

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D15138
C/gts

_____AD3d_____

Argued - April 2, 2007

DAVID S. RITTER, J.P.
FRED T. SANTUCCI
RUTH C. BALKIN
WILLIAM E. McCARTHY, JJ.

2006-02906
2007-04211

DECISION & ORDER

Diana Jean-Pierre, appellant, v Touro College,
et al., respondents, et al., defendant.

(Index No. 21332/01)

Cascione, Purcigliotti & Galluzzi, P.C., New York, N.Y. (Thomas G. Cascione of counsel) for appellant.

John P. Humphreys, New York, N.Y. (David S. Heller of counsel), for respondent Touro College.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York, N.Y. (Joel M. Simon and Eric Tosca of counsel), for respondent Arco Management Corp.

In an action to recover damages for personal injuries, the plaintiff appeals from (1) a judgment of the Supreme Court, Kings County (Schneier, J.), dated February 15, 2006, which, upon a jury verdict on the issue of liability, is in favor of the defendant Arco Management Corp. and against her dismissing the complaint insofar as asserted against that defendant, and (2) a judgment of the same court entered March 16, 2006, which, upon the jury verdict, is in favor of the defendant Touro College and against her dismissing the complaint insofar as asserted against that defendant.

ORDERED that the judgments are affirmed, with one bill of costs.

Contrary to the plaintiff's contention, the Supreme Court properly denied her request for an adverse inference charge against the defendants Touro College (hereinafter Touro) and Arco

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Management Corp. (hereinafter Arco) based upon their failure to produce an accident report allegedly generated by a nonparty to this action. A party seeking an adverse inference charge against an opponent who has failed to produce a document must make a prima facie showing that the document in question actually exists, that it is under the opponent's control, and that there is no reasonable explanation for failing to produce it (*see Wilkie v New York City Health & Hosps. Corp.*, 274 AD2d 474; *Cidieufort v New York City Health & Hosps. Corp.*, 250 AD2d 720, 721; *Scaglione v Victory Mem. Hosp.*, 205 AD2d 520, 520-521). Here, a Touro representative testified that he never sought or received the accident report, and an Arco representative testified that he was unable to locate the document after performing a search. Accordingly, the plaintiff failed to establish her entitlement to an adverse inference charge based upon the missing accident report (*see Mathis v New York Health Club*, 288 AD2d 56, 57; *Wilkie v New York City Health & Hosps. Corp.*, *supra* at 474-475; *cf. Cusumano v New York City Tr. Auth.*, 75 AD2d 801).

The plaintiff's remaining contentions are without merit.

RITTER, J.P., SANTUCCI, BALKIN and McCARTHY, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court