

**Heard v Schade**

2018 NY Slip Op 34296(U)

January 3, 2018

Supreme Court, Nassau County

Docket Number: Index No. 608642/2016

Judge: Randy Sue Marber

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**  
**JUSTICE**

X TRIAL/IAS PART 10

GLORIA HEARD,

Plaintiff,

Index No.: 608642/16  
Motion Sequence...01  
Motion Date...10/16/17

-against-

ROBERT SCHADE, COUNTY OF NASSAU and  
NASSAU COUNTY POLICE DEPARTMENT,

Defendants.

X

Papers Submitted:

- Notice of Motion.....X
- Affirmation in Opposition.....X
- Affirmation in Reply.....X

Upon the foregoing papers, the motion by the Plaintiff seeking an Order, pursuant to CPLR § 3212, granting her summary judgment against the Defendants on the issue of liability, is decided as provided herein.

This action arises out of a motor vehicle accident which occurred on June 8, 2016 at approximately 6:25 p.m. in the parking lot located at 172 Fulton Street, County of Nassau, New York (hereinafter the "subject parking lot"). The Plaintiff alleges that, while walking in the subject parking lot, she was struck by the vehicle operated by the Defendant, ROBERT SCHADE (hereinafter the "subject vehicle"). (See the Verified Complaint

attached to the Notice of Motion as Exhibit "B").

In support of the instant motion, the Plaintiff, GLORIA HEARD (hereinafter "HEARD"), submits, *inter alia*, her testimony of from a 50-h hearing and Examination Before Trial ("EBT") (*See* the transcripts attached to the Notice of Motion as Exhibits "E" and "F", respectively). The Plaintiff described the events leading up to the accident as follows. Ms. HEARD stated that, while a passenger of a vehicle (hereinafter the "HEARD vehicle"), she was parked in a spot in the subject parking lot. She indicated that she was parked in the spot to observe "a guy doing stunts" on a motorcycle. At some point, she exited the HEARD vehicle, and walked towards the motorcycle. Ms. HEARD testified that, prior to the accident, she observed the subject vehicle "standing still". She indicated that the subject vehicle was not in a parking spot. Ms. HEARD walked to the motorcyclist and asked him a question. She then walked back to and entered the HEARD vehicle. She exited the HEARD vehicle a second time and walked "towards" the subject vehicle. The Plaintiff testified that, she went to "pass" the subject vehicle, and the vehicle struck her.

Summary judgement should only be granted where there are no triable issues of fact (*See Andre v. Pomery*, 35 N.Y.2d 361 [1974]). The goal of summary judgment is to issue find, rather than issue determine (*See Hantz v. Fleischman*, 155 A.D.2d 415 [2d Dept. 1989]).

The burden then placed upon the party opposing the motion requires that they produce evidentiary proof in admissible form sufficient to impose a trial as to the material

issues of fact upon which the opposing claim depends (*See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966 [1988]; *Rebecchi v. Whitmore*, 172 A.D.2d 600 [2d Dept. 1991]).

It is well-settled that granting of summary judgment in favor of a plaintiff on the issue of liability is appropriate only when the plaintiff is free from comparative fault (*See Gorenkoff v. Nagar*, 120 A.D.3d 470 [2d Dept. 2014]; *Cox v. Nunez*, 23 A.D.3d 437 [2d Dept. 2005]).

Here, the Plaintiff failed to meet her *prima facie* burden in establishing that no issues of fact exist with respect to liability. The Plaintiff's conclusory Affidavit, wherein she attests that there was "nothing I could do to prevent the accident", is insufficient to establish that she was comparative fault (*See* the Plaintiff's Affidavit attached to the Notice of Motion as Exhibit "A").

This Court notes that, although the EBT testimony of the Defendant, SCHADE, was referenced by the Plaintiff's counsel as "Exhibit H", no such transcript is appended to the motion papers nor was the transcript electronically filed.

It is clear that issues of fact remain with respect to whether the Defendant driver, SCHADE's, actions were the proximate cause of the accident and whether HEARD was comparatively negligent. Ultimately, the Plaintiff, HEARD, and the Defendant driver, SCHADE, had a duty to assume that each would comply with Vehicle and Traffic Laws (*Moreno v. Gomez*, 58 A.D.3d 611, 872 N.Y.S.2d 143 [2d Dept. 2009]).

Given the unresolved issues of fact herein, summary judgment is inappropriate.

Accordingly, it is hereby

**ORDERED**, that the Plaintiff's motion seeking an order pursuant to CPLR § 3212, awarding her summary judgement on the issue of liability, is **DENIED**.

This constitutes the decision and order of the Court.

DATED: Mineola, New York  
January 3, 2018

  
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Hon. Randy Sue Marber, J.S.C.

HON. RANDY SUE MARBER

**ENTERED**

JAN 11 2018

NASSAU COUNTY  
COUNTY CLERK'S OFFICE