

<b>Mann v Cooper Tire Co.</b>
2004 NY Slip Op 30372(U)
November 10, 2004
Supreme Court, Bronx County
Docket Number: 21426/02
Judge: Nelson S. Roman
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX

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NANCY ESPERANZA MANN, AS INDIVIDUAL AND AS  
ADMINISTRATRIX FOR THE ESTATE OF CHAMKAUR  
SINGH MANN,

**DECISION AND ORDER**

Index No: 21426/02

Plaintiff(s),

- against -

THE COOPER TIRE COMPANY, AND THE TCB  
CORPORATION

Defendant(s).

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Plaintiffs move seeking to strike defendants' answer unless defendants consent to the release of a tire currently in the custody of the Canadian authorities. Plaintiffs argue that pursuant to a Court order dated February 20, 2004, plaintiff NANCY ESPERANZA MANN (Mann), was deemed the owner of the tire. Plaintiffs allege that due to defendants interference and discussions with the Canadian authorities, the Canadian authorities, fearing potential liability, will not release the tire unless defendants consent. Plaintiffs allege that repeated attempts to get defendants to consent to release of the tire to the custody of Mann have been futile.

Defendant's oppose asserting that there is no legal basis for the striking of defendants' answer. Defendants do little to explain what contact if any they have had with the Canadian authorities but concede that any efforts to obtain the tire

have been made in furtherance of their attempt to procure a key piece of evidence. They allege that any attempts by plaintiff to obtain the tire should not be tolerated because, pending the resolution of a motion before Justice Nelson Roman, this Court has stayed discovery in this action.

Briefly, this case involves a single car motor vehicle accident which occurred on March 4, 2001. It is alleged that the cause of the accident was tire failure, more specifically, tread separation in one of the tires. It is alleged that the Canadian authorities took possession of the tire which allegedly failed.

#### The Law on Striking Pleadings Based on Failure to Provide Discovery

Striking a party's pleading for failure to provide discovery is an extreme sanction, warranted only when the failure to disclose is willful, contumacious, or when the non-disclosing party has violated discovery Orders. Bako v. V.T. Trucking Co., 143 A.D.2d 767 (1<sup>st</sup> Dept. 1999). Where the failure to disclose is neither willful nor contumacious, a single instance of non-compliance does not warrant the striking of a party's pleadings. Palmenta v. Columbia University, 266 A.D.2d 90 (1<sup>st</sup> Dept. 1999); Commerce & Industry Insurance Company v. Lib-Com, Ltd, 266 A.D.2d 142 (1<sup>st</sup> Dept. 1999). Only when a party adopts a pattern of non-compliance in violation of Court Orders thereby delaying the discovery process, is the striking of pleadings warranted. Gutierrez v. Bernard, 267 A.D.2d 65 (1<sup>st</sup> Dept. 1999). Helms v. Gangemi, 265 A.D.2d 203 (1<sup>st</sup> Dept. 1999).

Discussion

Clearly, to the extent that plaintiffs seek to strike defendants' answer, there is no basis for the relief sought. Defendants' behavior is not the kind for which the Court can strike a pleading. This isn't a situation where the allegation is that defendants have repeatedly disregarded court orders or have neglected to provide discovery. Consequently, plaintiffs' motion is hereby denied.

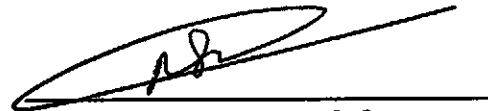
The Court cannot order defendants to consent to anything. Consent is a voluntary act. However, the Court notes that based on this Court's previous order, dated February 20, 2004, Mann is the rightful owner of the tire in question. Pursuant to that order, Mann is also entitled to possession of said tire. Defendants should not and cannot impede the Canadian authorities from releasing the tire to its rightful owner, Mann. The Canadian authorities should release the tire to Mann, despite any protest by defendants. If defendants want to examine the tire and test the same, they can address that issue through the discovery process. In fact, parties are directed to this Court's order dated November 10, 2004, which resolves defendants' motion to re-argue and sets the discovery schedule herein, including the release, exchange, and testing of the tire in question. It is hereby

**ORDERED** that defendant's not interfere with the Canadian authority's release of the tire in question to Mann. It is further

**ORDERED** that plaintiffs serve a copy of this order with notice of entry on defendants within ten (10) days hereof.

This constitutes this Court's decision and Order.

Dated :        November 10, 2004  
                  Bronx, New York

A handwritten signature in black ink, appearing to read 'N.S. Roman', is written over a horizontal line.

Nelson S. Roman, J.S.C.