

**Siminava v Smith**

2007 NY Slip Op 33753(U)

November 12, 2007

Supreme Court, New York County

Docket Number: 0107183/2006

Judge: Deborah A. Kaplan

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. DEBORAH A. KAPLAN  
*Justice*

PART 22

TATYANA SIMINAVA

INDEX NO. 107183/06

- v -

MOTION DATE 10-31-07

MOTION SEQ. NO. 001

CEDRIC SMITH, ON-TIME ELITE, INC.,  
ON-TIME ELITE LOCATION VAN, INC.  
and DLB LEASING, INC.

MOTION CAL. NO. 95

[and a third-party action]

The following papers, numbered 1 to 3, were read on this motion, *inter alia*, to strike the defendants' answer pursuant to CPLR 3126 for failure to provide discovery, and to strike the defendants' errata sheet pursuant to CPLR 3116(a).

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1

Answering Affidavits — Exhibits (Memo) \_\_\_\_\_

2

Replying Affidavits (Reply Memo) \_\_\_\_\_

3

Cross-Motion:  Yes  No

This is an action for damages arising from an automobile accident wherein the plaintiff, a professional model, suffered fractures, scarring and other injuries when she fell out of a 1982 motor home, the "Super Star", which was traveling on the Gowanus Expressway on its way to a photo shoot. She commenced the instant action against defendant Cedric Smith, the driver of the vehicle, On-Time Elite Location Van, Inc. [and its predecessor On-Time Elite, Inc.], which leased the vehicle from defendant DLB Leasing, Inc., alleging that an unlocked, improperly secured or broken door on the vehicle caused her to fall onto the highway. The plaintiff now moves, *inter alia*, to strike the defendants' answer pursuant to CPLR 3126 for failure to provide discovery, and to strike the defendants' errata sheet pursuant to CPLR 3116(a).

During the course of his deposition on December 8, 2006, Danny Joseph, a principal of On-Time Elite Location Van, Inc., testified regarding an "accident file" maintained by his company which contained "all of the paperwork that we got from the investigation and from the insurance company" as well as the police report and any statement made by the driver. Joseph also testified that the company maintains repair and maintenance records for each vehicle in its fleet. During this testimony, defendants' counsel turned over the personnel file of Cedric Smith, "the records in regard to the subject vehicle from April of

During the course of his deposition on December 8, 2006, Danny Joseph, a principal of On-Time Elite Location Van, Inc., testified regarding an "accident file" maintained by his company which contained "all of the paperwork that we got from the investigation and from the insurance company" as well as the police report and any statement made by the driver. Joseph also testified that the company maintains repair and maintenance records for each vehicle in its fleet. During this testimony, defendants' counsel turned over the personnel file of Cedric Smith, "the records in regard to the subject vehicle from April of 2004" and a document entitled Driver's Safety Manual. Counsel admitted that the documents had been requested in the past and were being provided in an untimely manner. Plaintiffs' counsel reserved his right to recall the witness after having a chance to review the documents just handed to him.

Following the deposition, the plaintiff served a discovery demand upon the defendants for the accident file and the vehicle's repair and maintenance records. Defendants' response was that the requested documents were "previously exchanged" at the deposition. On January 17, 2007, plaintiff's counsel served a second demand, explaining that the documents exchanged at the deposition were not responsive to the request. Again, the defendants responded only that the documents had been previously exchanged.

Plaintiff served a copy of Joseph's deposition transcript upon the defendants on January 5, 2007, for signature and any corrections. According to the plaintiff, the defendants did not return the transcript within sixty days as required by CPLR 3116 but waited until May 16, 2007. The transcript is signed by Joseph, notarized and is dated February 7, 2007. That errata sheet is blank. A separate errata sheet, also signed by Joseph and notarized, is dated April 10, 2007, and contains three corrections to the transcript. Two reference Joseph's "accident file" testimony and state: "There is no accident file. All we have is correspondence from insurance company, the police accident report and letters from my attorney." The third references the testimony in regard to "repair and maintenance records" and states: "The maintenance and repair records where [sic] provided to the [illegible] attorney and these are [illegible] records that there are." This motion ensued.

CPLR 3126 authorizes the Court to strike a pleading or impose other sanctions for a party's failure to comply with court-ordered discovery. The Court notes that a Case Scheduling Order was issued on August 8, 2006, and that the parties appeared for

subsequent compliance conferences which resulted in discovery orders. However, none of the court orders are included in the moving papers. Nor does the plaintiff allege that the Court previously ordered the defendants to provide the accident file or the repair and maintenance records. As such, she has not established that the defendants' failure to comply with their demands was "willful, contumacious or in bad faith." Palmenta v. Columbia Univ., 266 AD2d 90, 91 (1<sup>st</sup> Dept. 1999); see CPLR 3126; Figdor v City of New York, 33 AD3d 560 (1<sup>st</sup> Dept. 2006). Moreover, it is not clear that such records exist or have not already been exchanged in their entirety. The Court notes that the plaintiff did not make clear on the deposition record that the documents exchanged at the deposition were not those demanded, and never requested a further deposition of Joseph. Neither party has supplied to the court a copy of the documents actually exchanged at the deposition.

Therefore, that branch of the plaintiff's motion which seeks to strike the defendants' answer is granted to the extent that the defendants are directed to provide to the plaintiff, on or before December 13, 2007, the entire "accident file" and "repair and maintenance records" testified to by Danny Joseph at his deposition, to the extent not already provided or an affidavit of Danny Joseph stating which documents were exchanged at his deposition, stating that no further records exist and setting forth all efforts made to locate and produce them. The defendant's failure to comply will result in preclusion and/or other sanctions.

CPLR 3116(2) requires that the transcript of a deposition be signed by the witness and returned, along with any corrections or changes, within sixty days of receipt. The statute expressly provides that "no changes to the transcript may be made by the witness more than sixty days after submission to the witness for examination." Here, the defendants do not dispute that Joseph received the deposition transcript on January 5, 2007, and failed to sign, correct and return it within sixty days. Nor do they offer any cogent explanation for their failure to comply with the statute in a timely manner. Indeed, in their opposition papers, the defendants merely assert that the plaintiff was not prejudiced by their non-compliance.

Accordingly, that branch of the plaintiffs' motion which seeks to strike the errata sheet dated April 10, 2007, for failure to comply with CPLR 3116(a) is granted in its entirety. See Garcia v Stickel, 37 AD3d 368 (1<sup>st</sup> Dept. 2007); Rodriguez v Jones, 227 AD2d 220 (1<sup>st</sup> Dept. 1996). In so ruling, the Court has considered that, in light of plaintiff's outstanding demands for the accident report and repair and maintenance

records, the purported "corrections" to the transcript can be viewed as an attempt to evade discovery obligations. See Schachat v Bell Atlantic Corp., 282 AD2d 329 (1<sup>st</sup> Dept. 2001); Rodriguez v Jones, supra.

For these reasons, upon the foregoing papers and after oral argument, it is,

ORDERED that the branch of the plaintiff's motion which seeks to strike the defendants' answer pursuant to CPLR 3126 is granted to the extent that the defendants are directed to provide to the plaintiff, on or before December 13, 2007, the "accident file" and the "repair and maintenance records" testified to by Danny Joseph at his deposition, to the extent not already provided, or an affidavit of Danny Joseph stating which documents were exchanged at his deposition, stating that no further records exist and setting forth all efforts made to locate and produce them, and it is further,

ORDERED that the defendants' failure to comply will result in preclusion and/or other sanctions, and it is further,


ORDERED that the branch of the plaintiffs' motion which seeks to strike the errata sheet dated April 10, 2007, for failure to comply with CPLR 3116(a) is granted in its entirety, and the errata sheet is stricken, and it is further,

ORDERED that the plaintiff's motion is otherwise denied, and it is further,

ORDERED that the parties are to appear for a status conference on December 13, 2007, at 9:30 a.m. at Part 22, 80 Centre Street, Room 136, as previously scheduled.

This constitutes the Decision and Order of the Court.

Dated: November 12, 2007

  
Deborah A. Kaplan J.S.C.

**DEBORAH A. KAPLAN**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check If appropriate:  DO NOT POST

**FILED**  
NOV 23 2007  
COUNTY CLERK'S OFFICE  
NEW YORK