Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 22**
Justice

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NYJEE ANDERSON, by his mother and natural guardian, PHENNIA ANDERSON and PHENNIA ANDERSON, individually, Plaintiffs,	Motion Date May 22, 2007
-against-	Motion Cal. No. 2
THE NEW YORK CITY TRANSIT AUTHORITY and "MOTORMAN JOHN DOE", a fictitious name intended to identify an unidentified employee of THE NEW YORK CITY TRANSIT AUTHORITY, Defendants.	Motion Sequence No. C006

The following papers numbered 1 to 9 read on this motion by plaintiffs for an order striking defendant's answer due to its repeated failure to comply with court orders and plaintiffs' discovery demands or alternatively (ii) precluding defendant from offering any proof at trial regarding the issue of liability and (iii) scheduling the immediate trial of this matter.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1-4
Affirmation in Opposition.....	5–7
Reply Affirmation.....	8-9

Upon the foregoing papers it is ordered that this motion is determined as follows:

Plaintiffs argue that for 2 years, defendant has failed to comply with the Order of Justice Alan LeVine dated June 1, 2005 and for 3½ years, defendant has failed to comply with the Order of Justice Orin R. Kitzes dated October 16, 2003. Plaintiffs contend that defendant has never even attempted to comply with these Orders and has ignored repeated communications from plaintiffs requesting compliance and discovery.

Justice LeVine's Order stated:

> "plaintiffs' motion for an order directing defendant NYCTA to provide plaintiffs with duplicate original documents and photographs/video/animation regarding the 'train testing' conducted by the NYCTA's expert witness, Dr. Mark Marpet, an engineering expert, is granted and the NYCTA is directed to produce the aforementioned materials forthwith."

The Order also stated:

> "defendant NYCTA is directed to provide plaintiffs with the qualifications of expert Michael DeLuca and the substance of what he will testify to."

Plaintiff maintains that defendant, instead of complying with Justice LeVine's Order, filed a notice of appeal from the Order with the Appellate Division, Second Department on August 5, 2005 and thereafter failed to perfect the appeal, and so the Second Department on July 17, 2006 dismissed the appeal for failure to perfect.

Additionally, plaintiffs have served defendant with Supplemental Demands for Discovery and Inspection dated July 23, 2002. After not having received the responses, plaintiffs sent several correspondences to defendant in August and October, and then filed a motion to strike defendant's answer for noncompliance. While that motion was denied for insufficient evidence, on October 16, 2003, Justice Kitzes ordered that any outstanding discovery be completed by November 19, 2003. It is alleged that defendant never complied with that Order. Plaintiffs assert that during October and November of 2006, plaintiffs corresponded by telephone and letter numerous times in order to obtain compliance with the Orders, but defendant never complied, or sought an extension of time to comply.

Plaintiffs argue that "a succession of failures to reply to court orders and/or plaintiffs' discovery demands constitutes bad faith and justifies the striking of defendant's answer." Plaintiffs contend that defendant's behavior is wilful, contumacious, deliberate, and amounts to bad faith.

In opposition defendant maintains it did not evidence any wilful or contumacious behavior by not responding to Justice LeVine's Order dated June 1, 2005 because during a significant portion of the 2-year period in which plaintiff claims defendant failed to respond, the matter remained on appeal and defendant is entitled to have the appeal of an Order fully decided before it produces discovery that is in contention. In addition, counsel

for defendant Celeste Redmond-Smith, Esq. asserts that while the matter was on appeal, it was being handled by a separate unit and not directly by herself, and as such there was no willful disregard of the Order. Defendant states that one of the issues on appeal of Justice LeVine's Order was the exact discovery plaintiff claims should have been provided during the pendency of the appeal, and therefore defendant should have been given the opportunity to have its appeal heard to completion before being required to provide the ordered discovery.

Defendant asserts that it was not made aware that its appeal of the Order had been dismissed until a chance meeting with plaintiff's counsel in the Queens County Courthouse in October 2006, which dismissal it did not have evidence of until it received plaintiffs' instant motion in 2007. Defendant admits that while the appeal's dismissal was indeed listed in the New York Law Journal in July 2006, the dismissal's listing was not "caught" by defendant's representative due to law office failure.

Furthermore, Ms. Redmond-Smith states that when she received plaintiffs' instant motion, she requested an adjournment from March 20, 2007 to April 24, 2007 so that she could review the various orders that plaintiffs claimed had been violated to determine which discovery orders were indeed outstanding and to enable adequate time to conduct the review since she was engrossed in a family emergency that required an extensive amount of time out of the office and travel to Chicago, where her mother was ill. During the adjournment period, Ms. Redmond-Smith's mother passed away and she was required to return to Chicago in order to settle her mother's affairs; such resulted in an adjournment to June 5, 2007. Defendant maintains that when she returned to her office on May 4, 2007, she first learned that there was a stipulation advancing the adjourn date to May 15, 2007.

Moreover, defendant additionally argues that plaintiffs' argument that defendant violated the Order of Justice Orin R. Kitzes dated October 16, 2003 which ordered that outstanding discovery be completed by November 19, 2003 is misstated. Defendant feels that plaintiffs' motion is re-arguing the issue of a 2002 discovery request which would have been covered by Judge Kitzes' 2003 Order. Defendant asserts that it fully responded to this request in September, 2003 and attaches the response to its opposition. As such, there was no outstanding discovery to be provided by the defendant at the time of that Order.

Defendant further asserts that the only outstanding discovery is that of the photographs, videotape and report of Dr. Mark Marpet concerning the "train testing" and well as an exchange of the qualifications and statement as to the expected testimony of Michael DeLuca.

Finally, defendant concludes that her unexpected personal circumstances and numerous materials that had to be retrieved and reviewed to determine what materials were to be provided to the plaintiffs, delayed the provision of the appropriate materials.

In its reply papers, plaintiffs claim that defendant's contention that the matter was "stayed" after it filed its Notice of Appeal on August 4, 2005, and therefore, no discovery responses were required is incorrect because defendant's own motion against plaintiffs was made returnable by defendant for August 23, 2005----after its Notice of Appeal was filed--and the parties continued to litigate the matter with respect to defendant's own motion through February 1, 2006 when the motion was marked fully submitted.

Plaintiffs also states that defendant's claim that it was not aware that its appeal had been dismissed is misleading. It is argued that defendant knew on February 1, 2006 when it requested that the Second Department extend its time to perfect its appeal, that its time to perfect would be extended to April 4, 2006, and that its appeal would be dismissed on that date if it was not perfected. Thus, on April 5, defendant was immediately obligated to abide by Justice LeVine's Order.

Analysis

The drastic remedy of striking a pleading pursuant to CPLR 3126 for failure to comply with court-ordered disclosure should be granted only where the conduct of the resisting party is shown to be wilful, contumacious or in bad faith (*Ranfort v. Peak Tours, Inc.*, 250 AD2d 747 [2nd Dept 1998]). This Court finds that defendant's conduct fails to rise to the level of wilful, contumacious, or bad faith. While plaintiffs maintain that defendant repeatedly failed to comply with discovery requests and Court Orders, defendant attaches to its opposition papers a response to plaintiffs' Supplemental Demand for Discovery and Inspection dated September 16, 2003 (albeit not one in proper form). Additionally, defendant detailed extenuating circumstances regarding a family emergency which partially prevented prompt compliance.

a. Expert Witness Disclosure

It is Ordered that pursuant to the Order of Justice Alan LeVine dated June 1, 2005 defendant is to provide plaintiffs with duplicate original documents and photographs/video/animation regarding the "train testing" conducted by the NYCTA's expert witness, Dr. Mark Marpet, an engineering expert within thirty (30) days from the date of service of a copy of this Order with Notice of Entry or plaintiff shall be precluded from offering

such evidence at trial to the extent it has not previously been provided.

It is further Ordered that defendant is directed to provide plaintiffs with the qualifications of expert Michael DeLuca and the substance of what he will testify to within thirty (30) days from the date of service of a copy of this Order with Notice of Entry or plaintiffs shall be precluded from offering such evidence at trial to the extent it has not previously been provided.

b. Supplemental Disclosure Request

It is further Ordered that defendant is to provide a proper Response to Plaintiff's Supplemental Demand for Discovery & Inspection dated July 23, 2002. The Court warns defendant that any evasive or incomplete disclosure, answer, or response may be treated as a failure to disclose, answer, or respond. If defendant fails to respond or answer, plaintiffs may file a motion for sanctions. The Court notes that while defendant has attached to its moving papers a document dated September 16, 2003, which purports to be such a response, said document is unsigned and unaccompanied by an affidavit of service.

If defendant responds, and after receiving defendant's response, plaintiffs then believe defendant's response is incomplete, plaintiffs may make a motion to compel. Plaintiffs' motion papers shall (a) itemized separately verbatim each response or answer to which plaintiffs object or take exception and immediately followed thereafter, (b) a specific statement of the objection or exception to such answer or response accompanied by a detailed, explanation of the reason or grounds upon which plaintiffs are entitled to prevail as to each objection or exception.

The foregoing constitutes the decision and order of this Court.

Dated: June 15, 2007

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Howard G. Lane, J.S.C.