

Camillo v Colon
2019 NY Slip Op 33253(U)
October 31, 2019
Supreme Court, New York County
Docket Number: 153197/2015
Judge: Adam Silvera
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PRESENT: HON. ADAM SILVERA PART IAS MOTION 22

PART

IAS MOTION 22

INDEX NO. 153197/2015

MARIBEL CAMILLO.

MOTION DATE 06/10/2019

Plaintiff,

MOTION SEQ. NO. 004

- y -

JONAS COLON, ELVIS GELL, TOMAS NUNEZ

**DECISION + ORDER ON
MOTION**

Defendant.

X

The following e-filed documents, listed by NYSCEF document number (Motion 004) 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 117, 118, 119, 120, 121, 122, 123, 124, 125, 128, 129, 130, 131, 132

were read on this motion to/for

VACATE/STRIKE - NOTE OF ISSUE/JURY

Upon the foregoing documents, it is ORDERED that defendant Elvis Gell's motion to strike this action from the trial calendar and vacate plaintiff Maribel Camillo's Note of Issue and Statement of Readiness on the grounds that discovery has not been completed; to compel plaintiff to provide a response to defendant's Post-EBT Demands; to compel defendant Jonas Colon to provide a response to defendant's Post-EBT Demands; and to compel defendant Tomas Nunez also known as Tomas Nuez (hereinafter "Nuez") to provide a response to defendant's Post-EBT Demands is denied. Upon the foregoing documents, it is further ORDERED that defendant Nuez's cross-motion for an order pursuant to CPLR 3212 for summary judgment on the issue of liability in favor of said defendant is granted.

This action stems from a motor vehicle incident that occurred on June 29, 2014, at the intersection of Audubon Avenue and West 181st Street, in the County, City and State of New York when plaintiff was allegedly seriously injured while a passenger in a vehicle owned and

operated by defendant Nuez that was proceeding through a steady green traffic light when it was struck by a vehicle owned by defendant Gell and operated by defendant Colon.

Pursuant to 22 NYCRR 202.12(e) “any party to the action . . . may move to vacate the note of issue upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue . . .” A Note of Issue is premature when discovery remains outstanding (*Barnett v Demian*, 207 AD2d 693 [1st Dept 1994]). A motion to vacate a Note of Issue must be granted when a defendant has not had a reasonable opportunity to complete discovery (*Frierson v Concourse Plaza Associate*, 189 AD2d 609 [1st Dept 1993]). Absent a showing of “special, unusual or extraordinary circumstances” the Court may deny a motion to strike a plaintiffs’ Note of Issue and determine that no outstanding discovery remains (*Pannone v Silberstein*, 40 AD3d 327 [1st Dept 2007]).

Here, defendant Gell seeks to strike the Note of Issue on the basis the instant case is not ready for trial and that plaintiff and co-defendants have not provided responses to defendant’s Post-EBT Demands. Pursuant to stipulation signed before the Court at a Compliance Conference on May 15, 2019, moving defendant and all parties to this action stipulated that all discovery was complete. Plaintiff filed Note of Issue and Certificate of Readiness claiming that all discovery had been completed on May 20, 2019, after which defendant served co-defendants Colon and Nuez and plaintiff Post-EBT demands on May 22, 2019 (Mot, Exh G, H, & I). Defendant argues that it would be unduly prejudiced absent the receipt of the aforementioned responses to defendant’s Post-EBT Demands.

In this 2015 index number defendants have not demonstrated circumstances which would warrant vacating the Note of Issue. Defendant Gell had ample opportunity to serve its Post-EBT demands prior to the last Compliance Conference on May 15, 2019. The Court notes that

defendant did not make mention of the Post-EBT demands at the last conference and signed the stipulation confirming that discovery had been completed (Mot, Exh E). At this juncture, in order to obtain Post-Note of Issue discovery, defendant must establish that unusual or unanticipated circumstances developed after the note of issue was filed which require the additional discovery in order to prevent substantial prejudice (*see* 22 NYCRR 202.21(d)).

Defendant has not proffered a reasonable explanation for its failure to serve Post-EBT demands prior to the filing of the note of issue (*Drapper v Horan*, 164 AD3d 1192, 1193 [1st Dep't 2018] [finding that the Supreme Court properly denied defendants renewed motion where “[d]efendants offered no reasonable explanation for their failure to notice a medical examination before the note of issue was filed”]). Thus, defendants motion to strike this action from the trial calendar and vacate plaintiff’s Note of Issue and Statement of Readiness; to compel plaintiff and defendants’ responses to defendant’s Post-EBT demands is denied.

Defendant Nuez’s motion for summary judgment on the issue of liability in favor of defendant Nuez is granted. “The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to “demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure ... to do [so]” (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]). Violation of the Vehicle and Traffic Law (“VTL”) constitutes negligence per se (*See Flores v City of New York*, 66 AD3d 599 [1st Dep’t 2009]).

Defendant Nuez alleges that co-defendant Gell drove through a red light and caused the accident. In support of their motion, defendant cites to New York State Vehicle and Traffic Law (VTL) § 1110: Obedience to and required traffic-control devices, VTL § 1111: Red indications, and VTL § 375: Equipment.

VTL § 1110 states that:

- (a) Every person shall obey the instructions of any official traffic-control device applicable to him placed in accordance with the provisions of this chapter, unless otherwise directed by a traffic or police officer, subject to the exceptions granted the driver of an authorized emergency vehicle in this title.

VTL § 1111 states that:

(d)

- 1. Traffic, except pedestrians, facing a steady circular red signal, unless to make such other movement as is permitted by other indications shown at the same time, shall stop at a clearly marked stop line, but if none, then shall stop before entering the crosswalk on the near side of the intersection, or in the event there is no crosswalk, at the point nearest the intersecting roadway where the driver has a view of the approaching traffic on the intersecting roadway before entering the intersection and shall remain standing until an indication to proceed is shown ...

VTL § 375 states that:

- 1. (a) Every motor vehicle, operated or driven upon the public highways of the state, shall be provided with adequate brakes and steering mechanism in good working order and sufficient to control such vehicle at all times when the same is in use, and a suitable and adequate horn or other device for signaling, which horn or device shall produce a sound sufficiently loud to serve

as a danger warning but shall not be used other than as a reasonable warning nor be unnecessarily loud or harsh.

Defendant Nuez attaches the deposition of plaintiff, defendant Nuez, defendant Colon, and defendant Gell (Cross Mot, Exh B, C, D, & E). Defendant Nuez testified at deposition that he was driving through the intersection of Audubon Avenue and West 181st Street with a green light in his favor when he felt an impact to his car (*id.*, Exh C at 17, 28-29). Defendant Colon testified at deposition that while he was traveling northbound on Audubon Avenue, that the breaks on his vehicle failed which caused him to collide into defendant Nuez's vehicle (*id.*, Exh D at 42-43). Not only did defendant Colon testify that there was an issue with the breaks on the date of the accident, he also testified that the car previously had issues with the breaks, that the vehicle was not stopping properly, and that he considered the vehicle to be unsafe (*id.*, Exh D at 27-28, 31). Thus, defendant Nuez has demonstrated that defendant Colon violated the VTL and has made a prima facie showing of entitlement to summary judgment on the issue of liability in favor of defendant Nuez and as against defendant Colon.

In opposition defendant Colon argues that the cross motion is procedurally defective as defendant Nuez moves against non-moving defendant Colon on the issue of liability. Defendants opposition is unavailing and purely procedural. It is well established that the law should be held on the merits (*Picinic v Seatrain Lines*, 117 AD2d 504, 508 [1st Dep't 1986] [finding that a procedural issue such as a default judgment should be vacated where "the defense, if true, would absolve appellant of liability, a great miscarriage of justice would occur if appellant is not given its day in court on this issue"]).

In this case the Court notes that it is evident that defendant Nuez is not liable for the accident at issue and to deny him summary judgment on the issue of liability for a merely

procedural oversight due to a law office failure to file a separate motion rather than a cross motion against a non-moving party, would be a miscarriage of justice (*id.* at 507 finding that “the approximately 48-day delay in filing an answer was attributable to excusable law office failure”).

Here, the Court notes that defendant Nuez’s cross-motion was made before 60 days after the filing of the Note of Issue as proscribed by the Preliminary Conference Order (Aff in Op, Exh A). Thus, the Court, like the Court in *Picinic*, finds that defendant Nuez failure to timely move for summary judgment, “was not so egregious as to prevent us from reaching the merits of [defendants cross-motion] (*id.*).” Defendant Nuez cross-motion is granted on the issue of liability as against defendant Colon.

Accordingly, it is

ORDERED that defendant Elvis Gell’s motion to strike this action from the trial calendar and vacate plaintiff’s Note of Issue and Statement of Readiness is denied; and it is further

ORDERED that the branch of defendant’s motion to compel plaintiff to provide a response to defendant’s Post-EBT Demands is denied; and it is further

ORDERED that the branch of defendant’s motion for to compel defendant Jonas Colon to provide a response to defendant’s Post-EBT Demands is denied; and it is further

ORDERED that the branch of defendant’s motion to compel defendant Nuez to provide a response to defendant’s Post-EBT Demands is denied; and it is further

ORDERED that defendant Nuez’s motion for summary judgment for a finding that defendant Nuez is free from liability and to dismiss plaintiff’s Complaint and any cross-claims against defendant Nuez is granted; and it is further

ORDERED that the Complaint is dismissed in its entirety as against Nuez, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants Jonas Colon and Elvis Gell; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for defendant Nuez serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that within 20 days of entry, counsel for defendant Nuez shall serve a copy of this Decision/Order upon all parties with notice of entry.

This constitutes the Decision/Order of the Court.

10/31/2019

DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

☐

CASE DISPOSED

☐

GRANTED

☐

DENIED

☐

SETTLE ORDER

☐

INCLUDES TRANSFER/REASSIGN

☒

NON-FINAL DISPOSITION

☐

GRANTED IN PART

☐

SUBMIT ORDER

☐

FIDUCIARY APPOINTMENT

☒

OTHER

☐

REFERENCE

ADAM SILVERA, J.S.C.