

<b>Shepetokfsy v Lynch</b>
2009 NY Slip Op 31142(U)
May 6, 2009
Supreme Court, Richmond County
Docket Number: 104823/07
Judge: Joseph J. Maltese
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND DCM PART 3**

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**Index No.:104823/07  
Motion No.:003**

**ESTA SHEPETOKFSY**

*Plaintiff*

*against*

**ROBERT P. LYNCH, and  
ROBERT L. LYNCH**

*Defendants*

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**DECISION & ORDER**

**HON. JOSEPH J. MALTESE**

The following items were considered in the review of this motion for summary judgment

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3
Exhibits	Attached to Papers

The defendants' motion for summary judgment to dismiss the plaintiff's complaint is denied in its entirety.

**Facts**

This action arises out of a motor vehicle accident that took place on March 8, 2006. It is undisputed that the accident occurred as the Plaintiff, Esta Shepetofsky, was making a left hand turn from the northbound side of Hylan Boulevard onto Bedford Avenue, in Staten Island, New York. Upon making the left turn, the plaintiff's vehicle was struck by the defendants' vehicle, which was traveling southbound on Hylan Boulevard. Neither side of the subject intersection was controlled by a traffic light. The accident occurred at 5:45pm, under congested traffic conditions.

In her examination before trial, the plaintiff contended the following:

Q. Well, in order to make your left turn did you stop or did you just proceed to make the turn onto Bedford from Hylan?

A. I stopped.<sup>1</sup>

Q. How long were you stopped before you began to turn?

A. I couldn't tell you for sure. I stopped enough to realize that it was grid lock and that oncoming traffic if they had proceeded into the intersection would have been blocking the box and, therefore, they were stopped, the box was clear. It was bumper to bumper traffic aside from the intersection, and I proceeded into the intersection.<sup>2</sup>

Q. When the cars in the left lane and the center lane stopped you proceeded to make your turn?

A. I proceeded to make my turn. I looked and I had almost completed my turn and there was no car anywhere at all. Yes, I proceeded to make my turn.<sup>3</sup>

For his part, defendant Robert P. Lynch, declared the following at this examination before trial:

Q. When was the first time that you noticed the plaintiff's vehicle?

A. As it was making the left into the intersection prior to us hitting.<sup>4</sup>

Q. How far away from the intersection of Hylan and Bedford Avenue was your vehicle when you first observed the plaintiff's vehicle start turning left?

A. Approximately five to ten feet. It was practically in the intersection.<sup>5</sup>

Q. Was the SUV in the center lane on southbound Hylan Avenue able to stop his vehicle for the plaintiff to make his left turn?

A. Yes.

Q. And you observed that?

A. Yes.

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<sup>1</sup> Testimony of Esta R. Shepetofsky, September 22, 2009, 19.

<sup>2</sup> *Id.* at 20.

<sup>3</sup> *Id.* at 23.

<sup>4</sup> Testimony of Robert P. Lynch, September 22, 2008, 24.

<sup>5</sup> *Id.*

Q. Were you able to negotiate the stop as you were going on the right lane down Hylan Avenue southbound?<sup>6</sup>

A. No.<sup>7</sup>

### Discussion

A motion for summary judgment must be denied if there are “facts sufficient to require a trial of any issue of fact.”<sup>8</sup> Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. “Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion.”<sup>9</sup> Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.<sup>10</sup> As is relevant, summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law.<sup>11</sup> On a motion for summary judgment, the function of the court is issue finding, and not issue determination.<sup>12</sup> In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.

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<sup>6</sup> *Id.* at 26

<sup>7</sup> *Id.* at 26.

<sup>8</sup> CPLR § 3212[b].

<sup>9</sup> *Marine Midland Bank, N.A., v. Dino, et al.*, 168 AD2d 610 [2d Dept 1990].

<sup>10</sup> *American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1st Dept 1994].

<sup>11</sup> *Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1978]; *Herrin v. Airborne Freight Corp.*, 301 AD2d 500 [2d Dept 2003].

<sup>12</sup> *Weiner v. Ga-Ro Die Cutting*, 104 AD2d 331 [2d Dept 1984]. *Aff’d* 65 NY2d 732 [1985].

The defendants argue that they are entitled to a summary judgment motion because the plaintiff failed to ascertain whether the entire intersection was clear before proceeding to make a left hand turn. Specifically, the defendants state that the plaintiff violated *Vehicle Traffic Law* §1141, which provides that a driver who is turning left at an intersection must yield the right of way to any vehicle approaching the opposite direction. Furthermore, the defendants point out that a driver in the oncoming traffic is entitled to anticipate that a motorist making a left turn directly into his path will obey the traffic laws and yield to the oncoming vehicle.<sup>13</sup>

In her opposition papers, the plaintiff argues that the defendants' motion should be denied on both a procedural and substantive basis. The plaintiff correctly points out that the motion for summary judgment should have been filed within 60 days of the filing of the Note of Issue, in accordance with the rules of this part and the Uniform Rules of Richmond County. As the Note of Issue was filed on October 23, 2008, the summary judgment motion should have been filed on or before December 23, 2008. The present motion was not filed until January 13, 2009, exceeding 22 days from the deadline. The Court of Appeals of the State of New York has ruled that a court may allow the late filing of summary judgment motions only if the moving party provides a satisfactory explanation of "good cause."<sup>14</sup> In their reply, the defendants state that they were not aware that a Note of Issue was filed at the time the motion was drafted or filed. Law office failure, however, is an insufficient excuse to constitute good cause.<sup>15</sup> The defendants also contend that the late filing of their motion does not result in prejudice or inconvenience to the plaintiff. The Court of Appeals has also rejected non-prejudicial excuses.<sup>16</sup> As such, this court holds that the summary judgment motion filed by defendants was untimely and is therefore denied.

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<sup>13</sup> *Saint v. United States*, 483 F Supp.2d 267 [2007].

<sup>14</sup> *Brill v. City of New York*, 2 NY3d 648 [2004].

<sup>15</sup> *Crawford v. Liz Claiborne*, 45 AD3d 284, [1st Dept 2007], *revd* 11 NY3d 810 [2008].

<sup>16</sup> *Brill v. City of New York*, 2 NY3d 648 [2004], *supra*.

Even if this court were to entertain the defendants' motion, it would not grant summary judgment to defendants because too many issues of fact exist regarding the likelihood of their negligence in the subject action. "It is well settled that a driver must exercise reasonable care notwithstanding the invitation to proceed by the green light facing him."<sup>17</sup> "Furthermore, under the doctrine of comparative negligence, a driver who lawfully enters an intersection with a green light may still be found partially at fault for an accident if he or she fails to use reasonable care to avoid a collision with another vehicle in the intersection."<sup>18</sup> When approaching an intersection, a driver should always drive at an appropriate reduced speed.<sup>19</sup>

The facts of this case reveal that the plaintiff undertook some precautionary measures. She stopped and looked until the cars on two of the three opposite lanes would stop to give her the right of way. The plaintiff alleges she never saw the defendants' car in the far third lane until the collision. The defendant driver himself admitted that he did not see the plaintiff's vehicle until five to ten feet before the collision. In addition, while the defendant was driving within the posted speed limit, there is a question of fact whether his speed was appropriate given the traffic conditions at the time of the accident. There is also a question of fact whether the view of both vehicles were obstructed by the cars going southbound on Hylan Boulevard. At this juncture, it cannot be adjusted as a matter of law that the plaintiff is 100% culpable since comparative negligence may have resulted in the occurrence of the subject accident.

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<sup>17</sup> *Siegel v. Sweeney*, 266 AD2d 200 [2d Dept 1999]; *Shea v. Judson*, 283 NY 393; *Costalas v. City of New York*, 143 AD2d 573; *Klayman v. City of New York*, 130 AD2d 551

<sup>18</sup> *Id.*

<sup>19</sup> Vehicle and Traffic Law § 1180(e).

### Conclusion

This court finds that there are various issues of material fact. Specifically, this court cannot conclude as a matter of law that the plaintiff was solely culpable when she made a left turn from Hylan Boulevard onto Bedford Avenue, resulting in the collision with the defendants' vehicle. Such an inquiry is best left to a trier of fact to decide.

Accordingly, it is hereby

ORDERED, that the defendants' motion for summary judgment dismissing the plaintiff's complaint is denied in its entirety.

ORDERED, that the parties shall return to DCM Part 3 on **June 11, 2009 at 9:30 A.M.** for a Compliance Conference.

ENTER,

DATED: May 6, 2009

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Joseph J. Maltese  
Justice of the Supreme Court