

**Flems v City of New York**

2007 NY Slip Op 33241(U)

October 4, 2007

Supreme Court, New York County

Docket Number: 0114689/2003

Judge: Eileen A. Rakower

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

PRESENT: RAKOWER  
Justice

PART 5

FLGMS

INDEX NO. 114689/2003

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 3

MOTION CAL. NO. \_\_\_\_\_

- v -

City of NY

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1  
2  
3

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**

OCT 10 2007

NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: 10/4/07

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

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

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

BEATRICE FLEMS,  
Plaintiffs,

- against -

Index No.  
114689/03

Seq. No.: 003

**DECISION/ORDER**

THE CITY OF NEW YORK,  
Defendant.

-----X

HON. EILEEN A. RAKOWER

Plaintiff brings this action for personal injuries sustained when she was severely burned by hot water allegedly caused by a malfunctioning boiler. She was burned while taking a bath on March 31, 2003 in an apartment located at 410 West 128<sup>th</sup> Street, New York, New York. The apartment building was owned by the City of New York ("City") and run by the Department of Housing Preservation and Development ("HPD"). Plaintiff now moves to strike City's answer pursuant to CPLR §3126. City opposes the motion.

The parties have appeared for numerous compliance conferences to resolve outstanding discovery issues. The history of "so ordered" stipulations and direct Orders of the court issued at these conferences can be found in this courts decision dated September 27, 2006. Plaintiff previously brought a motion to strike City's answer based on its noncompliance with the following outstanding discovery: 1) building heating plant survey and low pressure boiler annual inspection reports from 1997 through March 31, 2003, 2) payment records, including but not limited to, invoices, bills, and estimates for maintenance and repair as reflected in the job description requisition orders relating to the boiler from 1997 to March 31, 2003, 3) affidavit(s) from person(s) with personal knowledge that conducted a search to the fact that demanded records do not exist including maintenance, inspection, repair and payment records, and 4) affidavit(s) from person(s) with knowledge explaining with specificity those documents previously submitted to the extent that they respond to plaintiff's demands.

**FILED**  
OCT 10 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

On September 27, 2006 this court issued a decision which stated:

ORDERED that plaintiff's motion to strike defendant's answer is granted unless defendant provides those items 1 through 4 as reflected above on or before November 30, 2006, and it is further

ORDERED that after submission of those items 1 through 4 as reflected above, the deposition of an HPD technical witness shall be conducted at defendant's office located at 52 Duane Street on or before January 10, 2007.

City provided an affidavit showing that a search was done and that no annual inspection reports were found. City submits a copy of that affidavit by Keira Stevenson, Supervisor with the Boiler Division for the New York City Department of Buildings ("DOB") dated October 26, 2006. Ms. Stevenson states:

At the request of the New York City Law Department, I personally conducted a search for Department of Building Annual Low Pressure Boiler Inspection Reports for the location of 410-418 West 128<sup>th</sup> Street . . . the results of my search were negative in that Department of Buildings does not have reports for the time period of 1997, 1998, 1999, 2000, 2001, or 2002 in its possession.

The remaining discovery items which are in contention here are the inspection reports regarding work performed by outside vendors, also known as field inspection reports or monitoring reports ("field inspection reports").

Plaintiff argues that in addition to annual reports, once a vendor submits an invoice for work performed at a building, an inspection by City is triggered and a field inspection report is generated. Mr. Salvatore DiMeglio, the supervisor of building maintenance and mechanical for HPD, testified at a deposition on February 7, 2007 regarding the field inspection reports:

Q: Was there an inspector from HPD that went to the building after the work that's reflected on 10/31[02] was performed?

A: I cannot tell from this documentation.

Q: Have you ever seen a technical monitoring report or a field

inspection report regarding this work?

A: No.

Q: Should there have been one?

...

A: I can't tell.

Q: If work was performed - -

A: Yes.

Q: - - would there be a field inspection report?

A: Only if I see a paid invoice. (DiMiglio Deposition, 86-87).

The parties held a compliance conference on May 15, 2007 and the following order was issued:

Defendant City of New York to provide *HPD inspector's inspection/field reports* (emphasis added) regarding *inspections of work performed by outside plumbing vendors* (emphasis added) including ticketed work and annual inspections/testing for 410-418 w. 128<sup>th</sup> Street from 1997-3/31/03 w/in 60 days.

City submits a "response to compliance conference order dated July 25, 2006" which it claims it had already provided to plaintiff twice. Annexed to that response are several field inspection reports as well as work description forms and invoices from companies which have worked on the boiler at the subject building. By way of reply, plaintiff claims that there are multiple purchase orders and invoices submitted by the City that have no corresponding field inspection reports.

Pursuant to CPLR §3126, a court may impose sanctions when a party willfully fails to disclose information which the court finds ought to have been disclosed. However, the extreme and drastic sanction of striking a party's pleadings is only justified where the moving party shows conclusively that the failure to disclose was willful, contumacious or due to bad faith. (Dauria v. City of New York, 127 A.D.2d 459[1st Dept. 1987]).

City responded to plaintiff in July, 2006 and produced several field inspection reports. Based on the testimony of Mr. DiMeglio, plaintiff maintains that "every inspection and/or repair performed by outside vendor should generate such a report." (Hecht Reply Aff. Paragraph 7). Plaintiff states that:

There are multiple Requisition/Purchase orders and invoices referencing maintenance, repairs and inspections performed by outside vendors to the subject boiler system that have no corresponding Technical Monitoring and/or Field Reports (See exhibits 2-17 from deposition of DiMeglio and 1-10 from Lindo Deposition)

Plaintiff submits the exhibits shown to Mr. DiMeglio at his deposition, which consist of approximately six requisition/purchase order forms or invoices. Plaintiff claims that City did not submit the corresponding field inspection reports that were triggered by these orders. However, City previously submitted a field inspection report dated November 20, 2002 which corresponds to the October 31, 2002 invoice/order that was shown to Mr. DiMeglio. Additionally, a field inspection report dated November 26, 1999 appears to correspond to the Open Market Order ("OMO"), which is the equivalent of a work order, dated October 4, 1999. Another field inspection report dated September 14, 2000 appears to correspond to the July 13, 2000 order. There is a corresponding field inspection report dated January 30, 2001 for the order to be completed by January 22, 2001. The same is true for the order to be completed by February 8, 2003, where City submitted a field inspection report dated February 25, 2003. Another order/invoice for work performed on November 2, 2002 corresponds to the November 20, 2002 field inspection report.

Plaintiff submits the exhibits that were used at the deposition of the building coordinator/real property manager for HPD, Hyacinth Lindo. These consist of ten OMO computer screen printouts. The orders dated: September 20, 2000, January 17, 2001, August 20, 2001, June 10, 2002 and July 21, 2003 do not have corresponding field inspection reports. In addition to the OMOs submitted by plaintiff, there are requisition/purchase orders previously submitted by City dated: January 6, 1997, January 17, 1997, January 28, 1997, February 25, 1997, March 8, 1997, April 4, 1997, April 10, 1997, April 13, 1998, July 6, 1998, September 24, 1998, November 10, 1998, November 20, 1998 and December 28, 1998 without corresponding field inspection reports.

Mr. Dimeglio does not state definitively that reports were generated on the dates at issue. Rather, he states that an inspection report should be generated if work was done and if he sees a paid invoice. Therefore, there is no showing that these field inspection reports for the outstanding dates do in fact exist or that the failure to produce them is willful, contumacious or due to bad faith.

Wherefore, it is hereby

ORDERED that plaintiff's motion for an order striking defendant the City of New York's answer is denied, and it is further

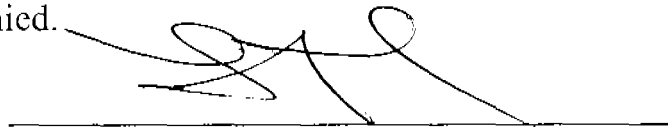
ORDERED that defendant the City of New York shall produce field inspection reports and/or monitoring reports corresponding to the orders dated: September 20, 2000, January 17, 2001, August 20, 2001, June 10, 2002 and July 21, 2003 within 45 DAYS of service of this order with notice of entry; and it is further

ORDERED that defendant the City of New York shall produce field inspection reports and/or monitoring reports corresponding to the orders dated January 6, 1997, January 17, 1997, January 28, 1997, February 25, 1997, March 8, 1997, April 4, 1997, April 10, 1997, April 13, 1998, July 6, 1998, September 24, 1998, November 10, 1998, November 20, 1998 and December 28, 1998 within 45 DAYS of service of this order with notice of entry, or provide an affidavit stating that they do not exist, or produce an affidavit stating that after a good faith and diligent search it has been unable to locate such documents.

This constitutes the Decision and Order of the Court.

All other relief requested is denied.

DATED: October 4, 2007



EILEEN A. RAKOWER, J.S.C.

**FILED**  
OCT 10 2007  
NEW YORK  
COUNTY CLERK'S OFFICE