

Kelly v Amboy Bus Co., Inc.
2016 NY Slip Op 30989(U)
May 27, 2016
Supreme Court, New York County
Docket Number: 160274/2013
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

GERALDINE KELLY
Plaintiff,
-against-
AMBOY BUS CO., INC.,
Defendants.

INDEX NO. 160274/2013
MOTION DATE 05-25-2016
MOTION SEQ. NO. 003
MOTION CAL. NO.

The following papers, numbered 1 to 7 were read on this motion to strike the Answer and summary judgment.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits
Replying Affidavits
Cross-Motion: [] Yes [X] No

Table with 2 columns: PAPER NUMBERED, and corresponding page ranges (1-3, 4-5, 6-7).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Upon a reading of the foregoing cited papers, it is Ordered that this motion to strike Defendant's Answer for Spoliation, and summary judgment on the issue of liability, is granted to the extent stated herein.

Plaintiff alleges that she tripped and fell on September 12, 2012, while working as an employee for the Board of Education aboard a bus owned by Defendant. Plaintiff initially commenced an action against Atlantic Express Transportation Corp. on December 19, 2012. The action was stayed pending the defendant and its subsidiaries filing for bankruptcy on November 4, 2013. The instant action was commenced against defendant Amboy Bus Co., Inc., (a subsidiary of Atlantic Express) on November 6, 2013, and the previous 2012 action against Atlantic Express was withdrawn. Issue was joined, the parties proceeded with discovery, and plaintiff filed the Note of Issue on September 3, 2015.

Plaintiff moved on a prior motion dated July 16, 2014, to strike the defendant's Answer and preclude defendant from introducing evidence on the issue of liability In an Order dated October 20, 2014, this Court denied the motion as moot. This Court found that defendant had responded to plaintiff's Notice to Produce and Combined Demands, plaintiff accepted these responses, and had only objected to specific responses. In this October 20, 2014, Order, This Court further directed that defendant provide plaintiff with the following:

- (1) The trip cards relative to the route known as Manhattan 808 at 225 East 23rd Street in New York City;
(2) Passenger rosters or manifests for the route known as Manhattan 808 at 225 East 23rd Street in New York City on September 12, 2012;
(3) The identity of all personnel employed by Amboy that were on the vehicle in question at the time of the accident on September 12, 2012;
(4) A full and complete copy of the Qualification File of the driver of the vehicle in question at the time of the accident on September 12, 2012;
(5) The warnings and instructions for the retractor on the subject bus; and
(6) The identity of the manufacturer or vendor who provided the retractors on the subject bus.

In the event that the discovery sought was unavailable, defendant was to provide a detailed search affidavit describing the search conducted, when the search was conducted, who performed the search, where the documents could be, and whether the documents were lost or destroyed. If defendant failed to comply with either providing the demanded discovery, or a detailed search affidavit, then defendant was to be precluded from introducing evidence at the time of trial regarding the items demanded but not produced. (Mot. Exh. M). Defendant provided search affidavits for its inability to provide documents pertaining to trip cards, passenger rosters, vehicle maintenance, and retractors. (Mot. Exhs. C & D).

In a May 28, 2015, Order This Court granted plaintiff's motion to amend its prior discovery Order of April 1, 2015. This Court directed that the deposition of defendant's driver Jean Juste, who was driving the vehicle on the day plaintiff was injured, was to be taken within 60 days, or he would be precluded from testifying at trial. Defendant failed to produce Mr. Juste.

Plaintiff now moves for an Order (1) pursuant to CPLR 3126, striking the Defendant's Answer for spoliation of critical evidence and documents, and (2) pursuant to CPLR 3212 for summary judgment in its favor on the issue of liability against defendant, and setting the matter down for an assessment of damages. Defendant opposes the motion.

Plaintiff contends that defendant spoliated vital documents by negligently or intentionally allowing these evidentiary documents to be lost or destroyed when defendant filed for bankruptcy and was subsequently dissolved. Plaintiff argues that the defendant was on notice of the instant action because of the previous action, commenced and later withdrawn, against its parent company Atlantic Express.

Plaintiff's claim is that defendant's employees failed to remove a retractor on the subject vehicle that was not in use, that the retractors are intended to be and required to be removed when not in use, and that this failure to remove the retractor created a tripping hazard upon which plaintiff tripped and fell causing her to sustain serious injuries. Plaintiff also argues that because defendant has not produced one witness for a deposition, and has failed to produce vital and relevant documents that go to the heart of plaintiff's case, defendant cannot put forth any evidence to the contrary, and therefore summary judgment on the issue of liability in favor of plaintiff is warranted.

In opposition, defendant does not provide any evidence to raise an issue of fact, other than stating plaintiff may be negligent for her own trip and fall because she stepped backwards and tripped on the retractor that was an "open and obvious" condition.

CPLR § 3126 grants the court the power to sanction a party that fails to comply with a court's discovery order. The nature and degree of the penalty to be imposed for a party's failure to comply with an order is a matter within the sound discretion of the court (CPLR § 3126). The striking of a pleading is a drastic remedy and is only warranted where a clear showing has been made that the noncompliance with an order was willful, contumacious or due to bad faith (*Mateo v. City of New York*, 274 A.D. 2d 337, 711 N.Y.S. 2d 396 [1st Dept. 2000]). Willful and contumacious conduct, warranting the striking of a pleading, may be inferred from a party's repeated failure to comply with a court order, coupled with inadequate explanations for the failure to comply (*Duncan v.*

Hebb, 47 A.D. 3d 871, 850 N.Y.S. 2d 610 [2nd. Dept. 2008]).

Here, plaintiff is requesting that This Court find that the defendant spoliated relevant evidence, and due to this, defendant's Answer should be stricken. Plaintiff filed the note of issue on September 3, 2015, and has not served any post-note of issue discovery demands. "While pretrial discovery after a note of issue has been filed is generally inappropriate, it may be permitted to prevent substantial prejudice where unusual or unanticipated circumstances develop subsequent to the filing of the note of issue." *Esteva v. Catsimatidis*, 4 A.D.3d 210, 772 N.Y.S.2d 267 [1st Dept. 2004], citing 22 NYCRR § 202.21[d)]. Plaintiff indicated on the note of issue that nothing was outstanding and all discovery was complete. (Mot. Exh. R). Plaintiff has not served any post-note of issue demands, nor has plaintiff indicated that there has been any change in circumstances that would result in substantial prejudice to the plaintiff. Therefore, plaintiff has not stated a basis for having defendant's Answer stricken.

Plaintiff has, however, stated a basis for summary judgment on the issue of liability.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (*Klein v. City of New York*, 81 N.Y. 2d 833, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (*Amatulli v. Delhi Constr. Corp.*, 77 N.Y. 2d 525, 569 N.Y.S. 2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (*SSBS Realty Corp. V. Public Service Mut. Ins. Co.*, 253 AD2d 583; *Martin V. Briggs*, 235 192).

Summary Judgment is "issue finding" not "issue determination" (*Sillman*, supra; *Epstein*, supra). It is improper for the motion court to resolve material issues of fact. These should be left to the trial court to resolve (*Brunetti, v. Musallam*, 11 A.D. 3d 280, 783 N.Y.S. 2d 347[1st Dept. 2004]).

Defendant has not produced a single witness for an examination before trial, has conceded that certain documents were not able to be located, and its only argument is that there is an issue of fact as to plaintiff possibly being contributorily negligent because she stepped backwards onto the retractor. Plaintiff has established that the retractor on the floor of the subject vehicle created a tripping hazard, causing plaintiff to trip and fall, and that this hazard was created by defendant. Defendant has failed to provide any evidence to the contrary. Therefore, summary judgment on the issue of liability in plaintiff's favor is warranted. To the extent plaintiff was contributorily negligent, a trial is required to determine plaintiff's comparative fault and damages.

Accordingly, it is ORDERED, that Plaintiff's motion is granted to the extent stated herein, and it is further,

ORDERED, that Plaintiff's motion to strike Defendant's Answer is denied, and it is further,

ORDERED, that Plaintiff's motion for summary judgment on the issue of liability against defendant is granted, and it is further,

ORDERED, that judgment is granted in favor of Plaintiff and against Defendant on the issue of liability, and it is further,


ORDERED, that Plaintiff shall serve a copy of this Order with Notice of Entry upon Defendant within thirty (30) days from the date of entry of this Order, and it is further,

ORDERED, that Plaintiff shall serve a copy of this Order with Notice of Entry upon the General Clerk's Office Trial Support Clerk (Room 119) who is directed to place this action on the trial calendar of this Court for a trial on Plaintiff's comparative fault and damages, and it is further,

ORDERED, that the Clerk of the Court enter judgment accordingly.

ENTER:

**MANUEL J. MENDEZ
J.S.C.**



**MANUEL J. MENDEZ
J.S.C.**

Dated: May 27, 2016

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE