Chan v Ward Trucking, Inc.
2008 NY Slip Op 30713(U)
March 5, 2008
Supreme Court, New York County
Docket Number: 0106110/2004
Judge: Michael D. Stallman
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SCANNED ON 3/13/2008
[* 1]

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

PRESENT: Hon. MICHAEL D. STALLMAN, *Justice* — PART 7

JOHN CAHN,
Plaintiff,

- v -

WARD TRUCKING, INC., et al.,
Defendants.

INDEX NO. 106110/04
MOTION DATE 11/15/07
MOTION SEQ. NO. 002
MOTION CAL. NO. 13

(And two third-party actions).

The following papers, numbered 1 to 14 were read on this motion to dismiss; cross motion for summary judgment; cross motion to strike answers

	PAPERS NUMBERED
Notice of Motion— Affidavits — Exhibits A-F	1-2
Answering Affidavits — Exhibits A-L	3-4
Replying Affidavits — Exhibits A	5
Notice of Cross Motion— Affidavits — Exhibits A-D	6-7
Answering Affidavits — Exhibits	8-9
Replying Affidavits	10
Notice of Cross Motion— Affidavits — Exhibits A-C	11-12
Answering Affidavits — Exhibit A; Exhibit A; Exhibits A-K	13-~~14~~ 15
Replying Affidavits	~~[illegible]~~ 16
Sur-reply	~~[illegible]~~ 17

Cross-Motions (2) : X Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross-motions are decided in accordance with the annexed Memorandum Opinion "Decision and Order".

FILED
MAR 12 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/5/08
New York, New York

MICHAEL D. STALLMAN
J.S.C.
J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
DATED: J.S.C.

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7

---------------------------------------X

JOHN CAHN,

Plaintiff,

-against-

WARD TRUCKING, INC., R.C. DOLNER, LLC, J.T. FALK COMPANY, INC., TACONIC MANAGEMENT COMPANY, LLC, 450 PARK, LLC, and 460 PARK AVENUE SOUTH ASSOCIATES, LLC,

Defendants.

---------------------------------------X

J.T. FALK & COMPANY, LLC,

Third-Party Plaintiff,

-against-

CHEMTREAT, INC.,

Third-Party Defendant.

---------------------------------------X

J.T. FALK & COMPANY, LLC,

Second Third-Party Plaintiff,

-against-

ATLANTIC COASTAL TRUCKING, INC. and TRIANGLE TRUCKING, a division of ATLANTIC COASTAL TRUCKING, INC.,

Second Third-Party Defendants.

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INDEX NO. 106110/04

Decision and Order

FILED
MAR 12 2008
NEW YORK
COUNTY CLERK'S OFFICE

THIRD-PARTY INDEX NO. 590947/05

SECOND THIRD-PARTY INDEX NO. 590446/07

MICHAEL D. STALLMAN, J.:

Defendants Atlantic Coastal Trucking, Inc. (Atlantic) and Triangle Trucking, a division of Atlantic Coastal Trucking, Inc. (Triangle, and collectively, Triangle) move to dismiss the second third party-complaint, pursuant to CPLR 3211 (5) and 2101 (c) and Uniform Court Rule 202.5 (a).

Defendant Ward Trucking, Inc. (Ward), cross-moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint and all cross claims against Ward.

Defendants Taconic Management Company LLC (Taconic) and 450 Park, LLC (450 Park) cross-move, pursuant to CPLR 3126, for an order striking the answers of defendants Ward and Atlantic and Triangle, based on alleged spoliation of evidence.

This case concerns an accident which occurred on March 12, 2003. The complaint alleges that plaintiff John Cahn (Cahn) was walking through the lobby of the building in which he worked, when a drum containing chemical solution being delivered to the building, fell from a pallet and hit his leg, injuring him. The complaint alleges that Ward undertook to deliver the drum to the building, pursuant to an agreement between Ward and J.T. Falk Company, LLC (Falk).

On or about April 12, 2004, Cahn commenced an action against defendants Ward, R.C. Dolner, LLC, Falk, Taconic, 450 Park, and 460 Park Avenue South Associates, LLC. On or about September 22, 2005, third-party plaintiff Falk commenced a third-party action against Chemtreat, Inc. (Chemtreat). On May 8, 2007, more than three years after the alleged accident occurred, Bill Fritchey, Ward's Vice President of Sales, was deposed. Fritchey testified that Triangle, not Ward, delivered the drums to the building. On or about May 9, 2007, Falk commenced a second third-party action against

third-party defendants Atlantic and Triangle. Finally, Cahn served a verified second amended complaint dated June 25, 2007, on Atlantic and Triangle.

Atlantic And Triangle's Motion To Dismiss The Amended Complaint

An action to recover damages for personal injury must be commenced within three years of the occurrence. CPLR 214 (5). Because plaintiff's alleged injury occurred on March 12, 2003, Atlantic and Triangle contend that plaintiff's action against them, which was commenced more than four years after that date, is time-barred. Atlantic and Triangle also contend that the second amended summons and complaint are procedurally defective for failure to include all of the names of the parties on both documents.

Plaintiff contends that Triangle should be estopped from relying on the defense of statute of limitations, or, alternatively, that the complaint was timely. Plaintiff argues that, because on or about November 17, 2003, Ward sent Triangle a letter from plaintiff's attorneys enclosing the accident report relating to plaintiff's accident, Triangle had actual knowledge of the accident and of plaintiff's intention to bring litigation. The letter to Ward from plaintiff's attorney specifically requested that Ward forward the letter to its insurance company or to its representative to discuss the matter. Therefore, according to plaintiff, Triangle should have contacted plaintiff's attorney. Because it did not, and Ward did not notify plaintiff of Triangle's

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involvement, Triangle should be estopped from relying on the defense of statute of limitations. Plaintiff's assertion that Triangle was obliged to contact his attorneys when Triangle received a copy of the accident report from Ward has no merit.

Plaintiff next argues that the complaint against Triangle relates back to the timely commenced action against Ward, because Triangle and Ward are united in interest. As evidence of the fact that the two companies are united in interest, plaintiff relies on the cartage agreement between them which provides that Triangle will indemnify Ward in connection with claims resulting from Triangle's providing local cartage services under the agreement, and that Triangle will issue or accept receipts in Ward's name for goods picked up or delivered for Ward, and the fact that Ward has to approve Triangle's public liability and commercial automobile policies. Plaintiff also relies on the fact that Triangle's first answer was served on plaintiff by the same law firm that represented Ward.

Finally, plaintiff argues that Ward has failed to provide pertinent discovery that would have revealed that Triangle delivered the drums, purposely deceiving plaintiff, and therefore, that Triangle's motion to dismiss should be denied.

According to Bill Fritchey, Ward was hired by defendant Chemtreat to deliver a shipment of chemicals to 450 Park Avenue, in New York City. Because Ward, which is located in Altoona,

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Pennsylvania, does not deliver to New York City, it entered into an agreement with Triangle to deliver the chemicals to their destination. Deposition of Bill Fritchey, at 19. In that agreement, Triangle is described as an independent contractor. Ward has cartage agreements with approximately six companies, one of which is Triangle. *Id.* at 55. In choosing companies with which to enter cartage agreements, Ward looks at their insurance ratings, financial ratings and insurance coverage limits (*id.* at 44), and safety ratings. *Id.* at 54.

In this particular instance, Ward picked up five drums of chemical solution from Chemtreat, drove them to Ward's terminal, most likely in Harrisburg, Pennsylvania (*id.* at 57), and then to Triangle in Carlstadt, New Jersey. *Id.* at 58.

Fritchey testified that normally Chemtreat, as the shipper, would band or shrink-wrap the drums together for shipping (*id.* at 59), though he noted that according to the bill of lading the drums were probably delivered loose, unless Triangle banded or shrink-wrapped them in some way. *Id.* at 60-61.

According to Fritchey, Ward is a family-owned business and has no common ownership with Triangle (*id.* at 55) or common employees (*id.* at 66); however, Ward maintains a sales office in the same building as Triangle in Carlstadt. *Id.* at 18. Ward does not train Triangle employees or the employees of the other companies with which it has cartage agreements. *Id.* at 43. Neither Ward nor

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Triangle drive each other's trucks (*id.* at 69), though they have an Interchange Agreement which enables them to use each other's trailers. *Id.* at 18. Although Triangle's equipment states that it is the exclusive agent of Ward, Triangle may occasionally do work for other companies and the cartage agreement between Ward and Triangle does not require them to work exclusively for Ward. *Id.* at 61.

Discussing the doctrine of relation back, the Appellate Division, First Department, explained that the relation back requirement is satisfied where

> "(1) both claims ar[i]se out of the same conduct, transaction or occurrence ***, (2) the new party is 'united in interest' with the original defendant, and by reason of that relationship he can be charged with such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits *** and (3) the new party knew or should have known that, but for an excusable mistake by plaintiff as to the identity of the proper parties, the action would have been brought against him as well."

Vanderburg v Brodman, 231 AD2d 146, 147 (1st Dept 1997)(citation omitted). The First Department went on to explain that unity of interest will be found where the relationship between the parties gives rise to vicarious liability. The question is one of control, that is, "'[t]he person in a position to exercise some general authority or control over the wrongdoer must do so or bear the consequences'[citation omitted]." *Id.* at 148. Furthermore, where there is such vicarious liability, the defenses of the two parties will be identical. *Hilliard v Roc-Newark Assoc.,* 287 AD2d 691, 692

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(2d Dept 2001).

Plaintiff argues that because Triangle is contractually bound to indemnify Ward, they are united in interest, citing *Austin v Interfaith Med. Ctr.* (264 AD2d 702 [2d Dept 1999]). However, by relying solely on the principle of indemnification, plaintiff totally overlooks the requirements of vicarious liability and control.

Here, the evidence indicates that Ward and Triangle are independent companies, and there is no evidence that Ward has any authority or control over Triangle's operations, beyond the fact that Triangle agrees to issue and accept receipts in Ward's name for goods that it delivers for Ward. Such an agreement regarding the issuance of receipts certainly does not establish that Ward controls the manner in which Triangle handles cargo or makes deliveries. Moreover, as Triangle argues, Ward and Triangle have discrete, independent defenses to charges of negligence by each other.

Plaintiff also contends that because Ward sent Triangle a copy of the accident report with the letter from plaintiff's attorney, Triangle knew or should have known that an action would be brought against it by plaintiff. However, because the statute of limitations for negligence had already run when Triangle was served with the amended complaint by plaintiff, it no longer had a reason to foresee that it would be sued. *See Fitzpatrick v City of New*

York, 185 Misc 2d 79 [Sup Ct, NY County 2000].

Plaintiff also argues that Triangle's motion to dismiss should be denied because of Ward's failure to provide pertinent discovery regarding Triangle's involvement in the incident. However, since Ward and Triangle are independent corporate entities and not united in interest, there is an insufficient basis to penalize Triangle for Ward's purported failure to respond to discovery, before Triangle was even a party to this action.

For these reasons, Triangle's motion to dismiss is granted, and plaintiff's amended complaint is dismissed as against Triangle, and the Court need not reach Triangle's argument, pursuant to CPLR 2101 (c).

Ward's Cross Motion For Summary Judgment In Its Favor

Relying on the deposition of Bill Fritchey and the cartage agreement between Ward and Triangle, Ward contends that it did not own, operate or manage the truck which delivered the drum that allegedly injured plaintiff, nor did it employ the driver of the truck. Although Ward did initially pick up the drums from Chemtreat for delivery to 450 Park Avenue, those drums were transferred to a Triangle truck in Carlestadt, New Jersey, and were delivered by Triangle employees to New York City.

According to Fritchey's testimony, Ward did not train or instruct Triangle employees, nor did it advise Triangle employees of safety problems or delivery problems. Furthermore, Ward

selected Triangle as an independent contractor to work with based upon Triangle' excellent safety record.

Ward contends that it did not direct, control, or supervise the delivery of the drums to the business or the transfer of the drums into the building, and, therefore, its motion for summary judgment should be granted.

Plaintiff opposes Ward's cross motion arguing first that the papers submitted by Ward's counsel are not based on personal knowledge. The affirmation of Ward's counsel either attaches documents or refers to documents which are before the Court in connection with the motion of Atlantic and Triangle, and thus, it is sufficient to support Ward's cross motion.

Plaintiff next argues that Ward was negligent in handling the drums that were involved in the accident, and finally, that questions of fact exist concerning Ward's vicarious liability for the negligence of Triangle.

Specifically, plaintiff cites the testimony of Bill Fritchey that Ward picked up the subject drums from Chemtreat and transported them to Triangle in Carlstadt, New Jersey. Although Fritchey indicated that generally Chemtreat would secure the drums on a pallet, he indicated that, according to the Bill of Lading, they were not secured together. Plaintiff argues that, had Ward secured the drums before transferring them to Triangle, plaintiff might not have been injured when one of the drums rolled from the

pallet and struck him.

Furthermore, Fritchey stated that where a delivery is being made to the inside of a building, Ward is responsible to take the delivery inside. Fritchey Deposition, at 52. Finally, plaintiff relies on the provision in the cartage agreement between Ward and Triangle that "Triangle will issue, or accept, in the name of Ward, receipts for any goods picked up or delivered hereunder." Cartage Agreement, ¶ 3. Therefore, according to plaintiff, Ward was responsible for the delivery.

Because plaintiff was allegedly injured by a falling drum that was not secured to the pallet, and since it appears that Ward failed to secure the drums when it transferred them to Triangle, questions of fact exist concerning the possibility of Ward's own negligence. Ward's cross motion for summary judgment is, therefore, denied, and it is not necessary for the Court to reach plaintiff's argument regarding Ward's vicarious liability for Triangle's alleged negligence.

Taconic And 450 Park's Cross Motion To Strike The Answers of Ward and Triangle

Taconic and 450 Park move to strike the answers of Ward and Triangle on the ground that Ward failed to respond and/or provided misleading responses to discovery requests that prevented the parties from timely learning that Triangle, not Ward, actually delivered the drums to 450 Park Avenue. Plaintiff's Combined Discovery Demands were served on or about July 1, 2005. Ward

responded on or about July 8, 2005.

In moving to strike both Ward and Triangle's answers, Taconic and 450 Park seek to make both Triangle and Ward responsible for Ward's responses to discovery, contending that the relationship between the two companies is "anything but that of contractor and independent contractor." Affirmation of Kenneth B. Brown in Support of Cross Motion to Strike, ¶ 7.

Movants rely on the provision in the cartage agreement that Triangle will issue and accept receipts for goods in the name of Ward and the fact that the invoice for the shipment involved in this action was made on Ward's paper. They also rely on Ward's Trucking Information Supplement Booklet which indicates that in areas that Ward does not service, it relies on "reliable agents," (Trucking Information Supplement Booklet, annexed to Affirmation of Kenneth B. Brown, dated October 23, 2007, as Exhibit B, at 4), and Fritchey's reference to cartage "partners."

Movants cite the testimony of Fritchey that Ward's computers automatically route deliveries to Triangle and that Triangle employees have access to Ward's computer system, and when a job is completed, Triangle inputs the information into Ward's computer system.

Finally, movants allege that Ward is being represented by Triangle's insurance carrier.

The only evidence concerning the actual structure of the two corporations indicates that they are separate corporations with unrelated officers and employees. This lack of corporate relationship is not altered by either the wording in Ward's promotional materials describing the companies with which Ward contracts as "agents" or Fritchey's use of the term cartage "partners." At the time that the Combined Discovery Demands and Ward's answer were served, Triangle was not a party to this litigation. Even assuming that there is a sufficient connection between Ward and Triangle to find Ward vicariously liable for the alleged negligence of Triangle, that does not establish that Triangle had sufficient involvement in Ward's responses to discovery demands to penalize Triangle for those responses. Furthermore, this Court has already concluded that the two companies are not united in interest for the purposes of statute of limitations. Thus, the cross motion is denied with respect to Triangle.

With respect to Ward, movants rely on plaintiff's submissions characterizing Ward's response to plaintiff's discovery requests. For example, in her affirmation dated September 27, 2007, plaintiff's attorney, Megan K. Gleason, contends that Ward failed to properly respond to requests for "all contracts, writing and agreements concerning the work being done at the building from March 12, 2002 through March 12, 2003," and for a copy of the

invoice regarding the pallet, pallet jack and drums "that had been delivered to the job site (See Exhibit D, Demand Nos. 5,6, and 18)." Gleason Affirmation In Opposition, dated September 27, 2007, ¶ 5. Those document demands and Ward's responses actually state as follows:

> 5. All contracts, writing and agreements, as well as any addendum thereto, between the defendants, or one of them, concerning *construction, renovation, alteration, repair or improvement work* at 450-460 Park Avenue, New York, New York, in the County of New York, City and State of New York, as of March 12, 2003 for a period of one (1) year prior thereto [emphasis supplied].
>
> Answer: None
>
> 6. All writings between the defendants, or one of them, and any person, corporation, firm or business entity concerning the delivery to the job site located at 450-460 Park Avenue, New York, New York, in the County of New York, City and State of New York, of a certain, [*sic*] as of March 12, 2003, and for a period of six (6) months year [*sic*] prior thereto.
>
> Answer: This is an improper demand inasmuch as it is overly broad and vague.
>
> 18. True and accurate copy of the invoice regarding the pallet, pallet jack and drums that were being *delivered by defendant WARD TRUCKING to the building owned by defendant*, 450 PARK LLC; managed by defendant, TACONIC MANAGEMENT COMPANY, LLC; and to defendant J.T. FALK COMPANY, INC. [emphasis supplied].
>
> Answer: Not applicable.

Request number 5 is not a general request regarding "work being done," as characterized by plaintiff. Rather, it specifically seeks documents concerning "construction, renovation, alteration, repair or improvement work." There is no allegation

that Ward was involved in such work. In their reply papers, Taconic and 450 Park contend that because Ward had an agreement with Falk to deliver chemicals which were construction materials, Ward's answer to demand number 5 was improper. However, the applicability of demand number 5 to a contract governing the transportation of construction materials, rather than actual construction work, is not sufficiently clear as to support the sanction of striking Ward's answer.

With respect to Ward's response objecting to request number 6 as overly broad and vague, plaintiff or co-defendants could have objected to Ward's response by means of a motion to compel, pursuant to CPLR 3124; however, they did not do so.

Plaintiff's request number 18 seeks a copy of the invoice for "the pallet, pallet jack and drums that were being delivered by defendant WARD TRUCKING to the building owned by defendant, 450 PARK LLC." Ward responded to the request by stating "not applicable." Triangle, rather than Ward, actually delivered the drums to the building, although pursuant to Ward's direction, the invoice was apparently made out in Ward's name. Thus, Ward's answer, while literally correct, could be viewed as evasive. That answer, however, should have alerted counsel for plaintiff or for co-defendants to further pursue the matter in order to determine the meaning of Ward's response.

In their reply papers, movants also point to other responses to the Combined Discovery Demands which they contend were intended to and did mislead the parties concerning Triangle's role in the accident. For example, demand number 11 seeks "all reports, incident reports and statements made in the regular course of business of the defendants, whether written, recorded or otherwise and whether or not made exclusively for litigation purposes relating to the occurrence in which the plaintiff John Cahn claims injury." Movants argue that Ward's November 17, 2003 letter to Triangle annexing plaintiff's incident report should have been provided in responsive to that demand. Rather, Ward responded "this is an improper demand." Here again, plaintiff or co-defendants could have, but failed to challenge Ward's response by means of a motion to compel.

Demand number 14 seeks "the name and address of each person claimed to be a witness by any party that you represent to any of the following: (a) the occurrence alleged to in the Complaint...." Ward responded, "Other than the parties to the action, this defendant is not aware of any other witnesses to the occurrence." Taconic and 450 Park contend that Ward's response was misleading because they were aware that Triangle employees were witnesses to the occurrence. It is unclear to the Court whether Ward's use of the phrase "parties to the action" was intended to refer to the persons involved in the incident, or the plaintiff and defendants

in the litigation. In any case, the wording of the demand is itself far from clear.

Finally, Taconic and 450 Park argue that in response to demand number 1 for any and all insurance policies relating to the accident/occurrence, although Ward responded "to be provided," Ward failed to provide the insurance policy issued to Triangle until December 15, 2006, after the statute of limitations had run. In a Preliminary Conference Order, filed on August 8, 2005, the court (per Soto, J) directed defendants to respond to combined discovery demands within 30 days. In a second Preliminary Conference Order, filed on November 28, 2005, the court directed a response by December 20, 2005. Particularly in light of those two orders, Ward's failure to provide the insurance policy until December 15, 2006 is particularly troublesome.

Movants cite the decision in *Emanuel v Broadway Mall Prop., Inc.* (293 AD2d 708 [2d Dept 2002]) where the Appellate Division upheld the ruling of the trial court striking the answer of a defendant that failed to comply with court-ordered discovery. The Appellate Division stated that there was an adequate basis for the trial court to infer "willful and contumacious" failure to provide disclosure in light of the defendant's "failure to comply with two court orders directing disclosure, and its protracted delay in providing a partial response to plaintiff's discovery demands, which were not adequately explained by the additional facts

submitted on renewal." *Id.* at 709. Movants also provide a copy of the brief of plaintiff-respondent in that case in an effort to show a similarity to Ward's conduct here. *Emanuel v Broadway Mall Prop., Inc.*, 2002 WL 32730999 (Brief of Plaintiff-Respondent). However, that brief suggests that the acts of the parties in *Emanuel* were quite different from the acts of the parties here. In *Emanuel*, discovery demands were served on defendant in January 2000. When defendant failed to respond to *any* demands, a request for judicial intervention was filed by plaintiff that resulted in a preliminary conference directing defendant to respond by June 26, 2000. Again, defendant failed to respond to *any* demands, so plaintiff sent a second "good faith" letter on October 12, 2000 requesting a response to the outstanding demands. When defendant again failed to respond, plaintiff moved to strike defendant's answer. That motion was adjourned at defendant's request and a second compliance conference was scheduled, with the understanding that defendant would respond to the discovery requests prior to the date of the conference. Defendant did not respond and on December 11, 2000, the court entered another order directing defendant to respond to the discovery demands by January 31, 2001. When defendant failed to do so, plaintiff once again moved to strike defendant's answer. Defendant finally submitted only partial responses on March 19, 2001.

Thus, in *Emanuel v Broadway Mall Properties, Inc.*, not only did the defendant repeatedly fail to respond to plaintiff's discovery demands and court orders, plaintiff diligently attempted to obtain compliance with the discovery requests.

Similarly, in the recent case of *Miller v City of New York* (15 Misc 3d 1127(A), 841 NYS2d 219, 2007 NY Slip Op 50882(U) [Sup Ct, Bronx County 2007]), where the court granted a motion to strike defendant's answer, the defendant failed to comply with four court orders directing it to provide plaintiff with numerous different discovery items and to produce a particular witness for deposition. At least one of those court orders was brought on by plaintiff's motion to compel discovery and one of the orders which was ignored by the defendant was a conditional order to strike its answer. The court finally granted plaintiff's motion to strike defendant's answer after the conditional order to strike expired without the defendant's compliance.

Here, in contrast, although Ward plainly failed to timely provide the insurance policy that would have revealed Triangle's involvement in the delivery of drums in compliance with the schedule ordered by the court in two preliminary conferences, Ward responded very promptly to the majority of the discovery requests. Ward's answers to certain of those other discovery demands were less than forthcoming; however, plaintiff and co-defendants failed to utilize the mechanisms available under the CPLR or court

procedure to obtain clarification of those answers. Nor did they diligently seek the assistance of the Court in obtaining the insurance policy that Ward stated it would provide. Finally, Ward did not resist the deposition of its employee. Apparently, Ward sought a delay of approximately one week, but all other delays in the entire schedule of depositions appear to have occurred as a result of requests of the other parties to the litigation.

In sum, cross-movants have not demonstrated that Ward acted willfully and contumaciously, or otherwise so as to justify the drastic sanction of striking Ward's answer. The cross motion of Taconic and 450 Park is, therefore, denied in its entirety.

Accordingly, it is hereby

ORDERED that the motion of defendants Atlantic Coastal Trucking, Inc. and Triangle Trucking to dismiss plaintiff's complaint is granted, and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court on submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the cross motion of defendant Ward Trucking, Inc. for summary judgment is denied; and it is further

ORDERED that the cross motion of defendants Taconic Management Company, LLC and 450 Park, LLC to strike the answers of defendants

Ward Trucking, Inc. and Atlantic Coastal Trucking, Inc. and Triangle Trucking is denied.

Dated: March 5, 2008
New York, New York

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