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**SHORT FORM ORDER**

**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF NASSAU**

**Present:**

**HON. DANIEL PALMIERI**
**Acting Justice Supreme Court**

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**FRANK RICCUITI,**

**TRIAL TERM PART: 48**

**INDEX NO.: 2327/07**

**Plaintiff,**

**-against-**

**MOTION DATE:7-7-08**
**SUBMIT DATE:9-8-08**
**SEQ. NUMBER - 001**

**CONSUMER PRODUCT SERVICES, LLC and YACEK KOWALSKI,**

**Defendants.**

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**The following papers have been read on this motion:**

**Notice of Motion, dated 6-9-08.....1**
**Affirmation in Opposition, dated 8-22-08.....2**
**Reply Affirmation, dated 9-8-08.....3**

Plaintiff's motion for summary judgment on the issue of liability and fault, CPLR §3212, and to preclude as to defendant Kowalski pursuant to CPLR §3126, is granted. The amount of damages to be awarded shall await the trial.

Plaintiff, a truck driver, was injured while making a delivery at the loading dock of the premises of defendant Consumer Product Services, LLC (Consumer) when he was struck

by a fork lift which was being operated by defendant Kowalski, an employee of Consumer, while the forklift was off loading from plaintiff's truck. This action ensued.

Both defendants by submission of an answer CPLR 320(a) appeared in this action, however, the only other witness to the accident, besides plaintiff, was defendant Kowalski who is believed to be in another country, has not been available for deposition, and who cannot be found by his attorney or his former employer the co-defendant. Defendants' attorneys state that efforts to locate their client Kowalski have been ongoing but unsuccessful.

This motion is supported by portions of examinations before trial of Consumer employees Mochalski and Rodziewicz and plaintiff's own deposition.

In opposition, defendant submits the complete depositions of employees Mochalski, Cafaro and Motyl, together with an incident report prepared by Cafaro based on conversations with employees, none of whom except for Kowalski were a witness and an incident report prepared by one Green, which does not give the source of his information and is thus lacking in any probative value.

It is well settled that summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue of fact. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957); *Bhatti v. Roche*, 140 AD2d 660 (2d Dept. 1988). It is nevertheless an appropriate tool to weed out meritless claims. *Lewis v. Desmond*, 187 AD2d 797 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N. A.*, 82 AD2d 168 (3d Dept. 1981). Even where there are some issues in dispute in the case which

have not been resolved, the existence of such issues will not defeat a summary judgment motion if, when the facts are construed in the nonmoving party's favor, the moving party would still be entitled to relief *Brooks v. Blue Cross of Northeastern New York, Inc.*, 190 AD2d 894 (3d Dept.1993).

Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's affirmation. *Olan v Farrell Lines,* 64 NY2d 1092 (1985). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, however, the burden then shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. *Mgrditchian v. Donato*, 141 AD2d 513 (2d Dept. 1988). Conclusory allegations are insufficient (*Zuckerman v. City of New York, supra*), and the defending party must do more than merely parrot the language of the pleadings. There must be evidentiary proof in support of the allegations. *Fleet Credit Corp. v. Harvey Hutter & Co., Inc.*, 207 A.D.2d 380 (2d

Dept. 1994); *Toth v. Carver Street Associates*, 191 AD2d 631 (2d Dept. 1993). If a party defends a motion by resort to CPLR 3212(f), that is, the party has a defense sufficient to defeat the motion but that the facts cannot yet be stated, that party must be able to make some showing that such facts do in fact exist; mere hope that discovery may reveal those facts is insufficient. *Companion Life Ins. Co. v All State Abstract Co.,* 35 AD3d 519 (2d Dept. 2006). Nor can mere speculation serve to defeat the motion. *Pluhar v Town of Southhampton,* 29 AD3d 975 (2d Dept. 2006); *Ciccone v Bedford Cent. School Dist.,* 21 AD3d 437 (2d Dept. 2005).

However, the court must draw all reasonable inferences in favor of the nonmoving party. *Nicklas v Tedlen Realty Corp.,* 305 AD2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner Corp.,* 215 AD2d 546 (2d Dept. 1995). The role of the court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but simply to determine whether such issues of fact requiring a trial exist. *Dyckman v. Barrett,* 187 AD2d 553 (2d Dept. 1992); *Barr v County of Albany*, 50 NY2d 247, 254 (1980); *James v. Albank*, 307 AD2d 1024 (2d Dept. 2003); *Heller v. Hicks Nurseries,* Inc., 198 AD2d 330 (2d Dept. 1993).

The Court need not, however, ignore the fact that an allegation is patently false or that an issue sought to be raised is merely feigned. *See Village Bank v Wild Oaks Holding, Inc.,* 196 AD2d 812 (2d Dept. 1993); *Barclays Bank of N.Y. v Sokol,* 128 AD2d 492 (2d Dept. 1987), such as when the affidavit in opposition clearly contradicts earlier deposition testimony. *Central Irrigation Supply v Putnam Country Club Assocs., LLC,* 27 AD3d 684

(2d Dept. 2006).

Plaintiff has made a *prima facie* showing of entitlement to relief thus passing the burden to defendants to raise a triable issue of fact which the defendants have failed to do.

Defendants rely solely on the two incident reports and a police report. The incident report of Green is not competent evidence for the reasons noted above. The incident report prepared by Cafaro, the Director of Administration, although admissible for consideration as a business record, is not sufficient to create an issue of fact. Of those providing information, the only witness was Kowalski and his contribution to the report consists of a naked denial bereft of any factual content. The major portion of this incident report deals with post incident events. The Court has not considered the police accident report because it is hearsay and inadmissible unless a hearsay exception applies. *Liquori v. City of New York*, 250 AD2d 738 (2d Dept. 1998). The police report is not competent evidence because the police officer did not see anything and the denial statement by Kowalski is self-serving and similarly lacking in factual content.

The speculation of defendants' attorney that the accident might have been avoided by plaintiff is not competent evidence since it fails to rely on any personal knowledge or on any other documentation. This affirmation is thus lacking in evidentiary value. *Feratovic v. Lun Wah, Inc.*, 284 AD2d 368 (3d Dept. 2001).

In short, there is no competent evidence to rebut plaintiff's claim that the conduct of Kowalski, the employee of Consumer was the sole and proximate cause of the accident and that on this evidence the trier of fact could not find any responsibility on the part of plaintiff for the happening of the accident.

The portion of plaintiff's motion which is to strike the pleadings of defendant Kowalski and for judgment against him pursuant to CPLR §3215 and 3126 for the relief requested in the complaint, is granted. The amount of damages to be awarded against Kowalski shall be decided at trial.

Kowalski has failed to comply with demands to attend an examination before trial and orders of this Court directing such compliance. As the Court of Appeals stated in *Kihl v. Pfeffer*, 94 NY2d 118 (1999) on the issue of a party's noncompliance with court orders:

> "If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity. Indeed, the Legislature, recognizing the need for courts to be able to command compliance with their disclosure directives, has specifically provided that a 'court may make such orders ... as are just,' including dismissal of an action. Finally, we underscore that compliance with a disclosure order requires both a timely response and one that evinces a good-faith effort to address the requests meaningfully" (*id.* at 123).

Wilful and contumacious conduct may be inferred from repeated failure to comply with court ordered discovery and other orders. *Nowak v. Veira*, 289 AD2d 383 (2nd Dept. 2001), *Poulas v. U-Haul International*, 288 AD2d 202 (2nd Dept. 2001).

Kowalski's failure to comply with the directives of this Court is considered to be wilful and deliberate and thus the drastic remedy of striking his answer and granting a default judgment against him is appropriate. *Reyes v. The Vanderbilt*, 303 AD2d (2d Dept. 2003). See also *DuValle v. Swan Lake Resort Hotel*, 26 AD3d 616 (3d Dept. 2006). Said defendant has failed to deny or adequately explain noncompliance as described above. Although Kowalski's attorneys have no doubt made good faith efforts to locate him, he appears to have left the country and his attorney has not submitted any facts from which there would be any

hope of finding him and having him return for an examination. Under these circumstances, there is no reason to delay these proceedings any further. The amount of the judgment to be imposed upon Kowalski shall await the trial.

Because this decision addresses the issues of liability or fault, only this case shall proceed on the issue of damages.

All parties shall appear at a conference before the undersigned at the Supreme Courthouse, 100 Supreme Court Drive, Mineola, N.Y., on November 5, 2008, at 9:30 a.m. No adjournments of this conference will be permitted absent the permission of or Order of this Court. All parties are forewarned that failure to attend the conference may result in Judgment by Default, the dismissal of pleadings (see 22 NYCRR 202.27) or monetary sanctions (22 NYCRR 130-2.1 et seq.).

This shall constitute the Decision and Order of this Court.

ENTER

DATED: September 15, 2008



HON. DANIEL PALMIERI
Acting Supreme Court Justice

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