

Jenkins v Metropolitan Transp. Auth.

2023 NY Slip Op 32063(U)

June 21, 2023

Supreme Court, New York County

Docket Number: Index No. 154268/2021

Judge: Denise M. Dominguez

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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. DENISE M DOMINGUEZ PART 21

Justice

-----X INDEX NO. 154268/2021

LISA JENKINS, MOTION SEQ. NO. 001

Plaintiff,

- v -

METROPOLITAN TRANSPORTATION AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY

DECISION + ORDER ON MOTION

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for DISCOVERY

Upon reading the above listed documents, Plaintiff LISA JENKINS's motion is denied in part and granted in part.

This personal injury matter arises out of a May 22, 2020 motor vehicle accident that occurred at the intersection of 57th Street and 10th Avenue in Manhattan between the Defendants' bus, bearing New York State license plate AU1019, and the Plaintiff's Nissan, bearing New York State license plate GYV9135, operated by the Plaintiff.1

Upon a review of the record, in both of the related action, Plaintiff LISA JENKINS commenced the action by the filing of the complaint on May 3, 2021 (NYSCEF Doc. #1) and the Defendants joined issue by the filing of their answer on July 16, 2021 (NYSCEF Doc. #5). In both related actions, the parties entered into a Preliminary Conference Order, dated April 28, 2022 (NYSCEF Doc. #7). However, the parties did not submit a Compliance Conference Order as per Part 21 rules as scheduled on September 30, 2022 in either action, nor was the Note of Issue filed on March 31, 2023 in either action.

1 A separate action was commenced by Plaintiff's counsel on behalf of Plaintiff's passenger, Gwendolyn Jamison, captioned Gwendolyn Jamison v. Metropolitan Transportation Authority, New York City Transit Authority, Index No. 154269/2021. These actions have not been joined for discovery or consolidated. A nearly identical motion has been filed by Plaintiff Jamison in that action, which is before this Court and is decided similarly to the within motion.

Plaintiff now moves by notice of motion to compel non-party Leronn D. McGowan, the apparent operation of the Defendants' bus, and former employee of Defendant NEW YORK CITY TRANSIT AUTHORITY, to appear at a deposition, to compel the Defendants to provide the last known address of Leronn D. McGowan, to preclude Leronn D. McGowan from testifying at the time of trial or from submitting an affidavit in connection with any "substantive motion practice", to compel the Defendants to execute a Stipulation of Judgment conceding liability and for costs associated with filing the motion.

Here, the Plaintiff's Affirmation of Good Faith (NYSCEF Doc. #22), does not attest to a time and date when the parties met in person, had a telephone conference or attempted to meet and confer to discuss the disclosure issue in this motion as required in 22 NYCRR 202.7[c] and Part 21 rules; written and/or email correspondence is insufficient. For that reason, the motion is denied as procedurally defective.

Moreover, upon review, the witness Plaintiff seeks to compel and/or preclude, Leronn D. McGowan, is alleged to have been the operator of the subject bus involved in this incident. However, the Plaintiff has not provided any evidence, such as the police report or other accident reports, to establish Leronn D. McGowan's role in this matter. However, as the Defendants appear to acknowledge that Leronn D. McGowan was the operator of the subject bus at the time of the accident, for the purposes of this motion, this Court accepts that Leronn D. McGowan was in fact the bus operator.

Significantly, though, Leronn D. McGowan is not a party to this action. It also appears that the Plaintiff has known for some time that Leronn D. McGowan was the operator of the Defendants' bus, but Plaintiff has never sought to add Leronn D. McGowan as a defendant in this matter. As such, Leronn D. McGowan is not a party to this action.

In opposition to the motion, the Defendants acknowledge that Leronn D. McGowan, is no longer in their employ and has not been responsive to their efforts to contact him regarding this matter. Although it appears that the Defendants attempted to gain the cooperation of Leronn D. McGowan so that he could appear for a deposition, it is clear that Leronn D. McGowan is no longer in the control of the Defendants. As the Defendants now consent, as set forth in their Affirmation in Opposition, to providing the last known address for Leronn D. McGowan, that branch of the Plaintiff's motion which seeks to obtain the last known address for Leronn D. McGowan is granted.

At this time, no evidence has been submitted that a subpoena for a non-party deposition of Leronn D. McGowan has been duly served as per CPLR §3106(b). As Leronn D. McGowan has not yet been served with a subpoena to appear for a non-party deposition, that branch of the Plaintiff's motion which seeks to compel the non-party Leronn D. McGowan to appear for deposition and/or to preclude the witness from testifying or submitting an affidavit is denied. As Leronn D. McGowan is not a party to this action and as he has not yet been served with a subpoena for a non-party deposition as per CPLR §3106(b), this non-party witness has not failed to comply with a subpoena and therefore this Court lacks the authority to "punish" the witness for his failure to comply with a subpoena pursuant to CPLR §2308. (*see e.g. Lloyd v. Young Men's Christian Ass'n of City of New York*, 282 A.D.2d 269, 723 N.Y.S.2d 182 [1st Dept 2001]; *State Div. of Hum. Rts. v. Berler*, 46 A.D.3d 32, 848 N.Y.S.2d 183 [2d Dept 2007]; *Maragos v. Town of Hempstead Indus. Dev. Agency*, 174 A.D.3d 611, 107 N.Y.S.3d 305 [2d Dept 2019]). Furthermore, the Plaintiff does not cite to any caselaw that would permit this court, at this time, to compel the deposition of a non-party witness, or to preclude a non-party witness for failing to appear for such a deposition.

Equally absent from Plaintiff's motion is any basis upon which this Court could demand that the Defendants enter into a Stipulation of Judgment conceding liability, and that branch of the Plaintiff's motion is likewise denied.

Accordingly, it is hereby ORDERED that Plaintiff LISA JENKINS's motion to compel the deposition of non-party witness Leronn D. McGowan is denied; and it is further

ORDERED that Plaintiff LISA JENKINS's motion to preclude the testimony and/or affidavit of non-party witness Leronn D. McGowan is denied; and it is further

ORDERED that Plaintiff LISA JENKINS's motion to compel the Defendants into entering into a Stipulation of Judgment is conceding liability is denied; and it is further

ORDERED that Plaintiff LISA JENKINS's motion to compel the disclosure of the last known address of Leronn D. McGowan is granted to the extent that the Defendants are directed to provide Plaintiff with the last known address of former employee and non-party witness Leronn D. McGowan by July 17, 2023; and it is further

ORDERED that the parties submit a joint proposed Compliance Conference Order on consent as per Part 21 rules on July 17, 2023 at which time a new note of issue date will be provided by the Court.

Any requested relief not expressly addressed herein has nonetheless been considered by the Court and is hereby expressly denied.

6/21/2023
DATE

CHECK ONE:


CASE DISPOSED
 GRANTED DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN


DENISE M. DOMINGUEZ, J.S.C.
HON. DENISE M. DOMINGUEZ
J.S.C.
 NON-FINAL DISPOSITION
 GRANTED IN PART OTHER
 SUBMIT ORDER
 FIDUCIARY APPOINTMENT REFERENCE