

**Rahmatullah v Erich**

2018 NY Slip Op 34524(U)

November 9, 2018

Supreme Court, Bronx County

Docket Number: Index No.: 23783/2018E

Judge: John R. Higgitt

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 14

-----X  
RAHMATULLAH, FATIMA, et ano.

Index No. 23783/2018E

- against -

Hon. JOHN R. HIGGITT,

ERICH, DIANE M., et ano.  
-----X

A.J.C.S.



The following papers numbered 9 to 15 and 20 to 23 in the NYSCEF System were read on this motion for **SUMMARY JUDGMENT (LIABILITY)**, noticed on August 02, 2018 and duly submitted as No. \_\_\_\_\_ on the Motion Calendar of October 10, 2018.

	NYSCEF Doc. Nos.
Notice of Motion – Exhibits and Affidavits Annexed	9-15
Notice of Cross-Motion – Exhibits and Affidavits Annexed	
Answering Affidavit and Exhibits	20-21
Replying Affidavit and Exhibits	22-23
Filed Papers	
Memoranda of Law	
Stipulations	

Upon the foregoing papers, plaintiffs’ motion for partial summary judgment on the issue of defendant’s liability for causing the subject motor vehicle accident is denied, in accordance with the annexed decision and order.

Dated: 11/9/2018

Hon.   
JOHN R. HIGGITT, A.J.S.C.

**Check one:**

- Case Disposed in Entirety
- Case Still Active

**Motion is:**

- Granted  GIP
- Denied  Other

**Check if appropriate:**

- Schedule Appearance
- Fiduciary Appointment
- Referee Appointment
- Settle Order
- Submit Order

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: I.A.S. PART 14

-----X  
FATIMA RAHMATULLAH and ISTIAQUE BAIG,

Plaintiffs,

DECISION AND ORDER

- against -

Index No. 23783/2018E

DIANE M. ERICH and THOMAS W. ERICH,

Defendants.  
-----X

John R. Higgitt, J.

This is a negligence action to recover damages for personal injuries plaintiff Rahmatullah<sup>1</sup> allegedly sustained in a motor vehicle accident that took place on September 27, 2017. Plaintiff Rahmatullah was crossing the street within the designated crosswalk and the walk signal in her favor when the vehicle driven by defendant Diana M. Erich and owned by defendant Thomas W. Erich struck her. Plaintiffs seek partial summary judgment on the issue of defendants' liability. For the reasons that follow, plaintiffs' motion for partial summary judgment is denied.

The proponent of a summary judgment motion 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 (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Summary judgment should be denied where there is any doubt as to the existence of a triable issue (*see Zuckerman, supra*). When there is conflicting

<sup>1</sup> Plaintiff Istiaque Baig asserted a derivative claim.

evidence as to how an accident occurred, summary judgment is inappropriate (*see Elamin v Robert Express, Inc.*, 290 AD2d 291 [1st Dept 2002]). In deciding a summary judgment motion, the court should not weigh the parties' credibility (*see Krupp v Aetna Life & Casualty Co.*, 103 AD2d 252, 262 [2nd Dept 2002]).

Plaintiffs supported their motion with the pleadings and plaintiff Rahmatullah's affidavit. The parties' differing accounts of the events preclude summary judgment relief. In her affidavit, plaintiff Rahmatullah avers that she observed a walk signal controlling her direction of travel into the intersection and that once she checked to make sure that there were no oncoming vehicles, she proceeded to cross the street. Plaintiff Rahmatullah further avers that as she began walking in the intersection, she noticed defendants' vehicle approaching at a high speed and although she attempted to move out of the way she was struck by defendants' vehicle.

On the other hand, defendant Diane Erich avers in her affidavit that plaintiff Rahmatullah walked into her vehicle as she was turning left at the intersection. Defendant further avers that she was driving slowly into the intersection when she saw plaintiff Rahmatullah walk into the roadway from her right side, and that she hit the breaks in order to avoid the impact and plaintiff Rahmatullah hit the hood of her vehicle.

The conflicting versions as to how the accident occurred creates issues of fact and credibility, making summary judgment in plaintiff's favor inappropriate (*see Peritore v Anna & Diane Cab Corp.*, 127 AD3d 669 [1st Dept 2014]).

The court notes that although defendants' opposition and plaintiffs' reply were untimely, the motion was inadvertently marked fully submitted on August 28, 2018 when the parties had stipulated to adjourn it to October 10, 2018.

Accordingly, it is

ORDERED, that plaintiff's motion seeking partial summary judgment on the issue of liability is denied.

This constitutes the decision and order of the court.

Dated: November 9, 2018

  
\_\_\_\_\_  
John R. Higgett, A.J.S.C.