**SUPREME COURT : STATE OF NEW YORK**
**COUNTY OF NASSAU**

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

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**CRYSTAL PANNELL,**

**Plaintiff,**

**- against -**

**PAMELA FLINK and ARNOLD BANK,**

**Defendants.**

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**TRIAL/IAS PART 19**
**Index No.: 603611-14**
**Motion Date: 9/22/16**
**Sequence No.: 002**

**DECISION AND ORDER**

MD

The following papers were read on this motion:

| | |
|---|---|
| Notice of Motion, Affirmation and Exhibits | 1 |
| Affirmation in Opposition and Exhibits | 2 |
| Affirmation in Reply and Exhibit | 3 |

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PRELIMINARY STATEMENT

Plaintiff brings this application for an order, pursuant to CPLR §3212, directing partial summary judgment as to the issue of liability alone, and to set this matter for a hearing, before a jury, as to the extent of plaintiff's damages and for such other and further relief which to this Court seems just and proper. Defendants have submitted opposition to this application.

BACKGROUND

On February 27, 2014, at approximately 6:00 P.M., plaintiff was in the process of crossing Gibson Street, Bay Shore, New York, when she was struck by a vehicle operated by Pamela Flink Plaintiff had just left her place of employment, which was on the north side of Gibson Street, and was walking to her automobile, which was parked in the municipal lot on the south side of the street.

As she was crossing, a white van came to a stop in front of her. She started to walk left toward the rear of the vehicle, when it began to move forward. As she continued crossing, she

looked around the van, looking for traffic coming from her right. She observed the Flink vehicle as it was exiting the same parking lot, to which she was headed. The Flink vehicle made a left on Gibson Street, and came in contact with plaintiff.

DISCUSSION

When presented with a motion for summary judgment, the function of a court is "not to determine credibility or to engage in issue determination, but rather to determine the existence or non-existence of material issues of fact." *(Quinn v. Krumland,* 179 A.D.2d 448, 449 — 450 [1st Dept. 1992]); See also, ( *S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.* 34 N.Y.2d 338, 343, [1974]).

To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented *(Stillman v. Twentieth Century-Fox Corp.,* 3 N.Y.2d 395, 404 [1957]). It is a drastic remedy, the procedural equivalent of a trial, and will not be granted if there is any doubt as to the existence of a triable issue *(Moskowitz v. Garlock,* 23 A.D.2d 94 [3d Dept. 1965]); *(Crowley's Milk Co. v. Klein,* 24 A.D.2d 920 [3d Dept. 1965]). However, where a party is otherwise entitled to judgment as a matter of law, an opposing party may not simply raise a feigned issue of fact to defeat the claim. To be "material issue of fact" it "must be genuine, bona fide and substantial to require a trial" (*Leumi Financial Corp. v. Richter,* 24 A.D.2d 855 [1st Dept. 1965]).

The evidence will be considered in a light most favorable to the opposing party (*Weill v. Garfield,* 21 A.D.2d 156 [3d Dept. 1964]). The proof submitted in opposition will be accepted as true and all reasonable inferences drawn in favor of the opposing party *(Tortorello v. Carlin,* 260 A.D.2d 201, 206 [1st Dept. 2003]). On a motion to dismiss, the court must " ' accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory' " *(Braddock v. Braddock,* 2009 WL 23307 [N.Y.A.D. 1st Dept. 2009]), (*citing Leon v. Martinez,* 84 N.Y.2d 83, 87 — 88 [1994]). But this rule will not be applied where the opposition is evasive or indirect. The opposing party is obligated to come forward and bare his proof, by affidavit of an individual with personal knowledge, or with an attorney's affirmation to which appended material in admissible form, and the failure to do so may lead the Court to believe that

there is no triable issue of fact (*Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 [1980]).

Vehicle and Traffic Law § 1151 provides as follows:

> (a) When traffic-control signals are not in place or not in operation the driver of a vehicle shall yield the right of way, slowing down or stopping if need be to so yield, to a pedestrian crossing the roadway within a crosswalk on the roadway upon which the vehicle is traveling, except that any pedestrian crossing a roadway at a point where a pedestrian tunnel or overpass has been provided shall yield the right of way to all vehicles.
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> (b) No pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close that it is impractical for the driver to yield.
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> (c) Whenever any vehicle is stopped at a marked crosswalk or at any unmarked crosswalk at an intersection to permit a pedestrian to cross the roadway, the driver of any other vehicle approaching from the rear shall not overtake and pass such stopped vehicle.

This incident did not occur at a location with traffic-control signals in place, or at a crosswalk. Plaintiff has not claimed in its pleadings, or in her deposition, that she was crossing at a corner or in a crosswalk. As such, the premise of this motion, that plaintiff had a right-of-way, is without foundation. Plaintiff has not established prima facie her entitlement to summary judgment (*See, Gomez v. Novak,* 140 A.D.3d 831 [2d Dept. 2016]).

Plaintiff's motion for partial summary judgment on the issue of liability is denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
November 7, 2016

**ENTER:**

Jerome C Murphy

**JEROME C. MURPHY**
**J.S.C.**

ENTERED

NOV 16 2016

NASSAU COUNTY
COUNTY CLERK'S OFFICE