

46 A.D.3d 501

Supreme Court, Appellate Division,
Second Department, New York.

Dawn CONCIATORI, et al., appellants,

v.

PORT AUTHORITY OF NEW YORK
AND NEW JERSEY, respondent.

Dec. 4, 2007.

Synopsis

Background: Pedestrian and her husband brought action to recover for personal injuries sustained when she was allegedly struck by bus operated by port authority. The Supreme Court, Queens County, Price, J., entered summary judgment in port authority's favor, and plaintiffs appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] fact issues remained as to whether pedestrian was struck by bus and whether bus was operated by port authority, and

[2] port authority's failure to witness produce for deposition did not warrant sanction precluding it from presenting evidence at trial.

Affirmed as modified.

West Headnotes (3)

[1] Judgment

🔑 Tort Cases in General

Genuine issues of material fact as to whether pedestrian was struck by bus, and whether bus was operated by port authority, precluded summary judgment in pedestrian's action against port authority to recover for personal injuries in accident.

2 Cases that cite this headnote

[2] Pretrial Procedure

🔑 Failure to Disclose; Sanctions

Striking pleading as discovery sanction is inappropriate absent clear showing that failure to comply with discovery demands is willful, contumacious, or in bad faith. McKinney's CPLR 3126.

7 Cases that cite this headnote

[3] Pretrial Procedure

🔑 Facts Taken as True or Denial Precluded; Preclusion of Evidence or Witness

Bus operator's failure to produce for deposition in personal injury action witness with adequate knowledge of operation of buses at airport did not warrant sanction precluding operator from presenting evidence at trial, where record did not reveal willful and contumacious disobedience. McKinney's CPLR 3126.

2 Cases that cite this headnote

Attorneys and Law Firms

****660** Barasch McGarry Salzman & **Penson**, New York, N.Y. (**Dominique Penson** of counsel), for appellants.

Downing & Peck, P.C., New York, N.Y. (John M. Downing, Jr., of counsel), for respondent.

HOWARD MILLER, J.P., WILLIAM F. MASTRO, ROBERT A. LIFSON, and EDWARD D. CARNI, JJ.

Opinion

***502** In an action to recover damages for personal injuries, etc., the plaintiffs appeal from an order of the Supreme Court, Queens County (Price, J.), entered June 6, 2006, which granted that branch of the defendant's cross motion which was for summary judgment dismissing the complaint and denied, as academic, their motion pursuant to CPLR 3126 to strike the defendant's answer or, in the alternative, to preclude the defendant from presenting evidence at trial for failure to timely comply with certain court-ordered discovery.

ORDERED that the order is modified, on the law, (1) by deleting the provision thereof granting that branch of the defendant's cross motion which was for summary judgment dismissing the complaint and substituting therefor a provision

denying that branch of the cross motion, and (2) by deleting the provision thereof denying, as academic, the plaintiffs' motion pursuant to CPLR 3126 to strike the defendant's answer or, in the alternative, to preclude the defendant from presenting evidence at trial for failure to timely comply with certain court-ordered discovery and substituting therefor a provision denying the plaintiffs' motion on the merits; as so modified, the order is affirmed, without costs or disbursements.

On January 22, 2003, the plaintiff Dawn Conciatori (hereinafter Conciatori) was injured outside an airline terminal located at LaGuardia International Airport (hereinafter the airport). Conciatori and her husband thereafter commenced the instant personal injury action against the defendant, alleging that Conciatori sustained her injuries when she was struck by a bus operated by the defendant.

The plaintiffs requested that the defendant produce various discovery material, including information regarding the defendant's operation of buses between the airline terminals at the airport. Although various discovery was conducted between the parties, the defendant did not provide **661 the plaintiffs with documentation pertaining to busing operations at the airport, or an opportunity to depose a witness knowledgeable about the busing operations at the airport.

Accordingly, the plaintiffs moved pursuant to CPLR 3126 to strike the defendant's answer or, in the alternative, to preclude it from presenting evidence at trial due to its failure to comply with court-ordered discovery. The Port Authority cross-moved, inter alia, for summary judgment dismissing the complaint on *503 the ground that either Conciatori was not struck by a bus, or, if she was struck by a bus, there was no evidence of negligence by the bus driver, or on the alternative ground that the defendant neither owned nor controlled the bus in question. The Supreme Court granted that branch of the defendant's cross motion which was for summary judgment dismissing the complaint and denied the plaintiffs' motion as academic. The plaintiffs appeal.

[1] The defendant sustained its initial burden of making a prima facie showing of entitlement to judgment as a matter of law (see *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 508 N.Y.S.2d 923, 501 N.E.2d 572) on both of the grounds set forth in its cross motion. Hence, on the question of the cause of Conciatori's injuries, the defendant submitted evidence demonstrating that Conciatori fell while running to avoid an

oncoming bus and that her injuries were not due to negligence on the part of the bus driver. However, the plaintiffs submitted evidence in opposition indicating that Conciatori was struck by the bus itself, due to the negligence of its operator. A court may not weigh the credibility of witnesses on a motion for summary judgment, "unless it clearly appears that the issues are not genuine, but feigned" (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 N.Y.2d 439, 441, 293 N.Y.S.2d 93, 239 N.E.2d 725; see *Ferrante v. American Lung Assn.*, 90 N.Y.2d 623, 631, 665 N.Y.S.2d 25, 687 N.E.2d 1308). Accordingly, the plaintiffs raised triable issues of fact with regard to the cause of Conciatori's injuries, and summary judgment on that ground was inappropriate (see *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 487 N.Y.S.2d 316, 476 N.E.2d 642; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595, 404 N.E.2d 718; *Vigliotti v. DeNicola*, 304 A.D.2d 751, 752, 759 N.Y.S.2d 109; see also *Sarwar v. Blackwell*, 285 A.D.2d 638, 728 N.Y.S.2d 400). Similarly, while the defendant submitted evidence indicating that it did not own or control the bus that allegedly caused Conciatori's injuries (see *GTF Mktg. v. Colonial Aluminum Sales*, 66 N.Y.2d 965, 498 N.Y.S.2d 786, 489 N.E.2d 755), the plaintiffs had no opportunity to depose a witness with knowledge regarding the defendant's control or supervisory role, if any, over the operation of the buses within the airline terminals located at the airport. Thus, evidence necessary for the plaintiffs to effectively oppose the defendant's cross motion remains exclusively in the defendant's possession (see *Levy v. Board of Educ. of City of Yonkers*, 232 A.D.2d 377, 378, 648 N.Y.S.2d 141), and summary judgment on this ground should have been denied as premature (see CPLR 3212 [f]; *Juseinoski v. New York Hosp. Med. Ctr. of Queens*, 29 A.D.3d 636, 638, 815 N.Y.S.2d 183).

[2] [3] The Supreme Court should have denied on the merits the plaintiffs' motion pursuant to CPLR 3126 to strike the defendant's answer or, in the alternative, to preclude the defendant from presenting evidence at trial for failure to timely comply *504 with certain court-ordered discovery. A court may, inter alia, strike the "pleadings or parts thereof" as a sanction against a party who "refuses to obey an order for **662 disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed [upon notice]" (CPLR 3126[3]). However, "striking [a pleading] is inappropriate absent a clear showing that the failure to comply with discovery demands is willful, contumacious, or in bad faith" (*Espinal v. City of New York*, 264 A.D.2d 806, 695 N.Y.S.2d 610). Although the defendant failed to produce for a deposition a witness with adequate knowledge

of the operation of buses at the airport, the record does not reveal willful and contumacious disobedience warranting the extreme relief requested by the plaintiffs (*see Kuzmin v. Visiting Nurse Serv. of N.Y.*, 22 A.D.3d 643, 644, 804 N.Y.S.2d 352).

Parallel Citations

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