TRC 3/22/06

To commence the 30 day 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

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CARLOS CEZAR FARIA,

DECISION/ORDER

Plaintiff,

- against -

Index No.
02414/03

Motion Date
12/9/05

CITY OF YONKERS, YONKERS DEPARTMENT OF PUBLIC WORKS, JAMES O'CONNOR and ROMEO FORCHETTI,

Defendant.

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LaCAVA, J.

The following papers numbered 1 to 4 were considered in connection with this motion by plaintiff for an ORDER granting leave to reargue his prior motion to strike the answers by defendants City of Yonkers (hereinafter Yonkers) and Romeo Forchetti (Forchetti) pursuant to CPLR §3126 (3) for the defendants' alleged failure to comply with discovery demands or to produce a witness for deposition, or, in the alternative, to preclude said defendants from producing, at the time of trial, witnesses or evidence regarding the issues known to said witnesses or contained in said evidence, and the prior cross-motion by Yonkers for a protective order and to dismiss certain counts; and for additional discovery and inspection:

PAPERS	NUMBERED
NOTICE OF MOTION/AFFIRMATION/AFFIDAVIT/EXHIBITS	1

AFFIRMATION IN OPPOSITION/EXHIBITS	2
AFFIRMATION IN OPPOSITION/EXHIBITS	3
AFFIRMATION/AFFIDAVIT/EXHIBIT	4

Plaintiff moves, in this personal injury action, to reargue the Decision and Order of the Court, dated October 7, 2005, the underlying motion for which sought an ORDER striking the answers by defendants pursuant to CPLR §3126 (3), for defendants' failure to produce witnesses for deposition, or to comply with prior discovery demands, or preclusion for said failures, and for additional discovery and inspection. Defendant Yonkers opposed the prior motion, asserting that it had either fully complied with, or properly objected previously to, the demands, and further disputed the failure to present witnesses for deposition by objecting to the number of witnesses noticed and the timing of the notices. Yonkers also cross-moved for a protective order relating to some of the demands, and to dismiss the plaintiff's claims for punitive damages and those causes of action which allege negligent hiring, training, or supervision. Defendant Forchetti also opposed the motion, asserting that he too has complied with all required discovery.

The Decision and Order of the Court, dated October 7, 2005, held

> The Yonkers Discovery
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> As defendant Yonkers correctly points out, "where an employee is acting within the scope of his or her employment, thereby rendering the employer liable for any damages caused by the employee's negligence under a theory of *respondeat superior*, no claim may proceed against the employer for negligent hiring or retention. *Karoon v. New York City Transit Auth.*, 241 A.D.2d 323, 324 (2nd Dept. 1997). Further, it is well established that the State and its political subdivisions are not subject to claims for punitive damages. *Sharapata v. Islip*, 56 N.Y.2d 332 (1982). Thus, there is no question that the plaintiff's claims for punitive damages, and those causes of action which allege negligent hiring, training, or supervision, must be dismissed.
>
> Yonkers further correctly argues that many of plaintiff's discovery demands should be the subject of a protective order, as they relate solely to these same, now stricken, counts. These include those requests denominated 7(b) ii (d), 7(c), 7(f), 7(g), 7(h), and 7(m) in plaintiff's moving papers. Absent a proper showing by plaintiff as to the relevance of these records, or some concrete failure of Yonkers to comply

with discovery requests or Orders in regard to these records, a protective order is granted to Yonkers, with leave for plaintiff to renew upon a proper showing of relevance. Yonkers also properly asserts that they have fully complied with plaintiff's demands by supplying documents responsive to the requests denominated 7(a), 7(b), 7(d), 7(e), 7(i), 7(j), 7(p), 7(q), and 7(r) in plaintiff's papers. Finally, plaintiff's request for a copy of a video in Yonkers' possession which is not related in any way to the instant matter, as it simply shows tree cutting methods, is denied.

The parties also dispute the failure of the opposing parties to conduct or participate in the discovery and inspection of the street-sweeper, and timely depositions, in this matter. Regarding the inspection, as to which the parties appear to disagree on how it became adjourned, the parties are directed to arrange for a mutually convenient date for the inspection to take place within 30 days of service of the instant order with Notice of Entry. The failure of either party to cooperate in accomplishing the inspection in a timely manner will give rise to preclusion with respect to evidence relating to the street-sweeper.

Yonkers further objects to the noticing of approximately one dozen party witnesses, who are all city officials and municipal employees, for depositions occurring outside the county and over multiple days, which notices were made without any consultation with counsel for Yonkers or Yonkers itself. Pursuant to CPLR § 3110 (1), noticed depositions for party witnesses (i.e. parties and their employees) must take place, *inter alia*,
within the county in which he resides or has an office for the regular transaction of business in person or where the action is pending.

As the instant notices failed to comply with the statute, they simply had no force or effect. In addition, the Court notes that the Preliminary Conference Order directed that these depositions need not occur until after the aforementioned street-sweeper inspection had occurred, and as noted above it has not occurred yet. The parties are therefore directed to commence the deposition of the plaintiff within 45 days of service of the instant order with Notice of Entry, with the depositions of defendants' party witnesses occurring immediately thereafter, said defendants'

depositions to be concluded no later than 30 days following the completion of the plaintiff's deposition. The failure of either party to cooperate in the scheduling or the holding of said depositions in a timely manner will give rise to preclusion with respect to evidence known to said witnesses.

Finally, plaintiff correctly notes that some items of discovery were conceded by defendant Yonkers at the Preliminary Conference, which agreement is So Ordered by the Court. Such items include time records of all City of Yonkers personnel at the scene of the accident on the date it occurred; and all maintenance records, operation manuals, repair manuals, manufacturer/purchaser records and training records. A protective order is sought for the time records of Yonkers employees who may have been present at the scene--Yonkers asserts such discovery is overbroad and harassment–and for the maintenance records, objected-to by Yonkers to the extent they disclose subsequent remedial measures. As Yonkers previously agreed to production of these records in the Preliminary Conference Order, production of these records is directed within 30 days of service of the instant order with Notice of Entry. The failure of Yonkers to provide said discovery in a timely manner will result in preclusion with respect to evidence contained in said documents.

The Forchetti Discovery

Forchetti asserts that he has produced the entire discovery sought by plaintiff. Plaintiff contests this assertion, but without personal knowledge of the truth of his assertion. In the event that Forchetti has failed to produce, no later than 30 days after service of the instant order with Notice of Entry, the entire discovery sought by plaintiff, said failure to provide said discovery in a timely manner will give rise to preclusion with respect to evidence contained in said documents.

Upon consideration of the foregoing, it is hereby

ORDERED, that plaintiff's motion for an ORDER striking the answer by defendants pursuant to CPLR § 3126 (3), for defendants' failure to produce a witness for deposition or evidence for discovery, or, in the alternative, to preclude defendants from producing, at the time of trial, evidence relating to said witness or documents, is granted, solely to the extent that defendant Yonkers is directed to comply with the discovery conceded for production in the Preliminary

Conference Order, on or before 30 days after service of the instant Order with Notice of Entry, as set forth previously, and is in all other respects denied; and it is further

ORDERED, that defendant Forchetti is directed to provide plaintiff with such portions of its construction file in the instant matter as have not previously been provided to plaintiff, on or before 30 days after service of the instant Order with Notice of Entry, as set forth previously; and it is further

ORDERED, that discovery and inspection of the street-sweeper in the instant matter is directed to be held on or before 30 days after service of the instant Order with Notice of Entry, as set forth previously; and it is further

ORDERED, that deposition of the plaintiff in the instant matter is directed to likewise commence on or before 45 days after service of the instant Order with Notice of Entry, as set forth previously, and that the depositions of the defendants are to be conducted no later than 30 days following the completion of the plaintiff's deposition, as previously set forth; and it is further

ORDERED, that defendant Yonkers' cross-motion to dismiss the plaintiff's claims for punitive damages and those causes of action which allege negligent hiring, training, or supervision, is granted; and it is further

ORDERED, that defendant Yonkers' cross-motion for a protective order relating to those demands denominated 7(b) ii (d), 7(c), 7(f), 7(g), 7(h), and 7(m) in plaintiff's moving papers, as relating to the stricken claims formerly alleging negligent hiring, training, or supervision, is likewise granted; and it is further

ORDERED, that, for the failure of any party to provide discovery in a timely manner as set forth herein, they are precluded with respect to evidence known to said witnesses or contained in said documents; and it is further

ORDERED, that, for the failure of any party to cooperate in accomplishing the aforementioned inspection or depositions in a timely manner as set forth herein, that party will be precluded with respect to evidence contained in said inspection or

depositions.

Plaintiff now seeks to reargue the aforementioned Order, and seeks, inter alia, the defendant driver's route; inspection records; maintenance records; the service manual; training records and other departmental rules and regulations; and the ropes and lines which caught the street sweeper on the date of the accident.

Initially, the Court notes that, to the extent that the motion is one to reargue, it is defective, as the plaintiff has failed to attach to these moving papers those moving and opposition papers sought to be reargued, in order to permit the Court to intelligently review and reconsider the prior motion. (*See* CPLR 2214[c]; Part Rules I [d] [2]). Further, plaintiff's motion is also defective as it is not properly denominated as one for reargument. (*See* CPLR 22214[d] 1.) Finally, while a motion to reargue must be based on an assertion that the Court allegedly overlooked or misapprehended some matter of fact or law in its decision, in fact the plaintiff has failed to delineate any specific matter of fact or law so overlooked or misapprehended, but has instead done nothing more than simply restate his prior position in his moving papers.

As Yonkers has properly set forth, while leave to reargue upon a proper showing was previously given regarding the items denominated 7(b) ii (d), 7(c), 7(f), 7(g), 7(h), and 7(m) in plaintiff's original moving papers, only the service manual falls into this group. And, the Court also notes, plaintiff has made no proper showing regarding this item. Nevertheless, as set forth below, Yonkers has already provided this item to plaintiff.

Further, as defendant Yonkers also properly points out, it has not only already previously provided (in some cases twice), the sought items where they exist, in particular the aforementioned route, inspection and maintenance records, service manual, and training records and other departmental rules and regulations, but it has also specifically indicated, prior to the instant motion, where the requested records do not exist. Hence, as the Court held previously, defendant Yonkers has already complied with defendant's prior requests for discovery and inspection.

To the extent that the motion seeks compulsion of discovery and inspection due to a failure to provide items which were not the subject of the October 7, 2005 Decision and Order of the Court, in particular the ropes and lines as set forth above, and the moving operational testing of the street sweeper during its discovery and inspection, as opposed to the mere inspection of the operating vehicle, the motion must be denied as Plaintiff has

failed to provide an Affirmation of Good Faith pursuant to 22 NYCRR 202.7. (See *Vasquez v. G.A.P.L.W. Realty*, 236 A.D.2d 311 (1st Dept. 1997); *Romero v. Korn*, 236 A.D.2d 598 (2nd Dept. 1997); *Koelbl v. Harvey*, 176 A.D.2d 1040 (3rd Dept. 1991).

In any event, Yonkers has already committed to securing the ropes and lines for discovery and inspection if they are presently possessed. Regarding the inspection of the vehicle, the undisputed evidence is that the it has been subject to nearly-constant operation for nearly four years, and that routine maintenance or repairs in that time have replaced many of the vehicle's moving parts, in some cases several times over. The Court thus recognizes, in light of these facts, and particularly prior to the deposition testimony of the defendant operator regarding the incident in question, that it is unclear at present what relevance the proposed testing and moving operation of the street sweeper as it exists today has to the condition and operation of the sweeper on the date of the accident. Indeed, even the cases cited by plaintiff make clear that an expert may make "a valid and reliable examination" of an item only when it has remained in the same condition as it was in on the date of the accident. *(See Wallace v. Benedictine Hospital*, 124 A.D.2d 433, 434 [3rd Dept. 1986], where testing was found to be proper only if the item was still in the same condition as it had been at the time of the accident, and at a previous examination which had occurred shortly after the accident.) The Court thus finds, in the exercise of its discretion, that plaintiff has failed to provide proper grounds to compel defendant Yonkers to permit the street sweeper, in clearly altered fashion, to be the subject of moving operational testing nearly four years post-accident.

Based on the foregoing, it is hereby

ORDERED, that the motion by defendants to reargue, and to compel discovery and inspection, including the moving operational testing of the instant street sweeper, is denied.

The parties are directed to appear before the Court at a Trial Readiness Conference scheduled for March 22, 2006 at 9:30 a.m.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: White Plains, New York
February 28 , 2006

S/

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