

Ortiz v Watson-Brown
2016 NY Slip Op 30107(U)
January 20, 2016
Supreme Court, New York County
Docket Number: 160199/2013
Judge: Michael D. Stallman
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 21

Index Number: 160199/2013
ORTIZ, EDWIN
vs.
WATSON-BROWN, LISA
SEQUENCE NUMBER: 002
PRECLUDE

INDEX NO. 160199/2013

MOTION DATE 10/29/15

MOTION SEQ. NO. 002

The following papers, numbered 16-24, 25-39, were read on this motion to preclude and compel

Notice of Motion —Affirmation—Affirmation of Good Faith — Exhibits A-E—
Affidavit of Service | No(s). 16-24

Affirmation in Opposition — Exhibits A-D; Affirmation in Opposition —
Exhibits A-D; Supplemental Affirmation in Opposition—Affirmation of Service | No(s). 25-39

Upon the foregoing papers, it is ordered that plaintiff's motion to preclude defendants from offering any evidence at trial, or in the alternative, to compel defendants' depositions is denied.

Pursuant CPLR 3126, plaintiff moves to preclude defendants from offering any evidence at trial, or in the alternative, to compel defendants' depositions. New York City Transit Authority, Metropolitan Transportation Authority, Manhattan and Bronx Surface Transit Operating Authority and Lisa Watson-Brown (the Transit Defendants) and defendant Tonya Horton oppose the motion.

Plaintiff gives little details about the allegations of the action. Plaintiff's counsel states only that "The plaintiff was a pedestrian that was run over by a bus." (Chopra Affirm. ¶ 3.) The complaint alleges that Watson-Brown operated a bus, and "the aforesaid bus...harshly stopped short creating an accident therein" at Seventh Avenue near its

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MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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intersection with 140th Street in Manhattan. (Chopra Affirm., Ex A [Complaint] ¶ 63.) The complaint alleges that Horton operated a vehicle (Complaint ¶ 61.)

Plaintiff asserts that defendants did not appear for depositions, as scheduled per the preliminary conference order dated July 24, 2014, and which were rescheduled to October 24, 2014. Defendants' depositions were tentatively rescheduled to November 14, 2014.

In opposition, Horton's counsel stated that the firm was unaware of the October 28, 2014 date because it was set by a preliminary conference order dated July 24, 2014 to which Horton was not a party (Horton filed her answer one month after that conference). The Transit Defendants state that Lisa Watson-Brown could not appear for her November 14, 2014 deposition due to a "work related injury" not further specified (Berkowitz Opp. Affirm. ¶ 7.)

Plaintiff's motion was marked submitted in the e-filing submissions part on November 26, 2014. The Court adjourned the motion to the compliance conference on December 18, 2014 to discuss the motion and to get further details about the action.

At the conference, it was revealed that plaintiff was alleging that he was a motorcyclist who was struck by Horton's vehicle, and the impact threw him onto the ground. While he was lying on the ground, his leg was allegedly run over by a M2 bus operated by defendant Watson-Brown, who allegedly fled the scene.

By an interim order dated December 18, 2014, this Court directed the Transit defendants to submit supplemental, non-hearsay papers on the following issues:

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- (1) the nature of Watson-Brown's alleged work-related injury;**
- (2) her current condition;**
- (3) how her current condition affects her ability to travel or to appear for a deposition;**
- (4) an anticipated date, if any, for Watson-Brown to return to work.**

Plaintiff's motion was adjourned to February 26, 2015 for submission of the additional papers.

In a supplemental affirmation dated February 3, 2015, the Transit defendants stated only that "defendant LISA WATSON-BROWN has returned to active employment status. As such, she will be able to appear for a deposition in this matter." (Berkowitz Suppl. Affirm. ¶ 4.)

In anticipation that Watson-Brown would be deposed, plaintiff's motion was not denied, but rather adjourned to the next court compliance conference on March 26, 2015, in contemplation of the Transit defendants' compliance. At the March 26, 2015 conference, the parties informed the Court that Watson-Brown's deposition was started on March 23, 2015, but not completed. Plaintiff's motion was adjourned to the next compliance conference on June 25, 2015, in contemplation of completion of Watson-Brown's deposition.

However, at the June 25, 2015 conference, the Court was informed that Watson-Brown's deposition was postponed to September 21, 2015. By an additional directive to the parties' so-ordered stipulation dated June 25, 2015, the Court ruled, "Provided that defendant Watson-Brown appears for the continued deposition and the deposition is completed, the provision in the order dated 12/18/14, directing Δ Watson-Brown, NYCTA, MTA, and MABSTOA to provide an affidavit or affirmation regarding Δ Watson-Brown's alleged work-related injury, is moot."

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At the court conference on October 29, 2015, the Court was informed that Watson-Brown did not appear for her continued deposition purportedly due to another work-related injury. Plaintiff's motion to compel was marked fully submitted.

Meanwhile, plaintiff and Horton each separately moved for preclusion against the Transit defendants, based on Watson-Brown's subsequent failures to appear for a deposition (Motion Seq. No. 004 and 005). These motions are not the subject of this decision and order.

"CPLR 3126 provides that if a party 'refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed ..., the court may make such orders ... as are just.'" (*Fish & Richardson, P.C. v Schindler*, 75 AD3d 219, 220 [1st Dept 2010].) A pattern of noncompliance with court orders and discovery demands and failure to offer a reasonable excuse for the noncompliance may give rise to an inference of wilfull and contumacious conduct. (See e.g. *Henderson v Manhattan and Bronx Surface Tr. Operating Auth.*, 74 AD3d 654 [1st Dept 2010.]) If a discovery sanction is warranted, it should be "appropriately tailored to achieve a fair result." (*Krin v Lenox Hill Hosp.*, 88 AD3d 597 [1st Dept 2011][citation and quotation marks omitted].)

Plaintiff's motion is denied as to defendant Horton, who was not a party to the preliminary conference order, and therefore was not directed to be deposed on October 28, 2014.

Plaintiff's motion is denied as to the Transit Defendants. Plaintiff has not demonstrated Watson-Brown's failure to appear at her deposition was a pattern of noncompliance with court orders at the time plaintiff's motion was made. Moreover, Watson-Brown did appear for a deposition, which renders moot the branch of plaintiff's motion to compel her deposition. "Belated but substantial compliance with a discovery order


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undermines the position that the delay was a product of willful or contumacious conduct." (*Cambry v Lincoln Gardens*, 50 AD3d 1081, 1082 [2d Dept 2008]); see also *Gradaille v City of New York*, 52 AD3d 279, 284 [1st Dept 2008].)

Watson-Brown's failure to appear for her continued deposition is addressed in the memorandum decision and order annexed to Motion Seq. No. 004.

Dated: 1/20/16
New York, New York


_____, J.S.C.

- 1. Check one:.....
- 2. Check if appropriate:..... MOTION IS:
- 3. Check if appropriate:.....

- CASE DISPOSED NON-FINAL DISPOSITION
- GRANTED DENIED GRANTED IN PART OTHER
- SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

MICHAEL D. STALLMAN
J.S.C.