

**Hawkins v Terry Gallagher, Inc.**

2008 NY Slip Op 32397(U)

August 18, 2008

Supreme Court, Nassau County

Docket Number: 1593-07/

Judge: Karen V. Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK  
TRIAL TERM, PART 22 NASSAU COUNTY**

**PRESENT:**

**Honorable Karen V. Murphy**  
**Justice of the Supreme Court**

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**MICHAEL A. HAWKINS,**

**Index No. 1593/07**

**Plaintiff(s),**

**Motion Submitted: 5/8/08**

**Motion Sequence: 002, 003, 004**

**-against-**

**TERRY GALLAGHER, INC., JAN CZAPLICKI,  
NOREEN T. EBBIGHAUSEN, ASHLEY N.  
LAWRENCE, EDWARD F. MIRACCO AND  
MARGARET MIRACCO,**

**Defendant(s).**

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The following papers read on this motion:

Notice of Motion/Order to Show Cause.....XXX  
Answering Papers.....XXX  
Reply.....XX

Motion by the defendants, Edward F. Miracco and Margaret Miracco, pursuant to CPLR § 3212, for an Order of this Court, awarding them summary judgment and dismissing the complaint of the plaintiff, Michael A. Hawkins and any cross-claims asserted against them and Cross Motion by the plaintiff, Michael A. Hawkins, pursuant to CPLR § 3212, for an Order of this Court, granting him summary judgment; and cross motion by the defendants, Terry Gallagher, Inc. and Jan Czaplicki, pursuant to CPLR § 3212, for an Order of this Court granting them summary judgment are determined herein.

This action arises from an accident that occurred on Spagnoli Road in Melville, New York on December 11, 2006 at approximately 9:20 a.m. The accident occurred as a result of contact between a vehicle owned by defendant Noreen T. Ebbighausen and operated by

defendant Ashley N. Lawrence (the "Lawrence defendants") and a dump truck owned by Terry Gallagher, Inc. and operated by Jan Czaplicki (the "Gallagher defendants"). As a result of said contact, the dump truck was caused to swerve off the road and into a driveway adjacent to Spagnoli Road where a vehicle being operated by Edward Miracco was at a complete stop. Plaintiff, Michael Hawkins, was a passenger in the Lawrence vehicle and was asleep at the time of the accident.

Defendant, Edward Miracco testified at deposition that he was at a full stop in the driveway of his place of employment when he saw the dump truck veer off the road and into the driveway, striking his vehicle. Defendant, Jan Czaplicki (the driver of the dump truck) also testified that the Miracco van was stopped in the driveway when his truck spun out of control into the driveway, hitting the Miracco van. Defendant, Ashley N. Lawrence, stated at her deposition that she never saw the Miracco vehicle at any time prior to the accident. Similarly, Edward Miracco testified that he did not see any vehicle behind the dump truck before there was an accident with his van; he did not see the van come out from behind the truck before the accident and after the accident he saw another van that went into the woods. Non-party witness to the accident, David Gribbin, testified at his sworn deposition that he was a witness to the accident; he was on Spagnoli Road in the left westbound lane. He stated that the minivan, i.e., the Lawrence vehicle, passed him in the right lane at a high rate of speed - over 60 miles per hour. Gribbin also stated that after the accident, he saw the minivan that passed him in the bushes with the roof crushed. Gribbin stated that the dump truck was in a driveway with another minivan, i.e., the Miracco vehicle.

Upon the instant applications, the Miracco defendants, the Gallagher defendants and the plaintiff all seek summary judgment in their favor.

Summary judgment is the procedural equivalent of a trial (*S.J. Capelin Assoc. Inc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 313 N.E.2d 776, 357 N.Y.S.2d 478 [1974]). It is a drastic remedy that will only be granted when the proponent establishes that there are no triable issues of fact (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 501 N.E.2d 572, 508 N.Y.S.2d 923 [1986]). Once the party seeking summary judgment has made a prima facie showing of entitlement to judgment as a matter of law, the party opposing the motion must come forward with proof in evidentiary form establishing the existence of triable issues of fact, or demonstrate an acceptable excuse for its failure to do so (*Alvarez v. Prospect Hosp., supra; Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]). Mere conclusions, expressions of hope or unsubstantiated allegations are insufficient (*Zuckerman v. City of New York, supra*).

While negligence cases do not generally lend themselves to resolution by motion for summary judgment, where the unrefuted facts clearly point to the negligence of one or more of the other parties without any fault or culpable conduct on the part of the moving party, in this case, the Miraccos, their motion for summary judgment must be granted (*LeGrand v. Primus Automotive Fin. Servs.*, 272 A.D.2d 450, 707 N.Y.S.2d 672 (2d Dept., 2000); *Lazar v. Fea Leasing*, 264 A.D.2d 818, 819, 695 N.Y.S.2d 592 [2d Dept., 1999]). A review of the record, including the deposition testimonies of defendant Jan Czaplicki and the sworn deposition testimony of non-party witness David Gribbin, confirms that any actions on the part of the Miracco defendants did not cause or contribute to the accident. None of the parties state that the Miracco van was moving or that it was in the road at any time prior to the accident. Miracco defendants established as a matter of law that their vehicle did not come into contact with the Lawrence vehicle (in which plaintiff was traveling), or the dump truck, and further established that they were not negligent, and their vehicle did not cause the accident between the Lawrence vehicle and the dump truck. (*LeGrand v. Primus Automotive Fin. Servs.*, *supra*; *Lazar v. Fea Leasing*, *supra*).

Plaintiff's "argument", in opposition to the Miracco defendants' motion, that the presence of skid marks under the front wheels of the Miracco vehicle (as depicted in a photograph marked for identification as "Plaintiff's Exhibit 9") warrants denial of the Miracco defendants motion for summary judgment. Plaintiff's allegations and conclusions that "it is possible for a jury to conclude that Miracco, after having waited for 30 seconds, which would have seemed an excessive amount of time without any cars having passed, started to enter Spagnoli Road but stopped short as evidenced by the skid marks under his vehicle . . . . A jury could conclude that Czaplicki swerved into Lawrence's lane in reaction to Miracco's sudden movement or skid" (Plaintiff's Cross Motion, p. 7) are wholly unsubstantiated. Plaintiff's opposition consists of mere speculation that the Miracco vehicle moved prior to the accident and that it is "possible" that the Miracco vehicle "started to enter Spagnoli Road but stopped short." This argument is clearly not based upon any admissible testimony, but upon alleged "skid marks." However, there is no proof that the marks in said photograph are skid marks, or that they were made by the Miracco vehicle. None of the parties deposed were asked to identify the marks in the photo. Thus, there is no testimony that the marks in the photo were skid marks made by any of the vehicles involved in the accident. Plaintiff submits no expert testimony to show that the marks in the photo were skid marks made by the Miracco vehicle. Accordingly, the Miracco defendants' motion for summary judgment is granted and plaintiff's complaint is herewith dismissed as against them.

The Gallagher defendants motion for summary judgment is denied. Defendants argument that "a rear-end collision establishes a prima facie case of liability against the moving vehicle" and as such they are entitled to summary judgment, is not only erroneous,

but it is entirely misplaced as well. Rear-end collisions *with stopped automobiles* establishes a prima facie case of negligence on the part of the operator of the moving vehicle and imposes a duty on the operator of that vehicle to explain how the accident occurred (*Moran v. Singh*, 10 A.D.3d 707, 782 N.Y.S.2d 284 (2d Dept., 2004); *Leal v. Wolff*, 224 A.D.2d 392, 638 N.Y.S.2d 110 (2d Dept., 1996); *Barile v. Lazzarini*, 222 A.D.2d 635, 635 N.Y.S.2d 694 [2d Dept., 1995]). In this case, it is undisputed that the Lawrence vehicle and the dump truck were both in motion at the time of the initial impact. Thus, the argument that a prima facie case has been established in this case is entirely unavailing.

Further, the Gallagher defendants have failed to demonstrate that this is a "rear end collision" case in the first place. There is conflicting testimony in this record as to how the accident occurred. Defendant Ashley Lawrence testified that as she was traveling in the left lane of the two lanes heading west on Spagnoli Road, she observed the dump truck in the right lane in front of her. She testified that she was traveling between 30-35 mph and that the truck was five to six car lengths in front of her in the right lane. She stated that as she was overtaking the truck, the front of her vehicle came to a point very near the left rear of the truck and at that point, the truck suddenly swerved into the left lane in which she was traveling.

Defendant Jan Czaplicki's version of the events is remarkably different. Defendant testified that he was heading west in the right lane of Spagnoli Road and that while in the right lane, his truck was struck in the rear and that the impact to the rear of the dump truck caused him to lose control. Issue finding rather than issue determination is the key and the motion for summary judgment must be denied where as here, there are conflicting versions of the events, thereby giving rise at least arguably to an issue of fact. (*Krupp v. Aetna Life & Cas. Co.*, 103 A.D.2d 252, 479 N.Y.S.2d 992 (2d Dept., 1984)).

Plaintiff's cross motion for summary judgment on the issue of liability is granted. The undisputed facts confirm that plaintiff was a sleeping passenger in the Lawrence vehicle at the time of the accident. The right of an innocent passenger to summary judgment is not in any way restricted by potential issues of comparative negligence as between the drivers of the two vehicles (*Johnson v. Phillips*, 261 A.D.2d 269, 272, 690 N.Y.S.2d 545 (1<sup>st</sup> Dept., 1999); *Silberman v. Surrey Cadillac Limousine Service, Inc.*, 109 A.D.2d 833, 486 N.Y.S.2d 357 [2d Dept., 1985]). Plaintiff's conduct in this case did not contribute to the happening of the accident. Plaintiff, as a sleeping passenger, was not in a position to influence the manner in which any of the drivers operated their respective vehicles. Accordingly, plaintiff has therefore sufficiently and adequately demonstrated his entitlement to partial summary judgment on the issue of liability. In the absence of any meaningful

opposition to the cross motion, including the papers submitted by the Lawrence defendants, plaintiff's cross motion for summary judgment on the issue of liability is herewith granted.

The foregoing constitutes the Order of this Court.

Dated: August 18, 2008  
Mineola, N.Y.

*Karen V. Murphy*  
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J. S.C.

**ENTERED**

AUG 26 2008

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**