

Brown v City of New York

2007 NY Slip Op 31426(U)

May 28, 2007

Supreme Court, New York County

Docket Number: 0101644/2001

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EILEEN A. RAKOWER
J.S.C. Justice

PART Part 5

Index Number : 101644/2001
BROWN, ERIC
vs
CITY OF NEW YORK
Sequence Number : 003
STRIKE A PLEADING

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED	
_____	1, 2
_____	3
_____	4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED
JUN 04 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: May 28, 2007


EILEEN A. RAKOWER *J.S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X
ERIC BROWN

Plaintiffs,

Index No.
101644/01

- against -

**ORDER AND
DECISION**

THE CITY OF NEW YORK, TROCOM CONSTRUC-
TION CORP., ANTHONY SANTORO, JOSEPH
TROVATO, FELIX EQUITIES INC., FELIX INDUS-
TRIES, INC., URBITRAN ASSOCIATES, INC.,
URBITRAN ASSOCIATE ENGINEERS, P.C.,
URBITRAN CONSTRUCTION and MANAGEMENT
CORP., JOHN COELLO and ROBERT COELLO,

Defendants.

FILED
JUN 04 2007
Not. Sec. 003
**NEW YORK
COUNTY CLERK'S OFFICE**

-----X
EILEEN A. RAKOWER, J.S.C.

Plaintiff filed this action for personal injuries allegedly sustained on Saturday, November 6, 1999, at approximately 3:23 a.m., in New York, New York. Specifically, Plaintiff was a passenger in a vehicle that was "speeding" southbound on the Henry Hudson Parkway (the Parkway) when the driver hit a construction compressor that was located near 103rd Street in a lane that was closed to traffic. The vehicle flew into the air and landed upside down in the Hudson River. On the morning of the accident, a portion of the Parkway was closed due to a reconstruction project to restore the Cherry Walk bike/walking path (Cherry Walk project) that is adjacent to the Parkway. The City of New York's (City) General Contractor on the reconstruction project was Defendant Trocom Construction Corp.. Defendants Anthony Santoro and Joseph Trovato are Trocom's Vice President and its work site supervisor, respectively (Collectively, Trocom.)

Plaintiff filed a timely notice of claim but discovery has proceeded slowly in this matter. In fact, the action was stayed for nearly two years due to bankruptcy proceedings in regard to a defendant not involved in this motion. City now moves for

an order pursuant to CPLR § 3126 striking Plaintiff's complaint for failure to comply with discovery demands, or in the alternative, precluding Plaintiff from offering any evidence of economic, emotional, mental or physical injuries at the time of trial. City notes that it moved for this same relief in a motion that was returnable on August 1, 2006 but that motion was resolved by a compliance conference order dated November 14, 2006 (November order). City further states that the purpose of the November order, and the preclusionary language that it contains, was to permit Plaintiff one last chance to comply with previous conference orders that went unheeded. Trocom cross-moves for the same relief. Plaintiff opposes their motions.

CPLR § 3126 states, in relevant part:

If any party ... refuses to obey an order for disclosure or wilfully fails to disclose information which the Court finds ought to have been disclosed . . . the Court may make such orders with regard to the failure as are just, among them:

- 1) an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action . . ., or
- 2) an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony . . ., or
- 3) an order striking out pleadings or parts thereof or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

The November order states, in relevant part:

- Plaintiff to provide all W-2s and tax returns from 1996 to present along with authorizations for tax returns and W-2s from 2000 to present within 30 days or plaintiff will be precluded from offering evidence of economic damages at trial. (Emphasis added).

- Plaintiff to submit to IME by 12/31/06 or be precluded from offering evidence of physical, mental or emotional injuries at trial. Plaintiff's motion to strike submitted on 8/1/06 is hereby resolved. (Emphasis added).

Plaintiff contends that he has substantially complied with the November order and attaches as an exhibit a copy of a letter dated March 26, 2007, which provides the above mentioned authorizations. Additionally, he notes that he appeared for a neurological IME on February 2, 2007, coincidentally, the same date as City's motion to strike. Plaintiff states that he is not in possession of any IRS or employment records, the records of any pharmacy or diagnostic tests. Additionally, he argues that City should not insist on strict compliance with the November order as it, too, has not complied with the same order.

This motion was not fully submitted until April 24, 2007. While City may be correct that Plaintiff adjourned this motion numerous times so he could be at least in partial compliance with the November order before the motion was before the Court, the fact remains that at this juncture, Plaintiff has, however belatedly, provided authorizations and appeared for the noticed IME. Accordingly, the motion to strike Plaintiff's complaint for failure to comply with discovery demands, or in the alternative, preclude Plaintiff from offering any evidence of economic, emotional, mental or physical injuries at the time of trial is denied.

The Court notes that the next compliance conference in this matter is scheduled for June 19, 2007, at 2:00p.m., in room 103 at 80 Centre Street. Wherefore, it is hereby

ORDERED that City's motion to strike Plaintiff's complaint, or in the alternative, preclude Plaintiff from offering evidence is denied; and it is further

ORDERED that Trocom's cross motion to strike Plaintiff's complaint, or in the alternative, preclude Plaintiff from offering evidence is denied.

All other relief requested is denied.

This constitutes the decision and order of the Court.

DATED: May 28, 2007

FILED

JUN 04 2007

NEW YORK
COUNTY CLERK'S OFFICE



EILEEN A. RAKOWER, J.S.C.