

Hornedo v New York City Tr. Auth.

2017 NY Slip Op 32131(U)

October 11, 2017

Supreme Court, New York County

Docket Number: 156487/2013

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED
Justice

PART 2

-----X

LINDA HORNEDO,
Plaintiff,

INDEX NO. 156487/2013

MOTION DATE 3/28/2017

- v -

MOT. SEQ. NOS. 001 and 002

NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN
TRANSPORTATION AUTHORITY, ACCESS-A-RIDE,
ADVANCE TRANSIT CO INC, STEFFEN S. RILEY, LUIS
ARNOLDO ABARCA MURILLO, ROSIBEL ZUNIGA

DECISION AND ORDER

Defendants.

-----X

On motion sequence No. 002, the following e-filed documents, listed by NYSCEF document number
60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 76, 77, 78, 79, 80, 81, 82, 83

were read on this application to/for SUMMARY JUDGMENT(AFTER JOINDER)

On motion sequence No. 001, the following e-filed documents, listed by NYSCEF document number
28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54,
57, 59, 74, 75

were read on this application to/for Strike Pleadings

This is a personal injury action based upon a motor vehicle accident on August 4, 2012 at
the intersection of Broadway and La Salle Street. Plaintiff alleges that, at the time of the
accident, she was the passenger in an Access-A-Ride vehicle driven by Riley, going west on La
Salle Street, when a van going south on Broadway, driven by Murillo with Zuniga as his
passenger, hit the Access-A-Ride vehicle on the right side.

Defendants New York City Transit Authority, Metropolitan Transportation Authority, Access-A-Ride, Advance Transit Co Inc. and Steffen S. Riley (hereinafter collectively referred to as the NYCTA defendants) move to strike the answer of co-defendants Luis Arnoldo Abarca Murillo and Rosibel Zuniga or, in the alternative, to preclude them from testifying at trial or furnishing an affidavit in response to a dispositive motion. (Motion Sequence No. 001.)

Plaintiff cross-moves for the same relief. The NYCTA defendants also move for summary judgment dismissing the complaint and cross claims against them. (Motion Sequence No. 002.)

With respect to the request for discovery relief against Murillo and Zuniga, their counsel, Rasleen Sahni, Esq., concedes that they have failed to appear for a deposition despite numerous court orders directing them to do so. (Doc. No. 74.) He states that they are both Costa Rican nationals and that, despite making good-faith efforts to get into contact with them, including hiring an investigator, he has been unable to do so. The only opposition raised to the relief requested in the motion and cross motion is as to the appropriate sanction to be imposed in light of Murillo's and Zuniga's failure to comply with court-ordered discovery.

Failure to appear for a deposition as directed in multiple discovery orders constitutes willful and contumacious conduct that, if unexcused, may support a motion to strike a defendant's answer. *See Menkes v Delikat*, 148 AD3d 442, 442 (1st Dept 2017); *Rivera v City of N.Y.*, 128 AD3d 567 (1st Dept 2015); *Loeb v Assara N.Y. I L.P.*, 118 AD3d 457 (1st Dept 2014); *Silvero v Arvelo*, 103 AD3d 401 (1st Dept 2013). A counsel's unsuccessful, good-faith efforts to locate his or her client may be considered when determining the appropriate sanction for failure to comply with multiple discovery orders. *See Heyward v Benyarko*, 82 AD2d 751, 751 (1st Dept 1981). However, a "bald statement that reasonable good faith efforts ha[ve] been taken to locate [the clients], including the hiring of an investigator to assist in the search," does not

suffice if it is “devoid of any detail” and is not accompanied by “an affidavit from the purported investigator detailing what efforts, if any, the investigator made to locate [the clients.]” *Reidel v Ryder TRS, Inc.*, 13 AD3d 170, 171 (1st Dept 2004); *see Silverio v Arvelo*, 103 AD3d 401 (1st Dept 2013); *Hann v Black*, 96 AD3d 1503, 1505 (4th Dept 2012); *Mason v MTA N.Y. City Tr.*, 38 AD3d 258 (1st Dept 2007). Counsel’s assertion that this Court should decline to strike Murillo and Zuniga’s answer is unsupported by an adequately detailed explanation of the reasonable, good-faith efforts undertaken to locate them. Under the circumstances presented by the current procedural posture, however, and in keeping with the need to consider that the real party in interest on behalf of Murillo and Zuniga is presumably an insurance company (*see Heyward v Benyarko*, 82 AD2d at 751), this Court finds it more appropriate to preclude said defendants from offering testimony as to liability rather than to strike their answer, so as to allow discovery on the issue of damages (*see generally Amato v Fast Repair, Inc.*, 15 AD3d 429, 430 [2d Dept 2005]).

Turning to the NYCTA defendants’ motion for summary judgment dismissing the complaint and cross claims against them, they submitted, among other things, plaintiff’s 50-h and deposition transcripts, the transcript of Riley’s deposition, and the transcripts of the depositions of three nonparty witnesses. Riley testified that, although he could not see the traffic coming from Broadway – since he was underneath an underpass and there was a wall blocking his view – he waited until the light turned green and then paused for two or three seconds before he began driving into the intersection, at which point his vehicle was struck. Robert Pennoyer and Mitchell Lee, both of whom are non-party, disinterested eyewitnesses, testified that the light was green when Riley pulled into the intersection. In the absence of any reason to doubt the consistent testimony of these three witnesses that the light was green when Riley pulled into the

intersection, and considering that Murillo and Zuriga are precluded from offering inconsistent testimony, this Court concludes that it is appropriate to search the record and award plaintiff partial summary judgment as to liability against Murillo and Zuriga. *See* CPLR 3212 (b); *Morris v Pavarini Const.*, 22 NY3d 668, 675 (2014); *Blanco v NBC Trust No. 1996A*, 122 AD3d 409, 409-410 (1st Dept 2014); *Mini Mint Inc. v Citigroup, Inc.*, 83 AD3d 596, 597 (1st Dept 2011).

Accordingly, it is hereby:

ORDERED that the motion by defendants New York City Transit Authority, Metropolitan Transportation Authority, Access-A-Ride, Advance Transit Co Inc, Steffen S. Riley for sanctions against Luis Arnoldo Abarca Murillo and Rosibel Zuniga, for failure to comply with discovery demands, is granted, and said defendants are precluded from offering testimony on the issue of liability; and it is further

ORDERED that the motion by defendants New York City Transit Authority, Metropolitan Transportation Authority, Access-A-Ride, Advance Transit Co Inc, and Steffen S. Riley for summary judgment dismissing the complaint and all cross claims against them is granted, the complaint and all cross claims against them are severed and dismissed, and the caption is amended accordingly; and it is further

ORDERED that counsel for the NYCTA defendants is directed to e-file a completed Notice to County Clerk (Form EF-22), with a copy of this order attached thereto, within 20 days after this order is entered, and the Clerk is directed to amend the caption to reflect that New York

City Transit Authority, Metropolitan Transportation Authority, Access-A-Ride, Advance Transit Co Inc, and Steffen S. Riley are removed as defendants; and it is further

ORDERED that, upon searching the record, plaintiff is awarded partial summary judgment in her favor on the issue of liability against defendants Luis Arnoldo Abarca Murillo and Rosibel Zuniga, and the only remaining issue of fact is the amount of damages to which plaintiff is entitled; and it is further

ORDERED that, following the conclusion of discovery and the filing of the note of issue, the issue of damages must be proved at an inquest; and it is further

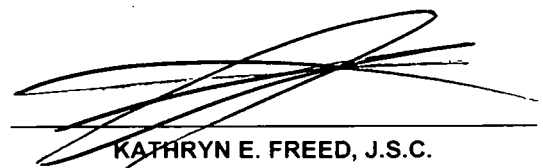
ORDERED that the parties are directed to appear for a status conference on November 28, 2017 at 2:15 p.m.

This constitutes the decision and order of the court.

ENTER:

10/11/17

DATE



KATHRYN E. FREED, J.S.C.

**KATHRYN E. FREED
J.S.C.**