

**Taylor v Bragaglia**

2019 NY Slip Op 34627(U)

November 22, 2019

Supreme Court, Westchester County

Docket Number: Index No. 56088/2019

Judge: Lawrence H. Ecker

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
MARIE TAYLOR,

**Index No. 56088/2019**

Plaintiffs,

**DECISION/ORDER**

-against-

**Motion Date: 10/23/2019**

GAIL BRAGAGLIA,

**Motion Seq. 1**

Defendant.

-----X

**ECKER, J.**

The following papers were read on the motion of plaintiff MARIE TAYLOR (plaintiff) [Mot. Seq. 1], for an order, pursuant to CPLR 3212, granting plaintiff partial summary judgment as to liability as against defendant GAIL BRAGAGLIA (defendant) and dismissing defendant's affirmative defense of culpable conduct:

**PAPERS**

Notice of Motion (plaintiff), Affirmation in Support, and Exhibits A-C  
Affirmation in Opposition  
Affidavit in Reply

Upon the foregoing papers, the court determines, as follows:

This action for personal injuries arises from an accident that occurred on June 14, 2018, at the intersection of Division Street and Main Street in the City of New Rochelle (the Accident). In the affidavit in support of the motion, plaintiff avers that Main Street is a one-way street with two moving lanes for traffic and parking. The street is straight and level, and controlled by a traffic light. At the time of the Accident, plaintiff avers, she was crossing Main Street in the marked pedestrian crosswalk, with the pedestrian signal in her favor, where it intersects with Division Street. Prior to entering the cross-walk, plaintiff states that she looked to her left and right, and no cars were approaching. Plaintiff avers that she was a little more than halfway across the street when she was hit on her left side by defendant's vehicle which was making a left turn, without warning, from Division Street onto Main Street. Plaintiff alleges that she did not contribute to the Accident.

In the complaint, filed on or about April 18, 2019, plaintiff alleges that she sustained serious injuries as the result of defendant's negligence in causing the Accident. On or about June 6, 2019, defendant filed an answer containing general denials, and affirmative

defenses of: culpable conduct; assumption of risk; CPLR 4545; failure to state a cause of action; no serious injury; lack of personal jurisdiction; and failure to mitigate damages. [NYSCEF No. 4].

Plaintiff now moves [Mot. Seq. 1] for an order, pursuant to CPLR 3212, granting plaintiff partial summary judgment as to liability as against defendant and dismissing defendant's affirmative defense of culpable conduct. In support of the motion, plaintiff submits her affidavit, referred to above, and a certified copy of the police report. There has been no discovery to date. In opposition, defendant submits an attorney's affirmation and argues that the motion must be denied as premature.

In the certified copy of the police report, the officer records that defendant admitted that, as she approached the left-hand turn onto Main Street, a truck was stopped in the left turning lane, and she drove around it to make the relevant left turn. [NYSCEF No. 8]. Defendant stated that the truck obstructed her view of the intersection, and that she did not see plaintiff in the cross-walk as she made the left turn and hit the plaintiff with the front bumper of her vehicle. Defendant stated that she had the green light at the time of the turn.

A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, *prima facie*, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries (*Wray v Galella*, 172 AD3d 1446 [2d Dept 2019]; see *Rodriguez v City of New York*, 31 NY3d 312 [2018]). Plaintiff is not required to demonstrate her freedom from comparative fault to be entitled to partial summary judgment as to defendant's liability (*Rodriguez v City of New York*, *supra*; *Lewis v Revello*, 172 AD3d 505 [1<sup>st</sup> Dept 2019]). Even though a plaintiff is no longer required to establish his or her freedom from comparative negligence, the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where, as here, the plaintiff moved for summary judgment dismissing a defendant's affirmative defense of comparative negligence (*Wray v Galella*, *supra*; *Yayoi Higashi v M & R Scarsdale Restaurant, LLC.*, \_AD3d\_, 2019 N.Y. Slip Op. 07240 [2d Dept 2019]).

Here, plaintiff establishes *prima facie* entitlement to judgment as a matter of law on the issue of defendant's liability by the submitted affidavit and certified police report that demonstrate that defendant was negligent in her operation of the vehicle, and that the operation of the vehicle was a substantial cause in the happening of the accident (*Gaston v Vertsberger*, \_AD3d\_, 2019 N.Y. Slip Op. 07384 [2d Dept 2019]; *Yayoi Higashi v M & R Scarsdale Restaurant, LLC.*, *supra*). A driver is bound to see what is there to be seen with the proper use of his or her senses (*Yayoi Higashi v M & R Scarsdale Restaurant, LLC.*, *supra*; see *Brandt v Zahner*, 110 AD3d 752 [2d Dept 2013]). Hence, plaintiff establishes her *prima facie* entitlement to judgment as a matter of law on the issue of liability by submitting evidence that she was in the cross-walk, with the right of way, and defendant driver never saw plaintiff before striking her (see generally *Rodriguez v City of New York*, *supra*).

The plaintiff's affidavit was also sufficient to establish, *prima facie*, that the plaintiff was not at fault in the happening of the Accident, as it demonstrated that she exercised due care by confirming that she had the pedestrian signal in her favor and by looking for oncoming traffic in all directions before entering the crosswalk and that the collision occurred so suddenly that she could not avoid it (see *Wray v Galella, supra*; *Gaston v Vertsberger, supra*).

In opposition to the plaintiff's *prima facie* showing, the defendant failed to raise a triable issue of fact as to his negligence or whether the plaintiff was comparatively at fault in the happening of the accident (*Wray v Galella, supra*; see *Brandt v Zahner*, 110 AD3d 752 [2d Dept 2013]). Of note, defendant does not submit a personal affidavit or an affidavit of any person with personal knowledge in the opposition to the motion nor does defendant set forth any basis for concluding plaintiff was negligent.

Contrary to the defendant's contention, plaintiff's motion for partial summary judgment is not premature, as defendant fails to offer any evidentiary basis to suggest that discovery may lead to relevant evidence, or that facts essential to opposing the partial summary judgment motion were exclusively within the knowledge and control of plaintiff (*Wray v Galella, supra*; *Gaston v Vertsberger, supra*; see CPLR 3212[f]; *Lazarre v Gragston*, 164 AD3d 574 [2d Dept 2018]). The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is an insufficient basis for denying the plaintiff's motion (*Gaston v Vertsberger, supra*).

Accordingly, plaintiff's motion for summary judgment on the issue of liability and dismissing the defendant's affirmative defense alleging comparative negligence is granted (See *Wray v Galella, supra*).

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

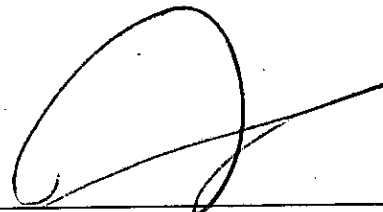
ORDERED that the motion of plaintiff MARIE TAYLOR [Mot. Seq. 1], for an order, pursuant to CPLR 3212, granting plaintiff partial summary judgment as to liability as against defendant GAIL BRAGAGLIA (defendant) and dismissing defendant's affirmative defense of culpable conduct is granted; and it is further

ORDERED that the parties shall appear at the Preliminary Conference Part of the Court, Room 811, on January 13, 2020, at 9:15 a.m.

The forgoing constitutes the Decision/Order of the court.

Dated: White Plains, New York  
November 22, 2019

ENTER,



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HON. LAWRENCE H. ECKER, J.S.C.

**Appearances:** All parties via NYSCEF