

Feliciano v Oladosu

2012 NY Slip Op 33614(U)

November 7, 2012

Sup Ct, Bronx County

Docket Number: 302698/07

Judge: Mary Ann Brigantti-Hughes

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11/15/12

**SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15**

PRESENT: Honorable Mary Ann Brigantti-Hughes

-----X
JOHN FELICIANO,

Plaintiff,

-against-

DECISION / ORDER

Index No. 302698/07

OLUFUNMILAYO OLADOSU, AKAHABI MOSES
OLADOSU, DANIEL AHENKORA and JOSEPHINE
AHENKORA d/b/a GOLD COAST TRADING CO.,
and JOHN DOE,

Defendants.

-----X
The following papers numbered 1 to 11 read on the below motions noticed on **May 14, 2012** and
duly submitted on the Part 1A15 Motion calendar of **August 30, 2012**:

<u>Papers Submitted</u>	<u>Numbered</u>
Gold Coast's Notice of Motion, Exhibits	1,2
Pl.'s Cross-Motion, Exhibits	3,4
Def.'s Aff. in Opp.	5
Pl.'s Aff. In Opp. To Motion, Exhibits	6,7
Gold Coast's Reply, Exhibits	8,9
Def.'s Aff. In Reply, Exhibits	10,11

In an action seeking damages for personal injuries arising out of an alleged motor vehicle-versus-pedestrian accident, defendants Daniel Ahenkora and Josephine Ahenkora d/b/a Gold Coast Trading Co. (collectively "Gold Coast") move for summary judgment, dismissing the plaintiff's complaint and all cross-claims pursuant to CPLR 3212. Plaintiff John Feliciano ("Plaintiff") opposes the motion and cross-moves for an Order (1) striking Gold Coast's Answer based on their willful refusal and failure to appear at Court-Ordered depositions; (2) compelling defendant Olufunmilayo Oladosu to appear for further deposition; (3) compelling further discovery from all Defendants. Defendants Olufunmilayo Oladosu and Ahlabi Moses Oladosu oppose both motions.

The subject accident occurred at or near the intersection of 144th Street at Canal Place, Bronx, New York, when the pedestrian Plaintiff was allegedly struck by the vehicle owned by

defendant Akahabi Moses Oladosu and operated by defendant Olufunmilayo Oladosu ("Oladosu"). Gold Coast annexes and refers to the police accident report drafted at the scene. The report, however, is uncertified and Gold Coast failed to lay a foundation for its admissibility on the motion, this Court will not consider it. *Figueroa v. Luna*, 281 A.D.2d 204, 206 (1st Dept. 2001).

Plaintiff testified at deposition that on July 28, 2006 at approximately 2:45 PM, he was walking eastbound on 144th Street toward Canal Place in the Bronx, New York. Plaintiff used the crosswalk to continue on 144th Street, crossing over Canal Place. At the time of the accident, he was forced out onto 144th street because a forklift was located in the crosswalk. When he was in the street, Plaintiff testified that he was struck by a vehicle's front passenger side. Plaintiff conceded at deposition that he had no reason to believe that the forklift or trucks belonged to the Gold Coast defendants. Plaintiff testified that he never spoke to the forklift operator. He was not actually struck by the forklift.

Gold Coast alleges, in affidavits, that they operate an African grocery business located at 381 Canal Place, Bronx, New York, approximately 50 feet from the intersection where the accident took place. Gold Coast states, however, that they do not own or maintain a forklift, nor had they retained the services of any contractor using a forklift for any reason at the time of this accident.

The Oladosu defendants and Plaintiff both oppose the motion. Plaintiff argues, *inter alia*, that the affidavits submitted by the Gold Coast defendants are deficient since they do not state the names and addresses of their grocery business, or the responsibilities of employees with respect to unloading trailers on the premises. Gold Coast does not provide any information as to who owned the subject forklift. Moreover, the Gold Coast defendants have yet to appear for deposition. Since the facts necessary to oppose this motion are exclusively within Gold Coast's knowledge, Plaintiff and co-defendants argue that the motion must be denied.

Plaintiff cross-moves for an Order (1) striking Gold Coast's Answer based on their willful refusal and failure to appear at Court-Ordered depositions; (2) compelling defendant Olufunmilayo Oladosu to appear for further deposition; (3) compelling further discovery from all Defendants. In support of the cross-motion, Plaintiff asserts that a preliminary conference order

dated July 16, 2008, directed that depositions of all parties be held on October 15, 2008. Thereafter, several compliance conferences took place, the most recent on January 15, 2011. As of this date, neither of the named Gold Coast defendants have been deposed. Counsel for Gold Coast requested adjournments of scheduled depositions on August 5, 2010 and November 4, 2011, on the grounds that the clients were out of the country. Now, instead of appearing for depositions, Gold Coast has submitted self-serving affidavits in support of their motion for summary judgment. With respect to defendant Olufunmilayo Oladosu, Plaintiff asserts that her attorney improperly directed her not to answer the question of whether she was permitted to operate her vehicle without a licensed driver present. This improper speaking objection limited the scope of the deposition and a further deposition is required.

Under these circumstances, the issue of ownership and/or control over the subject forklift is relevant evidence that is solely in the Gold Coast defendants' control. (*cf* CPLR 3212[f]). Gold Coast, however, has not eliminated every triable issue so as to warrant entitlement to judgment as a matter of law. The affidavits submitted in support of this motion only state that on the date of the accident, they did not own or hire a forklift. The affidavits do not address whether Gold Coast ever used forklifts in connection to their business or whether they engage in the use of delivery trucks at or near the accident location. Plaintiff and co-defendants are thus entitled to question Gold Coast as to its ownership and/or control over the accident location. Summary judgment will therefore be denied without prejudice, to renew upon completion of party depositions, pursuant to CPLR 3212(f).

Plaintiff's cross-motion is also denied. The cross-motion to compel various forms of discovery does not include the requisite good-faith affirmation pursuant to 22 NYCRR §202.7, acknowledging that counsel had conferred with his or her adversaries in good faith to resolve the issues before resorting to motion practice. *Fulton v. Allstate Ins. Co.*, 14 A.D.3d 380 (1st Dept. 2005). Here, there is no indication that good-faith efforts had been made to reschedule the Gold Coast defendants' depositions, resolve the issues that arose at the Oladosu deposition, or compel a response to previously-served discovery demands.

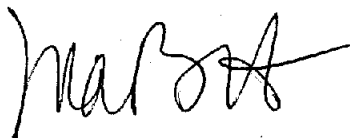
Accordingly, it is hereby

ORDERED, that Gold Coast's motion for summary judgment is denied without prejudice, to renew upon completion of discovery, and it is further,

ORDERED, that Plaintiff's cross-motion is denied.

This constitutes the Decision and Order of this Court.

Dated: November 7, 2012



Hon. Mary Ann Brigantti-Hughes, J.S.C.