

Martin v Sunrise Schwinn Inc.
2018 NY Slip Op 34420(U)
April 17, 2018
Supreme Court, Nassau County
Docket Number: Index No. 604761-15
Judge: Jerome C. Murphy
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**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. JEROME C. MURPHY,
Justice.**

JOAN MARTIN,

Plaintiff,

- against -

**SUNRISE SCHWINN INC. d/b/a SUNRISE
CYCLERY,**

Defendant.

TRIAL/IAS PART14

Index No.: 604761-15

Motion Date: 2/2/18

Sequence Nos.: 004, 005

MD, MD

DECISION AND ORDER

**SUNRISE SCHWINN INC. d/b/a SUNRISE
CYCLERY,**

Third-Party Plaintiff,

- against -

ENTERPRISE RENT-A-CAR,

Third-Party Defendant.

The following papers were read on this motion:

Sequence No. 004:

Notice of Motion, Affirmation and Exhibits..... 1

Sequence No. 005:

Notice of Cross-Motion, Affirmation and Attachments..... 2

Affirmation in Opposition and Exhibits..... 3

Affirmation in Reply and Exhibit..... 4

PRELIMINARY STATEMENT

In Sequence No. 004, defendant brings this application for an Order granting summary judgment in favor of the defendant dismissing the plaintiff's complaint pursuant to CPLR § 3212, and for such other and further relief as this Court may deem just, proper and equitable.

In Sequence No. 005, plaintiff brings this application for an Order pursuant to CPLR § 3212 granting plaintiff's summary judgment as against defendant finding defendant completely liable for the subject accident, and setting this matter down for an inquest or trial on the issue of plaintiff's damages, and for such other and further relief as this Court deems just, proper and equitable. Plaintiff has submitted opposition to this application and defendant has submitted a reply.

BACKGROUND

In preparation for a planned bicycle trip in Napa Valley, California, plaintiff Joan Martin sought to purchase a bike for building up her endurance for the trip. On June 9, 2015, she went to Sunrise Cyclery to examine bicycles and possibly make a purchase. She was age 63 at the time, and had not ridden a bike since childhood. She was interested in a recreational hybrid, as recommended by the tour group.

Catherine Totino, the manager of Sunrise Cyclery, assisted Ms. Martin in selecting a bicycle for a test ride. Her husband is the president of Sunrise Schwinn, Inc., and she is vice-president. She has been involved with the company, and the sale of bicycles for some thirty years. Her husband is certified in bicycle fitting, and she has learned from him over the years. She has also received training in bicycle dealership operations, attending Interbrike, which is a program conducted annually in Las Vegas, although she does not participate every year.

Ms. Totino recalls Ms. Martin coming in to the store, and trying out a recreational hybrid bicycle, made by Cannondale, and known as a Cannondale Adventure 3 for Ladies. She did not inquire of her experience as a bike rider. The term hybrid relates to the width of the tire, between the thin tire for a road bike, and the wide tire for a mountain bike. The bike she pulled out for Ms. Martin was small in size, which she selected on the basis of her height and leg length, which was about the same as hers. She did not physically measure her, as this is done with road bikes, which are sized in centimeters. A fit kit is maintained in the shop, upon which people stand while being measured with a tape measure.

She did not take any actual measurements of Ms. Martin's leg length, and she would not normally do so with a recreational bike. Ms. Martin was able to sit on the bike and put her feet down almost flat on the ground. She was shown a photograph of a men's bike, which she stated was not the bike upon which Ms. Martin was seated, and which she took out of the shop. Among the differences in the men's and women's bike were that the upper tube of the frame is tilted in the women's bike, as opposed to the men's bike. The actual bike which Ms. Martin was riding was sold two or three weeks after June 9, 2015.

In Motion Seq. No.4, defendant argues that there is nothing about the bike which was defective, or in any way contributed to the happening of the event. As acknowledged by plaintiff in her deposition, both of her feet were in contact with the ground while seated on the saddle of the bike. Ms. Totino, based upon 30 years experience, testified that this was the optimal position for a rider. Ms. Martin was not concerned about her not having ridden a bike in some 50 years, and never raised the issue with Ms. Totino.

Defendant argues that the conduct by plaintiff was an assumption of risk, and nothing which defendant did, or did not do, did not increase the risk inherent in riding a bicycle. The claim is that the bike was too tall for her, and that she expressed concern about this to the employee of the shop. She testified that while seated on the saddle, with the kick stand down, both feet were able to touch the floor.

Plaintiff moves for summary judgment in Motion Seq. No. 5. Plaintiff claims that after riding the bike for 5 minutes, Ms. Martin began to make a U-turn, but as she did so, the bike tipped to the left, and ultimately fell to the ground, with Ms. Martin attempting to break her fall with her left arm, thereby injuring her left wrist and hand. The claim is that she was unable to get off the bike as it was falling because it was too high for her.

Plaintiff attaches as Exh. "H" to her motion a report from J. Lucas Elrath, who presents himself as a Bicycling Expert. He concludes that Sunrise Cyclery failed to properly assess Martin's bicycling skills and experience in a manner that caused the fall; that their test ride practices are not consistent with established guidelines; and that they failed to provide a bicycle for a test ride that was appropriate for her bicycling experience, which was a cause of the fall.

Plaintiff opposes defendant's motion for summary judgment, claiming that defendant has not

established that the doctrine of assumption of risk is applicable to the facts of this case. Defendant replies that by riding the bicycle for 1/4 mile, while aware of any problem that the size of the bike presented, Ms. Martin assumed the risk of possibly falling, thus barring an action. They claim that the first two of the expert's three alleged failures have no relevance, in that plaintiff does not claim that her fall was precipitated by her lack of recent bicycling experience, or that the fall was the result of a mechanical defect. Thus, they claim, the arguments that defendant's failure to inquire as to plaintiff's recent bicycling experience, or her familiarity with hand brakes, gear shifts or suspension forks are irrelevant. Neither is the failure to suggest a route for a test drive relevant, since there is no claim that the sidewalk or roadway conditions contributed to plaintiff's fall.

With respect to plaintiff's cross-motion for summary judgment, defendant asserts that, even reading plaintiff's motion in its best light, it is plaintiff who chose to ride the bicycle which she claimed was too big, chose to make a sharp U-turn, and lost her balance after slowing the bike down to make the U-turn, which are significant contributing factors which preclude the grant of summary judgment to plaintiff.

Recognizing that the role of the Court in resolving a motion for summary judgment is a determination of whether or not a factual issue is presented, defendant's motion for summary judgment is denied, as plaintiff has raised a factual question as to whether defendant was negligent in evaluating plaintiff's capabilities and providing an improperly sized bicycle for her test ride. Plaintiff's motion for summary judgment is also denied. Defendant has raised a significant factual issue as to whether plaintiff's action in riding the bicycle was the sole contributing factor to the accident.

To the extent that requested relief has not been granted, it is expressly denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
April 17, 2018

ENTERED

APR 25 2018

NASSAU COUNTY
COUNTY CLERK'S OFFICE

ENTER:


JEROME C. MURPHY
J.S.C.