[* 1]
SCANNED ON 4/16/2008

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

PRESENT: HON. CAROL EDMEAD PART 35

Justice

Index Number : 102422/2004

BARKSDALE, CYNTHIA

INDEX NO.

vs

METRO-NORTH TRANSPORTATION

MOTION DATE 1/30/08

Sequence Number : 001

MOTION SEQ. NO.

DISMISS COMPLAINT

MOTION CAL. NO.

is motion to/for

PAPERS NUMBERED

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

Answering Affidavits — Exhibits

Replying Affidavits

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED

APR 16 2008

COUNTY CLERK'S OFFICE

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

Based on the accompanying Memorandum Decision, it is hereby

ORDERED that the branch of the defendants' motion for an order dismissing the complaint is granted solely as the Metropolitan Transit Authority, and the complaint as against the Metropolitan Transit Authority is dismissed; and it is further

ORDERED that the branch of the defendants' motion for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint as against Metro North Commuter Railroad is denied; and it is further

ORDERED that the branch of the defendants' motion for an order pursuant to CPLR 3126 dismissing the complaint is granted solely to the extent that the complaint is dismissed unless plaintiff files the note of issue by April 25, 2008; and it is further

ORDERED that defendants serve a copy of this order within 10 days; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: 4/10/08

J.S.C.

HON. CAROL EDMEAD

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

x

CYNTHIA BARKSDALE,

Plaintiff,

-against-

METROPOLITAN TRANSPORTATION AUTHORITY and METRO-NORTH COMMUTER RAILROAD,

Defendants.

x

EDMEAD, J.S.C.

Index No. 102422/04

DECISION/ORDER

MEMORANDUM DECISION

Defendants Metropolitan Transportation Authority ("MTA") and Metro-North Commuter Railroad ("Metro-North" collectively "defendants") move for an order (1) dismissing the complaint of plaintiff Cynthia Barksdale ("plaintiff") or precluding plaintiff from offering any evidence at a trial for failure to comply with multiple Court orders pursuant to CPLR 3126; or in the alternative (2) pursuant to CPLR 3212, granting summary judgment and dismissing plaintiff's complaint.

This personal injury action arises out of a slip and fall accident on January 17, 2003 at approximately 8:00 p.m. The alleged accident occurred on a station platform at the Park Avenue or 125th Street [Harlem] Station in New York, New York (the "station" or the "subject location"). Plaintiff claims she slipped and fell on snow.

Defendants' Contentions

MTA is Not a Proper Party to this Action

The MTA is not a proper party to this action because it did not own, control, operate, or maintain the Harlem/125th Street Station. Metro-North, however, a wholly-owned subsidiary of

the MTA, is the owner of the station. N.Y. Public Authorities Law §1266 provides that MTA's subsidiary corporations are distinct entities, individually subject to suit. Each subsidiary is responsible for the maintenance and repair of its own facilities, and the functions of the MTA do not include the operation, maintenance, and control of any facility. Furthermore, the law is well established that the MTA may not be held liable for the torts committed by a subsidiary.

Plaintiff's Complaint Should Be Dismissed for Noncompliance with Discovery

Plaintiff's complaint should be dismissed with prejudice for willful failure to comply with court-ordered discovery. Plaintiff has failed to fully comply with all court orders including the preliminary conference order, the compliance order of August 29, 2006, and the most recent court order of June 19, 2007. Plaintiff was to be produced for a deposition prior to March 15, 2006 and then on or prior to September 29, 2006, yet she was not produced until nearly one year later due to purported difficulty traveling and other purported commitments. Defendants were always prepared to produce a witness and were delayed in so doing because of plaintiff's failure to first schedule her deposition. In fact, it was the defendants' office that contacted the plaintiff to schedule the outstanding depositions.

Indeed, plaintiff's noncompliance with court-imposed deadlines has continued. To date, plaintiff has not filed a note of issue by the final deadline set forth in the June 19, 2007 order, nor did she request an extension of time. As such, plaintiff's repeated failure to comply with this court's orders is willful and contumacious.

Plaintiff's failure to comply with the discovery process justifies dismissal of her complaint. Plaintiff's counsel has offered no reasonable explanation for her blatant disregard of the CPLR as well as the court's orders. As a result, plaintiff has delayed the prosecution of this

case. Accordingly, the plaintiff's complaint should be dismissed in its entirety, with prejudice.

In the alternative, the plaintiff must be precluded from offering evidence at trial for her willful failure to comply with the court orders. As a result of plaintiff's obvious noncompliance with court orders, defendants have incurred unnecessary legal costs.

Plaintiff Cannot Establish Prima Facie Case of Negligence

Defendants' motion for summary judgment should be granted because plaintiff cannot establish a *prima facie* case of negligence. Summary judgment is appropriate where, as in this case, there are no genuine issues of material fact concerning the allegations against defendants.

A cause of action based on negligence requires several elements to be established: (1) that the defendant owed the plaintiff a duty to conform to a certain standard of conduct for the protection of others against unreasonable risks, (2) that the defendant breached that duty by failing to conform to the required standard, (3) that this conduct was a proximate cause of the plaintiff's injuries, and (4) that the plaintiff suffered actual loss or compensable damages.

In the case at bar, plaintiff is unable to establish that defendants were negligent. In addition, there is no evidence that defendants caused her alleged injuries. Plaintiff merely relies on her own self-serving testimony that there was snow on the platform and this caused her to slip and fall.

Furthermore, plaintiff will be unable to prove actual or constructive notice because there was no significant snowfall within the seven days prior to the incident. Certified weather reports indicate that there was no precipitation on the date of the accident. In fact, it did not snow the entire week prior to January 17, 2003. The weather reports show either a zero or a trace of precipitation the week prior to the day of the incident, with the exception of only 0.01-0.02

inches of "light snow fog/mist" between the hours of midnight to 2:00 a.m. on the date of the alleged accident. And, the last time the temperature reached at least 32 degrees Fahrenheit was four days earlier on January 13, 2003 at 8:00 p.m.

Moreover, there is no evidence of how the purported snow allegedly got to the platform. Although, plaintiff testified that she could see "a path that I [plaintiff] had slid" and that she saw "maybe an inch or two [of snow]" immediately after the alleged fall, there is no evidence that it snowed at all. Thus, if plaintiff is to be believed, someone must have tracked the purported snow to the alleged accident location, and there is no evidence that Metro-North had notice of any such purported event. Plaintiff's testimony alone is not enough to establish a *prima facie* case of negligence.

In addition, plaintiff testified that she did not notice any snow or rain between the hours of 7:00 p.m. to 10:00 p.m. on the day of the alleged accident. As there was no significant snowfall for seven days leading up to the day of the incident, there was no possible way for the defendants to have had any notice of purported snow. Plaintiff's testimony alone is not sufficient to prove defendants had notice.

Moreover, defendants note that Thomas Murphy ("Murphy"), a Metro-North Supervisor of Track, Grand Central Terminal, testified that the platform was inspected by a Metro-North employee and the employee had "taken no exception." Murphy explained further that "no exceptions" means no "snow, ice, debris, cracked concrete, [and/or] damaged platform."

In order to establish actual notice, plaintiff must offer evidence indicating that defendants knew of the dangerous condition and did not remedy it. The plaintiff will be unable to establish that defendants had either actual or constructive notice of the allegedly hazardous condition

because there could be no notice of such a condition in the absence of a significant snowfall.

Finally, plaintiff has not presented any evidence that defendants proximately caused her alleged injuries. It is well established that where evidence is insufficient to show that acts or omissions of defendants caused an alleged accident, negligence cannot be inferred upon the mere happening of the accident itself. Plaintiff cannot show that Metro-North knew that the area was snowy and/or icy and, if the condition as alleged by plaintiff existed, that defendants had not sufficiently or properly salted the platform.

Nor is there any evidence that defendant Metro-North created the condition that caused plaintiff's accident. Except for plaintiff's self-interested statements, nothing else supports her claim.

Plaintiff's Opposition

Defendant MTA is a Proper Party to this Action

Plaintiff contends defendants did not raise such a defense in their answer. Therefore, the defendants should now be estopped from raising this meaningless semantical argument at this late date. Furthermore, such an argument lacks merit as the courts in New York have allowed cases against the MTA and Metro-North.

Plaintiff has Not Willfully Failed to Comply with Discovery

Plaintiff has not failed to comply with any of the court's orders or the discovery deadlines. Plaintiff has met all of the prescribed deadlines, including the filing of a timely complaint, timely attendance of the public authorities hearing, scheduled deposition of the plaintiff, attendance at deposition of defendant, the pre-trial conference, and all scheduled hearings over the course of the four years since the complaint was initially filed. Also, plaintiff

provided her medical records, employment records, recorded statements, and tax returns and related income documents in plaintiff's possession. One or two unproduced documents, out of hundreds supplied to the defendants, do not constitute a failure to comply with court orders.

The gravamen of defendants' motion is that the plaintiff failed to prosecute the case in a timely manner. However, defendants' self serving and conclusory statements about the plaintiff "willfully failing to comply with court orders," are misleading and should not sway the Court. Thus, the complaint should not be dismissed.

The delay in this case is not solely attributable to the plaintiff. The reason for the delays rest with the countless number of defense attorneys assigned to this case. There have been no less than six different attorneys and paralegals assigned to this case. Upon the different stages, the attorneys had left the case causing lengthy delays as other attorneys then had to get "up to speed" on the case. Counsel for the plaintiff was often unable to locate the newest attorney in scheduling depositions and meeting deadlines; plaintiff would then have to wait weeks on end before a new attorney was assigned to the matter. Therefore, it is more than disingenuous for the defendant to now use delays as a basis for dismissing the case.

Plaintiff points out that the most recent court order in the plaintiff's possession is not clear as to the date of the note of issue. Although the Court repeatedly stated that the note of issue must be filed by a particular date with "no adjournments," deadline was continuously adjourned at the request of both parties. Furthermore, the Court's intent for setting such a date to file a note of issue is "purely administrative" in substance and form, and it would only be in egregious situations, where there has been a repeated failure to file a note of issue, that would warrant the most serious penalty of dismissing a case on this basis. Finally, as there is no

evidence of repeated failures by the plaintiff, it would be wholly unjustified and not in keeping with the customary practice of the Court to dismiss a claim where there is clearly some issue as to what the physical notice indicates.

Furthermore, there is no demonstrable evidence that plaintiff did not take the case seriously. Nor does the conduct articulated by the defendant, even if it were true, rise to the standard of being "willful and contumacious" as the defendants fail to provide evidence of repeated failures to infer such conduct.

Finally, the defendants are attempting to take some of the inevitable delays in scheduling and timing of depositions and the like, some of the plaintiff's scheduling issues, and use them to their advantage by asking the Court to disregard the defendants own delays and conduct.

There have been numerous opportunities to settle this matter yet the defendants chose to forge ahead. Furthermore, the defendants should not complain about legal costs as such costs are borne by both parties. Thus, dismissal of the complaint and preclusion are unwarranted.

Plaintiff Established a Prima Facie Case for Negligence

Plaintiff's pleadings, sworn affidavits, deposition testimony, and exhibits raise genuine issues of material fact that must be tried. Further, defendants failed to establish that a genuine issue of material fact does not exist. Whether notice of a dangerous condition can be attributed to the defendants when it performed routine maintenance check of the area is a genuine issue of fact. Further, defendants focused on procedural issues, and whether the dangerous condition was non-existent at the time of the accident is a question of fact.

Defendants had Both Actual and Constructive Notice

The defendants' allegations that they had no notice of a dangerous condition and that the

alleged dangerous conditions were non-existent create genuine issues of material fact. Defendants focused primarily upon procedural issues that are not dispositive of the issue of notice. What is clear concerning the defendants' argument is the issue of actual and/or constructive knowledge, and the maintenance responsibilities of the defendant.

Defendants' Reply

Plaintiff Failed to Rebut Defendants' Showing of Entitlement to Summary Judgment

Defendants established their entitlement to judgment as a matter of law by submitting certified weather reports for the week prior to and including the date of the incident, wherein no snow fall was reported the entire week prior to plaintiff's incident. In addition, only a trace of light snow was noted to have fallen on the date of the incident, from midnight to 2:00 a.m., more than 16 hours prior to plantiff's alleged incident.

Moreover, Murphy testified that Metro-North has a system for maintaining the platforms free of snow which includes watching the news for impending snow storms; when snow fall is announced, a crew of men are sent out to keep the platforms clean of snow and/or ice. Murphy testified there is no record of a crew being sent out to clean snow or ice on the date of the incident. Finally, Murphy testified that there is no record of a complaint regarding snow on the subject platform, prior to plaintiff's incident.

Plaintiff failed to present any evidence to rebut defendants' showing that there was no snow accumulation of 1" to 2" for one week prior to plaintiff's alleged incident. Plaintiff merely relies on her speculative claim that she slipped on pre-existing snow.

Plaintiff Acquiesces that MTA Owed No Duty of Care to Plaintiff

Plaintiff's silence in the issue regarding MTA's liability is deemed acquiescence. Thus,

plaintiff's cause of action against defendant MTA must be dismissed.

Plaintiff's Explanation for Her Failure to Comply with Court Orders is Without Merit

Plaintiff's counsel practices in Washington D.C. and uses a New Jersey address for service; yet, plaintiff's counsel argues that the assignment of this case to multiple attorneys in defendants' counsel office is the reason for his failure to comply with multiple Court orders regarding discovery. However, except for plaintiff's counsel's bare allegations, there is no evidence proffered to support how the handling of this case by defense counsel prevented plaintiff from complying with multiple discovery orders, such as the directives to serve outstanding authorizations. Moreover, plaintiff's counsel failed to explain why he has still not filed a note of issue as mandated by the Court. Therefore, the Court should find that the delayed prosecution of this case by plaintiff warrants the dismissal of her complaint with prejudice.

Analysis

MTA is Not a Proper Party to this Action

It is undisputed that the alleged incident occurred on the platform of the Park Avenue 125th Street [Harlem] Metro-North Station. Metro-North is a wholly owned subsidiary corporation of defendant MTA, established pursuant to N.Y. Public Authorities Law ("PAL") § 1266 (*see Rose v Metro North Commuter R.R.*, 143 AD2d 993, 533 NYS2d 629 [2nd Dept 1988]). Furthermore, PAL § 1266(5) specifies that the MTA's subsidiary corporations are distinct entities and shall be individually subject to suit, and provides that "the employees of any such subsidiary corporation, except those who are also employees of [the MTA] shall not be deemed employees of the [MTA]" (*Noonan v Long Island R.R.* 158 AD2d 392, 551 NYS2d 232 [1st Dept 1990]). In addition, each subsidiary is responsible for the maintenance and repair of its own facilities, and

the functions of the MTA do not include the operation, maintenance, and control of any facility (*Noonan v Long Island R.R.* 158 AD2d 392, 551 NYS2d 232 [1st Dept 1990] *citing Cusick v Lutheran Medical Center*, 105 AD2d 681, 481 NYS2d 122 [2nd Dept 1982]). Accordingly, the MTA may not be liable for the torts committed by a subsidiary arising out of the operations of the subsidiary corporation *(Noonan v Long Island R.R.*, 158 AD2d 392, 551 NYS2d 232 [1st Dept 1990]; *e.g.*, *Montez v MTA*, 43 AD2d 224, 350 NYS2d 665 [1st Dept 1974]). Furthermore, plaintiff's contention that defendants did not raise such a defense in their answer is without merit. Therefore, as this action alleges negligence in the improper operation, maintenance, and control of the railroad facilities owned by Metro-North, the MTA is not a proper party and summary judgment dismissing the complaint as against MTA is granted (*see Noonan v Long Island R.R.* 158 AD2d 392, 551 NYS2d 232 [1st Dept 1990]).

Summary Judgment: Actual and Constructive Notice of the Condition

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212[b]), sufficient to warrant the Court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390 [Sup Ct New York County, 2003]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d

230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002] [defendant not entitled to summary judgment where he failed to produce admissible evidence demonstrating that no triable issue of fact exists as to whether plaintiff would have been successful in the underlying negligence action]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212[b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562).

To establish a *prima facie* case of negligence in a slip and fall case, a plaintiff must demonstrate that the defendant created the dangerous condition which caused the accident or that the defendant had actual or constructive notice of that condition and failed to remedy it within a

reasonable time (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 501 NYS2d 646 [1986]; *see also Segretti v Shorenstein Company, East, LP*, 256 AD2d 234, 682 NYS2d 176 [1st Dept 1998]; *Weiss v Gerard Owners Corp.*, _ NYS2d _, 2005 NY Slip Op 07847 [1st Dept]; *O'Rourke v Williamson, Picket, Gross, Inc.*, 260 AD2d 260, 688 NYS2d 528 [1st Dept 1999]; *Gordon v Waldbaum, Inc.*, 231 AD2d 673, NYS2d 996 [2nd Dept 1996]). Thus, a defendant, as the proponent of a summary judgment motion, when attempting to make its requisite *prima facie* showing, must submit evidence in admissible form that shows it did not create nor had actual or constructive notice of the dangerous condition (*see Colt v Great Atlantic & Pacific Tea Company, Inc.*, 209 AD2d 294, 618 NYS2d 721 [1st Dept 1994]; *see also Giuffrida v Metro North Commuter Railroad Company*, 279 AD2d 403, 720 NYS2d 41 [1st Dept 2001]; *Gordon v Waldbaum, Inc.*, 231 AD2d 673, *supra*).

Moreover, to constitute constructive notice, a dangerous condition must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy the condition (*see Gordon v American Museum of Natural History*, 67 NY2d 836, *supra*; *see also Segretti*, 256 AD2d 234, *supra*; *Lemonda v Sutton*, 268 AD2d 383, 702 NYS2d 275 [1st Dept 2000]; *Guttierez v Lenox Hill Neighborhood House, Inc.*, 4 AD3d 138, 771 NYS2d 513 [1st Dept 2004]; *Budd v Gotham House Owners Corp.*, 17 AD3d 122, 793 NYS2d 340 [1st Dept 2005]). By contrast, a mere general awareness of the presence of some dangerous condition is legally insufficient to establish constructive notice (*see Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 622 NYS2d 493 [1994]; *see also Gordon v American Museum of Natural History*, 67 NY2d 836, *supra*; *Segretti*, 256 AD2d 234, *supra*).

Once a defendant has actual or constructive notice of a dangerous condition, the

defendant has a reasonable time to undertake remedial actions that are reasonable and appropriate under all of the circumstances (*see Stasiak v Sears, Roebuck & Co.*, 281 AD2d 533, 722 NYS2d 251; *LoSquadro v Roman Catholic Archdiocese of Brooklyn*, 253 AD2d 856, 678 NYS2d 347).

According to the deposition testimony of defendant's track supervisor, Thomas Murphy, who is responsible for clearing snow and ice on the platform at the subject station, (defendant's Amended Notice of Motion, EBT, p. 28), a"Chief rail traffic controller's log of unusual occurrences" ("controller's log") report was prepared. Such report indicated that an inspection of the tracks 1 and 3 was performed. The controller's log indicated: "B&B Vitello reports no exception on the 1, 3 platform on 125th street." According to the witness, the report demonstrates that there was no snow, ice or debris on the platform. However, the report was received by the Chief rail traffic controller's office at "22:33," *i.e.*, 10:33 p.m.. There is no indication, and Murphy did not know when the inspection was actually performed. Thus, it cannot be said, as a matter of law, that an inspection by defendant's prior to plaintiff's accident demonstrated the absence of snow so as to establish the lack of constructive notice. Arguably, the inspection was performed on or about the time the report was received, i.e., 10:33 p.m., in which case, it would have been *after* the plaintiff's accident. Arguably, a jury may infer from the testimony and the weather report that there was "light" snow fall earlier on the date of plaintiff's accident, and that defendant failed to remove the snow within the 17 to 18 hour-period after the light snow fall. Based on such evidence, a jury may conclude that snow on the platform existed for a sufficient length of time, *i.e.*, 17-18 hours, prior to the accident, to permit defendant to discover and remedy the condition.

As there is no evidence in the record of inspections performed prior to plaintiff's

accident, or that an inspection prior to plaintiff's accident did not reveal any snow at the accident location, it cannot be said the defendant met its burden on summary judgment to establish the absence of constructive notice of the condition that allegedly caused plaintiff's injury.

Defendants' assertion that plaintiff cannot prove actual or constructive notice because there was no significant snowfall the seven days prior to the incident in the face of weather reports is contradicted by the record. Contrary to defendant's contention, the weather reports show that there were three instances of "light" snow fall beginning the evening before the date of the accident at 11:00 p.m., and continuing for three hours, until 2:00 a.m., which was followed by a trace of snow at 3:00 a.m.

Furthermore, defendants' contention that plaintiff testified that "she did not notice it snowing between the hours of 7 p.m. to 10 p.m." is contradicted by the record. Contrary to defendant's contention, plaintiff also expressly stated that "It was snowing earlier in the day" (Page 25, line 11). Plaintiff's testimony is consistent with the weather report indicating "light snow" after midnight.

That there is no evidence of how the snow allegedly got the platform is inconsequential under the circumstances.

Moreover, defendants' contention that plaintiff's testimony alone is not enough to establish a prima facie case of negligence lacks merit. Plaintiff's testimony alone may support a claim for negligence (*see e.g.*, *Gonzalez v The American Oil Co.*, 42 AD3d 253 [1st Dept 2007] [plaintiff's testimony raises an issue of fact as to defendant's liability for injuries sustained when plaintiff fell on snow and ice on defendant's premises]).

Thus, the branch of defendants' motion to dismiss the complaint for failure to make out a

prima facie case of negligence is denied.

Plaintiff's Noncompliance with Discovery

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 willful, contumacious, or in bad faith (*Zletz v Wetanson*, 67 N.Y.2d 711, 713, 499 NYS2d 933 [1986]). It is equally well settled that where a party disobeys a Court order and his or her conduct frustrates the disclosure scheme provided for the CPLR, dismissal of a pleading is within the broad discretion of the trial Court (*see, Zletz v Wetanson, supra*). Although actions should be resolved on the merits wherever possible (*Maiorino v City of New York,* 2007 NY Slip Op 3104 [2007] *citing Cruzatti v St. Mary's Hosp.*, 193 AD2d 579, 580, 597 NYS2d 457), a court may strike the "pleadings or parts thereof" (CPLR 3126[3]) as a sanction against a party who "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed" (CPLR 3126). While the nature and degree of the sanction to be imposed on a motion pursuant to CPLR 3126 is a matter of discretion with the motion court (*Maiorino v City of New York,* 2007 NY Slip Op 3104 N.Y. App. Div [2007] *citing Soto v City of Long Beach*, 197 AD2d 615, 616, 602 NYS2d 691; *Spira v Antoine*, 191 AD2d 219, 596 NYS2d 1), "striking an answer is inappropriate absent a clear showing that the failure to comply with discovery demands is willful [and] contumacious" (*Maiorino v City of New York,* 2007 NY Slip Op 3104 [2007] *citing Harris v City of New York*, 211 AD2d 663, 664, 622 NYS2d 289).

It appears that all discovery is complete, and that the only portion of the Court's order that remains unsatisfied is the direction that plaintiff file the note of issue. Given that plaintiff

failed to file the note of issue, and failed to seek an extension of time to file the note of issue. The Court notes that the Preliminary Conference Order contains a directive that the failure of plaintiff to file the note of issue as directed shall result in dismissal of the complaint on notice by the Court. Thus, the directive of the Court mandates dismissal. However, since plaintiff has provided the discovery, the Court, in its discretion, mandates a conditional order of dismissal (*see, Crawford v Toyota Motor Credit Corp.*, 283 AD2d 184, 724 NYS2d 595 [1st Dept 2001]; *Campbell v Peele*, 289 AD2d 141, 734 NYS2d 449 [1st Dept 2001]; *Green v Mohamed*, 275 AD2d 599, 712 NYS2d 861 [1st Dept 2000]; *Kilh v Pheffer*, 94 NY2d 118, 123 [1999] ["If the credibility of Court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore Court orders with impunity"]).

Thus, the Complaint is hereby dismissed, unless plaintiff files the note of issue by April 25, 2008.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of the defendants' motion for an order dismissing the complaint is granted solely as the Metropolitan Transit Authority, and the complaint as against the Metropolitan Transit Authority is dismissed; and it is further

ORDERED that the branch of the defendants' motion for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint as against Metro North Commuter Railroad is denied; and it is further

ORDERED that the branch of the defendants' motion for an order pursuant to CPLR 3126 dismissing the complaint is granted solely to the extent that the complaint is dismissed

unless plaintiff files the note of issue by April 25, 2008; and it is further

ORDERED that defendants serve a copy of this order within 10 days; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: April 10, 2008

Hon. Carol Robinson Edmead, J.S.C.