

<b>King v Walmart, Inc.</b>
2016 NY Slip Op 33126(U)
September 14, 2016
Supreme Court, Onondaga County
Docket Number: 2014EF1035
Judge: Hugh A. Gilbert
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At a Term of Supreme Court held in and for the County of Onondaga, in the City of Watertown, New York on the 9<sup>th</sup> day of August, 2016.

PRESENT: HONORABLE HUGH A. GILBERT  
Supreme Court Justice

STATE OF NEW YORK

SUPREME COURT COUNTY OF ONONDAGA

AMBER KING,

Plaintiff,

MEMORANDUM  
DECISION AND ORDER

-vs-

Index No. 2014EF1035  
RJI No. 33-15-0405

WALMART, INC.,

Defendant.

Plaintiff Amber King commenced this action on March 28, 2014 to recover damages for personal injuries sustained on May 25, 2011 at the Wal-Mart store in Camillus, New York. She claims that she was injured when she sat in a display chair and it tipped backwards. Discovery is complete and the case is on the calendar.

Pending before the Court is a motion dismissing the Plaintiff's Verified and Amended Verified Complaint in its entirety on the grounds that the Court lacks jurisdiction over the proper Defendants, Wal-Mart Store, Inc., or Wal-Mart Stores

East L.P. It also seeks dismissal because no action was timely commenced against the proper Defendant. Plaintiff has cross moved for leave to amend the Summons and Complaint to correct the misnomer.

The basic facts relevant to the pending motions are not in dispute. After commencement, Plaintiff effected service on the Legal Department at the Executive Office of Wal-Mart Stores, Inc., in Bentonville, Arkansas. This was the address listed with the New York State Department of State. Defendant appeared by the service of an Answer which asserted that the Court lacked jurisdiction over it. In response to Plaintiff's Demand regarding that defense, Defendant asserted that Plaintiff failed to properly serve it.

The parties conducted discovery and depositions with a Wal-Mart representative being deposed on July 1, 2015. Plaintiff served and filed a trial note of issue on March 6, 2016 and the case is now scheduled for trial. We disagree with Plaintiff that Defendant waived its defense by failing to particularize it or move for relief shortly after service. We do find, however, that amendment is appropriate herein, notwithstanding the fact that the statute of limitations has expired.

Defendant suggests that this is not a situation where a proper Defendant was served with an improperly captioned Summons and Complaint.

Rather it contends that the party sued has no relationship to the premises at issue and does not share a unity of interest with the proper Defendants. It appears to ignore the fact that, notwithstanding the incorrect name in the caption, the proper Defendant was in fact served, appeared, and has participated in the completion of all required discovery such that the case is now on the trial calendar.

The amendment of a Summons and Complaint to reflect the proper name of a Defendant or correct a misnomer should be permitted only if "(1) there is evidence that the correct Defendant (misnamed in the original process) has in fact been properly served, and (2) the correct Defendant would not be prejudiced by granting the amendment sought." *Ober vs. Rye Town Hilton*, 159 AD2d 16, 20 (1990). Just as in *Ober*, these two elements have been satisfied here. Plaintiff herein does not seek to add or substitute a party Defendant but wishes to correct a misnomer. There is no proof that the granting of Plaintiff's motion would result in any prejudice. The party served but misnamed has appeared and defended the action and cannot advance any claim of prejudice other than the running of the statute of limitations, which is not sufficient. *Public Service Mutual Insurance Co. vs. Joyce*, 182 AD2d 535 (1992). Having served the party she intended to have, we find amendment to correct the name appropriate. *Medina vs. City of New York*, 167 AD2d 268 (1990).

THEREFORE, it is

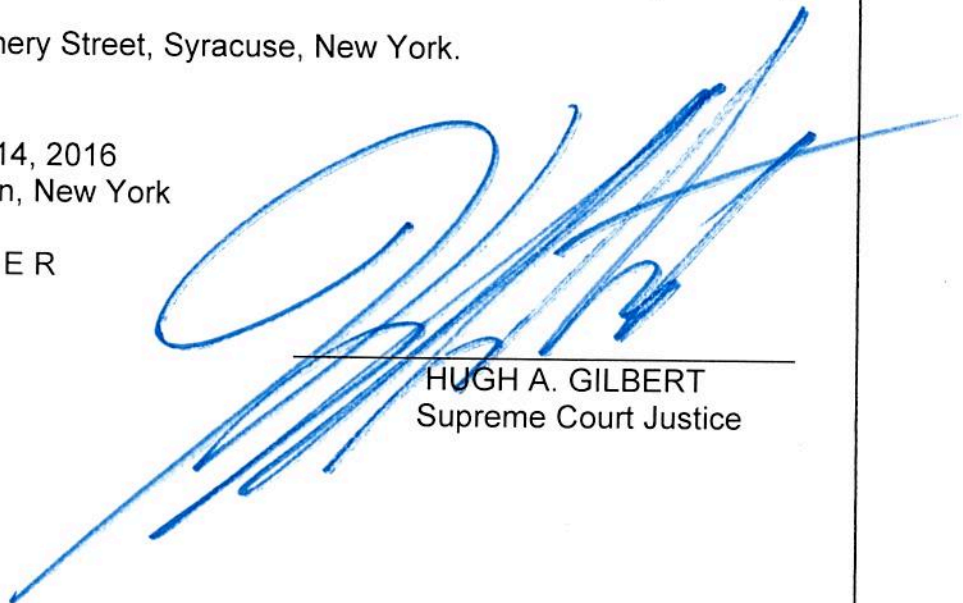
ORDERED, ADJUDGED AND DECREED that the Defendant's motion is respectfully denied; and it is further

ORDERED, ADJUDGED AND DECREED that the Plaintiff's cross motion is hereby granted; and it is further

ORDERED, ADJUDGED AND DECREED that the **JURY TRIAL** shall commence on **Tuesday, February 14, 2017 at 9:00 a.m.** at the Onondaga County Courthouse, 401 Montgomery Street, Syracuse, New York.

Dated: September 14, 2016  
at Watertown, New York

ENTER



HUGH A. GILBERT  
Supreme Court Justice