

<b>Witchey v Finnegan</b>
2019 NY Slip Op 34525(U)
April 11, 2019
Supreme Court, Dutchess County
Docket Number: Index No. 52662/2018
Judge: Christi J. Acker
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To commence the 30-day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF DUTCHESS**

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SCOTT P. WITCHEY,

Plaintiff,

**DECISION AND ORDER**

-against-

Index No.: 52662/2018

MICHELLE M. FINNEGAN,

Defendant.

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**ACKER, J.S.C.**

The following papers, numbered 1 to 12, were read on Plaintiff Scott P. Witchey's ("Plaintiff") motion for an Order granting him summary judgment pursuant to CPLR §§3212(a) and (c) on the issue of liability:

Notice of Motion-Affirmation of Lawrence A. Breslow, Esq.-Exhibits A-D .....	1-6
Affirmation in Opposition of Bryan R. Kaplan, Esq.-Exhibits A-C .....	7-10
Reply Affirmation of Levi Lipton, Esq.-Exhibit A .....	11-12

Plaintiff brought this personal injury action against Defendant Michelle M. Finnegan ("Defendant"), claiming that he was injured in an automobile accident that occurred on November 15, 2017 on Beekman Road in the Town of East Fishkill. Plaintiff was travelling westbound on Beekman Road at the time of the accident and Defendant was stopped at a stop sign facing a southbound direction on an exit ramp from the Taconic State Parkway. According to the police

report, Defendant proceeded to make a left turn onto Beekman Road and drove into the path of Plaintiff's vehicle, causing a collision.

Plaintiff moves for partial summary judgment on the ground that Plaintiff had the right of way and Defendant was negligent as a matter of law for failure to yield the right of way in violation of Vehicle and Traffic Law ("VTL") §1141. In support of his application, Plaintiff submits the pleadings, his own affidavit and the police accident report.

It is well settled that on a motion for summary judgment, the proponent "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 852 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]. In opposition, "the nonmoving party need only rebut the *prima facie* showing made by the moving party so as to demonstrate the existence of a triable issue of fact." *Poon v. Nisanov*, 162 AD3d 804, 806 [2d Dept. 2018], citing *Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986].

The papers submitted in support of and in opposition to a summary judgment motion should be scrutinized in a light most favorable to the party opposing the motion. *Dowsey v. Megerlan*, 121 AD2d 497 [2d Dept. 1986]; *Gitlin v. Chirkin*, 98 AD3d 561 [2d Dept. 2012]. "Issue finding, rather than issue determination, is the court's function on a motion for summary judgment." *Vumbico v. Estate of Wiltse*, 156 AD3d 939, 941 [2d Dept. 2017]. Summary judgment is a drastic remedy that deprives a litigant of his or her day in court that should only be employed when there is no doubt as to the absence of triable issues. *Castlepoint Ins. Co. v. Command Sec. Corp.*, 144 A.D.3d 731, 733 [2d Dept 2016].

In the instant case, Plaintiff argues that Defendant is negligent as a matter of law because

said Defendant violated VTL §1141. Pursuant to that section, “[t]he 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.” Both the police accident report and Plaintiff’s affidavit establish that Plaintiff was traveling with the right of way on Beekman Road when Defendant attempted a left turn in front of him. In addition, Plaintiff’s affidavit establishes that the Defendant made the turn so suddenly that there was no time for him to react and there was nothing Plaintiff could do to avoid the accident. This is sufficient to demonstrate Plaintiff’s *prima facie* entitlement to judgment as a matter of law on the issue of liability. *Ducie v. Ippolito*, 95 AD3d 1067 [2d Dept. 2012].

In opposition, Defendant fails to submit an affidavit from a person with personal knowledge of the facts sufficient to raise a triable issue of fact as to whether Defendant was negligent or whether Plaintiff’s culpable conduct contributed to the happening of the accident. *Service v. McCoy*, 131 AD3d 1038, 1039 [2d Dept. 2015]. Instead, Defendant has submitted only an attorney affirmation which annexes Defendant’s discovery demands served in October 2018. It appears that Defendant’s main argument is that Plaintiff’s motion is premature because Defendant cannot properly oppose the instant motion while discovery is outstanding. Specifically, it is alleged that responses to the outstanding discovery demands would clarify whether Plaintiff is aware of any witnesses to the accident who may have waved to Defendant, indicating that it was clear to turn.

However, the “mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is an insufficient basis for

denying the plaintiff's motion.” *Niyazov v. Hunter EMS, Inc.*, 154 AD3d 954, 955 [2d Dept. 2017]. As noted by Plaintiff in reply, information regarding the purported driver that waved to Defendant would more appropriately be in the possession of Defendant, who reported this other “witness” to the police. Moreover, Plaintiff provides an affidavit in reply that indicates he has no knowledge regarding the alleged uninvolved driver.

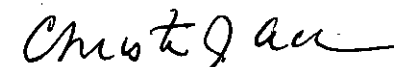
Therefore, Defendant fails to raise a triable issue of fact and Plaintiff is entitled to summary judgment on the issue of liability. *Niyazov, supra*.

The Court has considered the additional contentions of the parties not specifically addressed herein and finds them unavailing. To the extent any relief requested by either party was not addressed by the Court, it is hereby denied. Accordingly, it is hereby

ORDERED that Plaintiff's motion on the issue of liability is granted.

The foregoing constitutes the Decision and Order of the Court.

Dated: Poughkeepsie, New York  
April 11, 2019

  
CHRISTI J. ACKER, J.S.C.

To: All Parties via ECF