

White v Golden Touch Transp. of NY, Inc.
2017 NY Slip Op 30790(U)
April 19, 2017
Supreme Court, New York County
Docket Number: 160124/2014
Judge: Paul A. Goetz
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 22

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SHAMELA WHITE,

Index No.: 160124/2014
Motion Sequence No.: 1

Plaintiff(s),

DECISION and ORDER

-against-

GOLDEN TOUCH TRANSPORTATION OF NY, INC.
and JOHN DOE (INTENDED TO BE THE
OPERATOR OF THE SHUTTLE BUS),

Defendant(s).

-----X
Recitation, as required by CPLR § 2219(a), the following papers were considered on the motion(s):

<u>Papers</u>	<u>Numbered</u>
Plaintiff's Notice of Motion for summary judgment on liability and affirmation with exhibits	1
Defendant, Golden Touch Trans. of NY, Inc.'s notice of cross motion to strike the note of issue, preclude the sworn statement and/or testimony of Eric Hodgeson, dismiss the complaint on the grounds that Mr. Hodgeson provides a non-negligent reason for the alleged accident; grant summary judgment to Defendant on the grounds that Plaintiff did not suffer a serious injury, and hear Defendant's late cross-motion for summary judgment; affirmation with exhibits; and memo of law	2
Plaintiff's affirmation in opposition to cross motion with exhibits	3
Defendants' reply affirmation with exhibit	4
Plaintiff's reply affirmation	5

PAUL A. GOETZ, J.

Plaintiff's motion for summary judgment pursuant to CPLR § 3212 on the issue of liability and Defendant, Golden Touch Transportation of NY, Inc's (hereinafter "Defendant") cross motion to strike the note of issue, preclude the sworn statement and/or testimony of Eric Hodgeson, dismiss the complaint on the grounds that Mr. Hodgeson provides a non-negligent reason for the alleged accident, grant summary judgment in favor of Defendant on the grounds that Plaintiff did not suffer a "serious injury" under Insurance Law § 5102(d), and direct that Defendant's untimely cross motion for summary judgment be heard are decided as follows:

Plaintiff, a flight attendant, initiated this action seeking damages for personal injuries resulting from an incident that occurred on August 1, 2013, when Plaintiff was a passenger on Defendant's JFK shuttle bus used to transport airline employees from the

terminal to parking lots. Plaintiff claims she was seriously injured when the shuttle bus on which she was a passenger stopped short causing her to be thrown from her seat.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

At her deposition on September 16, 2015, Plaintiff testified she boarded Defendant's shuttle bus at approximately 10:30 pm outside Terminal 8 to take her and other passengers to the employee parking lot. During the trip the shuttle bus driver slammed on the brakes causing Plaintiff to be propelled forward and strike her right shoulder into the back of the seat in front of her while at the same time, two other passengers were propelled into Plaintiff.

Included with Plaintiff's moving papers is a sworn statement, handwritten and not in affidavit form from Plaintiff's long time co-worker, Eric Hodgeson. Mr. Hodgeson states, among other things, that he believes a taxi or car cut in front of the bus or stopped short causing the bus driver to abruptly apply the brakes to avoid hitting the other vehicle.

Defendant argues both that the Court should not consider Mr. Hodgeson's statement and that he provides a non-negligent explanation for the alleged accident. Plaintiff argues the Court should not consider Mr. Hodgeson's statement because Plaintiff failed to provide Defendant with Mr. Hodgeson's full name (only the name Eric was mentioned by Plaintiff at her deposition) and contact information despite being directed to do so pursuant to the Court's February 24, 2015, scheduling order requiring the exchange of witness information by April 7, 2015, and Defendant's discovery demand dated. Nevertheless, the Court may, in its discretion consider Mr. Hodgeson's statement because Defendant is not surprised by the submission of his statement since Plaintiff mentioned him during her deposition (*Pearson v City of New York*, 74 AD3d 1160 [2nd Dept 2010] [holding Court properly exercised its discretion in considering a witness's affidavit despite the plaintiff's failure to name the witness in response to the defendant's discovery demands in part because the plaintiff identified the witness as "Quane" in her deposition]).

Taking into account Mr. Hodgeson's description of what occurred on Defendant's shuttle bus on August 1, 2013, Plaintiff's motion for summary judgment must be denied. While Mr. Hodgeson describes a potentially negligent reason for the shuttle bus driver's actions - he stopped short; he also provides a potentially non-negligent reason for the shuttle bus driver's actions - he was cut off by another car or taxi (*Maisonet v Roman*, 139 AD3d 121, 123 [1st Dept 2016] ["[C]ourts have consistently held that the emergency doctrine may protect a driver from liability where the driver, through no fault of his or her own, is required to take immediate action in order to avoid being suddenly cut off."]). By submitting inconsistent accounts of the incident on August 1, 2013, Plaintiff has failed to meet her burden of establishing summary judgment as a matter of law on liability by eliminating all triable issues of fact (*Perris v Maguire*, 2007 NY App Div LEXIS 2087; 2017 NY Slip Op 02139 [1st Dept March 23, 2017])[holding defendant's summary

judgment motion “should have been denied, due to conflicting accounts of the accident presented in his own moving papers.”]; *Oluwatayo v Dulinayan*, 142 AD3d 113 [1st Dept 2016][holding plaintiff failed to eliminate all triable issues of fact in its summary judgment motion where plaintiff submitted conflicting deposition transcripts of how the accident happened]).

Accordingly, Plaintiff’s motion for summary judgment is denied.

DEFENDANT’S CROSS MOTION

To Vacate the Note of Issue & Strike from the Trial Calendar

Defendant cites NYCRR § 202.21 (d) in support of its contention that the note of issue should be vacated and the case struck from the trial calendar so that it may depose Mr. Hodgeson. 22 NYCRR § 202.21(d) provides in pertinent part that “[w]here unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice, the court, upon motion supported by affidavit, may grant permission to conduct such proceedings.” Thus, vacature of the note of issue is not contemplated under NYCRR § 202.21 (d), but rather permission from the Court to conduct additional post note of issue disclosure.

Indeed, where as here the Plaintiff refers to a witness during her deposition but fails to disclose the witness’s full name and contact information in response to a discovery demand or scheduling order the appropriate remedy is to permit the taking of the witness’s deposition testimony, post filing of the note of issue but before trial or the witness is precluded from testifying at trial (*Accord Cruz v City of New York*, 81 AD3d 505 [1st Dept 2011] [holding failure to disclose witness affidavits prepared before commencement of action did not require preclusion so long as the opposing party is afforded an opportunity to depose the witness before trial]; *cf Rivera v City of New York*, 253 AD2d 597, 600 [1st Dept 1998] [holding it was not an abuse of discretion to allow previously undisclosed witness to testify at trial where nondisclosure was not willful and the opposing party “did not seek any remedy such as a continuance for deposition”]).

Accordingly, that portion of Defendant’s cross motion seeking to vacate the note of issue and strike the case from the trial calendar to allow Mr. Hodgeson to be deposed is denied. However, Mr. Hodgeson testimony is precluded from testifying at trial unless, upon proper notice, he appears for a deposition at least 30 days prior to trial (*Cruz*, 81 AD3d at 505; *Pearson*, 74 AD3d at 1160).

To Dismiss Based on Mr. Hodgeson’s Non-Negligent Explanation for the Alleged Accident

For the same reason that the Court denies Plaintiff’s motion for summary judgment on the issue of liability, the Court denies Defendant’s cross motion for

dismissal of the complaint on the grounds that there is no material issue of fact concerning liability because Mr. Hodgeson provides a non-negligent explanation for the alleged accident. While Mr. Hodgeson does provide a potentially non-negligent reason for the alleged incident resulting in Plaintiff's alleged injuries, he also provides a potentially negligent reason - the shuttle bus driver simply stopped short. Therefore, Mr. Hodgeson's inconsistent explanations for the August 1, 2013, incident require denial of Defendant's cross motion to dismiss the complaint since there remains an issue of fact as to liability (*Perris*, 2007 NY App Div LEXIS 2087; 2017 NY Slip Op 02139; *Oluwatayo*, 142 AD3d 113).

Accordingly, Defendant's cross motion for dismissal is denied.

For Summary Judgment

Defendant also cross moves for summary judgment pursuant to CPLR § 3212 on the grounds that Plaintiff did not suffer a serious injury under New York Insurance Law § 5102 (d). The Rules of this Part require that motions for summary judgment be made no later than 60 days after filing of the note of issue. The note of issue in this case was filed on May 11, 2016, and Defendant filed the instant cross motion on August 8, 2016, 29 days late.

Citing *Hernandez v 620 W. 189th Ltd. Partnership* (7 Misc 3d 198 (SC NY Co 2005)), Defendant argues the Court can consider its late cross motion for summary judgment to "accommodate a genuine need" since the 60 day deadline is "self imposed" by the Court as opposed to the 120 day statutory deadline imposed by CPLR § 3212, and that "genuine need" does not necessarily mean "good cause." The need requiring accommodation here is that Defendant did not receive one of its doctor's opinions regarding Plaintiff's Worker's Compensation records until July 19, 2016 even though the records were sent to the doctor in early May, 2016, soon after they were received by Defendant's counsel.

Defendant ignores First Department cases subsequent to *Hernandez* that upheld denial of summary judgment motions for failure to establish "good cause" when the motion or cross motion was not made within the 60 day time limit set by the Supreme Court (*Farrell v Herzog*, 123 AD3d 655 [1st Dept 2014] [holding Supreme Court properly denied the defendant's cross motion for summary judgment since he failed to establish 'good cause' for his failure to cross-move within the 60-day time limit set by the Supreme Court for the making of motions or cross motion for summary judgment.]); *Doe v Madison Third Building Companies, LLC*, 121 AD3d 631 [1st Dept 2014] [same]). Therefore, notwithstanding Defendant's understanding to the contrary, it must establish "good cause" for not making its cross motion for summary judgment within 60 days of the filing of the note of issue (*Id.*).

The Court finds Defendant has not established "good cause" for bringing its cross motion beyond the 60-day time limit. Defendant does not state when it

determined it needed Plaintiff's Worker's Compensation records, when they were requested and why they could not have been requested earlier to ensure sufficient time for their receipt and for its doctor to review them. Moreover, Defendant's untimely cross motion can not be considered on the basis that it "is essentially duplicative" of Plaintiff's timely motion (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75 [1st Dept 2013]) because Plaintiff moves for summary judgment on the issue of liability and Defendant moves for summary judgment on the grounds that Plaintiff did not suffer a serious injury. Therefore, since Defendant has failed to establish "good cause" for its untimely cross motion for summary judgment and because its cross motion is not duplicative of Plaintiff's motion for summary judgment, its cross motion must be denied.

Accordingly, Defendant's cross motion for summary judgment is denied.

Based upon the foregoing, it is hereby

ORDERED that Plaintiff's motion for summary judgment on the issue of liability is **DENIED** in its entirety; and it is further

ORDERED that Defendant's cross motion to vacate the note of issue and strike the case from the trial calendar is **DENIED**; and it is further

ORDERED that Defendant's cross motion to dismiss the complaint is **DENIED**; and it is further

ORDERED that Eric Hodgeson is precluded from testifying at trial unless, upon proper notice, he appears for a deposition at least 30 days prior to trial; and it is further

ORDERED that Defendant's cross motion for summary judgment is **DENIED**.

This constitutes the Decision and Order of this Court.

Dated: April 19, 2017

ENTER:


HON. PAUL A. GOETZ