

**Perez v New York City Tr. Auth.**

2009 NY Slip Op 30696(U)

March 25, 2009

Supreme Court, New York County

Docket Number: 107290/2006

Judge: Harold B. Beeler

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
**HAROLD BEELER**

PRESENT: \_\_\_\_\_  
*Justice*

PART 21

*Hevon Beery*

INDEX NO. 107290/06

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

- v -

MOTION SEQ. NO. 003

*NY CR*

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

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

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION:**

*Note of issue deadline extended to 4/30/09.*

**FILED**

APR 01 2009

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: \_\_\_\_\_

*3/26/09*

*[Signature]*

**HAROLD BEELER 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: IAS PART 21

**FILED**  
APR 01 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

-----X

HECTOR PEREZ,

Plaintiff,

-against-

Index No. 107290/2006  
SEQUENCE MS005  
DECISION & ORDER

NEW YORK CITY TRANSIT AUTHORITY  
and ROBERT MARTINEZ

Defendants

-----X

**HAROLD B. BEELER, J.S.C.:**

Plaintiff moves by Order to Show Cause for an order striking defendants New York City Transit Authority's ("Transit Authority") and Robert Martinez's ("Martinez") (collectively, "defendants") Answer pursuant to NY CPLR § 3126(3) and scheduling an inquest on damages, on the grounds that defendants have frustrated and prejudiced litigation by repeatedly failing to comply with discovery orders. Defendants oppose the motion.

On March 14, 2005, plaintiff opened the driver's side door to his truck in the direction of traffic, and a passing Transit Authority bus driven by Martinez allegedly crushed plaintiff's hand. Plaintiff timely filed a Summons and Complaint against Martinez and Transit Authority on May 25, 2006. Defendants answered together.

On May 22, 2007, plaintiff submitted his first discovery request on defendants, and two days thereafter, at a Preliminary Conference, Justice Mills ordered defendants to respond to this request within 60 days. Following that, plaintiff alleges that he made numerous attempts to contact Transit Authority, by letter, fax and phone messages to obtain the discovery ordered by the Court. Plaintiff received no response to these communications.

On March 17, 2008, after rescheduling a previous court-ordered deposition for reasons that are unclear, Martinez appeared for a deposition. Martinez refused to answer certain

questions at the deposition. At a subsequent compliance conference on March 27, 2008, Justice Mills ordered the following:

- Martinez to reappear for deposition by May 14, 2008, to answer questions specific to photographs and prior work history
- A deposition of Transit Authority supervisor Mr. Kelleher,<sup>1</sup> by May 14, 2008
- Photographs of the bus and scene of accident within thirty days
- Audiotapes of Martinez's accident report within thirty days

On May 13, 2008, plaintiff's counsel appeared at Transit Authority's place of business for the scheduled depositions of Martinez and Kelleher. Counsel was informed that Transit Authority mistakenly called in a bus operator named Keller, and counsel was not permitted to ask questions of this inadvertently produced non-witness. Martinez was not present, and Transit Authority provided no reason for his absence.

These events led to plaintiff's first Order to Show Cause requesting the defendants' answer to be stricken. On June 12, 2008, Justice Mills ordered that defendants produce Martinez and Kelleher for deposition on June 25, 2008, or any Wednesday within 45 days thereafter. The order specified that if either deponent failed to appear, the answer would be stricken. Justice Mills also ordered that defendants were to provide plaintiff with all outstanding discovery, including audiotapes, and sanctioned defendants in the amount of \$500.

Martinez and the "correct" Kelleher were finally and properly deposed on July 2, 2008.

A status conference was held on October 2, 2008. The record does not indicate whether plaintiff sought to communicate with Transit Authority in the time between the depositions and this conference date. Nevertheless, at the conference the parties discussed individuals and documents whose existence came to light as a result of those depositions. As a result, Justice

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<sup>1</sup>None of the parties' moving papers enlighten this Court as to Mr. Kelleher's first name.

[\* 4 ]

Mills ordered Transit Authority to produce the following within 45 days:

- The bus-operator manual section pertaining to the distance between the operator's vehicle and parking lanes as identified in Kelleher's deposition
- Kelleher's patrol log, as identified in his deposition
- Incident reports and patrol logs of Transit Authority employee Patrick Sullivan
- Incident reports and patrol logs of Superintendent Scheuermann
- Incident reports and patrol logs of Superintendent Mellaci, and "SLD Brothers" as indicated in Kelleher's deposition
- Results of Martinez's blood work, breathalyzer, urinalysis, and all other testings taken after this accident, as indicated in Kelleher's deposition
- Production of witness statements, including Mr. Lakhov, as indicated in Kelleher's deposition
- Audio tapes, as indicated in Kelleher's deposition
- If any of the incident reports and patrol logs do not exist, an affidavit from someone with personal knowledge stating such

On December 18, 2008, another status conference was held. By this point, Transit Authority had not produced any of the items specified in the October 2 order, all of which were due by November 16. This conference resulted in another order for the items previously ordered, specifically: the bus operator manual, the patrol logs and incident reports, Martinez's test results, witness statements, audio tapes, and affidavits by someone with knowledge for items that do not exist. These items were ordered to be produced within 30 days. Plaintiffs were given until January 15, 2009 to file a Note of Issue, and a final status conference was scheduled for January 29.

By January 12, 2009, none of the missing discovery had been produced. Plaintiff wrote

[\* 5 ]

to Justice Mills that it could not, for that reason, comply with the January 15 deadline.

At the status conference on January 29, 2009, Transit Authority produced the previously ordered photographs and the bus operator manual, and the Court granted an extension of the Notice of Issue deadline to March 31, 2009. The Court also ordered plaintiff to submit an Order to Show Cause by February 13, 2009 as to why defendants' answer should not be struck. Defendants were ordered to submit their opposition papers seven days thereafter.

Plaintiff submitted its motion on February 12, 2009, but no opposition was submitted by the return date of March 5, 2009. On that date, defendants attempted to submit their opposition by hand, which was reluctantly accepted by the Court. Defendants also hand-delivered to plaintiff the audiotapes originally ordered on March 27, 2008.

Annexed to defendants' opposition is an affidavit from Felix Williams, Supervising Claims Examiner for the Transit Authority, which accounts for all but one of the outstanding items. Williams's affidavit states that he conducted a search for the items specified in the October and December orders. Kelleher's incident reports were found, although defendants' papers provide no indication that they were produced to plaintiff. Martinez's test results were also located, and annexed to the opposition papers.

According to Williams, the patrol logs for Kelleher and Scheuermann were destroyed due to a leak in the ceiling of the storage facility where they were kept. The affidavit provides no information as to when these documents were destroyed, nor any indication of attempts to preserve them for the purposes of this litigation. Williams also states that there were no incident reports for Sullivan, Scheuermann, Mellaci, and SLD Brothers; and no patrol logs for Sullivan, Mullivan, and SLD Brothers.

Finally, counsel for Transit Authority, in a separate affirmation, states that "[w]itness statements are hereby affirmed to as none."

[\* 6 ]

Discussion

Plaintiff argues that defendants' continuing disobedience of Court orders has delayed timely completion of discovery, and prejudiced plaintiff's case, warranting the striking of the Answer. Defendants argue that plaintiff's motion should be denied as moot, because all discovery is complete.

In *Figdor v. City of New York*, the First Department imposed upon trial courts an affirmative obligation to penalize parties who have frustrated litigation by repeatedly failing to comply with discovery orders. 33 A.D.3d 560, 561, 823 N.Y.S. 385 (1st Dept 2006). In *Figdor*, the First Department affirmed a \$10,000 sanction against the City of New York, where the City failed to respond to discovery orders over a period of two years, noting that documents eventually "trickled in with the passage of each compliance conference." *Id.* In the subsequent decision of *Gradaille v. City of New York*, the First Department again addressed the issue of sanctions for unreasonable discovery delay, and affirmed a \$2,500 sanction against defendant City of New York. 52 A.D.3d 279, 858 N.Y.S.2d 600 (1st Dept 2008). In *Gradaille*, the Supreme Court, New York County, originally granted plaintiff's motion to strike City's answer, after defendant repeatedly failed to comply with discovery orders and provided no reasonable explanation. *Id.* at 281, 858 N.Y.S.2d at 602 (J. McGuire, dissenting). The City moved to reargue, and provided plaintiff with the remaining discovery one week later. *Id.* at 282, 858 N.Y.S.2d at 602. The Supreme Court granted the motion to reargue, vacating the previous order to strike the answer, and instead imposed the \$2,500 sanction. *Id.*, 858 N.Y.S.2d at 603. The First Department affirmed, holding that the Supreme Court did not abuse its discretion by vacating the previous order, reasoning that the City's previous production of wrong records was not "willful and contumacious." *Id.* at 279-80, 858 N.Y.S.2d at 601. Justice McGuire dissented, but argued only for an increased monetary sanction. *Id.* at 285, 858 N.Y.S.2d at 285 (J. McGuire, dissenting).

In light of Transit Authority's numerous failures to timely comply with orders of the Court, the lateness of Transit Authority's opposition to this motion, and the revelation that items previously ordered have been destroyed, this Court agrees that this pattern of conduct warrants sanctions.

This court is particularly concerned that documents in Transit Authority's possession, which had previously been ordered, have subsequently been destroyed. Although there is no evidence that Transit Authority intentionally or recklessly destroyed relevant documents, it evidently did not take proper steps to preserve documents necessary for this litigation (although we cannot determine from defendants' papers if the documents were destroyed subsequent to the orders, this Court cannot give Transit Authority the benefit of the doubt where it failed to provide this information). *See, e.g. Yechieli v. Glissen Chem. Co., Inc.*, 2005 WL 6219363, \* 3 (Sup. Ct. Kings Co.), *affirmed*, 40 A.D.3d 988, 836 N.Y.S.2d 668 (2d Dept 2007) (permitting an adverse inference where physical evidence in defendant City's possession was destroyed, where City knew that the evidence was critical to a potential lawsuit, and there was no evidence of bad faith on the City's part). Kelleher's and Scheurmann's patrol logs were originally ordered on October 2, 2008, apparently as a result of the (belated) deposition of Kelleher on July 2. However, because Kelleher's signature appeared on the supervisor's accident crime investigation report in March 2005, and plaintiff filed a Summons and Complaint in May 2006 (and, presumably, a Notice of Claim earlier than that), the duty to preserve his patrol log attached much earlier than the date of the order.

However, this court declines to strike defendants' answer, and holds that giving an adverse inference at trial as to the destroyed documents is the more appropriate remedy. Plaintiff has not demonstrated how it would be prejudiced by the absence of the missing documents, and this court cannot determine how he would be. *See, e.g. Scarano v. Bribitzer*, 56 A.D.3d 750,

868 N.Y.S.2d 147, 148 (2d Dept 2008) (holding that because there is no indication that the plaintiff disposed of evidence in bad faith, or that the loss would leave defendant without a means to defend the action, a negative inference charge is preferable to dismissing the complaint); *Yechieli*, 2005 WL 6219363 at \* 3 (holding that because the absence of destroyed evidence will not prevent plaintiff from making its case, the “less severe sanction of a negative inference charge is more appropriate”). The bus driver involved in the accident and the signatory of the investigation report have been deposed. The audiotapes of the bus driver’s investigation, photographs of the accident scene, and relevant portions of the bus operator’s manual have been produced. Plaintiff has in his possession the necessary materials to continue his case, even though they have only found their way due to consistent intervention by the Court. Perhaps plaintiff believes that information in these missing documents is critical to his case, but he has failed on this motion to explain how.<sup>2</sup>

Finally, this court imposes a monetary sanction of \$2,500 on Transit Authority, as a penalty for its cumulative misconduct. *See Figdor*, 33 A.D. at 561, 823 N.Y.S.2d at 386 (upholding a \$10,000 monetary sanction where defendant’s “inexcusably lax” adherence to discovery orders resulted in “substantial and gratuitous delay and expense”).

Accordingly it is hereby

ORDERED that the sanction of a negative inference to be given at trial with respect to items that have been previously ordered and subsequently destroyed, and it is further

ORDERED that defendant Transit Authority pay costs to plaintiff’s counsel in the amount of \$2,500 within 30 days of service of this order with Notice of Entry.

This constitutes the decision and order of the court.

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<sup>2</sup> Plaintiff would not have known, prior to his motion, the specific documents which defendants now insist are destroyed. Nevertheless, nothing in plaintiff’s papers discuss the significance of any of the documents that had not been produced.

Dated: New York, New York  
March 25, 2009

ENTER:



Harold B. Beeler, JSC

**HAROLD BEELER**  
**J.S.C.**

**FILED**

APR 01 2009

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