

<b>Louise v Hampton Jitney, Inc</b>
2021 NY Slip Op 31457(U)
April 30, 2021
Supreme Court, New York County
Docket Number: 153839/2016
Judge: Nancy M. Bannon
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART IAS MOTION 42EFM

-----X

TINA LOUISE

Plaintiff,

- v -

HAMPTON JITNEY, INC,

Defendant.

INDEX NO. 153839/2016

MOTION DATE 04/29/2021,  
04/29/2021

MOTION SEQ. NO. 004 005

**DECISION + ORDER ON  
MOTION**

-----X

HON. NANCY M. BANNON:

**I. INTRODUCTION**

The plaintiff ,Tina Louise, brings this personal injury action against the defendant, Hampton Jitney, Inc., to recover damages for injuries she allegedly sustained when she fell while riding a Hampton Jitney bus on the Long Island Expressway on July 5, 2015. Trial is scheduled to begin, upon the selection of a jury, on May 5, 2021. In anticipation, the plaintiff and defendant have each filed pre-trial motions *in limine*.

The plaintiff seeks to compel the deposition of a nonparty witness, Ramadan “Dan” Sokoli, formerly employed by the defendant as a bus attendant on the date of the plaintiff’s accident, or, in the alternative, to preclude Sokoli from testifying for the defendant and to sanction the defendant for its failure to comply with prior discovery orders. (SEQ 005.) The defendant opposes the plaintiff’s motion. The defendant seeks to preclude (1) the plaintiff’s claim for lost earnings, (2) testimony regarding the bus driver’s alleged cell phone use, and (3)

lay witness testimony as to the estimated speed of the bus. (SEQ 004.) The plaintiff opposes the defendant's motion. For the following reasons, the plaintiff's motion is denied and the defendant's motion is granted in part.

## II. BACKGROUND

The Court assumes familiarity with the facts and allegations in this case, as well as the procedural background of this case. Briefly, on July 5, 2015, the plaintiff alleges that she fell while riding a Hampton Jitney bus when the bus driver, Moses Jilla, suddenly applied the brakes. The plaintiff alleges that, as a result of the fall, she sustained serious and permanent injuries. The plaintiff filed this action on May 13, 2016. She filed the Note of Issue, certifying that all discovery was complete, on June 20, 2019.

Additional factual information relevant to the parties' motions is addressed in the applicable section of the court's discussion.

## III. DISCUSSION

### A. The plaintiff's motion *in limine*

The plaintiff moves *in limine* to compel the deposition of nonparty Sokoli or to preclude him from testifying at trial and sanction the defendant for failing to comply with prior discovery orders.

The parties' submissions indicate that on August 31, 2018, Sokoli was identified by Jilla at his deposition as a bus attendant who worked for the defendant and who may have witnessed the plaintiff's fall. On September 12, 2018, this court, Silvera, J., so-ordered a stipulation between the parties representing, in relevant part, that "[a]ll parties reserve their rights to non-

party discovery and depositions.” On November 2, 2018, Justice Silvera so-ordered an additional stipulation wherein the parties agreed that the defendant would “produce the bus attendant at the time of accident or if no longer employed, then name, last known address and telephone.” On December 18, 2019, the plaintiff served post-deposition demands, including a demand requiring the defendant to produce the “full name, particulars and employment records” of “Dan,” an apparent reference to Sokoli. On February 13, 2019, the defendant, via email, provided the plaintiff with Sokoli’s last known home address in Kosovo and confirmed that he was no longer in the defendant’s employ. On May 28, 2019, the defendant formally responded to the plaintiff’s post-deposition demand and provided Sokoli’s last known United States address in Southampton, New York.

The plaintiff avers that she previously attempted to depose Sokoli. However, she provides no evidence or description of her attempts, asserting only she sent two letters to Sokoli’s Kosovo address with unspecified contents on unspecified dates. On April 7, 2021, the defendant produced a proposed trial witness list that included Sokoli. The defendant states that it has recently been in contact with Sokoli and that Sokoli has agreed to testify at the trial.

“Where 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 ... may grant such permission to conduct such necessary proceedings.” 22 NYCRR 202.21(d); see Portilla v Law Offices of Arcia & Flanagan, 125 AD3d 956 (2<sup>nd</sup> Dept. 2015); Esteva v Catsimatidis, 4 AD3d 210 (1<sup>st</sup> Dept. 2004); Audiovox Corp. v Benyamini, 265 AD2d 135 (2<sup>nd</sup> Dept. 2000). Here, the plaintiff fails to demonstrate entitlement to a further nonparty deposition on the eve of trial. The plaintiff was apprised of Sokoli’s identity in August 2018 and had all of Sokoli’s available contact information by May

28, 2019, at the latest. Nonetheless, she proceeded to file the Note of Issue nearly one month later without seeking first to depose Sokoli. Indeed, in the nearly two years that have passed since the defendant disclosed Sokoli's most recent addresses, one of which appears to be his current address, the plaintiff has never attempted to serve Sokoli with a subpoena pursuant to CPLR 3106(b).

Moreover, the court does not find that additional pretrial proceedings are necessary to prevent substantial prejudice. Both parties were aware of Sokoli's identity and contact information, and knew that Sokoli's testimony was very likely relevant to this action, for years, yet no party attempted to depose him. While the plaintiff may have assumed that the lack of response to her letters meant that Sokoli would not have appeared for a deposition, she cannot now claim she was unaware of the possibility that Sokoli could be called as a witness at trial. The foregoing facts belie the plaintiff's claims that permitting Sokoli to testify would be unduly prejudicial. Further, the fact that the plaintiff will have an opportunity to fully and fairly examine Sokoli during her trial mitigates any surprise the plaintiff claims was caused by the appearance of Sokoli on the defendant's witness list.

Finally, the court rejects the plaintiff's attempt to shift blame for failing to timely depose, or even attempt to timely depose, Sokoli prior to filing the Note of Issue. The plaintiff's suggestion that the defendant was obligated to produce Sokoli, a former employee over whom the defendant lacks control, during discovery is without merit. An employer cannot be compelled to produce its former employees for deposition. See Doomes v Best Transit Corp., 303 AD2d 322 (1<sup>st</sup> Dept. 2003). For the same reason, the plaintiff's demand that the defendant produce Sokoli now is itself improper.

As to the alternative relief the plaintiff seeks, the defendant cannot be sanctioned pursuant to CPLR 3126 for failing to produce a nonparty witness for the reasons explained above.

The court further observes that, generally, “the function of a motion *in limine* is to permit a party to obtain a preliminary order before or during trial excluding the introduction of anticipated inadmissible, immaterial, or prejudicial evidence or limiting its use. Its purpose is to prevent the introduction of such evidence to the trier of fact, in most instances a jury.” State of New York v Metz, 241 AD2d 192, 198 (1<sup>st</sup> Dept 1998). A motion *in limine* thus serves a function quite different from that pertaining to other motions, such as a motion to impose sanctions for failure to make disclosure. Thus, while “a motion *in limine* is the appropriate vehicle to determine what evidence may be presented at trial regarding [liability or] damages,” (Wey v New York Stock Exchange, 15 Misc 3d 1127[A], 2007 NY Slip Op 50880[U], 2007 NY Misc LEXIS 2965, \*37 [Sup Ct, N.Y. County 2007]), it may not be employed as a substitute for an untimely motion to impose sanctions for failure to make disclosure.

Under most circumstances, including those presented here, a motion pursuant to CPLR 3126 to impose sanctions for the willful failure to make disclosure must be made prior to the filing of the note of issue and certificate of readiness since, by that filing, a party represents that all discovery has been completed and that there are no outstanding discovery requests. See Flanagan v Wolff, 136 AD3d 739, 741 (2<sup>nd</sup> Dept. 2016). The failure to make a motion pursuant to CPLR 3126 prior to the filing of the Note of Issue and certificate of readiness is deemed a waiver of any contention that an adverse party has failed to meet his or her disclosure obligations. See id.; K-F/X Rentals & Equip., LLC v FC Yonkers Assoc., LLC, 131 AD3d 945,

946 (2<sup>nd</sup> Dept. 2015); Marte v City of New York, 102 AD3d 557, 558 (1<sup>st</sup> Dept. 2013); Rivera-Irby v City of New York, 71 AD3d 482, 482 (1<sup>st</sup> Dept. 2010).

For all of the foregoing reasons, the plaintiff's motion is denied.

B. The defendant's motion in limine

The defendant moves *in limine* to preclude (1) the plaintiff's claim for lost earnings, (2) testimony regarding the bus driver's alleged cell phone use, and (3) lay witness testimony as to the estimated speed of the bus.

(1) "Proof of lost earnings must be established with reasonable certainty." Godfrey v G.E. Capital Auto Lease, Inc., 89 AD3d 471, 477 (1<sup>st</sup> Dept. 2011); Jeffries v 3520 Broadway Management Co., 36 AD3d 421 (1<sup>st</sup> Dept. 2007). In Jeffries, the court set aside a jury award for past and future lost earning where the plaintiff "worked in the theater as a stage and production manager, but proffered no documentary evidence to support her claimed loss of earnings" save for testimony of one her alleged employers as to "occasional involvement by plaintiff in productions at Brown University" and "playbills" evidencing work in various community theater productions. The court expressly noted the absence of any tax returns or W-2 forms at trial.

Here, the plaintiff is an actress who intends to testify at trial that she was unable to negotiate and execute a movie contract and to attend an art reception where her paintings were being sold in October 2015 as a result of her injuries. The evidence she intends to offer is limited to her own testimony, an unsigned movie contract, and a cursory letter from the plaintiff's celebrity artist agent stating that the plaintiff could not attend an October 2015 art reception but did attend a rescheduled reception in January 2016. Nothing more is proffered. This evidence, devoid of any proofs such as pre- and post-accident tax returns, W-2 forms, or

other documentation, is insufficient to support a claim for lost earnings. See Shubbuck v Conners, 15 NY3d 871 (2010) (plaintiff's own testimony insufficient to establish lost wages); Martinez v Metropolitan Transp. Auth., 159 AD3d 584 (1<sup>st</sup> Dept. 2018) (same); DelValle v White Castle Sys., 277 AD2d 13 (1<sup>st</sup> Dept. 2000) (same). Accordingly, the plaintiff is precluded from asserting a claim for past or future lost earnings related to her fall.

(2) The branch of the defendant's motion seeking to preclude any testimony regarding Jilla's alleged cell phone use at the time of the accident is denied. Even if there is no direct testimony that Jilla was using his cell phone at the time of the accident, and Jilla denies doing so, there is sufficient anticipated circumstantial evidence that Jilla had a cell phone in his possession and may have been distracted by it to create an issue of fact as to whether cell phone use contributed to the plaintiff's accident. For example, Jilla is expected to testify that he had a cell phone mounted to the side window of the bus at the time of the accident, and the plaintiff is expected to testify that she saw Jilla using a device that may have been a cell phone prior to the accident. Though limited, this evidence could support a rational finding that, whether the phone was in his hands or not, Jilla's use of the phone caused him to take his eyes off the road and brake suddenly, causing the plaintiff to fall. Rather than creating undue prejudice, confusing the issues, or misleading the jury, (see Mazella v Beals, 27 NY3d 694 [2016]), testimony or evidence regarding cell phone use is instrumental to the plaintiff's theory of liability. Accordingly, there is no basis for precluding such testimony or evidence.

(3) The defendant's application for an order precluding lay witness testimony as to the estimated speed of the Hampton Jitney at the center of this action is likewise denied. A lay witness may properly testify as to the speed of a vehicle. See Shprtzman v Strong, 248 AD2d 524 (2<sup>nd</sup> Dept. 1998); Lo Faso v Jamaica Buses, Inc., 63 AD2d 998 (2<sup>nd</sup> Dept. 1978). "It has

long been the rule that “[a]n estimate of the speed at which an automobile is moving at a given time is generally viewed as a matter of common observation rather than expert opinion, and it is well settled that any person of ordinary ability and intelligence having the means or opportunity of observation is competent to testify as to the rate of speed of such vehicle.” (Marucci v Bird, 275 App Div 127, 129).” Guzek v B & L Wholesale Supply, Inc., 151 AD3d 1662, 1663-1664 (4<sup>th</sup> Dept. 2017); see Sweeney v Peterson, 1 AD3d 650 (3<sup>rd</sup> Dept. 2003); Corcoran v Babylon Transit, Inc., 295 AD2d 392 (2<sup>nd</sup> Dept. 2002). Indeed, “almost everyone today is familiar with the speed of automobiles and buses, and any person of ordinary intelligence can tell when a bus is traveling ‘fast’ or ‘slow’, or variations thereof.” Lo Faso v Jamaica Buses, Inc., supra at 998, 998 (2<sup>nd</sup> Dept. 1978) (finding reversible error where court precluded lay witness testimony as to speed of chartered bus. ); see also Tavarez v Oquendo, 58 AD3d 446 (1<sup>st</sup> Dept. 2009) (error in precluding lay witness to estimate speed of a truck found harmless). The Appellate Division, Second Department has further explained that “[a] lay witness will ordinarily be permitted to testify as to the estimated speed of an automobile, based upon the prevalence of automobiles in our society, the frequency with which most people view them at various speeds and an adequate foundation that the witness has estimated the speed of automobiles on prior occasions.” Swoboda v We Try Harder, Inc., 128 AD2d 862, 863 (2<sup>nd</sup> Dept. 1987).

The defendant focuses on an exception to this principle apparently carved out by the Second Department insofar as it has held that a lay witness may not testify as to the speed of a motorcycle under certain circumstances. See Swoboda v We Try Harder, Inc., supra; Larsen v Vigliarolo Bros., Inc., 77 AD2d 562 (2<sup>nd</sup> Dept. 1980) (motorcycles are less prevalent in society than automobiles.) However, the defendant cites no authority applying the same principle to buses, and research reveals none. Rather, the defendant implores the court to “take judicial

notice” that a passenger bus is “less prevalent” on the road than a standard automobile and preclude lay witness testimony on bus speed on that basis. The court declines to do so.

Thus, provided that the plaintiff’s counsel lays a proper foundation for such testimony, a lay witness may testify as to the speed of the defendant’s bus at the time of the plaintiff’s accident. To be sure, the lay witness would also be subject to cross-examination in regard to that testimony such that questioning regarding, *i.e.* his or her experience with buses and his or her ability to observe the movement of the subject bus and accurately estimate its speed would be permissible at trial.

#### IV. CONCLUSION

Accordingly, it is

ORDERED that the plaintiff’s motion *in limine* (SEQ 005) to compel a further nonparty deposition or, in the alternative to preclude such nonparty’s testimony and sanction the defendant is denied in its entirety; and it is further

ORDERED that the defendant’s motion *in limine* (SEQ 004) to preclude (1) the plaintiff’s claim for lost earnings, (2) testimony regarding the bus driver’s alleged cell phone use, and (3) lay witness testimony as to the estimated speed of the bus is granted to the extent that the plaintiff is precluded from claiming past or future lost earnings, and the motion is otherwise denied.

This constitutes the Decision and Order of the court.

**Dated: April 30, 2021**

**ENTER:**

  
\_\_\_\_\_  
NANCY M. BANNON, J.S.C.  
**HON. NANCY M. BANNON**