

Minchew v City of New York

2007 NY Slip Op 30109(U)

March 13, 2007

Supreme Court, Richmond County

Docket Number: 0014015

Judge: Thomas P. Aliotta

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

CHARLES MINCHEW,
Plaintiff(s),

-against-

THE CITY OF NEW YORK, CARMELO
VALENZIANO and JOSEPHINE VALENZIANO,

Defendant(s).

DCM PART 1

HON. THOMAS P. ALIOTTA

DECISION AND ORDER

Index No. 14015/01

Motion Nos. 926 - 004

1351 - 005

2851 - 006

The following papers numbered 1 to 6 used on these motions the 10th day of
January, 2007.

	Papers Numbered
Notice of Motion of Defendants CARMELO VALENZIANO and JOSEPHINE VALENZIANO to Extend their Time to Answer Plaintiff's Notice to Admit (Affirmation in Support) _____	<u>1</u>
Plaintiff's Affirmation in Opposition _____	<u>2</u>
Reply Affirmation of Defendants CARMELO VALENZIANO and JOSEPHINE VALENZIANO _____	<u>3</u>
Plaintiff's Cross Motion to Strike Answer (Affirmation in Support) _____	<u>4</u>
Affirmation in Opposition and in Reply of Defendants CARMELO VALENZIANO and JOSEPHINE VALENZIANO _____	<u>5</u>
Amended Notice of Motion of Defendants CARMELO VALENZIANO and JOSEPHINE VALENZIANO to Strike Plaintiff's Notice to Admit _____	<u>6</u>

Upon the foregoing papers, plaintiff's cross motion (No. 1351) is denied, and the
amended motion (No. 2851) of defendants CARMELO VALENZIANO and JOSEPHINE

VALENZIANO is granted to the extent indicated.¹

Plaintiff commenced this action to recover damages for personal injuries allegedly sustained when he tripped and fell on an uneven portion of a sidewalk located adjacent to premises owned by defendants CARMELO VALENZIANO and JOSEPHINE VALENZIANO (hereinafter “defendants”). A Notice to Admit was subsequently served upon these defendants seeking information regarding their prior repairs, if any, to the subject sidewalk. Following plaintiff’s rejection of their unverified answer, defendants moved for an extension of time to serve a verified answer.

In support of the extension, defendants claim, through their attorney, that they are elderly and infirm; live in Italy and do not speak English. Accordingly, time is requested to make the necessary arrangements to procure a proper answer.

Plaintiff opposes the application and cross-moves to strike defendants’ answer based on their failure to appear for a court-ordered deposition. Plaintiff contends that following several failed attempts to schedule their EBTs, defendants’ attorney produced their son, claiming that his clients are too ill to travel to the United States. However, it soon became apparent to plaintiff that the son lacked knowledge of either the location of plaintiff’s accident or the extent of any prior repairs. Plaintiff contends that it was this lack of information which prompted the service of the Notice to Admit. According to plaintiff, defendants’ initial response contained only general denials; was not verified; and was untimely.

In their Amended Notice of Motion, defendants seek to strike plaintiff’s Notice to Admit, claiming that it improperly seeks the admission of facts going to the heart of the controversy. In any event, defendants contend that the appropriate remedy for any perceived deficiency in their answer to the Notice to Admit is to award plaintiff the cost of proving the

disputed fact at trial. Striking the answer and deeming the facts admitted is not warranted. In the alternative, defendants repeat their request for additional time to serve a proper response.

With regard to so much of defendants' amended motion as seeks to extend their time to answer, it is uncontested that their initial response was neither signed nor verified. While such a response can be stricken (*cf.* Matter of Johnson v. Town of Haverstraw, 102 AD2d 451, 461), a Court may allow a party "to amend or withdraw any admission on such terms as may be just" (CPLR 3123[b]). Here, it is the opinion of this Court that defendants' attorney has sufficiently explained the circumstances which prevented the service of a timely verified response to warrant a reasonable extension of time within which to serve a proper answer.

However, with regard to the balance of the amended motion, it is well settled that the purpose of a notice to admit is to eliminate from dispute those matters about which there can be no real controversy (*see* CPLR 3123[a]; Howlan v. Rosol, 139 AD2d 799, 802). It is not intended to compel the admission of ultimate facts or issues that should only be resolved at trial (*see* Meadowbrook-Richman, Inc. v. Cicchiello, 273 AD2d 6). In this case, it does not appear that the notice is improper, as plaintiff merely seek to establish the extent of defendants' knowledge of any prior repairs at the location of his fall. These are fair and reasonable questions which plaintiff would surely be entitled to ask at an EBT, and do not go to the ultimate issue of whether any negligent repair constituted a proximate cause of plaintiff's injuries.

With regard to plaintiff's cross motion to strike defendants' answer for failing to appear for their EBT, the drastic sanction of striking a pleading should not be invoked unless the default is shown to be deliberate and contumacious (*see e.g.* Mayers v. Consolidated Charcoal Co., 154 AD2d 577). Thus, in order to prevail on such a motion, it is the movant's

burden to make a clear- cut showing of willfulness (*see* Rosner v. Blue Channel Corp., 131 AD2d 654). Here, plaintiff has failed to show that defendants' failure to appear was either wilful or contumacious. Neither has he provided this Court with any details regarding, *e.g.*, the dates and times of defendants' alleged failures to appear. In this regard, while the affirmation of defendants' attorney may be technically insufficient to establish defendants' purported ill-health, the nature of the explanation is sufficiently reasonable to preclude the extreme sanction of striking their answer (*id;* *cf.* CPLR 3123[c]).

Accordingly, it is

ORDERED that the motion (No. 926) of defendants CARMELO and JOSEPHINE VALENZIANO is denied as superceded by the amended motion dated August 29, 2006; and it is further

ORDERED that plaintiff's cross motion (No. 1351) is denied; and it is further

ORDERED that defendants' amended motion (No. 2851) is granted to the extent that they are directed to serve and file a proper response to plaintiff's Notice to Admit within 60 days after the service upon their attorney of a copy of this Decision and Order with notice of entry; and it is further

ORDERED that the balance of defendants' amended motion is denied.

This constitutes the decision and Order of the Court.

Law Clerk to notify both sides of this Decision/Order

DATED: MAR 13, 2007

HON. THOMAS P. ALIOTTA, J.S.C.

ASN BY EVE/pt on 3/13/07

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¹ Defendants' initial motion (No. 926) is dismissed as superceded by their amended motion dated August 29, 2006.