

Kennedy v City of New York

2009 NY Slip Op 30437(U)

February 19, 2009

Supreme Court, New York County

Docket Number: 107560/09

Judge: Eileen A. Rakower

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

EILEEN A. RAKOWER
J.S.C.

PRESENT: _____

PART 5

Index Number : 107560/2005
KENNEDY, JANE
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 002
STRIKE

INDEX NO. 107560/05
MOTION DATE _____
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED	
1	2
3	
4	

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

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

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

FILED
FEB 27 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 2/19/09

[Signature]
EILEEN A. RAKOWER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X
JANE KENNEDY,

Plaintiff,

Index No.
107560/09
**ORDER AND
DECISION**
Mot. Seq.: 002

- against -

THE CITY OF NEW YORK,
RANA SAJID, and HARLINE
REINHARDT,

FILED
FEB 27 2009
Defendants.
-----X
COUNTY CLERK'S OFFICE
NEW YORK

-----X
EILEEN A. RAKOWER, J.S.C.

Plaintiff brings this action for personal injuries allegedly sustained on June 27, 2004, when plaintiff's vehicle collided with a taxi at the intersection of Park Avenue and 35th Street, in the County and State of New York. Specifically, plaintiff alleges that City was negligent in "failing to maintain the intersection at the aforesaid location in a proper manner; in failing to provide proper signs and traffic controls for the guidance and management of traffic thereat . . ." Plaintiff now moves for an order striking defendant the City of New York's ("City") answer and setting the matter down for an inquest. Defendants Rana Sajid ("Sajid") and Harline Reinhardt ("Reinhardt"), together, join plaintiff's motion. City opposes.

Plaintiff, in support of her motion, submits: (1) a notice of motion; (2) counsel's affirmation; (3) the summons and complaint; the pleadings; (4) a May 11, 2006 case scheduling order; (5) plaintiff's letter to City, dated October 12, 2006, (6) City's response to the case scheduling order; (7) this court's April 30, 2007 decision; (8) the transcript of plaintiff's examination before trial ("EBT"); (9) plaintiff's September 12, 2007 letter to City; (10) plaintiff's October 1, 2007 letter to City; (11) plaintiff's November 21, 2007 letter to City; (12) plaintiff's December 20, 2007 letter to City; (13) plaintiff's April 16, 2008 letter to City; (14) plaintiff's first demand for discovery and inspection ("D&I"), dated July 23, 2008; (15) the transcript of Lawrence Malchie's EBT; (16) exhibits from the EBT including a signals map and an intersection order report; (17) plaintiff's further demand for D&I, dated August 25,

2008; (18) City's response to plaintiff's July 23, 2008 and August 25, 2008 D&I.; and so-ordered discovery stipulations from: September 5, 2006, October 28, 2006, June 26, 2007, September 11, 2007, November 20, 2007, January 15, 2008, April 1, 2008, August 12, 2008, October 14, 2008, and December 9, 2008.

Plaintiff argues that City has violated numerous court orders by failing to produce certain documents and produce a witness for deposition, and by failing to adequately respond to plaintiff's July 23, 2008¹ and August 25, 2008 D&I demands. Sajid and Reinhardt, submit counsel's affirmation in support of plaintiff's motion. City, in opposition submits counsel's affirmation, annexing the December 9, 2008 case scheduling order and City's response to Plaintiff's July 23, 2008 and August 25, 2008 discovery demands.

Plaintiff contends that after several failed attempts to get City to respond to her request, she obtained a set of documents from the DOT directly through "FIFO." However, plaintiff could not decipher the various symbols which appeared in the documents. Plaintiff requested that City's intended witness be able to interpret the codes at his deposition. The April 1, 2008 and August 12, 2008 so-ordered stipulations directed City to produce a "signs and pavement markings witness." On August 14, 2008, City produced Lawrence Malchie, an employee of the DOT's "marking section." Plaintiff claims that Mr. Malchie was unable to adequately explain the codes from the DOT documents. Further, plaintiff argues that Mr. Malchie did not know the answer to certain questions, but he testified as to which City organizations he believed would keep records relating to that information.

On August 25, 2008, plaintiff sent City a second set of D&I requests, demanding the following (along with the cites to the relevant page numbers of Mr. Malchie's deposition transcript): (1) Explanation of codes appearing on Plaintiff's Exhibit "1" dated 8/14/08, including but not limited to "EX M-2 COMBO W/CB", "ECS DUCT", "L1W" "LDW" "EX s-10"(pp 20-22); (2) Rules and regulations concerning frequency of inspections at the intersection from the Department of Transportation's Bureau Engineering and documents reflecting said inspections (p. 40); (3) Correct size of signs reflected in Plaintiff's Exhibit "2" on 8/14/08 as accurately set for the in witness' computer (p 41); (4) Documents referred to in ref

¹The only demand contained in the first D&I was for the "Department of Design and Construction records relating to the scene of the accident."

#99-0175(p 53); (5) Copies of documents reflecting inspections performed by the DOT's Manhattan Bureau of Engineering (p 76); (6) Studies performed by the Safety Unit of the DOT to determine whether or not the intersection of East 35th Street and Park Avenue is a high accident intersection (p 76); (7) Studies performed by the DOT's Traffic Signals and Bureau of Engineering to determine whether or not a left turn signal should be placed at intersection of East 35th Street and Park Avenue (p 78); (8) Documents in connection with the Bureau of Engineering's determination to place stop lines at the intersection of East 35th Street and Park Avenue (p 78); (9) Copies of traffic count at the intersection of East 35th Street and Park Avenue maintained by the DOT (p 79); Copies of the Actual Order Notes per reference # 99-0175 (p53); (10) Copy of the request from the Community Board #6 as reflected in reference #99-0175 (p54); (11) Documents reflecting the Manhattan Bureau of Engineering's determination of where to place signs at the aforesaid intersection (p58-60); and (12) Department of Design & Construction's ("DDC") records relating to the scene of the accident. (As previously requested in plaintiff's July 23, 2008 D&I).

City generally responded to each demand by claiming that it was palpably improper, vague, over broad, unduly burdensome, outside the scope of the case scheduling order and that plaintiff has made no showing under the CPLR as to why there is any relevance whatsoever to the demand.

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]). The moving party must show "conclusively that failure to disclose was willful, contumacious or due to bad faith." (*Dauria v. City of New York*, 127 AD2d 416[1st Dept. 1987]).

Although City produced a signs and pavements marking witness for deposition, it is clear upon reviewing Mr. Malchie's transcript that he was unable to clarify the meanings of certain markings which appeared at the subject intersection. As such, plaintiff is entitled to the items demanded in number (1) of her August 25, 2008 D&I. As to the additional documents requested in numbers (2) through (11) of plaintiff's August 25, 2008 D&I, plaintiff is entitled to their production, as the requests are neither vague nor over-broad and are relevant to plaintiff's allegations that City failed to provide proper signage or traffic controls at the subject intersection. Finally, the

* 5] ,
court finds that plaintiff's request of the production of the DDC records, as stated in her July 23, 2008 D&I and again in her August 25, 2008 D&I, is vague and over broad. Thus, plaintiff is directed to clarify that request in order to inform City of precisely which records she is seeking from the DDC .

While plaintiff's is entitled to receipt of the aforementioned documents, she has failed to show that City has acted either willfully or contumaciously. At a minimum, such a showing is necessary in order to impose the extreme sanction of striking a party's answer. However, to the extent City fails to respond to these demands, or provide such discovery as directed by the court, the failure to do so will be deemed willful and contumacious.

Wherefore it is hereby

ORDERED that plaintiff's motion to strike is denied; and it is further

ORDERED that defendant the City of New York shall provide the items requested in plaintiff's August 25, 2008 Demand for Discovery & Inspection, to the extent that they exist and have not already been provided, within 60 DAYS from receipt of a copy of this order with notice of entry; and it is further

ORDERED that, to the extent that such documents do not exist, defendant the City of New York shall provide an affidavit stating that a search was conducted and that no such documents exist;

ORDERED that plaintiff shall provide defendant the City of New York with a specific list of any and all documents she is seeking from the Department of Design and Construction within 30 DAYS of receipt of a copy of this order with notice of entry and City shall respond to plaintiff's request within 30 DAYS of receipt of such request.

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

DATED: February 19, 2009

FILED
FEB 27 2009

COUNTY CLERK'S OFFICE
NEW YORK


EILEEN A. RAKOWER, J.S.C.