

**Gallagher v McCurty**

2010 NY Slip Op 32510(U)

September 3, 2010

Supreme Court, Nassau County

Docket Number: 14783-08

Judge: Vito M. DeStefano

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SUPREME COURT - STATE OF NEW YORK

Present:

**HON. VITO M. DESTEFANO,**  
Justice

TRIAL/IAS, PART 21  
NASSAU COUNTY

\_\_\_\_\_  
**STEFANI A. GALLAGHER,**

**Decision and Order**

**Plaintiff,**

**MOTION SUBMITTED:**

**July 9, 2010**

**-against-**

**MOTION SEQUENCE:01**

**INDEX NO.: #14783-08**

**DAVID E. MCCURTY,**

**Defendant.**

\_\_\_\_\_  
**The following papers and the attachments and exhibits thereto have been read on this motion:**

Notice of Motion	1
Affirmation in Opposition	2
Reply Affirmation	3

In an action to recover damages for personal injuries sustained by the Plaintiff in a motor vehicle accident on June 29, 2008, the Defendant moves for an order pursuant to CPLR 3212 granting summary judgment dismissing the Plaintiff's complaint.

**Background**

On the evening of June 29, 2008, Plaintiff Stefani Gallagher was on her way home from work in Port Washington where she waitresses at a restaurant (Ex. "D" to Defendant's Motion at pp 10-11; Affidavit in Opposition at ¶¶ 2,3). The Plaintiff proceeded from the restaurant parking lot making a left turn onto Pleasant Avenue whereupon she continued until stopping at a "T" intersection formed between Pleasant Avenue and Shore Road (Ex. "D" to Defendant's Motion at pp 23-25; Affidavit in Opposition at ¶ 3). The intersection was controlled by a stop sign for vehicles on Pleasant Avenue (Ex. "D" to Defendant's Motion at p 25; Affidavit in Opposition at

¶ 3). Upon arriving at the intersection, the Plaintiff, intending to make a left turn onto Shore Road, stopped at the stop sign for about five seconds, checked for vehicles on Shore Road by looking left, right and left again (Ex. “D” to Defendant’s Motion at pp 28-29; Affidavit in Opposition at ¶¶ 4, 5). Due to the fact that her vision was limited, the Plaintiff then “inched up” and brought her car to a complete stop for a second time (Ex. “D” to Defendant’s Motion at pp 29-30). At this vantage point, Plaintiff “looked to the left and now was able to see approximately 200 feet to the left and approximately 200 feet to the right” (Affidavit in Opposition at ¶ 5). While stopped for about five seconds, Plaintiff again looked to the left, and to the right, and then to the left again (Ex. “D” to Defendant’s Motion at pp 30-32; Affidavit in Opposition at ¶ 6). Not observing any vehicles in either direction on Shore Road (Ex. “D” to Defendant’s Motion at p 33), the Plaintiff stated that she:

[s]tarted to make a left turn into the intersection, traveling about 5 mph and was about 90 percent through [her] turn and as the first quarter of [her] vehicle passed the double yellow line separating the opposite lanes of traffic on Shore Road, [she] observed defendant’s vehicle just a few inches to [her] left traveling at an excessive rate of speed.

(Affidavit in Opposition at ¶ 6). The Plaintiff testified that “[t]wo seconds before impact” she observed the headlights of the Defendant’s vehicle “coming from [her] left” (Ex “D” to Defendant’s Motion at p 33). The Plaintiff suggests that the Defendant’s vehicle was “speeding” because “when [she] first saw the headlights they were literally right there” (Ex. “D” to Defendant’s Motion at pp 37-38). Upon impact, the “entire driver’s side” of Plaintiff’s car impacted with the front of the Defendant’s car (Ex. “D” to Defendant’s Opposition at p 39).

Following the accident, the Plaintiff commenced the instant action alleging negligence on the part of the Defendant. Discovery was exchanged after which the Defendant moved for summary judgment.

#### *Defendant’s Motion for Summary Judgment*

In support of his motion for summary judgment, the Defendant submitted the pleadings, various discovery responses, and the deposition testimony of the Plaintiff. The Plaintiff had waived the deposition testimony of the Defendant (Affirmation in Support at ¶ 6). Defendant argues that Plaintiff cannot establish a *prima facie* case of negligence against Defendant as the evidence before the Court demonstrates that it was the Plaintiff who was negligent as a matter of law in violating VTL§1141<sup>1</sup> by making a left turn into the path of the Defendant’s vehicle, which was legally proceeding with the right of way (Affirmation in Support at ¶¶ 9-12, 14; Reply

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<sup>1</sup> Section 1141 of the Vehicle and Traffic Law provides the following: “The driver of a vehicle intending to turn to the left within an intersection or into an alley, private road, or driveway shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard.”

Affirmation in Support at ¶¶ 9,10). In this regard, Defendant argues that Plaintiff's negligence was the sole proximate cause of the accident and that there no evidence indicating any negligence on the part of the Defendant (Affirmation in Support at ¶ 15; Reply Affirmation in Support at ¶14).

The Plaintiff's affidavit submitted in opposition to Defendant's motion similarly demonstrates that the Plaintiff made a left hand turn onto Shore Road and did not see the Defendant's car until it was "just a few inches to [her] left" (Affidavit in Opposition at ¶ 6). Plaintiff does assert, however, that the Defendant was "traveling at an excessive rate of speed" and, on that basis, questions of fact exist with respect to whether the Defendant safely operated his vehicle, thereby precluding the granting of summary judgment (Affidavit in Opposition at ¶ 6; Affirmation in Opposition at ¶¶ 10-14).

For the reasons that follow, the Defendant's motion is granted and the complaint is dismissed.

### Analysis

On a motion for summary judgment, it is incumbent upon the movant to 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 (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment (*Alvarez v Prospect Hosp.*, 68 NY2d at 324, *supra*; *Zuckerman v City of New York*, 49 NY2d at 562, *supra*). In this regard, in opposing a motion for summary judgment, it is well settled that "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat the application (*Zuckerman v City of New York*, 49 NY2d at 562, *supra*).

While summary judgment is generally inappropriate in negligence actions (*Ugarriza v Schneider*, 46 NY2d 471, 475 [1979]), the Court nevertheless concludes that the Defendant has established his *prima facie* case entitling him to judgment as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d at 325, *supra*). Here, the Plaintiff's affidavit and deposition testimony demonstrate that she made a left turn directly into the path of the Defendant's oncoming vehicle, thus failing to yield the right of way to the Defendant's lawfully proceeding vehicle (*Loch v Garber*, 69 AD3d 814 [2d Dept 2010]; *Berner v Koegel*, 31 AD3d 591 [2d Dept 2006]; *Gabler v Marly Building Supply*, 27 AD3d 519, 520 [2d Dept 2006]; *Maloney v Niewender*, 27 AD3d 426 [2d Dept 2006]). As the Defendant's car had the right of way, Defendant was entitled to anticipate that the Plaintiff would obey the traffic laws which required her to yield to the Defendant's car (*Loch v Garber*, 69 AD3d at 816, *supra*; *Berner v Koegel*, 31 AD3d at 592-93, *supra*; *Gabler v Marly Building Supply*, 27 AD3d at 520, *supra*).

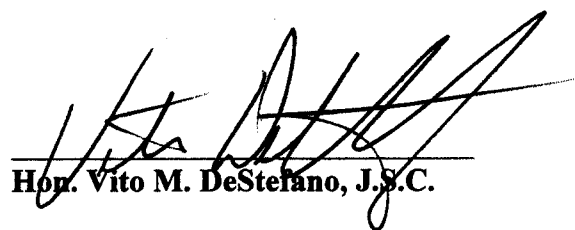
Additionally, since the Plaintiff admitted that she did not see the Defendant's car until about "two seconds before impact" when it was "inches from [her] car" she was negligent as a matter of law for failing to observe that which she should have observed through the proper use of her senses (*Yelder v Walters*, 64 AD3d 762 [2d Dept 2009]; *Aristizabal v Aristizabal*, 37 AD3d 503 [2d Dept 2007]; *Berner v Koegel*, 31 AD3d at 591, *supra* [defendant failed to rebut plaintiff's showing of its entitlement to judgment as a matter of law where defendant testified that she never saw plaintiff's car even though she had unobstructed view of road and oncoming traffic]; *Gabler v Marly Building Supply*, 27 AD3d at 520, *supra*; *Maloney v Niewender*, 27 AD3d at 426, *supra*; *Casaregola v Farkouh*, 1AD3d 306 [2d Dept 2003] [defendant's violation of VTL § 1141, by making a left turn into oncoming traffic, constitutes negligence as a matter of law]).

In opposition to the Defendant's *prima facie* showing, the Plaintiff failed to raise a triable issue of fact (*Gabler v Marly Building Supply*, 27 AD3d at 520, *supra*). Plaintiff's only explanation for the accident was that the Defendant "was traveling at an excessive rate of speed" and thus was not able to see the Defendant's car until it was "just a few inches to [her] left" (Affidavit in Opposition at ¶ 6). However, the Plaintiff's assertion that the Defendant was speeding is speculative, unsupported by competent evidence and thus insufficient to rebut the Defendant's *prima facie* showing of its entitlement to judgment as a matter of law (*Loch v Garber*, 69 AD3d at 816, *supra* [defendant driver failed to rebut plaintiff's *prima facie* showing where defendant's conclusory and speculative assertions concerning the speed of plaintiff's car were not supported by competent evidence]; *Maloney v Niewender*, 27 AD3d at 426, *supra* [plaintiff's conclusory and speculative assertions concerning the defendant's speed were unsupported by competent evidence and thus fail to raise a triable issue of fact]).

Based on the foregoing, the Defendant's motion for summary judgment is granted and the complaint is dismissed.

This constitutes the decision and order of the court.

Dated: September 3, 2010

  
 Hon. Vito M. DeStefano, J.S.C.

**ENTERED**

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