTIN  
Justice of the Supreme Court

MOTION DATE 8-8-13  
ADJ. DATE 9-17-13  
Mot. Seq. # 001 - MG  
              # 002 - XMG

-----X		SULLIVAN PAPAIN BLOCK, et al.
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RYSZARD RUSZCZYK, PATRICIA NOLAN and :		
NORTHPORT-EAST NORTHPORT UNION :		
FREE SCHOOL DISTRICT,	:	DEVITT SPELLMAN BARRETT, LLP
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-----X		

Upon the following papers numbered 1 to 19 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 8; Notice of Cross Motion and supporting papers 9 - 16; Answering Affidavits and supporting papers   ; Replying Affidavits and supporting papers 17 - 19; Other   ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion by defendants, Patricia Nolan and Northport-East Northport Union Free School District, for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims interposed against them is granted; and, it is further

**ORDERED** that the cross motion by plaintiff for an order pursuant to CPLR 3212 granting summary judgment against defendant Ryszard Ruszczyk on the issue of liability is granted.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff as a result of a motor vehicle accident which occurred on April 14, 2008 at approximately 5:30 p.m. on Route 25A at or near its intersection with Coves Run in the Village of Oyster Bay Cove, Nassau County, New York. (It is a "T" intersection with Route 25A traveling in an east-west direction with Coves Run intersecting it on the south side.) It is uncontroverted that plaintiff, the owner and operator of a motorcycle, was proceeding straight in the east-bound direction along Route 25A, a two lane roadway

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with one lane in each direction in the vicinity of the Coves Run intersection, when the motorcycle came into contact with the vehicle owned and operated by defendant Ryszard Ruszczyk. Defendant Ryszard Ruszczyk's vehicle made a left turn onto Route 25A from Coves Run in front of plaintiff, causing a collision, after which plaintiff was thrown from his motorcycle, slid into the west-bound lane of Route 25A, and was run over by a minibus, driven by defendant Patricia Nolan and owned by defendant Northport-East Northport Union Free School District.

Defendants Patricia Nolan and Northport-East Northport Union Free School District now move for summary judgment dismissing the complaint and cross-claims against them on the ground that they bear no liability for the subject accident inasmuch as the left turn by defendant Ryszard Ruszczyk into plaintiff's lane of traffic and the path of his oncoming vehicle, which had the right-of-way, was in violation of Vehicle and Traffic Law §§ 1141 and thus, was the sole proximate cause of the subject accident. Additionally, defendants Patricia Nolan and Northport-East Northport Union Free School District argue that defendant Patricia Nolan was faced with an emergency situation when plaintiff, approaching from the oncoming direction, suddenly and without warning slid/"flew" across the established lane of traffic in front of Nolan.

Plaintiff opposes the motion and cross-moves for summary judgment on the issue of liability solely against defendant Ryszard Ruszczyk. Plaintiff claims that defendant Patricia Nolan was negligent and partially responsible for plaintiff's injuries in that she failed to observe plaintiff's motorcycle and the accident between plaintiff and defendant Ryszard Ruszczyk, and failed to act as a reasonably prudent person. Plaintiff maintains that defendant Ryszard Ruszczyk proceeded to make an improper left turn onto Route 25A and that he failed to observe plaintiff, thus proximately causing the collision.

In support of the motions, the movants include, *inter alia*, copies of transcripts of examinations before trial taken of defendants Patricia Nolan and Ryszard Ruszczyk. Patricia Nolan testified that April 14, 2008, the date of the accident, was a dry, sunny afternoon and that she was proceeding westerly on Route 25A approximately 1/4 mile west of Berry Hill Road when the mini-bus she was operating, owned by defendant Northport-East Northport Union Free School District, was involved in an accident. Ms. Nolan maintained that there was no sun glare, that the sun was not in her eyes as she drove, and that Route 25A was straight with a slight incline at the time of the accident. She contended that the mini-bus was in contact with plaintiff himself and not his motorcycle and that she did not see plaintiff, his motorcycle, or any collision prior to a collision involving the mini-bus she was operating. Defendant Patricia Nolan stated that she saw a shiny metal object fly or slide in front of her bus while she was traveling at approximately 40 to 45 miles per hour, and that she did not realize what it was until after the incident occurred. She claimed that she first saw this object when it was crossing the double yellow lines separating east-west traffic and that it just passed about 3 feet in front of the bus. Patricia Nolan asserted that when she first saw the shiny metal object she instantaneously moved her foot from the accelerator to the brake and applied steady pressure to the brake using medium force until the bus came to a stop. Defendant Patricia Nolan contended that she was first aware that a motorcyclist was involved in the incident when she "felt a bump". She testified that she felt the front wheel go over the plaintiff motorcyclist, and then felt another "thump" when the wheels in the back went over him. She claimed that her foot was off of the accelerator when she felt the first "thump" and that it happened instantaneously.

During his deposition, defendant Ryszard Ruszczyk testified that on the date of the accident the sun did not bother him and it was not in his eyes when he looked to the left (west-bound) onto Route 25A. He claimed that he was turning left onto Route 25A, a two lane roadway with one lane in each direction, and that “[he] stopped, because [he] did not see, clearly, the traffic from the left to the right [east-bound traffic] then [he] moved a little bit forward again” and stopped a second time. Defendant Ryszard Ruszczyk averred that during this second stop he looked to the left, to the right, and to the left again and, although he could see “maybe 100 feet to the left,” he saw nothing and proceeded to enter Route 25A. Defendant Ryszard Ruszczyk stated that he brought his vehicle to a third stop because he saw plaintiff’s motorcycle approaching from his left (the west), approximately 100 feet away from him, and that the motorcycle hit his vehicle. According to the testimony of defendant Ryszard Ruszczyk, the motorcycle operator’s right foot rest came into contact with the license plate on his front bumper, and the plaintiff operator bounced off his car and ended up on the other side of Route 25A. Defendant Ryszard Ruszczyk did not observe the mini-bus driven by defendant Patricia Nolan strike plaintiff’s person.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 413 NYS2d 141 [1978]; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (*S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (*Benincasa v Garrubbo*, 141 AD2d 636, 637, 529 NYS2d 797, 799 [2d Dept 1988]). Once this showing by the movant has been established, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see Alvarez v Prospect Hosp.*, *supra*).

Vehicle and Traffic Law § 1141 provides that “[t]he driver of a vehicle intending to turn to the left within an intersection or into an alley, private road, or driveway shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard.” Here, plaintiff and defendants Patricia Nolan and Northport-East Northport Union Free School District demonstrated their *prima facie* entitlement to judgment as a matter of law by demonstrating that defendant Ryszard Ruszczyk violated Vehicle and Traffic Law § 1141 by making a left turn directly into the path of plaintiff’s vehicle when it was not reasonably safe to do so, as plaintiff was legally proceeding along Route 25A with the right-of-way (*see Ahern v Lanaia*, 85 AD3d 696, 924 NYS2d 802 [2d Dept 2011]; *Heath v Liberato*, 82 AD3d 841, 918 NYS2d 353 [2d Dept 2011]; *Berner v Koegel*, 31 AD3d 591, 819 NYS2d 89 [2d Dept 2006]). In addition, inasmuch as plaintiff had the right-of-way, he was entitled to anticipate that defendant Ryszard Ruszczyk would obey those traffic laws which required him to yield to plaintiff’s vehicle (*see Ahern v Lanaia*, *supra*). As plaintiff had no duty to watch out for or avoid Ruszczyk and cannot be found to be comparatively negligent, summary judgment in his favor on the issue of liability against defendant Ryszard Ruszczyk is granted.

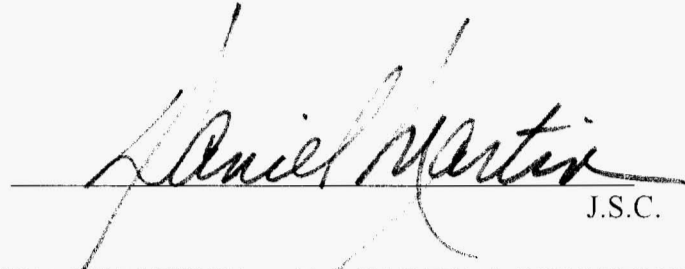
In opposition to the motion of defendants Patricia Nolan and Northport-East Northport Union Free School District, plaintiff contends that issues of fact exist as to whether defendant Patricia Nolan exercised reasonable care to avoid the collision with plaintiff's person since she failed to see the motorcycle, which she should have seen with the proper use of her senses, and she failed to swerve or otherwise avoid colliding with plaintiff. However, where plaintiff offers only counsel's conjecture, without any expert testimony or other evidence, to prove that defendant Patricia Nolan could have avoided running over plaintiff, he has failed to raise a triable issue of fact. Mere speculation that the driver faced with an emergency situation could have done something to avoid the collision is insufficient to defeat a motion for summary judgment (*see Barbaruolo v Difede*, 73 AD3d 957, 900 NYS2d 671 [2d Dept 2010]). The evidence submitted supports the claims of defendant Patricia Nolan, that she did not actually observe plaintiff or his motorcycle sufficiently prior to the accident so as to be able to avoid running over him (*compare Sirot v Troiano*, 66 AD3d 763, 886 NYS2d 504 [2d Dept 2009]; *Gorham v Methun*, 57 AD3d 480, 869 NYS2d 182 [2d Dept 2008]). Plaintiff asserts that the emergency doctrine is inapplicable in this instance because defendant Patricia Nolan was inattentive inasmuch as she did not observe plaintiff or his motorcycle before running over plaintiff. However, Patricia Nolan's testimony that her first observation was the motorcycle passing directly in front of her sets the time period between the initial accident and her contact with the plaintiff to be such that the emergency doctrine would be invoked. The emergency doctrine recognizes that when a driver is confronted with an emergency situation which leaves little or no time for thought, deliberation or consideration, he or she may not be negligent if the actions taken were reasonable and prudent in the emergency context (*Jacobellis v New York State Thruway Auth.*, 51 AD3d 976, 858 NYS2d 786 [2d Dept 2008]). The emergency doctrine applies only to circumstances where a party is confronted by a sudden and unforeseen occurrence not of his own making (*see Cascio v Metz*, 305 AD2d 354, 759 NYS2d 502 [2d Dept 2003]; *Muye v Liben*, 282 AD2d 661, 723 NYS2d 510 [2d Dept 2001]). It is axiomatic that a driver is not required to anticipate that an automobile traveling in the opposite direction will cross over into oncoming traffic (*see Bentley v Moore*, 251 AD2d 612, 675 NYS2d 108 [2d Dept 1998]). Such a scenario presents an emergency situation and the actions of the driver presented with such a situation must be judged in that context (*see, id.*). Although the existence of an emergency and the reasonableness of the response to it generally present issues of fact (*see Makagon v Toyota Motor Credit Corp.*, 23 AD3d 443, 444, 808 NYS2d 120 [2d Dept 2005]), those issues "may in appropriate circumstances be determined as a matter of law" (*Bello v Transit Auth. of N.Y. City*, 12 AD3d 58, 60, 783 NYS2d 648 [2d Dept 2004]; *see Huggins v Figueroa*, 305 AD2d 460, 462, 762 NYS2d 404 [2d Dept 2003])

Here, the adduced evidence established that defendant Patricia Nolan had almost no time to react after plaintiff's motorcycle and body crossed over into the westbound lane (*see Minor v C & J Energy Savers, Inc.*, 65 AD3d 532, 883 NYS2d 587 [2d Dept 2009]). Thus, plaintiff's arguments are specious at best, the testimony of defendants Patricia Nolan and Ryszard Ruszczyk during their pre-trial depositions all clearly show that defendant Ryszard Ruszczyk entered the intersection to make a left turn in front of plaintiff, and that the impact between plaintiff and the mini-bus, driven by defendant Patricia Nolan, occurred only after the vehicle of defendant Ryszard Ruszczyk's hit plaintiff's vehicle. Inasmuch as defendant Patricia Nolan was confronted by a motorcycle and plaintiff's body traveling across the roadway from oncoming traffic directly in front of her vehicle, an emergency situation existed, for which negligence cannot be found against her. Thus, the sole proximate cause of the subject accident was defendant Ryszard Ruszczyk's failure to yield the right-of-way as required by Vehicle & Traffic

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Law § 1141 (*see Ahern v Lanaia, supra; Agati v Wandel*, 49 AD3d 572, 854 NYS2d 445 [2d Dept 2008]) and summary judgment dismissing the complaint and cross claims interposed against defendants Patricia Nolan and Northport-East Northport Union Free School District is granted.

Dated: December 10, 2013

  
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J.S.C.

\_\_\_\_ FINAL DISPOSITION     X  NON-FINAL DISPOSITION