

Rosario v New York City Tr. Auth.

2016 NY Slip Op 30387(U)

March 7, 2016

Supreme Court, New York County

Docket Number: 155781/2014

Judge: Michael D. Stallman

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 21

FANY ROSARIO,

INDEX NO. 155781/2014

Plaintiff,

MOTION DATE 2/11/16

MOTION SEQ. NO. 001

- v -

NEW YORK CITY TRANSIT AUTHORITY,
METROPOLITAN TRANSPORTATION AUTHORITY, MTA
BUS COMPANY, MANHATTAN AND BRONX SURFACE
TRANSIT OPERATING AUTHORITY and MIGUEL
SANCHEZ,

Defendants.

The following papers, numbered 11-27, were read on this motion to compel

Notice of Motion —Affirmation —Affirmation of Good Faith— Exhibits 1-8 — No(s). 11-22
Affidavit of Service

Affirmation in Opposition — Exhibits A-C—Affidavit of Service No(s). 23-27

Upon the foregoing papers, it is ordered that plaintiff's motion to compel is granted in part, and within 45 days, defendants shall submit for *in camera* inspection all documents from the personnel file of defendant Miguel Sanchez, concerning or related to an accident on September 10, 2013, including the results of urine testing or breathalyzer testing, if any; and it is further

ORDERED that defendants shall produce supervisor Roscher (shield #761827) for a deposition, within 90 days of the court's decision as to the *in camera* review of Sanchez's personnel file; and it is further

ORDERED that, if Roscher's deposition is not held, then Roscher shall be precluded from testifying at trial on defendants' behalf.

(Continued...)

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

Rosario v New York City Tr. Auth., Index No. 155781/2014

Plaintiff alleges that, on September 10, 2013, she was a pedestrian struck by a BxM7 bus operated by defendant Miguel Sanchez at the intersection of Second Avenue and East 125th Street in Manhattan.

By a Post EBT Notice for Discovery and Inspection dated June 4, 2014, plaintiff demanded a copy of Sanchez's entire personnel file, "including his 'dismissal letter' and all reports made, including notes and testing...regarding the subject incident." Defendants objected to the demand. Plaintiff now moves to compel defendants to produce the personnel file.

As defendants indicate, courts have consistently ruled that the personnel file of an employee of the New York City Transit Authority (the NYCTA) is not discoverable when it is sought for the purpose of establishing the NYCTA's negligence under a theory of negligent supervision, training, or retention, and when it is undisputed that the NYCTA employee was acting within the scope of his or her employment.

"Generally, where an employee is acting within the scope of his or her employment, thereby rendering the employer liable for any damages caused by the employee's negligence under a theory of respondeat superior, no claim may proceed against the employer for negligent hiring or retention. This is because if the employee was not negligent, there is no basis for imposing liability on the employer, and if the employee was negligent, the employer must pay the judgment regardless of the reasonableness of the hiring or retention or the adequacy of the training."

(*Karoon v New York City Tr. Auth.*, 241 AD2d 323, 324 [1st Dept 1997] [citation omitted]; *Segal v St. John's Univ.*, 69 AD3d 702 [2d Dept 2010]; *Drisdom v Niagara Falls Mem. Med. Ctr.*, 53 AD3d 1142, 1143 [4th Dept 2008]; *Coville v Ryder Truck Rental, Inc.*, 30 AD3d 744 [3d Dept 2006].)

(Continued...)

Rosario v New York City Tr. Auth., Index No. 155781/2014

Karoon recognized an exception, “where the injured plaintiff is seeking punitive damages from the employer based on alleged gross negligence in the hiring or retention of the employee.” (*Karoon*, 214 AD2d at 324.) However, the exception does not apply to the defendants, because “the State and its political subdivisions, as well as public benefit corporations such as the instant Transit Authority defendants, are not subject to punitive damages.” (*Id.*) Thus, the personnel records of the bus driver are generally not discoverable for the purpose of proving negligent operation of the vehicle. (*Neiger v City of New York*, 72 AD3d 663, 664 [2d Dept 2010].)

In this case, it is undisputed that Miguel Sanchez was acting in the scope of his employment. However, at the court conference on February 11, 2016, plaintiff’s counsel narrowed his discovery demand only to those portions of Sanchez’s personnel file that are about the September 10, 2013 incident at issue in this action. Because the discovery sought would be reasonably calculated to lead to admissible evidence as to the issue of Sanchez’s operation of the vehicle on September 10, 2013, and not sought for the purpose of proving a theory of negligent supervision, training, or retention, defendants are directed to submit, for *in camera* inspection, all documents from the personnel file of defendant Miguel Sanchez, concerning or related to an accident on September 10, 2013 within 45 days.


Plaintiff is entitled to a conditional order of preclusion based on Roscher’s repeated failure to appear for a deposition. Defendants agreed to produce Supervisor Roscher for a deposition pursuant to a stipulation dated July 30, 2015 and a so-ordered stipulation dated November 13, 2015. It is undisputed that Roscher’s EBT has not been held. In their opposition papers, defendants offer no explanation as to why Roscher did not appear for his scheduled deposition. The absence of any explanation for the pattern of defendants’ non-compliance gives rise to an inference of willfulness. (*Henderson-Jones v City of New York*, 87 AD3d 498, 504 [1st Dept 2011] [internal citation and quotation marks omitted].)

(Continued...)

Rosario v New York City Tr. Auth., Index No. 155781/2014

At the court conference on February 11, 2016, plaintiff's counsel indicated that he wanted to take Roscher's deposition after the Court's decision on the *in camera* review. Thus, defendants shall produce supervisor Roscher (shield #761827) for a deposition, within 90 days of the court's decision as to the *in camera* review of Sanchez's personnel file, if he is still an employee. If Roscher's deposition is not held, then Roscher shall be precluded from testifying at trial on defendants' behalf, if he is still an employee.

Dated: 3/7/16
New York, New York


_____, J.S.C.

- 1. Check one:.....
- 2. Check if appropriate:..... MOTION IS:
- 3. Check if appropriate:.....

- CASE DISPOSED NON-FINAL DISPOSITION
- GRANTED DENIED GRANTED IN PART OTHER
- SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

MICHAEL D. STALLMAN
J.S.C.