

Gilbert v Ventura

2015 NY Slip Op 32146(U)

October 14, 2015

Supreme Court, Bronx County

Docket Number: 306585/13

Judge: Howard H. Sherman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX - Part 4

OCT 19 2015

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Donneisha Gilbert

Decision and Order

Plaintiff

Index No. 306585/13

-against-

**Nelson Ventura, Kerry M. Dixon, and
Basil A. Moore**

Defendants

Howard H. Sherman
J.S.C.

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The following papers numbered 1- 6 read on the plaintiff's motion for summary judgment and the defendants' cross-motion for an order vacating the Note of Issue

Notice of Motion , Affirmation and Exhibits 1-9	1	
Affirmation in Opposition - Exhibits A,B	2	
Affirmation in Reply	3	
Notice of Cross-Motion , Affirmation and Exhibits A-H	4	
Affirmation in Opposition , Exhibits 1,2	5	
Affirmation in Reply	6	

Upon the foregoing papers this motion by plaintiff Donneisha Gilbert (" Gilbert") for summary judgment on the issue of liability, and the cross-motion of the defendants Kerry M. Dixon ("Dixon") and Basil A. Moore ("Moore") for an order vacating the Note of Issue are consolidated for purposes of disposition and decided as follows.

In this action , plaintiff seeks damages for personal injuries alleged to have arisen out of a two vehicle collision that occurred January 16, 2012 at the intersection of East 166th Street and Clay Avenue in Bronx County. At that time plaintiff was a

passenger in a motor vehicle being driven by Dixon that came into contact with a motor vehicle owned and operated by Nelson Ventura ("Ventura").

This action was commenced in November 2013, and issue was joined in January 2014 with the service of the answer of defendants Dixon and Moore. As pertinent here, the answer asserts an affirmative defense alleging plaintiff's comparative negligence as well as a cross-claim against Ventura.

By decision and order of this court dated April 22, 2014, plaintiff's motion for a default judgment against Ventura was granted, and Ventura's subsequent motion to vacate that default judgment was denied.

Motion/Cross-Motion

Plaintiff moves for summary judgment on the issue of liability on the grounds that as a passenger she cannot be held liable, and the sole proximate cause of the collision was the negligence of the defendants. The motion is supported by the deposition testimony of plaintiff and that of defendants Dixon and Moore. The copy of the police accident report is uncertified, and as such, inadmissible here (see, Coleman v. Maclas, 61 A.D.3d 569, 877 N.Y.S.2d 297 [1st Dept. 2009]).

Dixon and Moore oppose the motion as premature as Ventura has not been deposed, and contend that based on the record, plaintiff has failed to sustain her burden to prove as a matter of law that Dixon's conduct was a proximate cause of the intersection collision.

In reply, plaintiff contends that defendants fail to address her argument that as a passenger she cannot be found at fault for the collision.

Defendants cross-move for an order vacating the Note of Issue and Certificate of Readiness and striking this matter from the trial calendar as there is outstanding discovery, including Ventura's deposition, yet to be conducted.

Plaintiff opposes the cross-motion and argues that if the court denies the motion seeking vacatur of Ventura's default judgment, the cross-motion is moot. Alternatively, it is argued that the case should remain on the trial calendar while any outstanding discovery is conducted.

In reply, defendants maintain that they would be prejudiced if the case were to remain on the trial calendar without Ventura having been deposed.

Discussion and Conclusions

Upon review of the moving papers as afforded all favorable inferences in favor of the non-moving parties and in consideration of the applicable law, this court finds that plaintiff has shouldered her burden to prove that she is entitled to an award of partial summary judgment upon a finding that she did nothing to cause the accident nor could she have prevented it, and the motion is granted to the extent indicated (see, Mello v. Narco Cab Corp., 105 A.D.3d 634, 963 N.Y.S.2d 581 [1st Dept. 2013]).

However, plaintiff has failed to meet her burden to prove as a matter of law that defendant Dixon was negligent and that his culpable conduct was a substantial factor

in causing the intersection accident. The record reveals that he stopped at the stop sign and waited for ten to twelve seconds to observe oncoming traffic on both sides , and then proceeded into the intersection, and at a point at which his vehicle was a couple of feet from the center of 166th Street , and while traveling at less than 5 miles an hour, the front left of his vehicle was struck by a livery cab. When the police officers responded to the accident scene, he told them the following.

A. I stopped at the stop sign, I looked both ways .
As I proceeded, I was looking to the left again
and he sped - - he was speeding through the traffic
light that was turning yellow .¹

33:12-16

It is submitted that the above testimony as afforded all favorable inferences precludes a finding that as a matter of law Dixon was negligent . It is noted that defendant Ventura by virtue of his default "is deemed to have admit[ted] all traversable allegations in the complaint, including the basic allegations of liability" (Al Fayed v Barak, 39 AD3d 371, 372, 833 NYS2d 500 [1st Dept 2007] [internal quotation marks omitted]).


In light of the prior history , the court finds no basis to vacate the Note of Issue and Certificate of Readiness.

¹ The light was at the intersection of 166th Street and Teller Avenue [Id. 17-25].

Accordingly, plaintiff's motion is granted solely to the extent of finding no culpable conduct by plaintiff on the issue of liability, and the cross-motion is denied in its entirety.

This shall constitute the decision and order of this court.

Dated: October 14, 2015



Howard H. Sherman