

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IAS PART 24
Justice

-----X

JULIO J. JUDAK and LAURA C. TOMMASIELLO,

Plaintiffs,

-against-

SOOK H. WHANG,

Defendant.

Index No.: 624/05

Motion Dated:
February 13, 2007

Cal. No.: 14

-----X

The following papers numbered 1 to 10 read on this motion by plaintiff on the counterclaim Julio J. Judak for summary judgment dismissing the counterclaim.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1 - 4
Answering Affidavits - Exhibits.....	5 - 7
Replying Affidavit	8 - 10

Upon the foregoing papers it is ordered that this motion by plaintiff on the counterclaim Julio J. Judak for summary judgment is decided as follows:

Plaintiffs allegedly sustained serious injuries when their motorcycle collided with defendant's vehicle, which was making a left turn at the intersection of Northern Boulevard and Douglaston Parkway in Queens County on July 29, 2004. Plaintiff on the counterclaim Julio J. Judak was the operator of the motorcycle and plaintiff Laura C. Tommasiello was a passenger on the motorcycle. Prior to the accident, plaintiffs were proceeding eastbound on Northern Boulevard, and defendant was waiting to turn left onto Douglaston Parkway from Northern Boulevard. Defendant testified at her examination before trial that there was a green light in her favor. As defendant proceeded to make her left turn, she felt an impact to the side of her vehicle. Defendant further testified at her deposition that she had a full view of the road down Northern Boulevard but

did not see plaintiffs' motorcycle. Plaintiff on the counterclaim testified at his examination before trial that when his motorcycle was a distance of two cars from the intersection, he saw defendant's vehicle begin to move, and he then hit his brakes.

The proponent of a summary judgment motion 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 issues of fact. (Ayotte v Gervasio, 81 NY2d 1062, 1063 [1993].) Once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action. (Zuckerman v City of New York, 49 NY2d 557, 562 [1980].)

Plaintiff on the counterclaim made a prima facie showing demonstrating his entitlement to judgment as a matter of law. The movant submits admissible evidence which established that defendant violated Vehicle and Traffic Law § 1141 by making a left turn directly into the path of the movant's motorcycle, which had the right of way. (see Aristizabal v Aristizabal, ___ AD3d ___, ___ NYS2d ___, 2007 NY Slip Op 01229 [Feb. 13, 2007]; Berner v Koegel, 31 AD3d 591, 592 [2006]; Gabler v Marly Bldg. Supply Corp., 27 AD3d 519, 520 [2006].) Furthermore, as noted above, defendant testified at her examination before trial that she did not see the movant's vehicle prior to the accident even though she had a "full view" of the road ahead of her. Thus, defendant was negligent by failing to see that, which through the proper use of her senses, should have been seen. (Almonte v Tobias, ___ AD3d ___, ___ NYS2d ___, 2007 NY Slip Op 00247 [Jan. 16, 2007]; Torro v Schiller, 8 AD3d 364, 365 [2004].)

In opposition, defendant fails to raise a triable issue of fact as to whether plaintiff on the counterclaim was negligent. Defendant's contention that plaintiff on the counterclaim was operating his motorcycle at an unreasonable speed under the circumstances is based solely upon speculation. (Carabella v Saad, 29 AD3d 618, 619 [2006].) Indeed, a motion for summary judgment cannot be defeated by speculation or surmise. (Singer v Neri, 31 AD3d 738 [2006]; Rendon v Castle Realty, 28 AD3d 532, 533 [2006].)

Accordingly, this motion by plaintiff on the counterclaim Julio J. Judak for summary judgment is granted, and the defendant's counterclaim is dismissed.

Dated: February 23, 2007

AUGUSTUS C. AGATE, J.S.C.

