

**Titze v Finlay**

2007 NY Slip Op 32624(U)

August 16, 2007

Supreme Court, Suffolk County

Docket Number: 0022156/2003

Judge: Emily Pines

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Supreme Court - State of New York  
I.A.S. Term, Part 23, Suffolk County

Present:

**HON. EMILY PINES**  
Justice Supreme Court

Original Motion Date: 05-14-2007  
Motion Submit Date: 06-28-2007  
Motion Sequence No's.: 002 MG  
003 MG

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MARIA TIZZE,

Wilson Elser Moslowitz Edelman &  
Dicker, LLP  
150 East 42<sup>nd</sup> Street  
New York, New York 10017

Plaintiff,

-against-

FIONA J. FINLAY PAUL MUNDER, VALERIE H.  
COLE and RUFUS KING III, As Administrator of  
the Goods and Chattels and Credits of the Estate  
of RUFUS KING, Deceased,

Longo & D'Apice  
26 Court Street, Suite 1700  
Brooklyn, New York 11242

Defendants .

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**ORDERED**, that the motion (motion sequence number 002) by Defendants Fiona J. Finlay and Paul Munder for summary judgment dismissing the complaint and all cross-claims is granted; and it is further

**ORDERED**, that the cross-motion (motion sequence number 003) by Plaintiff Maria Tizze for summary judgment on the issue of liability against Defendants Valerie H. Cole and Rufus King III, as Administrator of the Good Chattels and Credits of the Estate of Rufus King, is granted; and it is further

**ORDERED**, that a compliance conference is scheduled for September 20, 2007 at 9:30 a.m. before the undersigned.

Plaintiffs commenced the within action for personal injuries sustained in an automobile accident on July 28, 2005 at the entrance/exit to 790 Route 27 at the southbound Sunrise Highway Service Road, Bellport. Defendant Cole was the driver of the motor

vehicle that collided with Defendant Finlay's vehicle which was stopped at that location. Plaintiff was a passenger in the Defendant Finlay's vehicle, which was owned by Defendant Munder. Rufus King was the owner of the motor vehicle operated by Defendant Cole. Plaintiff commenced the instant action by the filing of a Summons and Complaint on or about January 9, 2003. Issue was joined by the service of Defendant Cole's Verified Answer on or about March 11, 2003 and service of a Verified Answer with Affirmative Defenses and Cross-Claims by Defendants Finlay and Munder on or about March 6, 2003.

Plaintiff appeared for an Examination before Trial ("EBT") on June 3, 2004 and testified under oath regarding the circumstances surrounding the accident. Plaintiff testified that she was a passenger in the vehicle operated by defendant Finlay and owned by Defendant Munder, that their car was totally stopped while they were exiting the shopping center and was struck on the driver's (left) side by a vehicle coming from the left. The vehicle she was in was impacted on driver's side causing it to move to the right, lift up and end up on top of the other vehicle. Defendant Finlay also appeared for an EBT on June 3, 2004. Finlay testified that she was exiting the Bellport Outlets on the Route 27 Service Road and was stopped about eighteen inches behind the stop sign waiting to exit. She testified that the weather that day was bright, sunny, warm and dry and that there was no construction on the roadway. Finlay testified that she looked to the left and observed a white oncoming car; she observed the car as it approached for a period of about ten seconds, while it was traveling in the left lane of the Service Road. As it approached the entrance/exit where Finlay was stopped, she testified that white car started to "veer" toward her car. Finlay testified that it did not appear that the car would be turning into the entrance because of the speed it was traveling and that there was no time for her to move her vehicle and there was a vehicle directly behind her. Defendant Cole's vehicle than impacted with Finlay's vehicle on the driver's side, including part of the driver's door and part of the passenger's door. She further stated that the impact caused her vehicle to be pushed to the right about twenty inches and tipped over and came down on the engine of Cole's vehicle. Finlay characterized the impact between the two vehicles as "extra heavy".

Defendant Cole has not appeared for an examination before trial.

Defendants Finlay and Munder now move for summary judgment dismissing the complaint and all cross-claims asserted against them. Plaintiff cross-moves for summary judgment on the issue of liability as against Defendants Cole and King and does not oppose the motion by Finlay and Munder. Defendants Cole and King oppose the motion solely by an Affirmation of their counsel.

In support of the respective motions, Plaintiff and Defendants Finlay and Munder submit the pleadings, EBT transcripts of Plaintiff and Finlay. They have also submitted the police report which indicated that Finlay's vehicle was stopped at the intersection and Cole's vehicle was traveling at a high rate of speed and Cole stated that she "lost the brakes couldn't stop and as a result broadsided" Finlay's vehicle.

In opposition to the motion, Cole and King have submitted merely an affirmation by their counsel. He argues that summary judgment should not be granted as Plaintiff and Defendants Finlay and Munder have failed to prove any admissible evidence that the vehicle involved in the accident was operated by Cole and owned by King. Counsel also objects to reliance on the police report as evidence of the happening of the accident. He also argues that Plaintiff's "cross-motion" was improperly delineated as such, and should have been brought as a "motion" since it does not seek relief against the moving Defendants.

It is well settled that summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a material issue of fact or where the issue is arguable. ***Estate of Beckford***, 280 A.D.2d 472, 720 N.Y.S.2d 176 (2d Dept. 2001); ***State Bank of Albany v. McAuliffe***, 97 A.D.2d 607, 467 N.Y.S.2d 944.

In the case at bar, Defendants Finlay and Munder and Plaintiff have met their *prima facie* burden of establishing negligence by Cole by demonstrating that their automobile was stopped at a stop sign when it was struck by the vehicle operated by Cole and owned by King. The opposition to the motions consists solely of an Affirmation from their attorney who lacks personal knowledge of the happening of the accident is devoid of evidentiary value and thus is insufficient to defeat the motion for summary judgment. ***Bates v. Yasin***, 13 A.D.3d 474, 788 N.Y.S.2d 397 (2d Dept. 2004); ***Miller v. City of New York***, 277 A.D.2d 363, 717 N.Y.S.2d 198 (2d Dept.

2000); *Mobil Oil Corp., v. Penna*, 139 A.D.2d 501, 526 N.Y.S.2d 849 (2d Dept. 1988); *Sheahan v. County of Suffolk*, 109 A.D.2d 832, 486 N.Y.S.2d 356 (2d Dept. 1985). It is undisputed that the Finlay vehicle was stopped at the time of the collision, and Cole has failed to submit a non-negligent explanation for the accident to rebut the inference of negligence. *Brady v. Correctional Transportation, Inc.*, 274 A.D.2d 404, 711 N.Y.S.2d 448 (2d Dept. 2000). Moreover, the Court can properly consider Defendant Cole's admission in the police report that she "broad-sided" Finlay's vehicle. *Abramov v. Miral Corp.*, 24 A.D.3d 397, 805 N.Y.S.2d 119 (2d Dept. 2005); *Orange v. Jacobs*, 11 A.D.3d 582, 783 N.Y.S.2d 634 (2d Dept. 2004). Although Cole stated in the police report that she "lost the brakes", she has not submitted any admissible evidence on this motion regarding the brake problem. *See, Hollis v. Kellog*, 306 A.D.2d 244, 761 N.Y.S.2d 253 (2d Dept. 2003). Finally, with regard to the claim by Cole's counsel that there is no admissible proof that the Cole/King vehicle was involved in the accident, the Court rejects this argument as wholly without merit. In addition to the police report referenced herein, the Verified Answer of these Defendants admits that Cole was the operator and King the owner of the vehicle that came into contact with Finlay's vehicle. Counsel is thus cautioned against making arguments that could be deemed frivolous.

Based upon the foregoing, the moving parties have demonstrated *prima facie* that Cole was negligent as a matter of law, and Cole has failed to raise a triable issue of fact. *Mizrahi v. Lam*, 40 A.D.3d 594, 836 N.Y.S.2d 200 (2d Dept. 2007). The submissions reflect that Cole was solely responsible for the happening of the accident. *Coumbes v. Taylor*, 298 A.D.2d 350, 751 N.Y.S.2d 373 (2d Dept. 2002). Therefore, the motion by Defendants Finlay and Munder dismissing the complaint and all cross-claims against them is granted.

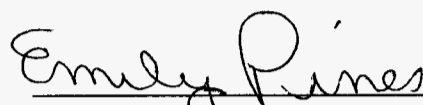
Turning to the cross-motion of Plaintiff on the issue of liability against Defendants Cole and King, that application is also granted. Although brought before the Court by Notice of Cross-Motion, instead of Notice of Motion, **CPLR Rule 3212(b)** authorizes the Court to grant summary judgment to other than the moving party without the necessity of a cross-motion if it appears that any other party is so entitled. The Court is empowered by **Rule 3212(b)** to search the record and award judgment where appropriate. *Irmityayeva v. Thompson*, 296 A.D.2d 439, 745 N.Y.S.2d 199 (2d Dept. 2002); *Grimaldi v. Pagan*, 135 A.D.2d 496 (2d Dept. 1987).

In the case *sub judice*, for the reasons set forth above, Plaintiff's motion for summary judgment against Defendants Cole and King on the issue of liability only is granted. Therefore, the action is continued against these Defendants on the issue of damages only.

Counsel are reminded that a compliance conference is scheduled for September 20, 2007 at 9:30 a.m. before the undersigned.

The foregoing constitutes the **DECISION** and **ORDER** of the Court.

Dated: August 16, 2007  
Riverhead, New York

  
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**EMILY PINES**  
J. S. C.