

**Caruso v 767 Fifth Partners LLC**

2025 NY Slip Op 33842(U)

October 7, 2025

Supreme Court, New York County

Docket Number: Index No. 158444/2019

Judge: Denis Reo

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 65

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ANTHONY CARUSO,

Plaintiff,

- v -

767 FIFTH PARTNERS LLC, APPLE FIFTH AVENUE,  
APPLE INC., TURNER CONSTRUCTION COMPANY

Defendant.

INDEX NO. 158444/2019

MOTION DATE 06/23/2025

MOTION SEQ. NO. 004

**DECISION + ORDER ON  
MOTION**

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HON. DENIS REO:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 93, 94, 95  
were read on this motion to/for DISMISS

Plaintiff Anthony Caruso, was injured while working at the Apple Store project at 767 Fifth Avenue, and asserts Labor Law and negligence claims against the owner, tenants, and general contractor. At his March 25, 2025, deposition, plaintiff admitted he had been shot after the accident but, on counsel's instruction, refused to answer further questions about the incident. Defendants move to dismiss under CPLR 3126 or, alternatively, to compel his continued deposition under CPLR 3124.

**Background**

Plaintiff alleges that on August 13, 2019, while lawfully on the premises in the course of his employment, he sustained serious injuries to his right arm/shoulder, lumbar spine, and cervical spine when he slipped and fell due to wet and slippery conditions (*id.* at 3-4).

During plaintiff's deposition he acknowledged that he had been 'shot' subsequent to the accident at issue. When defense counsel inquired into the circumstances of the incident, plaintiff's counsel instructed him not to answer further questions (*id.* at 53, 61, 71-72, 78).

Defendants now move pursuant to CPLR 3126 to dismiss the complaint based on plaintiff's willful refusal to answer questions concerning post-accident injuries, or in the alternative pursuant to CPLR 3124 to compel plaintiff to appear for a continued deposition (NYSCEF # 95, Buono Aff.).

### Discussion

#### **A. Dismissal Under CPLR 3126**

Dismissal under CPLR 3126 is a drastic remedy and inappropriate at this time. The First Department confirmed that 'CPLR 3126 provides that if a party "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed . . . , the court may make such orders . . . as are just." A court may strike an answer as a sanction where the moving party establishes that the failure to comply was "willful, contumacious or in bad faith" (*Rodriguez v United Bronx Parents, Inc.*, 70 AD3d 492, 492 [2010] [internal quotation marks and citation omitted]). Upon such showing, the burden "shifts to the nonmoving party to demonstrate a reasonable excuse" (*Reidel v Ryder TRS, Inc.*, 13 AD3d 170, 171 [2004])' (*Fish & Richardson, P.C. v Schindler*, 75 AD3d 219 [2010]). Dismissal is inappropriate as there has not been a violation of any prior orders of the court. Additionally, the conduct of plaintiff's counsel was not willful or contumacious or in bad faith.

#### **B. Motion to Compel Under CPLR 3124**

CPLR 3101(a) mandates 'full disclosure of all matter material and necessary in the prosecution or defense of an action.' The Court of Appeals has construed 'material and necessary' liberally to permit disclosure of testimony sufficiently related to the issues in litigation to make its acquisition reasonable in preparation for trial (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406-07 [1968]). It is the general policy of New York State to encourage "open and far-reaching pretrial discovery." (*Kavanagh v Ogden Allied Maintenance Corp.*, 92 NY2d 952, 954 [1998]). Discovery concerning subsequent injuries to the same portion of the body being claimed in the underlying matter is appropriate. (*Lopez v Kelly Street Realty, Inc.*, 106 AD3d 534 [1st Dept 2013] ["given the potential connection between plaintiff's subsequent

fracture of the ankle in the same leg in which she has claimed, inter alia, to have an inability to bear her full weight, defendant had a good-faith basis to seek disclosure pertaining to the latter injury, and granting same would serve the disclosure rules' purpose 'to advance the function of a trial to ascertain truth and to accelerate the disposition of suits'" [citation omitted]).

Plaintiff alleges permanent disabling injuries to his right arm and spine because of the August 2019 accident. Defendants are entitled to discovery concerning whether subsequent events—including plaintiff's involvement in a physical altercation in November 2021, during which he sustained gunshot wounds—bear upon the extent, causation, and credibility of those claimed injuries. Evidence of post-accident injuries is plainly relevant to damages.

22 NYCRR 221.2 strictly prohibits instructions not to answer questions posed at a deposition except to preserve a privilege, to enforce a court-ordered limitation, or where the question is plainly improper and would cause significant prejudice. Defendants' questions at the deposition are not "plainly improper" and will not "cause significant prejudice." The testimony concerning a subsequent injury to the same portion of the body that is being claimed in this action is appropriate and proper as Defendant must have the opportunity to determine which injuries are related to the subject accident and which are related to the discharge of the firearm. Absent plaintiff's assertion of his constitutional right against self-incrimination, plaintiff must be compelled to testify about the facts, circumstances, and injuries sustained in the subsequent incident as it is relevant to plaintiff's claimed pain, disability, and loss of earning capacity. Accordingly, defendants' motion to compel is granted to the extent set forth below.

Accordingly it is hereby

ORDERED that defendants' motion to dismiss pursuant to CPLR 3126 is DENIED; and it is further

ORDERED that defendants' motion to compel pursuant to CPLR 3124 is GRANTED; and it is further

ORDERED that plaintiff shall appear for a continued deposition within 45 days of service of this Decision and Order, limited to questions concerning (i) the November 2021 incident and any injuries

plaintiff sustained therein, and (ii) the impact of those injuries on plaintiff's right arm/shoulder, spine, or other body parts alleged to have been injured in the 2019 accident.

*Denis Reo*

10/7/2025

DATE

DENIS REO, A.J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE