

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

D26450
W/kmg

_____AD3d_____

Submitted - February 9, 2010

MARK C. DILLON, J.P.
ANITA R. FLORIO
HOWARD MILLER
LEONARD B. AUSTIN, JJ.

2008-09109

DECISION & ORDER

Frank Riccuiti, respondent, v Consumer Product Services, LLC, et al., appellants.

(Index No. 2327/07)

Martyn, Toher and Martyn, Mineola, N.Y. (John J. Bello, Jr., of counsel), for appellants.

Bloom & Noll, LLP, Mineola, N.Y. (Brett I. Bloom of counsel), for respondent.

In an action to recover damages for personal injuries, the defendants appeal from an order of the Supreme Court, Nassau County (Palmieri, J.), dated September 15, 2008, which granted the plaintiff's motion for summary judgment on the issue of liability and pursuant to CPLR 3126 to strike the answer insofar as asserted on behalf of the defendant Yacek Kowalski.

ORDERED that the order is affirmed, with costs.

On the morning of December 30, 2005, the plaintiff, a tractor-trailer operator, was delivering merchandise to a warehouse owned by the defendant Consumer Product Services, LLC (hereinafter CPS), when he allegedly was struck by a forklift operated by the defendant Yacek Kowalski, a CPS employee. The plaintiff commenced this action to recover damages against both CPS and Kowalski. Thereafter, the plaintiff moved, inter alia, for summary judgment on the issue of liability and pursuant to CPLR 3126 to strike the answer insofar as asserted on behalf of Kowalski, based upon Kowalski's failure to appear for a court-ordered deposition.

The evidence submitted by the plaintiff in support of his motion established, prima facie, that the underlying accident was caused solely by Kowalski's negligence in operating the forklift

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(see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). In opposition, the defendants failed to submit any admissible evidence which raised a triable issue of fact (see CPLR 3212[b]).

“Although actions should be resolved on the merits whenever possible, where the conduct of the resisting party is shown to be willful and contumacious, the striking of a pleading is warranted” (*Savin v Brooklyn Mar. Park. Dev. Corp.*, 61 AD3d 954, 954). Here, the Supreme Court providently exercised its discretion in striking the answer insofar as asserted on behalf of Kowalski. The record reflects that the answer was interposed on behalf of both defendants, and that Kowalski did not raise any defenses based upon lack of personal jurisdiction. In opposition to that branch of the plaintiff’s motion which was to strike the answer insofar as asserted on behalf of Kowalski, defense counsel represented that his office was unable to locate Kowalski and, therefore, could not produce him for a deposition. The mere fact that Kowalski may have been outside the State of New York, and had made himself unavailable, did not preclude the Supreme Court from striking the answer insofar as interposed by him for failure to appear at a court-ordered deposition (see *Carabello v Luna*, 49 AD3d 679, 680; *Maignan v Nahar*, 37 AD3d 557).

DILLON, J.P., FLORIO, MILLER and AUSTIN, JJ., concur.

ENTER:


James Edward Pelzer
Clerk of the Court