

<b>Hyatt v Thalle Indus. Inc.</b>
2020 NY Slip Op 35111(U)
May 29, 2020
Supreme Court, Putnam County
Docket Number: Index No. 500302/2017
Judge: Victor G. Grossman
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To commence the 30 day statutory time period 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 PUTNAM**

-----X  
JOSEPH HYATT and JOSEPH HYATT, SR.,

Plaintiffs,

-against -

**DECISION & ORDER**

Index No. 500302/2017  
Sequence No. 3  
Motion Date: 5/19/2020

THALLE INDUSTRIES INC., JOSEPH LINDA,  
ROGER A. CHERICO, DOMINIC JOHN  
CHERICO, TODD T. McCARTER and  
DARLENE McCARTER,

Defendants.

-----X  
**GROSSMAN, J.S.C.**

The following papers, numbered 1 to 23, were considered in connection with Defendant Joseph Linda's Notice of Motion, dated February 14, 2020, for an Order, granting summary judgment.

<b>PAPERS<sup>1</sup></b>	<b>NUMBERED</b>
Notice of Motion/Affirmation in Support/Exhs. A-L	1-14
Affirmation in Opposition/Exhs. A-G	15-22
Reply Affirmation	23

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<sup>1</sup> The parties and counsel shall familiarize themselves with this Court's Part Rules, which can be found on the OCA website, as parts of this motion and the responsive papers fail to comply with those Rules, to the extent that Plaintiff shall designate exhibits by number, while Defendant shall designate exhibits by letter, and exhibit lettering or numbering shall not begin anew for subsequent papers submitted by the same party. Any future motions that do not comply with this Court's Part Rules may be rejected or dismissed.

This is an action for personal injuries allegedly sustained by Plaintiff Joseph Hyatt,<sup>2</sup> a driver's-side backseat passenger in a vehicle operated by Defendant Dominic John Cherico (hereinafter "Defendant" and/or Cherico), and owned by Defendant Roger A. Cherico, that was involved in an accident as it traveled southbound on Route 9 in the Town of Fishkill, New York. Cherico's Honda Civic struck Todd and Darlene McCarter's Hummer head-on in the northbound lane, after having crossed over the double yellow line immediately prior to impact. Cherico maintains that Defendant Joseph Linda's vehicle suddenly stopped in the southbound lane, causing Cherico to brake suddenly and swerve over the yellow lines to avoid striking Defendant Linda's car.<sup>3</sup> As a result of the accident, Hyatt was severely injured and rendered paralyzed.

Defendant Linda now moves for summary judgment, seeking dismissal of the complaint and all cross claims. Defendant Linda argues that at the time of the accident, he was stopped in the southbound lane on Route 9, waiting until traffic in the opposite direction passed in order to safely make a left turn into his place of employment, Thalle Industries, Inc. He explains that at the same time and behind him, Cherico was also proceeding southbound on Route 9 and in an attempt to avoid his car, Cherico entered the northbound lane where he struck the Hummer. Defendant Linda asserts that he is entitled to summary judgment because he was not negligent in stopping his vehicle in order to make the left turn. In support of his motion, Linda proffers, *inter alia*: (1) the pleadings; (2) the police accident report; (3) excerpts from Plaintiff Hyatt's

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<sup>2</sup>Plaintiff Joseph Hyatt, Sr. is seeking damages for loss of services. For purposes of this Decision and Order, the Court will refer to Plaintiffs, as Plaintiff and/or as Hyatt, meaning the physically-injured plaintiff.

<sup>3</sup>The action was previously discontinued, upon stipulation, as to Defendants Thalle Industries, Todd T. McCarter, and Darlene McCarter.

deposition; (4) excerpts from Defendant Linda's deposition; (5) excerpts from Todd McCarter's deposition; and (6) photographs; (7) excerpts from Defendant Cherico's deposition (Notice of Motion; Exhs. A-L).

In opposition, Plaintiff argues that Defendant Linda's car stopped short and he had to suddenly brake to avoid colliding with it. In support of his position, Plaintiff proffers, *inter alia*: (1) Joseph Hyatt's deposition transcript; (2) Dominic Cherico's deposition transcript; and (3) Julian Mastrantone's deposition transcript. Plaintiff argues that Defendant Linda fails to address the testimony from Cherico, Mastrantone, and Plaintiff regarding the fact that he stopped short, and has therefore, failed to meet his burden of establishing a prima facie case.

In reply, Defendant Linda argues that the assertion that he stopped short is a bald, conclusory allegation insufficient to defeat the summary judgment motion. Defendant Linda notes that Plaintiff's statement that he stopped short is hearsay, as he admitted that he has no recollection of the accident, only learning of Defendant Linda's purported actions by being told the same by Mastrantone. As to Defendant Cherico and Mastrantone, Defendant Linda asserts that both of them had either no, or poor, recollection of the remainder of the facts surrounding the accident. Moreover, there is no non-hearsay testimony of a truck pulling out of the quarry prior to the accident.

It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of facts are raised and cannot be resolved on conflicting affidavits (*see Millerton Agway Coop. v Briarcliff Farms*, 17 NY2d 57, 61 [1966]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Initially, "the proponent... must make 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.” However, once a movant makes a sufficient showing, “the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Where the moving papers are insufficient, the court need not consider the sufficiency of the opposing papers (*id.*; see also *Fabbricatore v Lindenhurst Union Free School Dist.*, 259 AD2d 659 [2d Dept 1999]).

It is well settled that “[c]rossing a double yellow line into the opposing lane of traffic, in violation of Vehicle and Traffic Law § 1126(a), constitutes negligence as a matter of law, unless justified by an emergency situation not of the driver’s own making” (*Rodriguez v Gutierrez*, 138 AD3d 964, 967 [2d Dept 2016], quoting *Foster v Sanchez*, 17 AD3d 312, 313 [2d Dept 2005]).

It is undisputed that Defendant Cherico crossed the double yellow line into the opposing lane of traffic. Defendant Cherico admitted to doing so, and Mastrantone corroborated this fact. As such, Defendant Linda established a *prima facie* case that Defendant Cherico was negligent (see *Campbell v County of Suffolk*, 57 AD3d 821, 822 [2d Dept 2008] [passenger of vehicle struck by bus established her entitlement to summary as matter of law by submitting evidence that bus crossed over dividing median into opposite lane of traffic, in violation of traffic law, and caused the accident]).

In opposition, Plaintiff asserts that Defendant Cherico was responding to an emergency situation – to wit, Defendant Linda stopped short. Cherico testified to this fact, and Mastrantone corroborated it.<sup>4</sup>

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<sup>4</sup>Defendants Cherico did not oppose this motion.

In reply, Defendant Linda states Plaintiff that this testimony is self-serving and conclusory, and it fails to raise a triable issue of fact.

“[T]he emergency doctrine holds that those faced with a sudden and unexpected circumstance, not of their own making, that leaves them with little or no time for reflection or reasonably causes them to be so disturbed that they are compelled to make a quick decision without weighing alternative courses of conduct, may not be negligent if their actions are reasonable and prudent in the context of the emergency” (*Bello v Transit Auth. of NY City*, 12 AD3d 58, 60 [2d Dept 2004]). “The essence of the emergency doctrine is that, where a sudden and unexpected circumstance leaves a person without time to contemplate or weigh alternative courses of action, that person cannot reasonably be held to the standard of care required of one who has had a full opportunity to reflect, and therefore should not be found negligent unless the course chosen was unreasonable or imprudent in light of the emergent circumstances (*Id.*). “As a general rule, the questions of the existence of an emergency and the reasonableness of the response to it is an issue for the trier of fact \* \* \*, although ‘they may in appropriate circumstances be determined as a matter of law’”(*Makagon v Toyota Motor Credit Corp.*, 23 AD3d 443 [2d Dept 2005], quoting *Bello v Transit Auth. of NY City*, 12 AD3d at 60 [internal citation omitted]). The only admissible evidence in the record that Defendant Linda stopped short is the testimony of Defendant Cherico and Mastrantone.

Here, there are two witnesses supporting opposite version of the events. On one hand, Defendant Linda and McCarter state that Defendant Linda was stopped with his directional illuminated, waiting to make a left turn (Linda EBT at 14-16, 25; McCarter EBT at 18-19, 20-21). On the other hand, Defendant Cherico and Mastrantone state that Defendant Linda stopped

short (Cherico EBT at 21-24, 27-28, 56, 63-64; Mastrantone EBT at 26, 37-38, 42, 44). What happened, and whether the emergency doctrine is applicable, under the facts of this case, is an issue for the trier of fact.

Accordingly, it is hereby

ORDERED that Defendant Joseph Linda's motion for summary judgment is denied; and it is further

ORDERED that the parties and counsel are to appear before the undersigned on Thursday, June 11, 2020 at 9:30 a.m. for a pre-trial conference; counsel are advised to confirm the scheduling with the Court due to interruptions that may persist due to the COVID-19 pandemic.

The foregoing constitutes the Decision and Order of the Court.

Dated: Carmel, New York  
May 29, 2020

  
HON. VICTOR G. GROSSMAN, J.S.C.

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