

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
SHAWN L JONES,

Plaintiff,

**NOTICE OF ENTRY**

-against-

Index No.: 65779/2016

JOHN F. MARTINEZ AND AAA CARRETA  
CARTING,

Defendants.

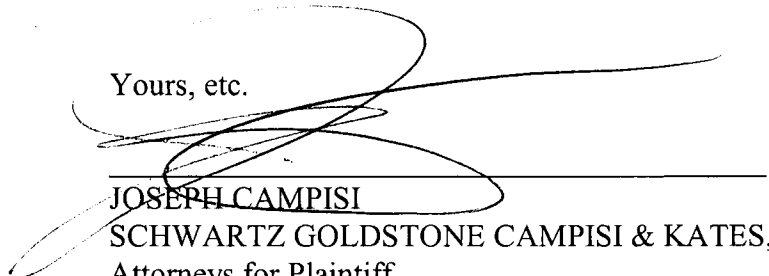
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COUNSELLORS:

**PLEASE TAKE NOTICE**, that annexed is a true copy of an Order duly entered in the office  
of the Clerk of the within named Court on March 20, 2018.

Dated: New York, New York  
March 20, 2018

Yours, etc.



\_\_\_\_\_  
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Our File No. 4944

TO:  
Goldberg Segalla, LLP  
Attorneys for Defendants  
AAA CARRETA CARTING AND JOHN F MARTINEZ  
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER-COMPLIANCE PART

-----X  
SHAWN L. JONES,

Plaintiff,

-against-

JOHN F. MARTINEZ and  
AAA CARRETA CARTING,

Defendants.  
-----X

LEFKOWITZ, J.

The following papers were read on plaintiff's motion for an order directing the issuance of an open commission to permit plaintiff to depose Bryan Ayres as an out of state witness.

Order to Show Cause dated February 23, 2018; Affirmation in Support; Exhibits A-I

Upon the foregoing papers and proceedings held on March 19, 2018, this motion is determined as follows:

This is an action for personal injuries allegedly sustained on August 26, 2016, as a result of a motor vehicle accident. On October 16, 2017, plaintiff served defendants with a Notice of Discovery and Inspection (Exhibit F)<sup>1</sup> seeking, among other items, the full name of the safety officer who came to the scene of the accident, and his last known address if he was no longer an employee. Plaintiff also sought all reports, notes, memos, recordings, photos, video taken or produced by this safety officer in connection with the subject incident.

Submitted on this motion is an "Accident Report," dated August 26, 2016, prepared by a person plaintiff asserts is "Bryan Ayres."<sup>2</sup> The second line of this report states "Police Report #1631702" (Exhibit G). Plaintiff states that Exhibit G is the one page report that was included in defendants' Response. Although that report states that there is a diagram of the accident scene, plaintiff states that this diagram was excluded from the materials defendants provided in discovery.

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<sup>1</sup>Plaintiff incorrectly states that Exhibit F is also defendants' Response to Notice of Discovery and Inspection and Combined Demands.

<sup>2</sup>The signature is not clear and the name is not printed on the report.

Plaintiff also submits a two page report dated November 1, 2016 (Exhibit H), signed by what appears to be the printed name of "Payson Bryan Ayres." It is titled "City Carting Inc. Policy #ISA-H09042878."

Both reports state that plaintiff's vehicle ran a red light by moving when the car in front of it turned right on red. They both state that defendants' car was traveling north when plaintiff's car ran the red light. The accident report states that defendants' vehicle had a solid green light.

Both reports also list three witnesses (Henry Yeadon, Rasheen James, and Pierre Robinson) and give the phone numbers for two of them (Yeadon and James). Nonparty Henry Yeadon was deposed on October 11, 2017, and the parties executed a stipulation on February 15, 2018, so-ordered by the court (Lefkowitz, J.), to allow for the issuance of an open commission to take the deposition of nonparty, out of state witness, "James Robinson Pierre."

Plaintiff also submits the one page "Witness Report of Accident" of Henry Yeadon dated December 6, 2016 (Exhibit I). Plaintiff states that Exhibit I was included in defendants' Response. At his deposition, referring to his report, Yeadon testified, "I think three," sheets of paper were filled out. "I think it definitely was more than one." (Exhibit E, pages 142-43).

Defendant John F. Martinez (hereinafter "Martinez") was deposed on November 20, 2017.<sup>3</sup> He testified that after the accident he called the office and Mrs. Frank answered. He further testified that he told her he had gotten into an accident and that she told him that Bryan (the safety coordinator), was coming down. Martinez also testified that to his knowledge Bryan went to every accident scene (Exhibit D, pages 75-78).

Presently, plaintiff seeks an order directing the issuance of an open commission to permit him to depose nonparty, out of state witness Bryan Ayres. Plaintiff's counsel states that in good faith he communicated with defendants' counsel in order to schedule the deposition and they indicated they would not cooperate in producing this witness in New York or in Connecticut.<sup>4</sup> Plaintiff argues that Bryan Ayres was involved in investigating the facts and circumstances surrounding this accident, that he had conversations with people who were purportedly witnesses to this accident and that he got information from them, that he took pictures and created records relating to this accident. Plaintiff contends that Ayres spoke to a witness, Rasheen James and got a phone number for him but that the number is disconnected. Defendants have not opposed this motion.

Pursuant to CPLR 3108 a party may take an oral deposition outside the state under an open commission where it is determined to be necessary or convenient (*Sorrentino v Fedorczyk*, 85 AD3d 759 [2d Dept 2011]). In order to justify the issuance of a commission to take the

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<sup>3</sup>Plaintiff served defendants' counsel with a Demand for Execution of Transcript on December 21, 2017. According to his counsel, to date the executed transcript has not been returned to his office.

<sup>4</sup>Plaintiff asserts that in their Response defendants provided the last known address for Bryan Ayres, an address in Connecticut.

deposition of an out-of-state nonparty witness, the party seeking the commission must show that the information sought is material and necessary to the prosecution or defense of the claims (*Meckert v Sears Roebuck & Co.*, 275 AD2d 308 [2d Dept 2000]). The moving party must establish that the witness possesses relevant evidence or that an examination of the witness would be reasonably calculated to lead to the discovery of information bearing on the claims or the defense at issue (*Kelly v Juskowitz*, 182 AD2d 677 [2d Dept 1992]). Moreover, the party seeking an open commission must also demonstrate that a voluntary appearance or compliance by the witness is unlikely or that discovery cannot be obtained by stipulation or the cooperation of the witness either in New York or the other state (*Wiseman v American Motor Sales Corp.*, 103 AD2d 230 [2d Dept 1984]).

This motion should be denied for two reasons. First, plaintiff has not shown that the nonparty, out of state witness Bryan Ayres, possesses information that is material and necessary to his prosecution of this action. Plaintiff submits Martinez' deposition testimony that demonstrates Bryan Ayres came to the scene after the accident occurred. The court notes that based on information contained in Bryan Ayres' reports (copies of which are in plaintiff's possession and were submitted in support of this motion), plaintiff already has deposed one eyewitness to this accident and the parties have agreed to the issuance of an open commission regarding a second eyewitness. Moreover, the present application is devoid of any information concerning plaintiff's efforts to obtain Bryan Ayres' cooperation. Plaintiff only states that he reached out to defendants who were uncooperative, but it is plaintiff who has asserted that he is a nonparty, and as such he would not be under defendants' control.

In light of the foregoing, it is:

ORDERED that plaintiff's motion is denied in its entirety; and it is further

ORDERED that the parties shall appear for a compliance conference on March 23, 2018, in the Compliance Part, Room 800, at 9:30 a.m., as they were previously directed to do so; and it is further,

ORDERED that plaintiff shall serve defendants with a copy of this decision and order with notice of entry within five days of entry.

The foregoing constitutes the decision and order of this court.

Dated: White Plains, New York  
March 19, 2018

  
HON. JOAN B. LEFKOWITZ, J.S.C.

To:

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cc: Compliance Part Clerk

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