

**Amores v Levittown Union Free School Dist.**

2012 NY Slip Op 30330(U)

January 27, 2012

Supreme Court, Nassau County

Docket Number: 24079/09

Judge: Denise L. Sher

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**SHORT FORM ORDER**

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER  
Acting Supreme Court Justice

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ANTHONY AMORES,  
  
Plaintiff,  
  
- against -  
  
LEVITTOWN UNION FREE SCHOOL DISTRICT and  
SOUTH SHORE TRUCK REPAIR, INC.,  
  
Defendants.

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TRIAL/IAS PART 31  
NASSAU COUNTY  
  
Index No.: 24079/09  
Motion Seq. Nos.: 03, 04, 05  
Motion Dates: 07/05/11  
08/25/11  
11/17/11

**The following papers have been read on these motions:**

	Papers Numbered
<u>Notice of Motion (Seq. No. 03), Affirmation and Exhibits</u>	<u>1</u>
<u>Notice of Cross-Motion (Seq. No. 04), Affirmation, Affidavit and Exhibits</u>	<u>2</u>
<u>Supplemental Affirmation in Support of Cross-Motion (Seq. No. 04) and Exhibit</u>	<u>3</u>
<u>Affirmation in Opposition to Cross-Motion (Seq. No. 04)</u>	<u>4</u>
<u>Notice of Cross-Motion (Seq. No. 05), Affirmation and Exhibits</u>	<u>5</u>
<u>Affirmation in Opposition to Motion (Seq. No. 03) and Exhibits</u>	<u>6</u>
<u>Affirmation in Opposition to Cross-Motion (Seq. No. 05) and in Reply to Plaintiff's Opposition</u>	<u>7</u>
<u>Reply Affirmation</u>	<u>8</u>
<u>Reply Affirmation</u>	<u>9</u>

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Defendant Levittown Union Free School District ("Levittown") moves (Seq. No. 03), pursuant to CPLR § 3212, for an order granting it summary judgment dismissing the Verified

Complaint against it. Plaintiff opposes the motion. Defendant South Shore Truck Repair, Inc. (“South Shore”) moves (Seq. No. 04), pursuant to CPLR § 3212, for an order granting it summary judgment dismissing the Verified Complaint and all Cross-Claims asserted against it. Plaintiff opposes the motion and cross-moves (Seq. No. 05), pursuant to CPLR § 3124, for an order compelling non-party witness Adriano “Alex” Carrasco (“Carrasco”) to comply with plaintiff’s subpoena for oral examination and/or imposing such penalties upon him as justice requires for his failure to comply; and cross-moves for an order staying defendants’ respective motion and cross-motion for summary judgment pending the oral examination of Carrasco. Defendant South Shore opposes plaintiff’s cross-motion.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff on September 16, 2008, at or about 4:00 p.m., at MacArthur High School, Levittown, New York. At the time of the accident, plaintiff was employed by Cunningham Duct Cleaning Co., Inc. (“Cunningham”). Plaintiff was a service technician and cleaned boilers, chimneys and air conditioners and heating systems.

In paragraph 16 of the Verified Complaint, plaintiff alleges that, while he was directing a certain vehicle into the loading dock, “[the] truck’s brake gave out, allowing the truck to roll back and crush plaintiff between the truck and the loading dock.” *See* Defendant Levittown’s Affirmation in Support Exhibit A ¶ 16.

The Police Accident Report states “Op veh.1 (Carrasco) states that pedestrian Amores was on the rear of the vehicle assisting with backing the vehicle up. Pedestrian became caught between the truck and the wall of the building. Witness Martinez, Rafael, A. DOB 6/29/57, P.O. Box 913, Brentwood, NY 11717 (631) 936-8186. Pedestrian transported with Wantagh FD

Ambulance 698 to NUMC.” See Defendant South Shore’s Affirmation in Support Exhibit F.

Defendant Levittown contracted with Cunningham to perform certain alteration and repair of the heating system including the boiler at the High School.

Cunningham, the employer of plaintiff, became a customer of defendant South Shore in approximately 1984-1986. Cunningham also serviced their trucks with Higbie Service and Michael Anthony Service.

The Verified Complaint advances causes of action against defendant Levittown for violations of Sections 200 and 241(6) of New York State Labor Law and of 12 NYCRR 23-9.7(a) and 12 NYCRR 23-9.7(b). The Bill of Particulars alleges that defendant South Shore failed to, *inter alia*, adequately and properly maintain the brake system on the subject vehicle, failed to remedy the defective and dangerous condition of which it had prior notice and failed to warn operators of the vehicle of the hazardous condition existing thereon.

Defendants Levittown and South Shore both move for summary judgment dismissing the Verified Complaint against them. Defendant South Shore submits that plaintiff cannot provide any proof that the braking mechanism on the truck failed or malfunctioned in any way and, hence, cannot make a *prima facie* case of negligence against defendant South Shore. As set forth in the affidavit of Scott Nowak, the Vice President of defendant South Shore, the last time defendant South Shore did any work related to the brakes on the vehicle involved in the accident, AIRDUCT 7, was six months prior to the date of the accident.

Defendant Levittown argues that it may not be found liable under New York State Labor Law § 200 and/or common law negligence, and, since plaintiff’s accident occurred in a non-construction, non-renovation context, plaintiff is not entitled to Labor Law § 241(6) protection.

Plaintiff cross-moves for an order compelling Carrasco to comply with the subpoena and for an order staying defendants' motion and cross-motion pending the oral examination of Carrasco. Plaintiff asserts that Carrasco's testimony "would not only be material but could very well be the most probative evidence as to whether the truck's brakes failed . . ." See Plaintiff's Affirmation in Support ¶ 10.

In response, defendants Levittown and South Shore contend that plaintiff's cross-motion should be denied on several grounds - plaintiff filed his Note of Issue and Certificate of Readiness wherein it was stated that discovery proceedings now known to be necessary were completed and that the case was ready for trial, no effort was made to locate Carrasco prior to the filing of the Note of Issue and plaintiff waited several months before seeking court intervention.

On July 7, 2011, plaintiff's counsel served a subpoena upon Carrasco to take his Examination Before Trial on July 26, 2011. Carrasco did not appear on said date and has never contacted counsel's office in response to the subpoena.

CPLR § 3212(f) permits a party opposing a motion for summary judgment to obtain further discovery when it appears that facts supporting the position of the opposing party exist but cannot be stated. See *Lettieri v. Cushing*, 80 A.D.3d 574, 914 N.Y.S.2d 312 (2d Dept. 2011); *Botros v. Flamm*, 77 A.D.3d 602, 908 N.Y.S.2d 358 (2d Dept. 2010); *Family-Friendly Media, Inc. v. Recorder Tel. Network*, 74 A.D.3d 738, 903 N.Y.S.2d 80 (2d Dept. 2010); *Aurora Loan Servs., LLC v. LaMattina & Assoc., Inc.*, 59 A.D.3d 578, 872 N.Y.S.2d 724 (2d Dept. 2009); *Juseinoski v. New York Hosp. Med. Ctr. of Queens*, 29 A.D.3d 636, 637, 815 N.Y.S.2d 183 (2d Dept. 2006).

Although determination of a summary judgment motion may be delayed to allow for

further discovery where evidence necessary to oppose the motion is unavailable to the opponent (see CPLR § 3212(f)), “[a] determination of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence.” *Anne Koplick Designs, Inc. v. Lite*, 76 A.D.3d 535, 906 N.Y.S.2d 331 (2d Dept. 2010); *Williams v. D & J School Bus, Inc.*, 69 A.D.3d 617, 893 N.Y.S.2d 133 (2d Dept. 2010). See also *Nascimento v. Bridgehampton Construction Corp.*, 86 A.D.3d 189, 924 N.Y.S.2d 353 (1<sup>st</sup> Dept. 2011); *Lambert v. Bracco*, 18 A.D.3d 619, 795 N.Y.S.2d 662 (2d Dept. 2005).

Based upon the record submitted, plaintiff has demonstrated that the deposition of the truck operator, Adriano “Alex” Carrasco, may lead to relevant evidence. See *Lettieri v. Cushing, supra*; *Botros v. Flamm, supra*.

A court may properly vacate a Note of Issue if the Certificate of Readiness contains misstatements or material errors. See *Lynch v. Vollano*, 6 A.D.3d 505, 774 N.Y.S.2d 433 (2d Dept. 2004); *Savin v. Brooklyn Marine Park Development Corp.*, 61 A.D.3d 954, 878 N.Y.S.2d 178 (2d Dept. 2009).

Where outstanding discovery requests remain and plaintiff files a false Statement of Readiness and Note of Issue indicating that there are no outstanding requests for discovery, striking of the action from the calendar is warranted. See *Ortiz v. Valdescastilla*, 98 A.D.2d 610, 469 N.Y.S.2d 347 (1<sup>st</sup> Dept. 1983); *Maloney v. National Cleaning Contractors*, 105 A.D.2d 653, 481 N.Y.S.2d 710 (1<sup>st</sup> Dept. 1984); *H & Y Realty Co. v. Barron*, 121 A.D.2d 238, 503 N.Y.S.2d 35 (1<sup>st</sup> Dept. 1986); *Adamson v. Airweld, Inc.*, 188 A.D.2d 575, 592 N.Y.S.2d 607 (2d Dept. 1992); *Silverman v. Caplin*, 194 A.D.2d 602, 599 N.Y.S.2d 997 (2d Dept. 1993); *Club Italia, Inc. v. Italian Fashion Trading*, 268 A.D.2d 219, 701 N.Y.S.2d 34 (1<sup>st</sup> Dept. 2000).

Under the circumstances, the Note of Issue should be **VACATED**.

Accordingly, plaintiff's cross-motion (Seq. No. 05), pursuant to CPLR § 3124, for an order compelling non-party witness Adriano "Alex" Carrasco to comply with plaintiff's subpoena for oral examination and/or imposing such penalties upon him as justice requires for his failure to comply and for an order staying defendants' respective motion and cross-motion for summary judgment pending the oral examination of Carrasco is hereby **GRANTED**.

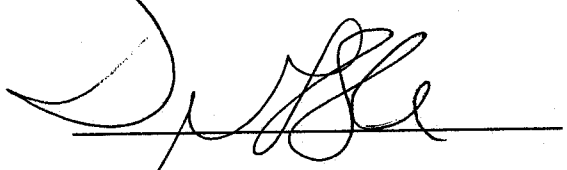
Defendant Levittown's motion (Seq. No. 03) and defendant South Shore's cross-motion (Seq. No. 04) for summary judgment are **DENIED without prejudice** to renewal thereof within ninety (90) days of the date hereof.

It is the further order of this Court that the oral deposition of non-party witness Adriano "Alex" Carrasco shall be completed within ninety (90) days of the date hereof.

All parties shall appear for a Conference in IAS Part 31, Nassau County Supreme Court, 100 Supreme Court Drive, Mineola, New York, on May 1, 2012, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

**ENTER :**



**DENISE L. SHER, A.J.S.C.**

Dated: Mineola, New York  
January 27, 2012

**ENTERED**  
**JAN 31 2012**  
**NASSAU COUNTY**  
**COUNTY CLERK'S OFFICE**