

**Gales v Catucci**

2019 NY Slip Op 34302(U)

January 22, 2019

Supreme Court, Dutchess County

Docket Number: Index No. 2017-50347

Judge: Peter M. Forman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF DUTCHESS

-----X  
GREGORY GALES,

Plaintiff,

DECISION AND ORDER  
Index No. 2017-50347

-against-

JUDITH A. CATUCCI and JOSEPH M.  
CATUCCI,

Defendants.  
-----X

FORMAN, J., Acting Supreme Court Justice

The Court read and considered the following documents upon  
this motion:

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By way of background, this is an action to recover damages for personal injuries allegedly sustained by the plaintiff as a result of an accident which occurred on February 5, 2016. The collision between plaintiff's bicycle and defendants' vehicle occurred at the intersection of Maple Street and North Grand Avenue in Poughkeepsie, New York.

Defendants have moved for summary judgment dismissing this action, on the grounds that they are not liable for the accident

as a matter of law. For the reasons stated herein, that motion is denied.

Defendants have also moved for a trial preference, on the grounds that Judith C. Catucci has reached the age of seventy years. For the reasons stated herein, that motion is granted.

#### DISCUSSION

On a motion for summary judgment, the test to be applied is whether triable issues of fact exist or whether on the proof submitted judgment can be granted to a party as a matter of law (*see Andre v. Pomeroy*, 35 NY2d 361 [1974]). The movants must set forth a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (*see Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the movants set forth a *prima facie* case, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*see Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

In support of their motion, defendants submit the deposition transcripts of plaintiff Gregory Gales and defendant Judith A. Catucci.

Plaintiff testified that the traffic light controlling the intersection where the accident occurred was green when he first

saw it (see Deposition of Plaintiff at p 46 lines 17-19). From the point that he first saw the green light up and until the point of the accident, plaintiff testified that he kept the traffic light under continual observation (see Deposition of Plaintiff at p 46 lines 20-24). Plaintiff testified that the light remained green, until the point he was "about to go right under it", then it turned yellow (see Deposition of plaintiff at pp 46-47 lines 25, 2-4).

Defendant Judith A. Catucci testified that when she first observed the traffic light at issue, she was approximately five to six car lengths away and it was green (see Deposition of Defendant Judith A. Catucci at p 49 lines 13-16). Mrs. Catucci testified that the light remained green up and until the time of the accident (see Deposition of Defendant Judith A. Catucci p 49 lines 17-20). Upon further questioning, the defendant re-affirmed her testimony concerning the color of the traffic light by proclaiming that "...I definitely had a green light" (see Deposition of Defendant Judith A. Catucci at p 52 lines 19-20).

It is well established that the court's role in determining summary judgment motions is issue finding, not issue determination (see *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957] *reargument denied by* 3 NY2d 941). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (see

*Rotuba Extruders, Inc. v. Ceppos*, 46 NY2d 223 [1978]). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied (see *Stone v. Goodson*, 8 NY2d 8 [1960] reargument denied by 8 NY2d 934). It is not the court's function on a motion for summary judgment to assess credibility (see *Brown v. Kass*, 91 AD3d 894 [2<sup>nd</sup> Dept 2012]). Summary judgment is inappropriate where triable issues of fact or credibility are raised (*id.*).

Here, the defendants have failed to make a prima facie demonstration that they are entitled to summary judgment. Specifically, the conflicting deposition testimony of the plaintiff and the defendant Judith Catucci require an assessment of credibility to determine which party had the green light at the time of the accident (see *Napolitano v. Sanderson*, 2018 NY Slip Op 08943 [2<sup>nd</sup> Dept 2018]; *Chuachingco v. Christ*, 132 AD3d 798 [2<sup>nd</sup> Dept 2015]). Therefore, defendants' motion for summary judgment is denied without the need to consider the sufficiency of plaintiff's opposition papers (see generally *Coscia v. 938 Trading Corp.*, 283 AD2d 538 [2<sup>nd</sup> Dept 2001]).

Defendants also move for an order, pursuant to CPLR 3403(a)(4), for a special trial preference because defendant Judith Catucci is more than seventy years of age. Specifically, CPLR 3403(a)(4) states that an action "shall be entitled to a preference" when a party is 70 years of age or older. Given that

the Legislature's use of the imperative "shall" is mandatory, not permissive, this court lacks any discretion when deciding a motion for a trial preference based upon the age of the parties (see *Campbell v. Kelly*, 42 AD2d 601 [2<sup>nd</sup> Dept 1973]; *Cruz v. Integrated Health Admin. Servs., Inc.*, 56 Misc3d 654 [Sup Ct, Queens County 2017]). Based upon the foregoing, it is hereby


ORDERED, that Defendants' motion for summary judgment is denied; and it is further

ORDERED, that Defendants' motion for a trial preference is granted; and it is further

ORDERED, that counsel for all parties shall appear for a pretrial conference on March 4, 2019 at 9:30 a.m.

This constitutes the Decision and Order of the Court.

Dated: January 22, 2019  
Poughkeepsie, New York

  
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HON. PETER M. FORMAN, AJSC

TO: Sobo & Sobo, LLP  
John A. Del Duco III, Esq.  
Attorneys for Plaintiff  
One Dolson Avenue  
Middletown, New York 10940

Law Office of Thomas K. Moore  
Alyson M. Piscitelli, Esq.  
Attorneys for Defendants  
PO Box 2903  
Hartford, Connecticut 06104