

**Calderon v Violetti**

2020 NY Slip Op 34460(U)

July 13, 2020

Supreme Court, Bronx County

Docket Number: 22728/2017E

Judge: John R. Higgitt

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This opinion is uncorrected and not selected for official publication.

[\* 1]

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

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TIFFANY CALDERON,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 22728/2017E

FRANCESCO J. VIOLETTI, FRANK L. VIOLETTI,  
CHRISTOPHER WILLIAMS and DONALD  
WILLIAMS, JR.,

Defendants.  
-----X

John R. Higgitt, J.

Upon the May 26, 2020 notice of motion of defendants Francesco J. Violetti and Frank L. Violetti (“the Violetti defendants”) and the affirmation and exhibits submitted in support thereof; plaintiff’s June 9, 2019 affirmation in opposition and the exhibits submitted therewith; the Violetti defendants’ June 10, 2020 affirmation in reply; and due deliberation; the Violetti defendants’ motion to vacate the prior order of the court granting plaintiff’s motion for summary judgment on the issue of the Violetti defendants’ liability is granted, and, upon vacatur of the court’s prior order, plaintiff’s motion is denied.

This is a negligence action to recover damages for personal injuries plaintiff sustained in a motor vehicle accident that took place on March 19, 2016.

On January 19, 2020, plaintiff moved for summary judgment on the issue of defendants’ liability for the subject accident. In support of her motion, plaintiff submitted her affidavit. Plaintiff averred that at the time of the accident she was a passenger in the vehicle operated by defendant Christopher Williams and owned by defendant Donald Williams Jr. (“the Williams defendants”). The Williams defendants’ vehicle was traveling eastbound on Westchester Avenue near its intersection with Blondell Avenue in Bronx County. Plaintiff averred that as the

Williams defendants' vehicle was approaching the intersection, with a green light in its favor, the Violetti defendants' vehicle, which was traveling northbound on Blondell Avenue, failed to yield the right of way to the Williams defendants' vehicle, striking the Williams defendants' vehicle. The Violetti defendants failed to oppose the motion.

On May 7, 2020, the court granted the aspects of plaintiff's motion seeking summary judgment against the Violetti defendants and seeking dismissal of defendants' affirmative defenses alleging plaintiff's comparative fault. The court denied that aspect of the motion that sought summary judgment against the Williams defendants.

On the present motion to vacate, the Violetti defendants assert that they have a reasonable excuse for their failure to oppose plaintiff's summary judgment motion: their attorney was dealing with a family emergency. Plaintiff does not dispute that the Violetti defendants' attorney's family emergency constitutes a reasonable excuse of their failure to oppose plaintiff's prior summary judgment motion. Therefore, the Violetti defendants provided a reasonable excuse for the default (*see Mr. Ho Charter Serv., Inc. v Ho*, 94 AD3d 631 [1st Dept 2012]; *see also Imperato v Mount Sinai Medical Center*, 82 AD3d 414 [1st Dept 2011]).

With respect to a potentially meritorious defense to plaintiff's summary judgment motion, the Violetti defendants submitted the deposition testimony of defendant Francesco Violetti, who testified that he was traveling on East Tremont Avenue with a green traffic signal in his favor. Defendant Francesco Violetti testified that he first saw the green traffic signal when he was at a distance of five car lengths away from the subject intersection as he was traveling 20 miles per hour. He further testified that the traffic signal was green in his favor as he entered the intersection. Defendant Francesco Violetti testified that he first noticed the other vehicle (i.e., the Williams defendants' vehicle) at the moment of impact.

The conflicting versions of the subject accident make summary judgment in plaintiff's favor on the issue of liability inappropriate. Therefore, summary judgment on the issue of defendants' liability is inappropriate at this juncture. "[T]he pronouncement in [*Garcia v Tri-County Ambulette Serv.*, 282 AD2d 206 (1st Dept 2001)][, upon which plaintiff rely,] stands only for the proposition that in motor vehicle negligence actions, an innocent plaintiff is entitled to a determination that [he or] she had no culpable conduct on the issue of liability irrespective of the unresolved issue of a defendant driver's negligence" (*Oluwatayo v Dulinayan*, 142 AD3d 113, 119 [1st Dept 2016]). Plaintiff must still affirmatively establish the negligence (and causal relationship between the negligence and the accident) of at least one defendant. Based on plaintiff's affidavit and defendant Francesco Violetti's deposition testimony, the court cannot say that, as a matter of law, the liability of one or more of the defendants has been established.<sup>1</sup>

Plaintiff did, however, establish that, as an "innocent passenger," she is entitled to dismissal of defendants' affirmative defenses alleging plaintiff's comparative fault (*see id.*).

Accordingly, it is

ORDERED, that the aspect of the Violetti defendants' motion seeking to vacate the May 27, 2020 decision and order is granted, and that order is vacated; and it is further

ORDERED, that the aspect of plaintiff's prior motion seeking summary judgment on the issue of defendants' liability is denied; and it is further

ORDERED, that the aspect of plaintiff's prior motion seeking dismissal of defendants' affirmative defenses alleging plaintiff's comparative fault is granted; and it is further

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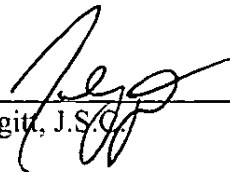
<sup>1</sup> Triable issues of fact exist regarding, among other things, which driver had the right of way, the attentiveness of each driver, whether one or both drivers failed to take evasive action, and the casual relationship of each driver's conduct and the subject accident.

[\* 4]

ORDERED, that the Williams defendants' first affirmative defense and the Violetti defendants' fourth affirmative defense are dismissed.

This constitutes the decision and order of the court.

Dated: July 13, 2020

  
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John R. Higgin, J.S.C.