

Texiera v Aponte

2014 NY Slip Op 33231(U)

January 27, 2014

Supreme Court, Bronx County

Docket Number: 21358/1

Judge: Mark Friedlander

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NEW YORK SUPREME COURT-COUNTY OF BRONX
PART IA-25

NILDA TEXIERA,

Plaintiff,

-against

**MEMORANDUM
DECISION/ORDER**

Index No.: 21358/1

ELISA APONTE, TERRANCE MCLAURIN,
JAMAL KHANDAKER,

Defendants.

HON. MARK FRIEDLANDER

Defendant, Terrance McLaurin ("McLaurin"), moves for an order, pursuant to CPLR§3212, granting summary judgment in favor of McLaurin, dismissing plaintiff's complaint and all cross-claims against McLaurin, on the ground that the undisputed facts establish that no liability exists against defendant McLaurin for the occurrence of the incident. Defendant, Jamal Khandaker ("Khandaker"), moves for an order, pursuant to CPLR§3212, granting summary judgment in favor of Khandaker, dismissing plaintiff's complaint and all cross-claims and counterclaims against Khandaker, on the ground that Khandaker is not liable for the subject accident. Plaintiff Nilda Texeira ("Texeira"), cross-moves for an order, pursuant to CPLR§3212, granting Texeira summary judgment on liability against defendant, Elisa Aponte and remanding the remaining issues of damages and liability of the remaining defendants, for trial; or, in the alternative, for a conditional order, pursuant to CPLR§3124, precluding the testimony of defendant Aponte, unless she provides necessary discovery. McLaurin's motion, Khandaker's motion and Texeira's cross-motion are consolidated for disposition and decided as hereinafter indicated.

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This is an action by plaintiff Teixeira to recover monetary damages for serious injuries allegedly sustained on July 16, 2011, involving three or four motor vehicles and a pedestrian knockdown on East Fordham Road, Bronx, New York.

The facts, as culled from the deposition testimony of the parties herein and the affidavits of Khandaker and Aponte, except as indicated, are not in dispute. On July 16, 2011, Aponte was the owner and operator of a 2000 Hyundai. Aponte was traveling westbound on East Fordham Road, in the left lane, at approximately 15 to 20 miles per hour, approaching Morris Avenue. At the location, East Fordham Road is a two-way roadway, straight and level, with two east bound and two westbound lanes, plus a parking lane on each side of the street. The eastbound and westbound lanes are separated by a double yellow line. A traffic light controls the intersection of East Fordham Road and Morris Avenue. Aponte testified at her deposition and stated in an affidavit that her vehicle was hit in the rear by another motor vehicle, pushing her forward. In trying to avoid the vehicle in front of her, she swerved to the left, crossed the double yellow line and sideswiped the vehicle in the eastbound lane of East Fordham Road, owned and operated by McLaurin. As a result of this collision, Aponte testified that she passed out and lost consciousness and had no recollection of what occurred thereafter. The next day, Aponte saw her vehicle at a "collision place" in the Bronx and observed that her vehicle's side windows were broken, both airbags had deployed, the rear end had a big dent in the middle, pushed inward, and the left side and front end were seriously damaged.

McLaurin testified at his deposition that his vehicle was stopped at a red traffic light on the Eastbound side of East Fordham Road for about a minute, or a minute and a half, when he observed a vehicle (Aponte's vehicle) come out of a line of cars on the opposite side, swerve,

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cross over the double yellow line and strike the front driver's side fender, the wheel base on the driver's side and the side mirror on the driver's side of McLaurin's vehicle. After Aponte's vehicle hit McLaurin's vehicle, McLaurin saw Aponte's vehicle hit another vehicle on the opposite side of the street (the westbound side).

Khandaker testified at his deposition and stated in an affidavit that, at approximately 7:30 P.M., He was operating his vehicle on East Fordham Road, traveling westbound. Khandaker was stopped for approximately 5 to 10 seconds at a red light at the intersection of East Fordham Road and Walton Avenue, when he was hit in the rear by Aponte's vehicle.

Teixeira testified at her deposition that she was standing at the curb on East Fordham Road, waiting to cross the street, when a vehicle traveling westbound on East Fordham Road, in the lane closest to the parking lane, struck her.

The transcripts of the parties are admissible, notwithstanding the fact that they were not signed, as they were certified by the reporter and the accuracy of the transcripts was not challenged. *Martin v. City of New York*, 82 A.D.3d 653 (1st Dept. 2011).

McLaurin's testimony that his vehicle was stopped at a red light when it was sideswiped by Aponte's vehicle, and Khandaker's testimony and affidavit that his vehicle was stopped at a red light when it was hit in the rear by Aponte's vehicle, establish a lack of liability and a *prima facie* entitlement to summary judgment which has not been rebutted. Accordingly, the motions for summary judgment by McLaurin and Khandaker are granted, and plaintiff's claims against McLaurin and Khandaker are dismissed. All cross-claims against McLaurin and Khandaker are also dismissed.

Teixeira has made out a *prima facie* showing that she did not engage in any culpable

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conduct that contributed to the happening of the accident. Accordingly, the branch of plaintiff's cross-motion seeking summary judgment is granted, solely on the issue of lack of liability or culpable conduct of the plaintiff. The only evidence that Aponte's vehicle struck Teixeira is contained in the Police Accident Report ("PAR"). However, an uncertified copy of a PAR is inadmissible and cannot be considered by the Court. *Coleman v. Maclas*, 61 A.D.3d 569 (1st Dept. 2009); *Westchester Med. Ctr. v. Progressive Cas. Inc. Co.*, 51 A.D.3d 1014 (2nd Dept. 2008); *Holliday v. Hudson Armored Car & Courier Servs.*, 301 A.D.2d 392 (1st Dept. 2003); *Figueroa v. Luna*, 281 A.D.2d 204 (1st Dept. 2001). Accordingly, the branch of plaintiff's cross-motion seeking summary judgment against Aponte is denied. Parenthetically, even if the PAR were admissible, plaintiff's cross-motion would have been denied, as Aponte's testimony and affidavit that Aponte's vehicle was hit in the rear, causing the chain of events, raises an issue of fact, precluding summary judgment, notwithstanding plaintiff's assertion that no vehicle or a "phantom" vehicle hit Aponte's vehicle in the rear.

The branch of plaintiff's cross-motion seeking a conditional order, pursuant to CPLR§3124, precluding the testimony of defendant Aponte, unless she provides necessary discovery, is respectfully referred to the Justice presiding in the discovery part.

The foregoing constitutes the Decision and Order of the Court.

Dated: 1/27/14



MARK FRIEDLANDER, J.S.C.