

**Takouo v Abrams**

2019 NY Slip Op 34622(U)

September 20, 2019

Supreme Court, Westchester County

Docket Number: Index No. 53757/2018

Judge: John P. Colangelo

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This opinion is uncorrected and not selected for official publication.

To commence the 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 WESTCHESTER

-----x  
JEAN CHARLES TAKOUO,

Plaintiff,

-against-

MARIA ABRAMS,

Defendant.  
-----x

DECISION AND ORDER  
Motion Sequence #1  
Index No. 53757/2018

COLANGELO, J.

The following papers were considered on Defendant's Motion for Summary Judgment pursuant to CPLR §3212 dismissing Plaintiff's Complaint:

	NYSCEF
Notice of Motion-Affirmation-Exhibits A-D	15-21
Affirmation in Opposition-Exhibit A & B	23-24
Reply Affirmation	26

Upon the foregoing papers it is ORDERED that the motion is disposed of as follows:

**Background**

This is an action brought by Plaintiff Jean Charles Takouo ("Plaintiff") to recover damages for alleged personal injuries sustained by him when his vehicle was struck by the vehicle being operated by Defendant Maria Abrams ("Defendant") on December 8, 2015 on the westbound Cross County Parkway in Yonkers, New York.

The Police Accident Report and transcripts of Plaintiff's and Defendant's deposition are submitted in support of the instant motion. (Def. Exhs. B, C & D, respectively).

Both parties made statements to the responding police officer. Plaintiff stated that he was stopped on the safety strips (express and local) using his cell phone and when he merged into the local left lane, Defendant's vehicle struck the passenger side of his vehicle. Defendant stated that Plaintiff's vehicle drove across the grass/cement curb divider from the express lanes onto the local lanes and struck the driver's side of her vehicle (she contends she was already in the left lane when Plaintiff entered and struck her vehicle).

The deposition testimony of the parties as to how the accident occurred is consistent with their statements to the police. According to Defendant, her car was in the left lane at the time of impact, and only Plaintiff's front wheel, passenger side quadrant was in the left lane. (Def. Exh. D., p. 32). Defendant testified that she was three or four car lengths away from Plaintiff's vehicle when she saw Plaintiff's brake lights come on. Once she saw Plaintiff moving, she stepped on her brakes. She saw a car next to her, and couldn't go to the right. (*Id.*, pp. 30-31). Defendant's driver's side wheel, front wheel and Plaintiff's passenger side front wheel then came into contact. Plaintiff's vehicle started to come out into the road at a high rate of speed; Defendant described Plaintiff's speed as going from "standing still to full throttle. He was stepping on the gas to come into the lane in front of me." (*Id.*, pp. 33-34).

Plaintiff testified that the right side of his vehicle came into contact with the left side of Defendant's vehicle. (Def. Exh. C., pp. 39-40). Plaintiff was traveling in the left lane and pulled over to the left onto the median that divides the highway, to make a phone call. He was in this lane, which is for distressed cars, for five minutes, and would re-enter the Cross County Parkway going to his right. (*Id.*, pp. 22-23). Plaintiff testified that when he left the divider, the distressed lane, he made it into the lane of travel prior to the accident. Before re-entering the highway,

Plaintiff looked to see if any cars were coming, and there were none. (*Id.*, pp. 25-26). Plaintiff admitted that drivers are not permitted to drive on the striped portion of the highway where he had pulled onto. (*Id.*, p. 29).

In opposition to the motion, Plaintiff contends that triable issues of fact exist which require denial of Defendant's motion.

### **Discussion and Conclusions**

CPLR §3212(b) states in pertinent part that a motion for summary judgment "shall be granted if, upon all of papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party."

In *Andre v Pomeroy*, 35 N.Y.2d 361, 364 (1974), the Court of Appeals held that:

[s]ummary judgment is designed to expedite all civil cases by eliminating from the Trial Calendar claims which can properly be resolved as a matter of law . . . when there is no genuine issue to be resolved at trial, the case should be summarily decided, and an unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated.

Moreover, if summary judgment is granted, plaintiff is entitled to an immediate trial on the issue of damages pursuant to CPLR § 3212(c), after completion of the outstanding discovery.

CPLR § 3212(c) states in pertinent part:

Immediate trial. If it appears that the only triable issues of fact arising on a motion for summary judgment relate to the amount or extent of damages . . . the court may . . . order an immediate trial of such issues of fact raised by the motion, before a referee, before the court, or before the court and jury, whichever may be proper.

On a motion for summary judgment, the moving party has the burden 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." *Voss v. Netherlands Ins Co.*, 22 N.Y.3d 728 (2014), quoting *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986); see also *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853 (1985), *Ayotte v Gervasio*, 81 N.Y.2d 1062, 1063 (1993); *S.J. Capelin Associates, Inc. v. Globe Manufacturing Corp.*, 34 N.Y.2d 338, 341(1974), *Finkelstein v. Cornell University Medical College*, 269 A.D.2d 114, 117 (1st Dept. 2000).

Once the moving party has sustained his or her burden of making a prima facie showing of entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). The failure of the proponent of a motion for summary judgment to make a prima facie showing of entitlement requires denial of the motion, regardless of the sufficiency of the opposing papers. *Winegrad v New York University Medical Center*, 64 N.Y.2d 851, 853 (1985).

This Court finds that based upon the foregoing, Defendant has tendered sufficient evidence to establish her *prima facie* entitlement to judgment as a matter of law. Her testimony established that she was operating her vehicle in a permissible lane of travel, while Defendant had pulled off of the highway to an unauthorized area available only to distressed cars, to make a phone call. When Plaintiff re-entered or attempted to re-enter the lane of travel next to the unauthorized area, his passenger side front wheel came into contact with Defendant's driver's side front wheel. The testimony establishes that while Plaintiff attempted to re-enter the highway at a high rate of speed, ("from standing still to full throttle"), Defendant exercised due care immediately in an attempt to avoid Plaintiff's vehicle by stepping on her brakes and looked to see

if a move to right lane was possible, which it was not.

This conclusion is further supported by the point of impact described by both parties as the right passenger side of Plaintiff's vehicle and the front driver's side of Defendant's vehicle, which reflects the angle at which Plaintiff entered the lane of highway that Defendant was already traveling in just prior to impact.

In opposition, Plaintiff has failed to raise an issue of fact requiring a trial of this action.

Accordingly and based upon the foregoing, Defendant's motion is granted, and the action is dismissed.

The foregoing constitutes the Decision and Order of this Court.

Dated: September 20, 2019  
White Plains, New York

  
HONORABLE JOHN P. COLANGELO, J.S.C.