

Brooks v New Dawn Tr. LLC
2020 NY Slip Op 34039(U)
December 7, 2020
Supreme Court, Kings County
Docket Number: 519486/17
Judge: Lawrence S. Knipel
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At an IAS Term, Part 57 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 7th day of December, 2020.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice:

-----X
MATTIE BROOKS,

Plaintiff,

- against -

Index No. 519486/17

NEW DAWN TRANSIT LLC, RAINBOW TRANSIT
INC., FEDERAL AUTOMOTIVE SERVICES
INCORPORATED, HALMON MILLER, AWA GNING,
JEAN MAYO, MV TRANSPORTATION, INC.,
AUTUMN LEMONS, NEW YORK CITY TRANSIT
AUTHORITY, METROPOLITAN TRANSPORTATION
AUTHORITY, MTA NYC TRANSIT, PARATRANSIT
DIVISION and ACCESS-A-RIDE,

Defendants.
-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed_____

95-116

Opposing Affidavits (Affirmations)_____

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Upon the foregoing papers in this personal injury action regarding an automobile accident, plaintiff Mattie Brooks (Brooks) moves (in motion sequence [mot. seq.] four) for an order, pursuant to CPLR 2221 (a) and/or 5019 (a), to resettle the August 13, 2020 order and correct the named defendant in that order.

Brooks' counsel contends that defendant Rainbow Transit Inc. (Rainbow Transit)

“is the party that has refused to appear for an EBT in this matter to date.” According to a September 18, 2019 Final Pre-Note Conference Order, Rainbow Transit was required to be deposed on December 3, 2019. Brooks’ counsel affirms that Rainbow Transit “did not appear on that date and despite numerous telephone calls by my office has not appeared for a deposition to date.” Consequently, on February 26, 2020, Brooks moved (in mot. seq. three) for an order compelling Rainbow Transit to appear for a deposition. Notably, Rainbow Transit did not oppose Brooks’ motion to compel.

By an August 13, 2020 order, this court ordered, in part, that defendant New Dawn Transit (New Dawn) appear for an examination before trial by October 15, 2020 or be precluded from testifying at trial or submitting an affidavit in any dispositive motion. Plaintiff’s counsel contends that “[t]his was a clerical error” because the order was supposed to compel and/or preclude defendant Rainbow Transit, and not New Dawn, which has already been deposed.

For this reason, Brooks now moves to resettle and/or correct the August 13, 2020 order so that it directs Rainbow Transit, the correct party defendant, to appear for a deposition or be precluded. Brooks’ counsel further notes that the August 13, 2020 order also directed defendants Rainbow Transit, New Dawn/Halmon Miller and Jean Mayo/Gning to serve responses to the Preliminary Conference Order by September 30, 2020, and “[t]o date, [those] defendants have not provided the aforementioned responses.”

Brooks' counsel asserts that "[t]he instant motion for resettlement of the Order is only to correct an obvious error . . . and not in any way to change the substance of the Order." Brooks further argues that "[a]ny objection or opposition to this motion should not be considered" since Rainbow Transit did not oppose the prior motion to compel.

Rainbow Transit, in partial opposition, submits an attorney affirmation asserting that "this office is ready to proceed with the deposition of Rainbow [Transit]" and that "[t]here has never been a willful or contumacious failure to appear." Defense counsel admits that "there was a delay in finding a knowledgeable witness, as it took some time to identify the appropriate person with knowledge." In addition, defense counsel asserts that "there was and still remains difficulty caused by the COVID-19 pandemic." Rainbow Transit requests that the October 15, 2020 deposition date be extended so that its deposition can be conducted.

Under CPLR 5019 (a), the court has the power to make clerical amendments to an order without changing the substance of the order (*Salvati v Salvati*, 208 AD2d 516, 516 [1994]). Here, Brooks has demonstrated that the August 13, 2020 order contains a typographical error because it erroneously compels New Dawn, instead of Rainbow Transit, to appear for a deposition or be precluded. Correction of the August 13, 2020 order is warranted, under these circumstances. Accordingly, it is

ORDERED that Brooks' motion (in mot. seq. four) is granted, and this court's August 13, 2020 order is hereby amended and corrected to read as follows:

"Plaintiff's motion to restore/compel/preclude is granted, there being no opposition. Defendant *Rainbow Transit* to appear for EBT by 1/15/21 or be precluded from testifying at trial or submitting affidavit in any dispositive motion without necessity for further motion by plaintiff. Defendants *Rainbow Transit*, *New Dawn* and *Mayo/Gning* to serve responses to P.C. order by 12/31/20. Note of issue to be filed by 2/12/21 (emphasis added).

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

Justice Lawrence Knipfel