

**Lambertus v Gulnick**

2021 NY Slip Op 33822(U)

May 24, 2021

Supreme Court, Dutchess County

Docket Number: Index No. 2020-53496

Judge: Christi J. Acker

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This opinion is uncorrected and not selected for official publication.

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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KERRI LAMBERTUS,

Plaintiff,

**DECISION AND ORDER**

-against-

Index No.: 2020-53496

BURTON GULNICK, JR., as Limited  
Administrator of the Estate of PAUL HENRY PITT,  
deceased,

Defendant.

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ACKER, J.S.C.

The following papers, numbered 1 to 13, were read on Plaintiff Kerri Lambertus' ("Plaintiff") motion for an Order pursuant to CPLR 3212(a) and (c) granting her summary judgment on the issue of liability against Defendant Burton Gulnick, Jr., as Limited Administrator of the Estate of Paul Henry Pitt, deceased (hereinafter "Defendant" and/or "Decedent"):

Notice of Motion-Affirmation of Lawrence A. Breslow, Esq.- Exhibits A-C-	
Affidavit of Plaintiff.....	1-6
Affidavit in Opposition of John C. Burns, Esq.-Exhibits A-C.....	7-10
Reply Affirmation of Lawrence A. Breslow, Esq.-Exhibits 1-2.....	11-13

Plaintiff commenced this personal injury action on or about October 28, 2020 against Defendant based upon an accident that occurred on June 29, 2019 between Plaintiff's vehicle and a vehicle owned and operated by Decedent. It is alleged that Decedent was travelling eastbound on Route 55 in the Town of Pawling when he crossed over into Plaintiff's opposite lane of travel,

striking her oncoming vehicle and causing serious injuries. Decedent died on the day of the accident.

Plaintiff moves for partial summary judgment claiming that there are no triable issues of fact with regard to Defendant's liability. In support of her motion, Plaintiff submits her own affidavit, the Pleadings and aerial photographs of the vehicles after the accident.

The movant for summary judgment "bears the initial burden of demonstrating its prima facie entitlement to the requested relief." *Roos v. King Constr.*, 116 NYS3d 344, 346 [2nd Dept. 2020], citing *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853. Failure to make the initial showing "requires denial of the motion, regardless of the sufficiency of the opposition papers." *Junger v. John V. Dinan Assoc., Inc.*, 164 AD3d 1428, 1429 [2nd Dept. 2018], citing *Winegrad, supra*. Only when the movant has met its *prima facie* entitlement "does the burden then shift to the party opposing summary judgment to tender evidence, in a form admissible at trial, sufficient to raise a triable issue of fact." *Roos, supra*, citing *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986].

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, supra*. "The function of a court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist." *114 Woodbury Realty, LLC v. 10 Bethpage Rd., LLC*, 178 AD3d 757, 759 [2d Dept. 2019]. Summary judgment should be granted only where there are no material and triable issues of fact and the papers shall be scrutinized in the light most favorable to the party opposing the motion. *Id.* Such relief 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 AD3d 731, 733 [2d Dept. 2016].

In the instant case, it is uncontested that Decedent crossed over a double yellow line and into Plaintiff's lane of travel. As such, Plaintiff maintains that in crossing a double yellow line, Decedent violated VTL §1126(a), which constitutes negligence as a matter of law. While Plaintiff meets her *prima facie* burden, the Court notes that the cases upon which Plaintiff relies for this premise also provide that such negligence can be justified by an emergency situation not of the driver's own making. *See Barbaruolo v. Difede*, 73 AD3d 957 [2d Dept. 2010].

In opposition, Defendant's counsel argues that the instant motion is premature as no discovery has been conducted and the autopsy report suggests that Decedent may have had a medical emergency that caused him to cross into Plaintiff's lane of travel.

Pursuant to CPLR 3212(f), "[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just." "In a personal injury action, a party should generally be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment." *Amyotte v. Armic Serv. Corp.*, 167 AD3d 558 [2d Dept. 2018].

Defendant's opposition sufficiently establishes that there may be facts necessary to justify opposition that cannot yet be stated, warranting the denial of the instant motion. Defendant is the Finance Commissioner in Ulster County, who was appointed as a Limited

Administrator of Decedent's estate. As such, Defendant does not have immediate access to the Decedent's medical records, nor direct knowledge of witnesses who may have relevant information as to Decedent's medical condition. Moreover, given that Plaintiff submitted expert evidence in reply,<sup>1</sup> Defendant is, at a minimum, entitled to gather Decedent's medical records and, if appropriate, have his own expert opine on whether Decedent suffered a sudden medical emergency at the time of the accident.

Plaintiff argues in reply that there is no proof of a medical emergency, relying upon the conclusions of the two medical experts submitted in reply. However, the instant motion was filed less than two months after the commencement of the action and only one month after Defendant's counsel filed an Answer. Therefore, Defendant has not had an adequate opportunity to conduct discovery. *See Amyotte, supra* (Second Department denied Plaintiff's motion for summary judgment on the issue of liability that was filed less than three weeks after the defendants filed their answer).

Further, as demonstrated by the aerial photographs,<sup>2</sup> this is not a simple car accident case that lends itself to a pre-discovery decision on the issue of liability. Indeed, given that Decedent died on the day of the accident and Defendant has no personal connection to Decedent, granting the instant motion before any discovery is conducted would be drastic relief, potentially depriving Defendant of his day in court. *See Castlepoint Ins. Co., supra*. Finally, Plaintiff's allegations in reply that Defendant is "posturing frivolous positions" and "meritless defenses" are

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<sup>1</sup> Plaintiff's reply includes an affidavit from the medical examiner who conducted the autopsy and prepared the report, as well as an affidavit from Dr. Louis M. Roh, MD, a forensic pathologist.

<sup>2</sup> Plaintiff does not provide a copy of a police accident report.

wholly unsupported by the record before this Court.<sup>3</sup> Breslow Reply Affirmation, ¶9.

For the reasons stated herein, Plaintiff's motion is denied pursuant to CPLR 3212(f) in order to permit Defendant to pursue discovery on the issue of liability, in addition to any appropriate discovery with respect to Plaintiff's claimed damages.

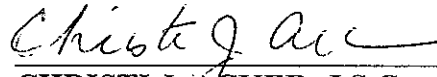
The Court has considered the additional contentions of the parties not specifically addressed herein and finds them unavailing. To the extent any relief requested by either party was not addressed by the Court, it is hereby denied. Therefore, it is hereby

ORDERED that Plaintiff's motion is denied without prejudice; and it is further

ORDERED that a Preliminary Conference Stipulation Order will be uploaded and the attorneys shall confer and fill out said Order and submit to Court on or before **June 14, 2021**.

The foregoing constitutes the Decision and Order of the Court.

Dated: Poughkeepsie, New York  
May 24, 2021

  
CHRISTI J. ACKER, J.S.C.

To: All Parties via ECF

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<sup>3</sup> The Court is aware, as stated by Plaintiff, that 9% interest begins to run with the entry of judgment on liability. While Plaintiff obliquely asserts that Defendant's opposition is premised on avoiding the payment of pre-judgment interest, it is equally plausible that Plaintiff filed the instant motion at the earliest stage of the litigation in order to commence the running of the interest as soon as possible.