

**Smith v City of New York**

2008 NY Slip Op 32670(U)

September 8, 2008

Supreme Court, New York County

Docket Number: 104113/06

Judge: Eileen A. Rakower

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

**EILEEN A. RAKOWER**

PRESENT: \_\_\_\_\_ **J.S.C.**  
*Justice*

PART 5

Index Number : 104113/2006

**SMITH, RANDY**

vs.

**CITY OF NEW YORK**

SEQUENCE NUMBER : 002

STRIKE ANSWER

INDEX NO. 104113/06

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

MOTION SEQ. NO. 002

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

n this motion to/for \_\_\_\_\_

PAPERS NUMBERED

12  
3

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**

SEP 11 2008

COUNTY CLERK'S OFFICE  
NEW YORK

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

Dated: 7/8/08

[Signature]

**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  
RANDY SMITH an Infant by his Mother and  
Natural Guardian, DENISE SMITH, and DENISE  
SMITH, Individually,

Plaintiffs,

Index No.  
104113/06

- against -

THE CITY OF NEW YORK,  
Defendants.

**FILED**  
SEP 11 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

**DECISION/ORDER**  
Seq. No.: 002

-----X  
HON. EILEEN A. RAKOWER

Plaintiffs bring this action for personal injuries allegedly sustained when infant plaintiff fell off his bike due to an allegedly patched uneven surface on a roadway leading to a ramp which led to the swimming pool in Marcus Garvey Park on August 20, 2005. The park is located at 124<sup>th</sup> Street and 5<sup>th</sup> Avenue in the County and State of New York. Plaintiffs now move to strike defendant the City of New York's ("City") answer pursuant to CPLR 3126 or, in the alternative, an order compelling: (1) a deposition of Robert Garcia or a person with knowledge concerning inspections and repairs of the subject area; (2) inspection reports and repair records pertaining to the specific area where the accident occurred; and (3) color copies of photographs previously exchanged. City opposes the motion.

Plaintiffs, in support of their motion, argue that the witness City produced for deposition, Kenneth Wheeler, was only a "pool manager" and that he did not conduct inspections of the pool or the areas surrounding it prior to August 2005. Plaintiffs next served City with a notice seeking the deposition of Robert Garcia, who Plaintiffs discovered was the park inspector prior to the date of the accident. City did not produce Mr. Garcia and plaintiffs claim that his is material and necessary to their case. Further, plaintiffs claim that during his deposition, Mr. Wheeler testified that inspection reports which were produced did not cover inspections for the ramps and roadways around the pool area. Plaintiffs request here that City be directed to produce

\* 3 ]  
the relevant inspection reports. Finally, plaintiffs request that City supply them with color photocopies of photographs that were previously exchanged as the ones already produced are poor black and white xerox copies.

City, in opposition, argues that Mr. Wheeler has provided sufficient, knowledgeable testimony and a deposition of Robert Garcia in unwarranted. City claims that plaintiffs' basis for their argument, that Mr. Garcia's name is on the inspection reports previously exchanged, is insufficient to show that City must produce him as those reports did not pertain to the area in question. City also argues that it should not have to produce duplicative color copies of the inspection photographs because those reports do not pertain to the area upon which infant plaintiff fell.

Plaintiffs submit Mr. Wheeler's deposition transcript in which he testifies to his personal observations about the subject area, the inspection reports, and as to his inspection duties and inspections generally:

Q: Now, in your position, did you have anything to do with maintaining or reporting or inspecting the area around the pool, meaning, the area shown in this photograph?

A: Anything that's on the immediate outside of the pool building, I must inspect everyday.

Q: How far out?

A: There's no boundary. I would say six feet.

Q: So, the area shown in this photograph, would that be in an area that you would be inspecting?

A: Yes.

Q: Is that within six feet of the pool?

A: Of the building itself, yes.(Wheeler Deposition, Pages 11-12).

...

Q: Did you do inspections on that area, prior to the time you were supervising the pool in August of '05?

A: No. (Id. at 14).

...

Q: Do you know, during that period, how often inspections were made?

A: As parks personnel, I know that within a two week time period every park is supposed to be inspected.

...

Q: Are they also inspecting for broken pavement?

A: Yes.(Id. at 17).

...

Q: Once you became pool supervisor, did you personally inspect both of those areas, the area to the right of the ramp and the ramp, as well?

A: Everyday that I worked.

Q: You personally inspected it?

A: I personally do it.

Q: Did you find any defects?

A: No. (Page 21, line 21 through page 22, line 5)

Regarding the inspection reports, Mr. Wheeler testifies:

Q: I'll show you these inspection reports that were given to me this morning and I'll ask if any of them pertain to the ramp leading to the pool or the area to the right of the pool.

A: All these are around the pool area, but none of them immediately around the pool itself.

Q: So, I just want to make sure I understand. None of them would be of the ramp leading to the pool?

A: Right. (Id. at 22-23).

...

Q: When an inspector would come around and inspect, would he always prepare a report?

A: My understanding is yes, but I really don't know what they do.

Q: The area of the ramp and the area to the right of it, that would be inspected?

A: Yes.

Q: Did you ever prepare a report involving that, either of those areas?

A: Only for the pool itself and immediately outside, but my stuff goes directly to the pool office.

Q: So, you had reports for the ramp, leading up to the ramp that we've been talking about?

A: At the end of the pool season, I must write a report about the whole pool and the immediate outside area of the pool and that goes into the pool office, if I recommend that anything should be fixed around the

pool or inside the pool.

Q: Well, does that include the ramp leading to the pool?

A: That definitely includes the ramp.

Q: Would it include the road that is shown in the photograph to the right of that ramp?

A: Not, basically, the road, just the ramp leading to the pool. Once we get down to the road that, like, belongs to the park itself. (Id. at 25).

Upon being shown photographs of the patched road where plaintiff fell, Mr. Wheeler testifies:

Q: I'm going to show you this photograph . . . I'll ask if you recognize that as the area we've just discussed.

A: This is the road that leads to the ramp and also to the front of the pool.

Q: So that would be the area we were just talking about, right?

A: No, no. This is just the road - - the ramps are a little bit further up. They're not part of this road. (Id. at 10).

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. The sanction of striking a party's answer is warranted when a party repeatedly and persistently fails to comply with several disclosure orders issued by the court. (*Yoon v. Costello*, 29 A.D.3d 407[1st Dept. 2006]). A court may strike a party's answer only when "a clear showing that the failure to comply is willful, contumacious or in bad faith" is made by the moving party. Repeated non-compliance with court orders gives rise to an inference of willful and contumacious conduct. (*Goldstein v. CIBC World Markets Corp.*, 30 A.D.3d 217[1st Dept. 2006]).

CPLR 3124 states:

If a person fails to respond to or comply with any request, notice, interrogatory, demand, question, or order under this article . . . the party seeking disclosure may move to compel compliance or a response.

The motion to strike is denied as City's conduct does not rise to the level of being deemed willful and contumacious. However, Mr. Wheeler's testimony and the photographs submitted by Plaintiffs make a sufficient showing that another

\* 6 ]  
deposition is necessary. Mr. Wheeler clearly testifies that while he is responsible for the pool and the ramp leading up to it, he is not responsible for, and did not conduct inspections of, the road leading up to the pool ramp. Further, the ramp area is not part of the road. Plaintiffs allege that infant plaintiff's accident occurred on that road, not on the ramp itself. Mr. Wheeler also testified that inspections by Park's personnel are done every two weeks and that the road leading to the pool ramp "belongs to the park itself."

City is directed to produce a Parks Department witness who can testify about inspections done in the subject area, whether that be Mr. Garcia or someone else. City is further directed to supply plaintiffs with relevant inspection reports which relate to the specific roadway area in question. However, City does not need to supply color photocopies of the reports already exchanged as plaintiffs has conceded that those reports are for the wrong areas of the park.

Wherefore it is hereby

ORDERED that plaintiffs' motion is granted to the extent that defendant the City of New York shall produce a witness with knowledge as to the inspections conducted prior to the accident of the specific area wherein the accident occurred; and it is further

ORDERED that defendant the City of New York shall produce inspection reports and repair records for the specific area of the road leading up to the pool ramp to the extent that they exist within 45 DAYS of receipt of a copy of this order with notice of entry; and it is further

ORDERED that if no such records exist defendant the City of New York shall provide plaintiffs with an affidavit by a person charged with keeping such records stating that a search was conducted and that no such records were found.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: September 8, 2008



EILEEN A. RAKOWER, J.S.C.

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