[* 1] SCANNED ON 1/2/2007

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

PRESENT : DONNA M. MILLS **PART** 21

Justice

LEA, CHARLENE

Plaintiff,

-v-

NEW YORK CITY TRANSIT AUTHORITY,

Defendant.

INDEX NO. 103372/06

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL NO.

The following papers, numbered 1 to 3 were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	1
Answering Affidavits– Exhibits	2
Replying Affidavits	

CROSS-MOTION: ____ YES ✓ NO

Upon the foregoing papers, it is ordered that this motion

IS DECIDED IN ACCORDANCE WITH THE MEMORANDUM DECISION WHICH IS ATTACHED.

FILED
NOV 02 2007
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10-18-07

J.S.C.

Check one: ____ FINAL DISPOSITION ✓ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

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CHARLENE LEA,

Plaintiff,

Index No. 103372/2006

-against-

THE CITY OF NEW YORK TRANSIT AUTHORITY,

Defendant.

----------X

HON DONNA M. MILLS, J.:

In this personal injury action, plaintiff moves for an order: (1) to strike the answer pursuant to CPLR 3126 for defendant's failure to present a witness for a court-ordered deposition and its failure to respond to plaintiff's notice for discovery and inspection and (2) to extend plaintiff's time to serve and file a Note of Issue and Certificate of Readiness for Trial.

This action is brought by plaintiff Charlene Lea to recover damages for personal injuries that she sustained following a trip and fall upon defendant The City of New York Transit Authority's steps at the Brooklyn Bridge/City Hall subway station in Manhattan (Premises).

On June 21, 2007, the parties entered into a stipulation whereby defendant agreed to respond to plaintiff's April 6, 2007 and December 11, 2006 discovery demands by July 28, 2007. Defendant also agreed to produce a witness for an examination before trial on July 31, 2007. On August 1, 2007, defendant made an objection to the first, fifth, and seventh paragraphs of the April 6, 2007 demand, and declined to turn over the documents. In addition, defendant refused to go forward with the examination before trial. On August 2, 2007, the parties entered into a second stipulation that allowed defendant another opportunity to respond to plaintiff's outstanding discovery demands. On August 21, 2007, defendant made an objection to

paragraphs two, five, six, and seven of the December 11, 2006 discovery demand, and thus omitted responses to the discovery demands.

Plaintiff argues that the court should grant its motion to strike the answer because: (1) defendant's history of non-compliance with the court's discovery orders is willful and contumacious and (2) defendant failed to make an objection to plaintiff's discovery demands within 20 days of service, and thus has waived the right to object.

Defendant argues that plaintiff's motion should be denied because defendant did not engage in a pattern of dilatory and obstructive conduct to frustrate the disclosure scheme and provided plaintiff with the information that it was seeking absent those items which were beyond the scope of discovery.

The drastic remedy of striking an answer 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 willful and contumacious (*Goldstein v Kingsbrook Jewish Med. Ctr.*, 39 AD3d 816, 817 [2d Dept 2007]). Willful and contumacious conduct can be inferred from repeated noncompliance with court orders, inter alia, directing depositions, coupled with either no excuses or inadequate excuses, or a failure to comply with court-ordered discovery over an extended period of time (*id.*).

On February 14, 2007, this court ordered that all outstanding discovery and inspection requests were due on or before March 26, 2007. By said date, defendant produced eight of the fourteen discovery requests, which included testimony taken on February 21, 2007 from Vincent Moschello, a transit employee who testified to the maintenance and repair records of the Premises. Defendant also agreed to depose the repair worker or the station supervisor that was

on duty at the Premises on the day of the accident. The record reveals that the repair worker, Richard Otto, is no longer a Transit Authority employee. Thus, defendant agreed to depose the station manager on July 31, 2007. On August 1, 2007, defendant made an objection to the first, fifth, and seventh paragraphs of the April 6, 2007 demand and subsequently declined to turn over the aforementioned documents. In addition, defendant declined to go forward with the station manager's examination before trial scheduled on the following day. Three weeks later, defendant objected to paragraphs two, five, six, and seven of the December 11, 2006 discovery requests. Overall, defendant provided responses to eight of defendant's fourteen discovery requests, raised six objections to the items that were demanded, stating that the demands in question were overly broad and irrelevant as a reason for its failure to produce the requested information. Given these facts, there is no clear showing that the failure to produce the demanded discovery requests was willful and contumacious.

Plaintiff further argues that defendant has waived its right to object to plaintiff's discovery demands because it failed to file an objection within 20 days of service.

CPLR 3122 (a) provides that a party objecting to disclosure sought pursuant to CPLR 3120 must serve a response particularizing the reasons for the objections within 20 days of service of the demand. Here, it is undisputed that the objections to disclosure were untimely. The failure of a party to challenge the propriety of a notice for discovery and inspection within the time prescribed under CPLR 3122 forecloses inquiry into the propriety of the information sought, except as to material which is privileged under CPLR 3101 or requests which are palpably improper (*Srinivasan v City of New York*, 276 AD2d 786, 787 [2d Dept 2000]). Defendant makes no claim of privilege, but argues that the material requested by plaintiff is

improper because it is irrelevant and over broad. A disclosure request is palpably improper if it seeks information of a confidential and private nature that does not appear to be relevant to the issues in the case (*Titleserv, Inc. v Zenobio*, 210 AD2d 314, 315-16 [2d Dept 1994]). Plaintiff seeks business records that are relevant to the issues in the case. Furthermore, she seeks information to support testimony given by Moschello in his examination before trial. Thus, defendant's failure to comply with the provisions of article 31 constitutes a waiver of any objections to disclosure.

Regarding plaintiff's request to extend her time to serve and file a Note of Issue and Certificate of Readiness for Trial, defendant has made no objection to said request. Moreover, the court considers her request to be reasonable.

Accordingly, it is

ORDERED that plaintiff's motion is granted only to the extent of allowing her leave to extend the time to file the note of issue, and plaintiff is directed to file the note of issue on or before December15, 2007; and it is further

ORDERED that defendant's answer will be stricken unless defendant complies with the outstanding discovery demands within thirty days of service of this order.

Dated: 10-18-07

ENTER:

J.S.C.