

Xiao Mang Ye v City of New York

2023 NY Slip Op 35027(U)

August 31, 2023

Supreme Court, Queens County

Docket Number: Index No. 700746/20

Judge: Kevin J. Kerrigan

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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 KEVIN J. KERRIGAN Part 10
Justice

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Xiao Mang Ye,

Index
Number: 700746/20

Plaintiff,

Motion
Date: 8/28/23

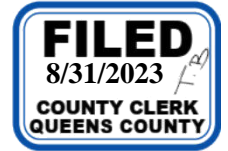
- against -

City of New York, New York City Board
of Education, New York City Department
of Education, Hoyt Transportation
Corp. and Lydia Y. Utley,

Motion Seq. No.: 10

Defendants.

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The following papers numbered E237-E261 & E270-E271 read on this motion by Defendants for an order to renew and reargue; and cross-motion by Plaintiff for an order to preclude defendants from offering testimony at trial.

Papers
Numbered

Notice of Motion-Affirmation-Exhibits.....E237-247
Notice of Cross-Motion-Affirmation-Exhibits..... E248-261
Reply..... E270-271

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by Defendants for an order to renew and reargue is granted solely to the extent set forth below. Cross-motion by Plaintiff for an order to preclude defendants from offering testimony at trial is granted solely to the extent that Defendants shall provide a Jackson Affidavit detailing the efforts made to locate the subject contract.

The instant action arises from an accident which occurred between Plaintiff, when she was struck by a bus, owned by Defendant Hoyt Transportation and operated by Defendant Lydia Utley at or near the intersection of Utopia Parkway and 46th Avenue in Queens County on February 26, 2019.

The original, underlying, motion was made by Plaintiff to preclude Defendants from testifying at the time of trial and to compel discovery. The motion was set down for a conference by order issued March 15, 2023. The order specified that the conference was to be held on April 4, 2023 in Courtroom 63 located at 88-11 Sutphin Boulevard, Jamaica, New York. On April 4, 2023, Defendants failed to appear at the scheduled conference. An order was issued on that date and directed the following to be completed within 90 days: a) City and Hoyt to produce the contract in effect on the date of loss, b) Hoyt to produce photos referred to in their expert report, c) City and Hoyt to respond to Plaintiff's notice for discovery and inspection dated June 2, 2022, and d) depositions of the City, Department of Education (DOE), Board of Education (BOE), and Hoyt Transportation.

On April 24, 2023, the Court issued an order granting summary judgment as against the City of New York, DOE, and BOE.

Thereafter, Defendants moved to renew and reargue the Court's April 4, 2023 order, indicating that their failure to appear was due to law office failure. The Court denied the motion by order issued June 27, 2023.

Now, Defendants move to renew and reargue the June 27, 2023 order, to the extent that the April 4, 2023 order called for production of witnesses from the City, DOE, and BOE, who were dismissed from this action on April 24, 2023. Not surprisingly, the effect of summary judgment is that the party granted it is summarily dismissed from the action after adjudication on the merits, and the party is entitled to a res judicata effect (see Zapata v. Town of Huntington, 1990 NYLJ LEXIS 982 [NY Sup Ct., Suffolk County 1990]; see also Landau, P.C. v. LaRossa, Mitchell & Ross, 11 N.Y.3d 8 [2008]). Thus, the Court need not decide the issue presented here by motion. The effect of the Court's April 24, 2023 order dismissed the City, DOE, and BOE from this action. The order granting summary judgment eliminated their duty to provide discovery. Notwithstanding, the April 4, 2023 is modified to the extent that the portions thereof referring to the City of New York, the Department of Education, and the Board of Education, are hereby vacated.

On the cross-motion, Plaintiff seeks to preclude Defendants for their failure to produce the subject contract referenced in the April 4, 2023 order. In support, Plaintiff points to the deposition of Joseph Termini, the Vice President of Hoyt Transportation. Termini testified that the contract provided to Plaintiff was not the contract in effect on the date of Plaintiff's accident. The Court notes that the Plaintiff failed to append the complete

transcript. However, the pages included provide that Termini was familiar with the subject contract. The contract provided was entered into prior to his employment at Hoyt. Termini indicated he is familiar with the current contract, whose contents are "probably" different than the one provided and shown to him at his deposition. In opposition to the cross-motion, Defendants proffer the affidavit of Joseph Termini. Termini avers that, despite his testimony, Hoyt is not in possession of the subject contract, as it was destroyed during Hurricane Sandy in 2012. Termini did locate an "extension agreement" which constitutes the current contract with the City for busing services. In reply, Plaintiffs allege that Termini committed perjury, and that this scenario amounts to an attempt by Defendants to conceal the subject contract from Plaintiff, warranting preclusion.

Contrary to Plaintiff's contention, the Court does not find Defendants' failure to provide the subject contract was wilful or contumacious (see Pizzo v. Lustig, 216 A.D.3d 38 [2d Dept. 2023]; Gregorian v. New York Life Ins. Co., 211 A.D.3d 706 [2d Dept. 2022]). Initially, the Court notes that it is unable to ascertain the full scope of Termini's testimony due to Plaintiff's failure to append the transcript in its entirety. However, even considering the portions appended, it is not unreasonable to conclude that Termini was simply mistaken regarding the availability of the contract. Indeed, Termini swears to so much in his affidavit, where he explains that the contract was destroyed as a result of Hurricane Sandy. The forgoing represents an acceptable and adequate excuse (see Nunez v. City of New York, 37 A.D.3d 434 [2d Dept. 2007]). Courts have found that "sanctions are not appropriate where records are destroyed for reasons of a natural disaster" (see Hinton v. Westbeth Corp., 2019 N.Y. Misc. LEXIS 5115 [NY Sup Ct., New York County 2019]; see also Matter of Whitfield v. Moriello, 71 A.D.3d 415 [1st Dept. 2010]).

Notwithstanding the above, Termini's affidavit fails to set forth how the search for the subject contract was conducted. Therefore, Defendants shall provide, within 30 days of service of a copy of this order with notice of entry, an affidavit from a person who has conducted a search for the subject contract, including what efforts have been made to locate it (see Donovan v. City of New York, 239 A.D.2d 461 [2d Dept. 1997]; Jackson v. New York, 185 A.D.2d 768 [2d Dept. 1992]).

Plaintiff further seeks to preclude Defendants for failure to produce for depositions. Plaintiff concedes that Defendants Utley and Hoyt Transportation have appeared, but "Defense counsel refuses to produce any of the other named Defendants for deposition despite being directed to do so in this Court's order dated April 4, 2023."

Incredibly, it appears that Plaintiff is seeking to compel production of the City, DOE, and BOE, all of whom were granted summary judgment. The Plaintiff failed to cite to any authority, and this Court is unaware of any, which would compel a party dismissed from an action to comply with a discovery order *after* their dismissal. As noted supra, the City, DOE, and BOE have no duty to appear for depositions, *as they are no longer parties to the action*. Consequently, the cross-motion with this respect appears to amount to no more than frivolity, of which, the Court admonishes Plaintiff.

Accordingly, the motion by Defendants is granted solely to the forgoing extent. The cross-motion by Plaintiff is granted solely to the extent that Defendants shall provide an affidavit detailing the efforts made to locate the subject contract within 30 days of service of a copy of this order with notice of entry.

Dated: August 31, 2023



KEVIN J. KERRIGAN, J.S.C.

