

VanEpps v Mancuso

2022 NY Slip Op 34507(U)

November 22, 2022

Supreme Court, Wyoming County

Docket Number: Index No. 49171

Judge: Michael M. Mohun

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At a term of the Supreme Court held in and for the County of Wyoming, at the Court-house in Warsaw, New York, on the 22nd day of November, 2022.

PRESENT: HONORABLE MICHAEL M. MOHUN
Acting Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT: COUNTY OF WYOMING

**HELENE F. VANEPPS and
JAMES J. VANEPPS, Her Husband**

Plaintiffs,

v.

DECISION AND ORDER

Index No. 49171

**DAVID D. MANCUSO d/b/a
MANCUSO COUNTRY AUTO and d/b/a
MANCUSO LIMOUSINES & BUSES OF WNY and
JOSHUA D. WAHL,**

Defendants.

By notice of motion dated July 18, 2022, the defendants request an order Granting leave to serve an amended Answer and amended Bill of Particulars. By notice of motion dated October 24, 2022, the plaintiffs request an order limiting the proof at trial so as to prevent “mention before the jury of the following subject matter: (a) Claims that either of the plaintiffs were intoxicated; (b) Any comment that there may have been a person or child in the roadway.” By notice of cross-motion dated October 24, 2022, the plaintiffs also request an order striking from the defendants’ Answer the first and third affirmative defenses.

NOW, upon reading the pleadings of the parties, and on reading and filing the notice of motion to amend, supported by the affirmation of Cory J. Weber, Esq., attorney for the defendants, dated July 18, 2022, together with the annexed exhibits; the affidavit in opposition to the motion to amend (and in support of the cross-motion to strike) of Carrie L. Smith, Esq., attorney

for the plaintiffs, sworn to on October 24, 2022, together with the annexed exhibits; the reply affirmation in further support of the motion to amend (and in opposition to the cross-motion to strike) of Cory J. Weber, Esq., dated October 28, 2022; the notice of motion in limine, supported by the affidavit of Carrie L. Smith, Esq., sworn to on October 24, 2022, together with the annexed exhibits; the affirmation in opposition to the motion in limine of Cory J. Weber, Esq., dated October 27, 2022, together with the annexed exhibits; the affidavit in reply and in further support of the motion in limine of Carrie L. Smith, Esq., sworn to on October 31, 2022; the notice of cross-motion to strike, supported by the affidavit of Carrie L. Smith, Esq., sworn to on October 24, 2022, together with the annexed exhibits; and the reply affidavit in further support of the cross-motion (responding to the October 28 affirmation of Cory J. Weber, Esq.) of Carrie L. Smith, Esq., sworn to on October 31, 2022, together with the annexed exhibits; and after hearing, with respect to the above-mentioned motions and cross-motion, Cory J. Weber, Esq., for the defendants and Carrie L. Smith, Esq., for the plaintiffs, due deliberation having been had, the following decision is rendered.

The defendants seek to amend both their answer, by adding a seventh affirmative defense alleging “[a]ll or part of the damages claimed by the plaintiffs would have been prevented by the use of an available seatbelt,” and their Bill of Particulars, by adding to their response to the second demand the statement that the plaintiffs failed to mitigate their damages by “failing to wear an available seatbelt.” Plaintiffs’ counsel, in her responses, raises no objection to the proposed amendments. Rather, she points out that, by statute and under longstanding case law, evidence of non-use of a seatbelt “shall not be admissible as evidence in any civil action in a court of law in regard to the issue of liability[,] but may be introduced into evidence in mitigation of damages provided the party introducing said evidence has pleaded such non-compliance as an affirmative defense” (Vehicle and Traffic Law §1229-C[8]; see also Spier v. Barker, 35 N.Y.2d 444 [1974]). Indeed, defendants’ counsel argues that the seatbelt defense already may “arguably” be sufficiently pleaded in second affirmative defense which generally alleges a failure to mitigate damages. Nonetheless, presumably to be on the safe side, he now asks for leave to plead the seatbelt defense explicitly in an added, seventh affirmative defense in the Answer, and in the proposed amendment to the Bill of Particulars. Since, as noted, the motion to amend is essentially unopposed, it shall be granted.

Similarly, the defendants raise no substantive objections to the plaintiffs’ cross-motion to strike the first affirmative defense, alleging that the plaintiffs recovery must be barred or reduced in proportion with the extent to which the plaintiffs’ own culpable conduct caused injury, and the third affirmative defense, alleging the same with respect to “others” over whom the defendants exercised no control. The cross-motion to strike shall also be granted.

With regard to the cross-motion, the Court notes that defendants’ counsel does object to the statement by plaintiffs’ counsel in her supporting affidavit that she intends to request “a limiting instruction as to proof of seatbelts on the trial of liability,” as well as her contention that,

in this “unique case,” proof that the driver of the limo bus “did not know whether the limo bus was equipped with seatbelts or whether the passengers were belted is relevant to Plaintiffs’ allegation that Driver Wahl failed to brake or reduce the speed of the limo bus in a safe manner.” Defendants’ counsel argues that Vehicle and Traffic Law §1229-C(8) and Spier prohibit the introduction of such proof during the liability phase. The Court prefers to leave these evidentiary rulings until the trial. Moreover, the Court does not interpret the plaintiffs’ cross-motion as seeking a ruling on the relevance of the driver’s lack of knowledge regarding the seatbelts, or a ruling on the yet-to-be-made “request” for a limiting instruction. Accordingly, the Court will not rule on these matters at this time.

Lastly, regarding the motion in limine, the Court declines to grant the plaintiffs’ request for a broad, pre-trial ruling prohibiting all “mention before the jury” of anything suggesting that one or both of the plaintiffs were intoxicated, or that “there may have been a person or child in the roadway.” Once again, these are matters that the Court prefers to handle at the trial. Until then, it is not possible for the Court to judge whether or not a question to be asked a witness is founded on a good faith basis, or whether or not an item of evidence proffered is relevant to a material question of fact. When the question shall be asked, or the evidence offered, the Court will of course entertain an appropriate specific objection from the opposing counsel. Also, if there is need at the trial to determine a given issue outside the presence of the jury, the Court will arrange to do so.

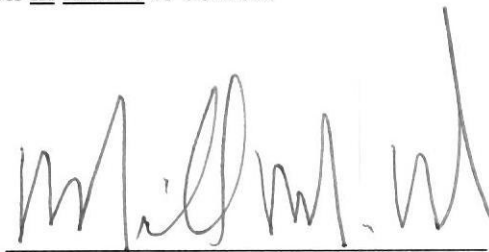
NOW, THEREFORE, it is hereby

ORDERED that the defendants’ motion to amend the Answer and the Bill of Particulars is granted, and the amended Answer and Bill of Particulars is deemed served; and it is further

ORDERED that the plaintiffs’ motion to strike the first and third affirmative defenses contained in the now amended answer is granted; and it is further

ORDERED that the plaintiffs’ motion in limine is denied.

Dated: November 22, 2022



MICHAEL M. MOHUN

Acting Supreme Court Justice

