

**Wallace v Barody**

2013 NY Slip Op 33902(U)

October 31, 2013

Supreme Court, Saratoga County

Docket Number: 20121476

Judge: Stephen A. Ferradino

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**SUPREME COURT  
STATE OF NEW YORK**

**COUNTY OF SARATOGA**

SALLY WALLACE, as Administratrix of the Estate  
of LAWRENCE MILLINGTON, JR., Deceased,

Plaintiff,

- against -

**DECISION and ORDER**  
RJI # 45-1-2012-1594  
Index # 20121476

PATRICIA BARODY,

Defendant.

**APPEARANCES**

Finkelstein & Partners, LLP  
Attorneys for the Plaintiff  
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Newburgh, New York 12551

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SARATOGA COUNTY  
CLERK'S OFFICE  
BALLSTON SPA, NY

FILED

STEPHEN A. FERRADINO, J

The defendant has moved for an order of this court, pursuant to Civil Practice Law and Rules (CPLR) §3212, granting summary judgment and dismissing the plaintiff's complaint in its entirety. The plaintiff has opposed the motion.

This is an action to recover damages for the death of plaintiff's decedent, Lawrence Millington, Jr. (Mr. Millington), that resulted from injuries sustained in an accident which occurred on November 10, 2011. On November 10, 2011, at approximately 4:00 p.m., the defendant was operating her motor vehicle in the right, northbound lane of Upper Glen Street, in the town of Queensbury. The defendant was aware of a large vehicle moving

beside her in the left, northbound lane. The intersection of Upper Glen Street and Bank Street is controlled by a traffic light and has a crosswalk for pedestrian traffic. The traffic light was green as the defendant approached the intersection. The defendant proceeded, at approximately thirty (30) miles per hour, into the intersection. As she was almost through the intersection, Mr. Millington walked into her vehicle from the left, striking the driver's side.

The defendant testified that, at the point of impact, she noticed that the vehicle to her left had stopped. She observed Mr. Millington for the first time when he appeared on her windshield. The driver's side mirror of the defendant's vehicle was damaged and the windshield, on the driver's side, was cracked. The defendant testified that she was not issued a ticket at the scene, nor was she later charged with any crime or infraction as a result of the accident.

In support of her motion for summary judgment, the defendant submitted the affidavits of three eyewitnesses: Edwin Weaver (Mr. Weaver), James White (Mr. White) and Kathryn Cote (Ms. Cote). These eyewitnesses confirm that the light controlling traffic in the northbound direction of Upper Glen Street was green at the time of the accident. These witnesses also confirm that Mr. Millington was crossing Upper Glen Street, against a red light, and into oncoming traffic.

Mr. Weaver, who was operating his large cargo van in the left, northbound lane of Upper Glen Street, slightly ahead of the defendant's vehicle, averred that he stopped abruptly to avoid hitting Mr. Millington. According to Mr. Weaver, Mr. Millington passed in front of his van and walked directly into the path of the defendant's vehicle. Mr. Weaver indicated that Mr. Millington did not look for oncoming traffic.

Mr. White was operating his vehicle directly behind the defendant's vehicle. According to Mr. White, the cargo van in the left northbound lane slammed on its brakes and came to an abrupt stop. Mr. White stated that he observed Mr. Millington come out into the right lane of traffic, from in front of the cargo van, at which point he was struck by the defendant's vehicle.

Ms. Cote's vehicle was stopped at a red light on Bank Street. According to Ms. Cote, she observed Mr. Millington crossing Upper Glen Street, at a quick pace, against a red light and into oncoming traffic. She stated that Mr. Millington passed in front of the cargo van, without slowing down, hesitating or stopping.

The defendant has moved for summary judgment. In order to succeed in obtaining summary judgment, the moving party must establish his cause of action or defense sufficiently to warrant the court, as a matter of law, in directing judgment in its favor. CPLR §3212(b). To prevail on the motion, the moving party must offer evidentiary proof in admissible form. *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-1068 [1979]. The party opposing the motion must demonstrate upon admissible evidence the existence of a triable issue of fact. *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]. The evidence presented must be viewed in the light most favorable to the nonmoving party. See, *Sutherland v Thering Sales & Serv., Inc.*, 38 AD3d 967, 968 [3d Dept 2007]; *De Cicco v Longendyke*, 37 AD3d 934, 936 [3d Dept 2007]. Summary judgment should be granted only in the absence of any material or triable issue of fact. *Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]. The Court should not employ this drastic remedy and deny a party their day in court if there is any doubt as to whether such issues exist or if the issue is arguable. *Id.*, citing *Barrett v Jacobs*, 255 NY

520, 522 [1931].

The defendant has established her prima facie entitlement to judgment, as a matter of law, by providing sufficient evidence that Mr. Millington walked out into an intersection, against a red light, and directly into the path of her vehicle, leaving her unable to avoid contact. See, *St. Andrew v O'Brien*, 45 AD3d 1024, 1027 [3d Dept 2007], citing *Sheppard v Murci*, 306 AD2d 268, 268-269 [2d Dept 2003]. The defendant and three eyewitnesses all concur that the traffic light was green, giving the defendant's vehicle the right of way entering the intersection. The plaintiff has produced no evidence to contradict this testimony. It is significant that the defendant's vehicle did not run into Mr. Millington. Rather, Mr. Millington walked into the driver's side of the defendant's moving vehicle.

The burden now shifts to the plaintiff to demonstrate upon admissible evidence the existence of a triable issue of fact. The plaintiff attempts to raise the following issues to create material questions of fact: the speed of the defendant's vehicle, the failure of the defendant to see what there was to be seen, the requirement that a driver reduce speed when confronted with potential danger, the requirement that a driver take evasive action when circumstances permit and to sound the horn.

A driver of a motor vehicle is required to see what should be seen and, in the exercise of reasonable care, to avoid the happening of an accident. *National Interstate v A.J. Murphy Co., Inc.*, 9 AD3d 714, 715-716 [3d Dept 2004], quoting *Gage v Raffensperger*, 234 AD2d 751, 752 [3d Dept 1996]. In this case, however, Mr. Millington was not positioned at or near the front of the defendant's vehicle prior to the accident. Rather, Mr. Millington approached from the side and walked into the defendant's vehicle, as it was traveling through the intersection. The defendant only observed Mr. Millington when he struck the

vehicle and landed on her windshield. The position of Mr. Millington did not give rise for the defendant to take evasive action or to sound the horn.

The defendant had no reason to suspect that she was confronted with a potential danger. Contrary to the plaintiff's assertion herein, the defendant did not admit that she observed a vehicle stopped in the left lane prior to impact. The defendant's specific testimony was that she noticed that the vehicle to her left was not moving, at the point of impact. This testimony is supported by the affidavits of the eyewitnesses who stated that the vehicle in the left, northbound lane stopped abruptly and that Mr. Millington was moving quickly as he proceeded through the intersection.

The plaintiff produced the affidavits of two eyewitnesses, Jeffrey Robert Diamond (Mr. Diamond) and Shasta Sheppard (Ms. Sheppard). These witnesses stated that they observed the accident and noticed that the defendant's vehicle never slowed down as she traveled through the intersection, even though the car in the inside left stopped. Mr. Diamond added that the defendant's vehicle was traveling at full speed.

These affidavits are insufficient to raise a triable issue of fact and, contrary to the plaintiff's contention, do not create issues of credibility. Mr. Diamond offers no information or estimation regarding the defendant's rate of speed. Traveling at "full speed" is not equivalent to traveling at an excessive rate of speed. Mr. Diamond's vague and ambiguous statement cannot be accepted as admissible proof to create a question of fact. The plaintiff has offered no expert proof regarding the speed of the defendant's vehicle or how the speed of the defendant's vehicle relates to this accident. Moreover, the assertion of these eyewitnesses, that the defendant's vehicle never slowed down as she traveled through the intersection even though the car in the inside left had stopped, does not create

a question of fact for jury resolution. The defendant admits that she proceeded through the intersection, at approximately thirty (30) miles per hour. The defendant had the right of way. The defendant was not aware of any circumstance or condition that would require her to slow down as she proceeded through the intersection. The defendant was not aware that the vehicle to her left had stopped until the point of impact with Mr. Millington.

The court is obligated to construe the facts in a light most favorable to the party opposing the motion. It is incumbent on the court, however, to search the proof to determine whether it discloses a real issue, rather than a formal, perfunctory or shadowy one. *Di Sabato v Soffes*, 9 AD2d 297, 300 [1<sup>st</sup> Dept 1959]. Only the existence of a bona fide issue raised by evidentiary facts, and not one based on conclusory, speculative or irrelevant allegations, will suffice to defeat summary judgment. See, *Du Pont v Town of Horseheads*, 163 AD2d 643, 645 [3d Dept 1990].

The plaintiff has failed to submit admissible evidence to contradict the defendant's proof that she was traveling thirty (30) miles per hour, that she had the right of way, that she was almost through the intersection when the impact occurred and that Mr. Millington was proceeding through the intersection, against a red light, and into oncoming traffic. While this is certainly a tragic accident, the plaintiff simply cannot overcome the proof that it was Mr. Millington's own actions that caused the accident and that the defendant was free from contributory negligence in the happening of the accident. See, *Feldman v Downey*, 64 AD2d 731, 731 [3d Dept 1978], citing *Hood v Murray*, 25 AD2d 163, 164 [3d Dept 1966].

The defendant's motion for summary judgment is granted. Any relief not specifically granted herein is denied. No costs are awarded to any party. This decision shall constitute the order of the Court. The original decision and order shall be forwarded to the attorney

for the defendant for filing and entry. The underlying papers will be filed by the court.

Dated: *October 31, 2013*  
Malta, New York

*Stephen A. Ferradino*  
STEPHEN A. FERRADINO, J.S.  
ENTERED  
Peter R. Martin  
*Peter R. Martin*  
Saratoga County  
Clerk's Office  
Ballston Spa, NY  
Saratoga County  
Clerk's Office  
Ballston Spa, NY

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ENTERED

Papers Received and Considered:

Notice of Motion, dated September 27, 2013

Affirmation of Paul Briggs, Esq., affirmed September 27, 2013, with Attached Exhibits A-E

Affidavit of Patricia A. Barody, sworn to June 27, 2013

Affidavit of Edwin S. Weaver, sworn to September 13, 2013

Affidavit of James A. White, sworn to September 25, 2013

Affidavit of Kathryn M. Cote, sworn to September 25, 2013

Affirmation in Opposition, of James W. Shuttleworth, III, Esq., affirmed October 17, 2013, with Attached Exhibits A-C