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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: **ANTONIO I. BRANDVEEN**
J. S. C.

MILDRED MENDOZA,

Plaintiff,

- against -

EXCLUSIVE CONCEPTS, INC., and MELVIN SANTOS,

Defendants.

TRIAL / IAS PART 32
NASSAU COUNTY

Index No. 14146/03

Motion Sequence No. 002

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits 1
Answering Affidavits 2, 3
Replying Affidavits 4
Briefs: Plaintiff's / Petitioner's . . . . . _____
Defendant's / Respondent's . . . . . _____

The plaintiff moves for an order pursuant to CPLR 3212 granting summary judgment on the issue of liability upon the ground the defendants' negligence was the sole legal and proximate cause of the subject occurrence, and for an order pursuant to CPLR 3126 striking the answer of the defendant Melvin Santos upon the ground the defendant repeatedly failed to appear for court-ordered examinations before trial. The underlying personal injury action arises from a motor vehicle accident on July 5, 2003, at the intersection of Fulton Avenue and Robson Place, Hempstead, New York, between a vehicle owned by the corporate defendant and operated by the defendant Melvin Santos

and a vehicle operated by the plaintiff. This Court has carefully reviewed and considered all of the parties' papers submitted with respect to this motion.

The plaintiff's attorney states, in a supporting affirmation dated March 7, 2008, the accident was caused when the defendant driver failed to yield the right of way, and made a left turn causing a front to front collision with the plaintiff's oncoming vehicle. The plaintiff's attorney points out, following a March 23, 2005 preliminary conference order and a number of defense counsel adjournments, the plaintiff and a representative of the defendant corporation testified at examinations before trial on February 7, 2006. The plaintiff's attorney notes the defendant Melvin Santos failed to appear for a court-ordered deposition, and a statement was placed on the record by this defendant's counsel indicating this defendant could not be located, and may have been deported. The plaintiff's attorney submits, under these circumstances, the plaintiff is entitled to summary judgment on the issue of liability, or at the very least, an order striking the defendant Melvin Santos' answer. The plaintiff's attorney points to the plaintiff's testimony, and contends the law requires a left turning vehicle must yield the right of way to an approaching vehicle from the opposite direction. The plaintiff's attorney insists there is no question the defendant Melvin Santos violated the Vehicle & Traffic Law § 1141 by making a left turn, and failing to yield to the plaintiff's oncoming car, and this defendant's disappearance or making himself unavailable provides no basis for denying this motion.

The defendant Exclusive Concepts, Inc. opposes this motion. The attorney for the defendant Exclusive Concepts, Inc. states, in an opposing affirmation dated April 9, 2008, striking the answer of the defendant Melvin Santos would be prejudicial to the corporate defendant whose only potential liability is vicarious. The attorney for the defendant Exclusive Concepts, Inc. notes the corporate defendant appeared for a deposition on February 7, 2006. The attorney for the defendant Exclusive Concepts, Inc. requests the defendant Melvin Santos be precluded from testifying at the trial if not produced for a deposition by a date set down by the Court. The attorney for the defendant Exclusive Concepts, Inc. asserts the plaintiff's motion for summary judgment on liability should be denied because there are questions of fact involved in this intersection collision, including whether the plaintiff was negligent because of action or inaction. The attorney for the defendant Exclusive Concepts, Inc. avers questions exist as to whether the plaintiff, who first observed the defendant Melvin Santos from 50 feet away, took appropriate and adequate steps to avoid the happening as it related to the motor vehicle the plaintiff operated. The attorney for the defendant Exclusive Concepts, Inc. points to the plaintiff's testimony, in pertinent part, regarding the happening of the accident, and states the plaintiff had sufficient time to avoid the accident, and the testimony was inconsistent.

The attorney for the defendant Melvin Santos states, in an opposing affirmation dated April 30, 2008, the plaintiff's requests are improper, and adopt the arguments by counsel for the codefendant in opposition to the plaintiff's motion. The attorney for the

defendant Melvin Santos contends striking the answer of the defendant Melvin Santos is inappropriate because the plaintiff has not made a clear showing, as required by law, that the failure to comply with discovery demands is willful, contumacious, or in bad faith. The attorney for the defendant Melvin Santos points out the defendant Melvin Santos has complied with all discovery directives apart from appearing for a deposition. The attorney for the defendant Melvin Santos also notes the defendant Melvin Santos has been deported from this country, and cannot be brought back for a deposition, so there is nothing willful about this defendant's failure to appear, but it is rather an impossibility. The attorney for the defendant Melvin Santos contends should the Court grant any portion of the plaintiff's motion under CPLR 3126, it is suggested the Court exercise its discretion and utilitze a less drastic remedy as provided in CPLR 3126.

The plaintiff's attorney states, in a reply affirmation dated May 1, 2008, the attorney for the defendant Melvin Santos has not submitted any sworn statement from the defendant Melvin Santos in support of the deportation claim nor should it make any difference. The plaintiff's attorney submits there is no legal basis for preventing the plaintiff from having the defendant driver's answer stricken or obtaining summary judgment on liability against the defendant simply because the defendant owner may found vicariously responsible. The plaintiff's attorney states, under the circumstances of this motion, it would be prejudicial to deny the plaintiff the relief sought by motion. The plaintiff's attorney claims the plaintiff's deposition testimony and the case law

unequivocally establish the defendant driver was solely responsible for the happening of the accident. The plaintiff's attorney points out no evidentiary proof has been submitted for the defendant driver to either excuse the defendant driver's failure to appear for deposition or to rebut the plaintiff's *prima facie* showing of entitlement to judgment on liability. The plaintiff's attorney notes the defendant owner's affirmative defense of non-permissive use which, if established at trial, would be the owner's defense to any imposition of vicarious liability, so there is no reason to deny the plaintiff this relief on the issue of vicarious liability. The plaintiff's attorney avers the defense counsels' assertions are based upon speculative and conclusory assertions.

Under CPLR 3212(b), a motion for summary judgment "shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." "The motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." Summary judgment is a drastic remedy that is awarded only when it is clear that no triable issue of fact exists (***Alvarez v. Prospect Hosp.***, 68 N.Y.2d 320, 325; ***Andre v. Pomeroy***, 35 N.Y.2d 361). Summary judgment is the procedural equivalent of a trial (***Museums at Stony Brook v. Village of Patchogue Fire Dept.***, 146 A.D. 2d 572). Thus the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law

(*see, Whelen v. G.T.E. Sylvania Inc.*, 182 A.D. 2d 446). The court's role is issue finding rather than issue determination (*see, e.g., Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395; *Gervasio v. Di Napoli*, 134 A.D.2d 235, 236; *Assing v. United Rubber Supply Co.*, 126 A.D.2d 590). Nevertheless, "the court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated" (*Gervasio v. Di Napoli, supra*, 134 A.D.2d at 236, quoting from *Assing v. United Rubber Supply Co., supra; see, Columbus Trust Co. v. Campolo*, 110 A.D.2d 616, *aff'd* 66 N.Y.2d 701). If the issue claimed to exist is not genuine, and, therefore, there is nothing to be resolved at the trial, the case should be summarily decided (*see, Andre v. Pomeroy*, 35 N.Y.2d at 364; *Assing v. United Rubber Supply Co., supra*).

"Vehicle and Traffic Law § 1141 provides that a left-turning vehicle must yield the right-of-way to a vehicle approaching from the opposite direction" (*Lester v. Jolicofur*, 120 A.D.2d 574, 502 N.Y.S.2d 61). A violation of Vehicle and Traffic Law § 1141 constitutes negligence as a matter of law, to wit the driver of the left turning vehicle who fails to observe the approaching vehicle from the opposite direction is under a duty to see that which under the circumstances should be seen by the proper use of senses and not doing so is a violation (*see Nunziata v. Birchell*, 238 A.D.2d 555, 556, 656 N.Y.S.2d 383 [2nd Dept., 1997]). Here, the defendant Melvin Santos made a left turn, and failed to yield to the plaintiff's oncoming vehicle. Clearly, the plaintiff had the right of way, and was entitled to anticipate this defendant operator would obey the traffic laws (*see Stiles v.*

County of Dutchess, 278 A.D.2d 304, 717 N.Y.S.2d 325). Neither the defendant Melvin Santos nor any other defense witness has testified at a deposition regarding other vehicles or other circumstances at the accident site, and the defendant Melvin Santos has not testified about seeing plaintiff's vehicle prior to that left turn. The plaintiff met the initial burden by showing as a matter of law "that the sole proximate cause of the accident was defendant's failure to yield the right of way" to plaintiff (***see Guadagno v. Norward***, 43 A.D.3d 1432, 1433, 842 N.Y.S.2d 844 [4th Dept.,2007]. The defense fail to raise a triable issue of fact regarding the issue of liability.

> "To invoke the drastic remedy of striking a pleading, the court must determine that the party's failure to comply with a disclosure order was the result of willful, deliberate, and contumacious conduct or its equivalent (***see***, CPLR 3216; ***Harris v. City of New York***, 211 A.D.2d 663, 664, 622 N.Y.S.2d 289; ***Lestingi v. City of New York***, 209 A.D.2d 384, 618 N.Y.S.2d 731)" (***Martignetti v. Ricevuto***, 271 A.D.2d 508, 509, 706 N.Y.S.2d 915)." "The willful and contumacious character of a party's conduct can be inferred from his [or her] repeated failures to appear for examination before trial, coupled with inadequate excuses for these defaults" (***Mills v. Ducille***, 170 A.D.2d 657, 658, 567 N.Y.S.2d 79; ***see also, Herrera v. City of New York***, 238 A.D.2d 475, 476, 656 N.Y.S.2d 647). It is also well settled that the determination whether or not to strike a pleading lies within the sound discretion of the trial court (***see, Zletz v. Wetanson***, 67 N.Y.2d 711, 499 N.Y.S.2d 933, 490 N.E.2d 852; ***Kubacka v. Town of North Hempstead***, 240 A.D.2d 374, 657 N.Y.S.2d 770)

Patterson v. Greater New York Corp. of Seventh Day Adventists, 284 A.D.2d 382, 383, 726 N.Y.S.2d 278 [2nd Dept., 2001].

The Second Department:

> has repeatedly held that "[t]he fact that defendant has disappeared or made himself unavailable provides no basis for denying a motion to strike his answer, particularly in the face of continued defaults in appearance for examination before trial" (***Moriates v Powertest Petroleum Co.***, 114 AD2d 888, 889; ***Foti v Suero***, 97 AD2d 748). Indeed, this court has "reject[ed]

> the contention that in a case such as this one, counsel may permit an indifferent client to slip into obscurity and thereafter contend that the client's failure to appear pursuant to court orders cannot be met with the appropriate sanction" (***Moriates v Powertest Petroleum Co., supra***, at 889-890)

Mills v. Ducille, 170 A.D.2d 657, 658, 567 N.Y.S.2d 79 [2nd Dept.,1991]. The Second Department has also held:

> Moreover, the absence of any excuse for the delay in responding to discovery demands, and the delaying party's failure to object to the demands, supports an inference that the failure to comply was willful (***see, Mills v. Ducille***, 170 A.D.2d 657, 567 N.Y.S.2d 79; ***Brandi v. Chan***, 151 A.D.2d 853, 542 N.Y.S.2d 827; ***Anteri v. NRS Constr. Corp.***, 117 A.D.2d 696, 498 N.Y.S.2d 435)

Brady v. County of Nassau, 234 A.D.2d 408, 650 N.Y.S.2d 802 [2nd Dept.,1996]. However, the Appellate Division has also ruled in an analogous matter, involving a deported defendant witness:

> Although the nature and degree of a sanction for a party's failure to comply with discovery generally is a matter reserved to the sound discretion of the trial court, the drastic remedy of striking an answer is inappropriate absent a showing that the failure to comply is willful, contumacious, or in bad faith (***see Andruszewski v Cantello***, 247 AD2d 876 [1998]; ***Mohammed v 919 Park Place Owners Corp.***, 245 AD2d 351 [1997]; ***Stocker v Rupp***, 231 AD2d 872 [1996]; ***Gaylord Bros. v RND Co.***, 134 AD2d 848 [1987]). Here, plaintiffs made no showing of any such conduct on the part of Guiterrez. We therefore conclude that Supreme Court abused its discretion in granting that part of plaintiffs' motion seeking to strike the answer of Guiterrez.

Green v. Kingdom Garage Corp., 34 A.D.3d 1373, 1374, 826 N.Y.S.2d 863 [4th Dept., 2006].

The plaintiff has the initial burden of coming forward with a sufficient showing of willfulness by the defendant Melvin Santos, who must then offer a reasonable excuse for a default (***see Read v. Dickson***, 150 A.D.2d 543, 541 N.Y.S.2d 126 [2nd Dept., 1989]).

Here, the plaintiff has not shown the defendant Melvin Santos' conduct to be willful and contumacious nor can it be inferred from this defendant's responses to the plaintiff's requests for discovery and inspection, rather it appears this defendant has complied with court orders directing such disclosure, and there seems to be a reasonable excuse for this defendant's failure to appear at a deposition, to wit deportation (***contrast Novick v. DeRosa***, 51 A.D.3d 885, 858 N.Y.S.2d 371 [2nd Dept., 2008]).

Accordingly, the motion is granted only to the extent of awarding partial summary judgment on liability against the defendants. An trial is ordered on the issue of damages.

A copy of this order shall be served and accompany the note of issue when filed to add this matter to the Calendar Control Part of this court for trial on the issue damages. Entry of judgment is stayed pending a determination of damages.

So ordered.

Dated: **September 8, 2008**

ENTER:

J. S. C.
HON. ANTONIO I. BRANDVEIN

FINAL DISPOSITION NON FINAL DISPOSITION

ENTERED
SEP 18 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE