SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
PART 7

Index No. 309534/09
Motion Calendar No. 17,18
Motion Date 5/21/12

REVEREND CARLOS LOPEZ ACOSTA,
Plaintiff,

-against-

JERMAINE A. FORRESTER, DIANA A. WHITE & VAN POOL INC & SPHINX EXPRESS, INC.
Defendants,

DECISION/ORDER
Present:
Hon. Wilma Guzman
Justice Supreme Court

Recitation, as required by C.P.L.R. 2219(a), of the paper considered in the review of this motion to dismiss and motion for summary judgment.

Papers	**Numbered**
Plaintiff Notice of Motion, Affirmation in Support, and Exhibits in Support	**1**
Affirmation in Opposition	**2**
Defendant Van Pool Inc. Notice of Cross-Motion	**3**
Reply and Opposition	**4**
Defendant Van Pool Inc. Order to Show Cause	**5**
Affirmation in Opposition	**6**

Upon the foregoing papers and after due deliberation, and upon oral argument, the Decision/Order on this motion is as follows:

Plaintiff, Reverend Carlos Lopez Acosta, moves for an order pursuant to CPLR § 3025 granting leave to amend his complaint with the addition of Galaxy Towers Inc., and Boulevard Lines Inc., as defendants to this suit. Plaintiff also moves for an order pursuant to CPLR § 3126 to strike the defendant's answer, or in the alternative, any such other and further relief the Court deems just and proper, for failing to comply with discovery demands. Defendant Van Pool Inc. (hereinafter referred to as "Van Pool"), submitted an affirmation in opposition.

Defendant Van Pool then filed a cross-motion to dismiss Plaintiff's claim pursuant to CPLR §§ 3042 and 3126, or in the alternative, a motion to compel pursuant to CPLR § 3121. This motion was withdrawn on the record during oral argument as Plaintiff has agreed to submit to Defendant's IME demands.

Defendant Van Pool moves for an order pursuant to CPLR § 3106(b) granting subpoenas to compel the attendance of non-party witnesses, Detective Michael Weguelin and Officer

Giacomo Sciuto (hereinafter referred to as "the Officers").

Statement of Fact

Plaintiff commenced this action for injuries sustained as the result of an accident on October 17, 2007. Plaintiff is a Roman Catholic Priest who was struck by the passenger side rear view mirror of an oncoming vehicle as he peeked out between two buses he claims were illegally parked, obstructing his view of oncoming traffic. A witness, Dionisio Gomez (hereinafter referred to as "Gomez"), testified that the two buses were illegally parked and that both buses had the word "Sphinx" printed on their sides. Gomez also stated that the Officers arrived on the scene as the two buses were leaving but before the ambulance had arrived.

Plaintiff commenced this action on November 23, 2009 naming Van Pool Inc. and Sphinx Express, among others, as defendants. Neither Van Pool nor Sphinx Express appeared, and Plaintiff moved for default judgment against both parties. Default judgment was granted on July 12, 2010 and entered with the Clerk's Office on July 19, 2010. Plaintiff was then contacted by ARI Insurance Companies, the insurer for Defendant Van Pool, seeking an agreement to vacate the default judgment on behalf of Defendant Van Pool. Both ARI Insurance Companies and Defendant Van Pool's counsel identified Van Pool Inc. d/b/a Sphinx Transportation as the proper defendant. Plaintiff agreed and the default judgment was vacated on May 20, 2011 by stipulation. It was further stipulated that Plaintiff would agree to accept defendant's answer submitted on July 15, 2010.

Plaintiff first served discovery demands upon Defendant Van Pool on June 30, 2011, along with a cross notice of deposition for witness testimony. A Court Ordered Preliminary Conference was held on July 19, 2011 where Defendant Van Pool was ordered to respond to the plaintiff's discovery demands within 30 days, and where all parties were ordered to appear for depositions on October 6, 2011. Additionally, all parties were ordered to meet for a Compliance Conference on March 19, 2012. Defendant Van Pool responded to the discovery demands on September 30, 2011 but did not appear for the depositions on October 6, 2011. Defendant Van Pool also claimed all of their records, other than their insurance policy, were destroyed in a fire. Plaintiff contends that Defendant Van Pool scheduled a deposition for December 8, 2011 but failed to appear on that date. Defendant Van Pool then rescheduled for a deposition on January 31, 2012 but failed to appear on that date as well.

On February 24, 2012 Plaintiff served notice of a motion to amend the complaint pursuant to CPLR § 3025 to add Galaxy Towers Inc. (hereinafter referred to as "Galaxy") and Boulevard Line Inc. (hereinafter referred to a "Boulevard") as co-defendants to the suit. All three companies were incorporated separately. All three owners share the same owner (Magdy Abdallah), share the same address, share the same d/b/a ("Sphinx Transportation"), and are all named on the same insurance policy.

Plaintiff Moves to Add Galaxy and Boulevard as Defendants Through the Relation Back Doctrine

At the time Plaintiff filed his motion to amend, over four years had passed since the accident on October 17, 2007. Any claims against Galaxy and Boulevard are untimely unless Plaintiff can invoke the relation back doctrine to demonstrate that the claims related back to the timely claim against the original defendant, Defendant Van Pool. *See* Vanderburg v. Brodman et al., 231 A.D.2d 146, 147 (1st Dep't 1997). The relation back doctrine "allows a claim asserted against a defendant in an amended filing to relate back to claims previously asserted against a co-defendant for Statute of Limitations purposes where the two defendants are 'united in interest'" within the meaning of CPLR § 203(c). Buran v. Coupal, 87 N.Y.2d 173, 177 (1995). "[T]he doctrine enables a plaintiff to correct a pleading error – by adding either a new claim or a new party – after the statutory limitations period has expired." *Id.* The doctrine gives courts discretion to identify cases where relaxation of limitations strictures is justified to facilitate a decision on the merits if the correction will not cause undue prejudice to the defendant. *Id at 178.* To determine when the application of the relation back doctrine is appropriate, courts have adopted a three-pronged test. *See* Mondello v. New York Blood Ctr., 80 N.Y.2d 219 (1992). Under this standard, the three conditions that must be met in order for "claims against one defendant to relate back to claims asserted against another are that:

> '(1) both claims arose out of the same conduct, transaction, or occurrence, (2) the new party is 'united in interest' with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits and (3) the new party knew or should have known that, but for an excusable mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against him as well.'"

Buran v. Coupal, 87 N.Y.2d 173, 177 (*citing* Brock v. Bua, 83 A.D.2d 61, 69 (2d Dep't 1981)). All

three conditions must be satisfied for the statutory relation back remedy to be operative. Mondello v. New York Blood Ctr., 80 N.Y.2d 219, 226

Plaintiff's motion to amend the caption must be granted because all three conditions of the relation back doctrine are satisfied. All of the claims Plaintiff asserts against Van Pool, Galaxy, and Boulevard arise out of the same accident which occurred on W 42nd St on October 17, 2007. Plaintiff asserts no new theories of liability and only seeks to add all of the parties he deems may be responsible. The first prong of the test is therefore satisfied as the claims against the new defendants arise out of the same traffic accident occurrence.

The second prong of the test is satisfied as Galaxy and Boulevard are "united in interest" with Defendant Van Pool and by reason of that relationship can be charged with notice of the action. Generally speaking, "unity of interest will be found where there is a relationship between the parties giving rise to the vicarious liability of one for the conduct of the other." Cuello v. Patel, 257 A.D.2d 499 (1st Dep't 1999). "Their interests must be 'such that they stand or fall together and that judgment against one will similarly affect the other.'" Connell v. Hayden, 83 A.D.2d 30, 40 (2d Dep't 1981) (quoting Prudential Ins. Co. v. Stone, 270 N.Y. 154 (1936).

In the instant case, given the legal relationship that exists between Defendant Van Pool, Galaxy, and Boulevard, judgment against one will similarly affect the others. Plaintiff submitted certified documents from the FMCSA and the State of New Jersey which show all three corporations operate under the same alternative business name, "Sphinx Transportation." A judgment against Defendant Van Pool d/b/a Sphinx Transportation will similarly affect all corporations also operating under the name "Sphinx Transportation," and therefore Galaxy and Boulevard will "stand and fall together" with Defendant Van Pool d/b/a Sphinx Transportation. *Id.* Additionally, Defendant Van Pool's insurance policy that was in effect from July 16, 2007 until July 16, 2008 names Defendant Van Pool, Galaxy, and Boulevard as the insured corporations. This policy also includes a list of all vehicles the policy covers under a section labeled "Schedule of Covered Autos You Own." The policy names all three corporations as the insured and lists vehicles that, as explained below, may have been involved in the accident on October 17, 2007. A judgment against Defendant Van Pool for their misconduct in operating the listed vehicles under the name "Sphinx Transportation" will affect all corporations named on the insurance policy. The insurance policy thus creates a relationship between Defendant Van Pool, Galaxy, and Boulevard that makes each party vicariously

liable for each other's conduct when the vehicles listed are involved. *See* Cuello v. Patel, 257 A.D.2d 499.

Defendant Van Pool argues that there has been no indication that the particular vehicles involved in the accident are owned or operated by Defendant Van Pool, Galaxy, or Boulevard. In support of this position, Defendant Van Pool contends that the bus in the photo Gomez identified as a "Sphinx Transportation" bus is a 21-25 seat bus, whereas the buses typically used by Defendant Van Pool are all 33-40 seat buses. Defendant Van Pool, however, offers no evidence that Defendant Van Pool exclusively uses 33-40 seat buses. Furthermore, the insurance policy identifies every vehicle listed as having a seating capacity of 21-60 seats. This includes both the supposed 21-25 seat bus in the photo and the 33-40 seat buses Defendant Van Pool claims to exclusively use. Defendant Van Pool notes that four other bus companies operate in the area using buses similar to the one depicted in the photo. However, Defendant Van Pool offers no evidence that any of these other bus companies use buses with the word "Sphinx" printed on their sides as depicted in the picture or described in Gomez's testimony.

Defendant Van Pool further contends that Galaxy does not own any buses and neither Galaxy nor Boulevard has a payroll, and therefore neither Galaxy nor Van Pool could have any involvement in the incident and cannot be held vicariously liable for the incident. Defendant Van Pool, however, offers no evidence to support these assertions other than an affidavit submitted by the owner of the three corporations, Magdy Abdallah. In this affidavit, Abdallah claims the pertinent evidence, such as bus routes, vehicle registrations, and employee records which would show who owned these vehicles and who employed the drivers, have all been lost in a fire. In addition to the missing documents, however, the insurance policy, the common d/b/a delineation, the common owner, and the common business address of all three corporations are sufficient to raise questions of fact as to which corporation owned and operated the vehicles and employed the drivers involved in the accident on October 17, 2007. Where there is a question of fact as to a legal relationship that may create vicarious liability, such as employment, it is still appropriate to allow the plaintiff to amend the caption through the relation back doctrine. See Cuello v. Patel, 257 A.D.2d 499, 500 (where questions of fact remained as to whether there was an employment relationship between the parties that would give rise to Health Center's liability for defendant-appellant's decedent's negligence, the court nevertheless allowed Health Center to be added, as "assuming an employment relationship is

established, the fate of the Health Center and defendant-appellant would rise and fall together").

Finally, given that all three corporations share the same owner and same address, it would be fair to say that timely served notice on the owner of Defendant Van Pool was timely served notice on the owner of Galaxy and Boulevard as he is the same individual located at the same business address. *See* Buran v. Coupal 87 N.Y.2d 173, 181 (where the court stated that "the 'linchpin' of the relation back doctrine [is] notice to the defendant within the applicable limitations period).

The third prong of the Relation Back Doctrine test is satisfied as Galaxy and Boulevard knew, or should have known that, but for an excusable mistake by plaintiff as to the identity of the proper parties, the action would have been brought against them as well. *See id* at 178. The Court in Buran ruled that adding the word "excusable" to the third prong effectively converted what are already valid considerations under the first and second prongs into an independent factor under the third prong. *Id* at 180. This is not to say that removing the excusability requirement from the third prong would prevent a court from denying the application of the relation back doctrine in cases where the plaintiff omitted a defendant in order to obtain some tactical advantage. *Id.* Such a situation has not occurred here, however. The only reason for the omission was Defendant Van Pool's delay in responding to the initial suit, to wit, the year it took to vacate the default judgment and the request for discovery not being fulfilled until September 30, 2011. For the reasons discussed in the second prong, Galaxy and Boulevard knew, or should have known that once plaintiff discovered these two corporations existed and operated as "Sphinx Transportation" they would be added to the suit.

Plaintiff's Motion to Strike Defendant's Answer Must be Granted if Defendant's Conduct Was Willful, Deliberate, and Contumacious

Plaintiff seeks to strike Defendant Van Pool's answer pursuant to CPLR § 3126. To invoke the drastic remedy of striking an answer, the court must determine the party's failure to comply with a disclosure order was the result of willful, deliberate, and contumacious conduct or its equivalent. *See* Bates v. Baez, 299 A.D.2d 382 (2d Dep't 2002). Willful and contumacious conduct can be inferred from repeated failures to appear for depositions without adequate excuses or from the extensive nature of delays without adequate excuses. *Id;* Wolfson v. Nassau County Medical Center, 141 A.D.2d 815 (2d Dep't 1988). Additionally, "while it is true that the nature and degree of the

penalty to be imposed for failure to comply with a discovery order is generally a matter left to the sound discretion of the trial court, the penalty of striking an answer for failure to disclose is extreme and should be levied only where the failure has been willful or contumacious." Hanson v. City of New York, 227 A.D.2d 217 (1st Dep't 1996).

Defendant's Conduct was Willful, Deliberate, and Contumacious

Defendant Van Pool's repeated delay and failure to appear for a deposition without a valid excuse is willful, deliberate, and contumacious conduct. *See* Bates v. Baez 299 A.D.2d 382. Plaintiff's initial discovery demands were served on June 30, 2011. Since that date, Defendant Van Pool has missed a court ordered deposition on October 6, 2011, two rescheduled deposition dates on December 8, 2011 and January 31, 2012, and has failed to follow the discovery schedule ordered by the Preliminary Conference to be complete by March 19, 2012. As of the date of this motion, May 21, 2012, Defendant Van Pool has missed at least three deposition dates, going 11 months without appearing for a Court Ordered examination. While Defendant Van Pool contends that they have responded to all written discovery demands, Defendant Van Pool concedes in their affirmation in opposition that they have failed to appear at any of the scheduled depositions, and offers no valid excuse as to their failure to appear. Additionally, Defendant Van Pool has not provided any employee records, bus route schedules, vehicle registration records, or any other documents pertinent to the relationship of Defendant Van Pool, Galaxy, and Boulevard to the vehicles and employees that may have been involved in the accident in question on October 17, 2007. While Defendant states these documents were consumed in a fire, Defendant has provided no official record of the fire or made any attempt to obtain copies of these discovery demands from other sources such as the Department of Motor Vehicles. These continual failures to appear for a deposition permit an inference that this conduct was willful, deliberate, and contumacious, therefore Plaintiff's motion to strike the Defendant's answer is granted upon a Conditional Order.

Defendant Van Pool's Motion Granting Subpoenas Pursuant to CPLR § 3106(b) to Compel the Attendance of Non-Party Officers Must Be Granted

CPLR § 3101(a) states in pertinent part, "[there] shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof."

"Material and necessary" are interpreted to mean nothing more or less than "relevant." Osowski v. AMEC Construction Management, Inc., et al., 69 A.D.3d 99, 106, 887N.Y.S.2d 11 (1st Dep't 2009) (quoting Allen v. Crowell-Collier Publ. Co., 21 N.Y.2d 403, 288 N.Y.S.2d 449, 235 N.E.2d 430 (1968)). "[T]he phrase must be 'interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity.'" *Id.* Furthermore, the term "evidence" has not been "restrictively interpreted to mean that a party has no right to obtain information at a pretrial examination that might be inadmissible or might not be used as evidence at trial. Wiseman v. American Motor Sales Corp., 103 A.D.2d 230, 237, 479 N.Y.S 2d 528 (2d Dep't 1984). In other words, inadmissibility is no longer a bar to a motion for discovery. *Id.* Defendant Van Pool seeks an Order granting subpoenas to compel the attendance of non-party witnesses, the Officers, pursuant to CPLR § 3106(b).

Defendant Van Pool's motion to compel the Officers for a deposition for discovery must be granted. Although the Officers were not eyewitnesses to the accident such that their hearsay evidence will be inadmissible at trial, their pretrial examination may provide assistance in the preparation for trial by "sharpening the issues and reducing delay and prolixity." Osowski v. AMEC Construction Management, 69 A.D.3d 99, 106. In Wiseman v. American Motor Sales, despite the fact that the police officer had not witnessed the accident, the court ruled it was possible that his observations of the scene when he arrived along with his opinion as to the cause of the accident would be material to a defense of plaintiff's action, though his opinion would be inadmissible. Wiseman v. American Motor Sales, 103 A.D.2d 230, 239. Additionally, the officer's report contradicted the plaintiff's version of the events.

Similarly, in the instant case the Officers' reports seem to contradict Gomez's testimony. While Gomez testified that the buses were still at the scene of the accident when the Officers arrived, and that he actually pointed out the buses to the Officers, the diagram in the police report suggests that the vehicles were not present upon arrival. A deposition of the Officers may clarify this discrepancy. If the discrepancy exists because the vehicles were not in the parked positions Gomez described but were in the process of leaving the scene, the Officers would have an observation of the scene of the accident that may be material to a defense. Considering the liberal construction of CPLR § 3101 with regards to discovery, and the discrepancy between the report and the testimony, Defendant Van Pool's motion granting subpoenas pursuant to CPLR § 3106(b) must be granted.

Accordingly, it is

ORDERED that Plaintiff's motion to amend pursuant to CPLR § 3025(b) is granted. It is further

ORDERED that Plaintiff's motion to strike Defendant Van Pool Inc., d/b/a Sphinx Transportation's answer pursuant to CPLR § 3126 is granted to the extent that Defendant Van Pool must produce someone with personal knowledge of the facts for an EBT within 45 days of service of this order with notice of entry. If Defendant Van Pool fails to appear within the prescribed 45 days, Defendant's answer will be automatically stricken without any further Court Order. There will be no adjournment for the EBT without a Court Order. It is further

ORDERED that Defendant Van Pool Inc., d/b/a Sphinx Transportation is to produce any documents as to the proof of the fire at the deposition. It is further

ORDERED that Defendant Van Pool Inc., d/b/a Sphinx Transportation produce any and all documents Plaintiff requested for discovery that were not destroyed in the fire, and any and all documents available from other sources. It is further

ORDERED that Defendant Van Pool Inc., d/b/a Sphinx Transportation's motion granting subpoenas to compel Detective Michael Weguelin and Officer Giacomo Sciuto for discovery pursuant to CPLR § 3106(b) is granted. It is further

ORDERED that Defendant Van Pool serve a copy of this Order with Notice of Entry on all parties within 30 days of entry of this Order.

This constitutes the decision and Order of the Court.

JUL 20 2012

DATE

HON. WILMA GUZMAN

JUSTICE SUPREME COURT