

Burton v Rigo Limo Auto Group, LLC

2023 NY Slip Op 34966(U)

November 28, 2023

Supreme Court, Queens County

Docket Number: Index No. 718416/2019

Judge: Maurice E. Muir

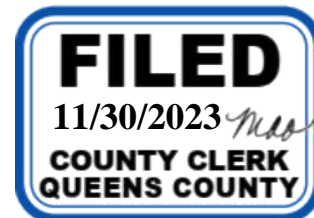
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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

Present: HONORABLE MAURICE E. MUIR
Justice



JAMILAH REGINA BURTON,

Plaintiff,

-against-

RIGO LIMO AUTO GROUP, LLC, OLIWOLE J.
OGUNNUBI, UBER TECHNOLOGIES, INC.,
UBER USA, LLC, RASIER-NY, LLC, EDWARD A.
HERRERA- ECHAVARRIA, and RYAN DOOKHI,

Defendants.

IAS Part - 42

Index No.: 718416/2019

Motion Date: 2/16/23

Motion Cal. No. 34

Motion Seq. No. 2

The following electronically filed (“EF”) documents read on this motion by Oliwole Ogunnubi and Rigo Limo-Auto, Corp. (collectively, the “movants”) for an order pursuant to CPLR § 3212 granting summary judgment to Defendants, Oliwole Ogunnubi and Rigo Limo-Auto, Corp., dismissing all claims and cross-claims as against Defendants Oliwole Ogunnubi and Rigo Limo-Auto, Corp. on the basis that they bear no responsibility for this motor vehicle accident together with such other and further relief as this Court may deem just and proper. Moreover, Uber Technology, Inc., Uber USA, LLC and Rasier-NY, LLC (collectively, “Uber” or “cross-movants”) cross move for an order pursuant to CPLR § 3212(b), granting summary judgment in favor of Uber, dismissing plaintiff’s complaint and any co-defendant cross-claims against Uber in their entirety together with such other and further relief as this Court deems just and proper. Additionally, Jamilah Regina Burton (“Ms. Burton” or “plaintiff”) cross moves for an order: (1) striking defendants, Rigo Limo Auto Group, LLC and Oliwole J. Ogunnubi, Answers due to their willful and contumacious failure to appear for deposition and to otherwise comply with Preliminary Conference Order and Compliance Conference Order; and/or (2) compelling depositions of the defendants, Rigo Limo Auto Group, LLC and Oliwole J. Ogunnubi, by a date certain with a conditional Order of preclusion in the event that any of the

aforesaid defendants fail to appear for their respective depositions; (3) precluding defendants, Rigo Limo Auto Group, LLC and Oliwole J. Ogunnubi, from testifying at the time of trial; and (4) extending plaintiff's time to file Note of Issue;

	<u>Papers</u> <u>Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	EF 43 - 55
Plaintiff's Affirmation in Opposition-Exhibits.....	EF 56 - 58
Affirmation in Reply-Exhibits.....	EF 59
Notice of Cross Motion-Affirmation-Exhibits.....	EF 60 - 68
Affirmation in Opposition to Cross Motion-Exhibits.....	EF 69 - 70
Notice of Cross Motion-Affirmation-Exhibits.....	EF 71 - 79
Affirmation in Opposition-Exhibits.....	EF 82 - 83
Affirmation in Support-Exhibits.....	EF 84
Affirmation in Reply.....	EF 85
Affirmation in Reply.....	EF 87

Upon the foregoing papers it is ordered that the motion and cross-motions are combined herein for disposition, and determined as follows:

This is an action to recover damages for personal injuries Jamilah Regina Burton ("Ms. Burton" or "Plaintiff") allegedly sustained in a motor vehicle collision -- on January 21, 2018, on the Van Wyck Expressway near the JFK Airport Terminal 4 exit in Queens, New York. As a result, on October 29, 2019, the plaintiff commenced the instant action; and on or about January 15, 2020, issue was joined, wherein the movants interposed an answer. On January 11, 2021, the court issued a preliminary conference order ("PCO"), which states, in relevant part, that "[e]xamination before trial for all parties/nonparties shall be conducted remotely at a mutually convenient time, or, if so agreed by the parties, in person at a mutually agreed location and time, within ninety (90) days of this order." Moreover, on October 13, 2021, the court issued a Compliance Conference Order ("CCO"), which states, in relevant part, that "[a]ll parties shall appear for Examination Before Trial on or before thirty (30) days. All depositions shall be conducted virtually, unless otherwise agreed upon in writing by the parties. Parties shall produce all relevant books, records and documents for use at said deposition." Now, the parties seek the above-described relief.

In support of the main motion, Mr. Ogunnubi avers that on January 21, 2018, he was driving a livery vehicle wherein, Ms. Burton was a passenger. Moreover, he avers that he was traveling on Van Wyck Expressway; and planned on merging onto Terminal 4 exit. However, a few moments later his vehicle was rear-ended by vehicle No. 2, who was previously rear ended by vehicle No. 3. In opposition, Ms. Burton testified, at a deposition, that "[a]s best I can

describe it, we got on the parkway. It was a normal ride, moving, light traffic, nothing heavy. As we started getting closer [Mr. Ogunnubi] was going to Terminal 4, and he asked me whether that was right or not, and I told him we were going to Terminal 5, and then he just abruptly moved over to the left side because we were -- it was so quick. We were going to Terminal 4, and he realized that that wasn't my terminal. . . . Then I felt the impact. . . . It was the rear on my righthand side." Furthermore, in support of Uber's cross-motion, Edward A. Herrera Echavarria testified that co-defendant Ryan Dookhi ("Mr. Dookhi") hit his vehicle, which propelled him into Mr. Ogunnubi's motor vehicle.

It is well settled law that "[a] defendant moving for summary judgment in a negligence action has the burden of establishing, *prima facie*, that he or she was not at fault in the happening of the subject accident" (*Boulos v. Lerner-Harrington*, 124 AD3d 709 [2d Dept 2015]; see *Aponte v. Vani*, 155 AD3d 929 [2d Dept 2017]; *Baulete v. L & N Car Serv., Inc.*, 134 AD3d 753 [2d Dept 2015]; *Miron v. Pappas*, 161 AD3d 1063 [2d Dept 2018]; see also *Chan Pok Kim v. Jurado*, 203 AD3d 694 [2d Dept 2022]). "There can be more than one proximate cause of an accident." (*Lopez v. Reyes-Flores*, 52 AD3d 785, 786 [2d Dept 2008] quoting *Cox v. Nunez*, 23 AD3d 427 [2d Dept 2005]; and "[g]enerally, it is for the trier of fact to determine the issue of proximate cause" (*Kalland v. Hungry Habor Assoc., LLC*, 84 AD3d 889 [2d Dept 2011]). Here, the court finds that the defendants failed to demonstrate their *prima facie* entitlement to judgment as a matter of law. Furthermore, the court finds that issues of fact and credibility are present, which cannot be resolved on a motion for summary judgment. Moreover, the court notes that Mr. Ogunnubi failed to appear for a court-ordered examination before trial. Accordingly, the court must deny the defendants' motions, which seek summary judgment. (*Colletti v. City of New York*, 208 AD3d 749 [2d Dept 2022]; *Gall v. Schwed*, 119 AD3d 804, 808 [2d Dept 2018]; *Poon v. Nisanov*, 162 AD3d 804, 808 [2d Dept 2018]).

Now, the court will turn to the plaintiff's motion for discovery. The plaintiff argues that ". . . your affirmant's office has attempted to schedule defendants RIGO LIMO AUTO GROUP, LLC and OLIWOLE J. OGUNNUBI depositions for nearly a year, without success." In opposition, counsel for Mr. Ogunnubi argues that "[t]his office has made and continues to make a diligent and good faith effort to produce Defendants for depositions. This office was in contact with OLIWOLE OGUNNUBI to make aware of deposition dates after they returned from abroad. This office has assigned in house investigators to make contact with Defendants and continue to make efforts to produce Defendant." It is well settled law that the drastic remedy of

striking an answer is inappropriate absent a clear showing that a defendant's failure to comply with discovery demands is willful and contumacious. (*Guardado v. K.B.G. Commercial Inc.*, 209 AD3d 721 [2d Dept 2022]; *Kuang v. MetLife*, 159 AD3d 878 [2d Dept 2018]; *Zubaidi v. Hasbani*, 136 AD3d 708 [2d Dept 2016] citing *Poveromo v. Kelley–Amerit Fleet Servs., Inc.*, 127 AD3d 1048 [2d Dept 2015]; *Dutchess Truck Repair, Inc. v. Boyce*, 120 AD3d 543 [2d Dept 2014]). Notwithstanding the same, it must be remembered that “[c]ourts are to interpret discovery requests liberally in favor of disclosure” (*Brito v. Gomez*, 33 NY3d 1126 [2019]; *M.C. v. Sylvia Marsh Equities, Inc.*, 103 AD3d 676 [2d Dept 2013]; *Kakharov v. Archer*, 166 AD3d 746 [2d Dept 2018]; *Greco v. Wellington Leasing Limited Partnership*, 144 AD3d 981 [2d Dept 2016]). Moreover, the plaintiff is entitled to depose the defendants in preparation for trial. (*Carmona v. HUB Properties Trust*, 186 AD3d 1485 [2d Dept 2020]; see also *Bouri v. Jackson*, 177 AD3d 947 [2d Dept 2019]; *Sepulveda v. 101 Woodruff Avenue Owner, LLC*, 166 AD3d 835 [2d Dept 2018]; *Honghui Kuang v. MetLife*, 159 AD3d 878 [2d Dept 2018]). Here, defendants, Rigo Limo Auto Group, LLC and Oliwole J. Ogunnubi, failed to appear for an EBT as required by the PCO and the CCO. Moreover, they failed to provide a reasonable explanation for their noncompliance with the court's discovery orders. It is well settled law that the fact that Oliwole Ogunnubi and Rigo Limo-Auto, Corp. have disappeared or made themselves unavailable does not provide a basis to deny a plaintiff's motion to strike their answer. (*Carmona v. HUB Properties Trust*, 186 AD3d 1485 [2d Dept 2020] citing *Bouri v. Jackson*, 177 AD3d 949 [2d Dept 2019]; and *Sepulveda v. 101 Woodruff Ave. Owners, LLC*, 166 AD3d 835, 837 [2d Dept 2018]).

Accordingly, it is hereby

ORDERED that OLIWOLE OGUNNUBI and RIGO LIMO-AUTO, CORP., motion for summary judgment, pursuant to CPLR § 3212, is denied, in its entirety; and it is further,

ORDERED that Uber Technology, Inc., Uber USA, LLC and Rasier-NY, LLC's cross motion for summary judgment is denied, in its entirety; and it is further,

ORDERED that OLIWOLE OGUNNUBI shall appear for an examination before trial on or before February 20, 2024 either by Skype for Business, Zoom, Skype, Microsoft Teams, in person, or its equivalent and shall produce all relevant books, papers, records, and other material for use at the deposition; and it is further,

ORDERED that RIGO LIMO-AUTO, CORP., shall appear for an examination before trial on or before February 20, 2024 either by Skype for Business, Zoom, Skype, Microsoft

Teams, in person, or its equivalent and shall produce all relevant books, papers, records, and other material for use at the deposition; and it is further,

ORDERED that if OLIWOLE OGUNNUBI fails to appear for the examination before trial on or before February 20, 2024, his answer shall be dismissed with prejudice; and it is further,

ORDERED that if RIGO LIMO-AUTO, CORP. fails to appear for the examination before trial on or before February 20, 2024, its answer shall be dismissed with prejudice; and it is further,

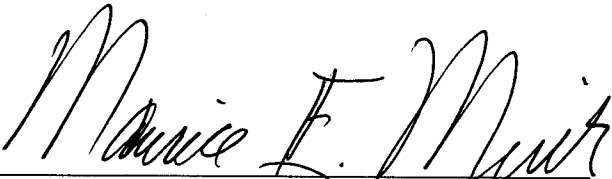
ORDERED that the plaintiff shall serve and file her Note of Issue and Certificate for Readiness for Trial on or before March 5, 2024; and it is further,

ORDERED, that plaintiff shall serve a copy of this decision and order with notice of entry upon the defendants, via certified mail and NYSCEF, on or before December 20, 2023.

The foregoing constitutes the decision and order of the court.

Dated: November 28, 2023
Long Island City, New York




MAURICE E. MUIR, J.S.C.