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

PRESENT: RAKOWER Justice

PART 5

INDEX NO. 404121/05

MOTION DATE

MOTION SEQ. NO. 6

MOTION CAL. NO.

MARGARET BRICK

-v-

3859 BROADWAY CORP

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2, 3
Answering Affidavits — Exhibits	4, 5
Replying Affidavits	6

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

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

Dated: 7/14/09

HON. EILEEN A. RAKOWER

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 5

----------X

MARGARET R. BRICK, as Administratrix of the Estate of THOMAS C. BRICK, Deceased, and MARGARET R. BRICK, Individually,

Plaintiff,

- against -

3859 TENTH AVENUE CORP., ARBIB & RABBA REALTY CO., LE FRANK MANAGEMENT CORP., BARTA TRADING CORP., and THE CITY OF NEW YORK, EL PARAISO CORP., and BIANCA DIAZ,

Defendants.

Index No. 404121/05

Mot. Seq. 006

----------X

THE CITY OF NEW YORK,

Third-Party Plaintiff,

- against -

SCOTT TECHNOLOGIES, INC. and SCOTT HEALTH AND SAFETY, A DIVISION OF SCOTT TECHNOLOGIES, INC.,

Third-Party Defendants.

Third-Party Index No. 590358/08

HON. EILEEN A. RAKOWER, J.

Plaintiff brings this action to recover for negligence and wrongful death in connection with the death of New York Fire Department ("FDNY") firefighter Thomas C. Brick ("Brick") on December 16, 2003, while responding to a fire at 3859 10th Avenue, in the City, County, and State of New York. Plaintiff commenced this action on or around December 30, 2004 against, *inter alia*, the City of New York ("City"), and alleges that Brick's injuries and subsequent death were caused at least in part due to the City's failure to properly maintain Brick's FDNY-issued Self-Contained Breathing Apparatus ("SCBA") and Personnal Alert Safety System

("PASS"). On or around April 19, 2007, the City filed a Third-Party Summons and Complaint against Scott Technologies, Inc. ("Scott"). The City claims, to the extent that Brick's injuries and death were caused by a failure of his SCBA and/or PASS to function properly, the City is entitled to common law indemnification as against Scott, as designer, manufacturer, and seller of the defective product(s).

Presently before the court are two motions. First, Scott moves the court by order to show cause for an order (1) compelling the City to produce various discovery items, as well as a number of City witnesses for deposition, pursuant to CPLR 3124; (2) awarding Scott sanctions pursuant to CPLR 3126 for the City's alleged willful failure to comply with its discovery obligations; (3) awarding Scott costs and attorneys fees incurred in bringing the instant order to show cause; and (4) severing the Third-Party claim against Scott pursuant to CPLR 1010. Second, Defendant Barta Trading Corp. ("Barta") cross-moves for an order granting Barta leave to amend its Answer to assert cross-claims for indemnity and contribution against Scott.

Turning first to Scott's motion, Scott alleges that the City has frustrated Scott's efforts to obtain discovery by way of depositions and relevant documents for over six months. On October 9, 2008, Scott provided a list of thirty-nine City witnesses it wanted to depose. In response, the City selected Lt. Kevin Harrison (who appeared on the list) as the first witness to depose. Scott agreed to first depose Lt. Harrison, but informed the City that it would need to conduct depositions of additional City witnesses. On January 9, 2009, following the deposition of Lt. Harrison, Scott provided the City with a revised list of witnesses Scott sought to depose, as well as requests for written discovery. On January 13, 2009, the parties appeared for a compliance conference, wherein the City agreed to "respond to written discovery items # 17 & 18 set forth in correspondence of Scott of 1/9/09 and to evaluate all other written discovery requests [within] 60 days." The City further agreed to "produce fact finding firefighters to extent necessary & available and to evaluate the others identified in Scott correspondence dated 1/9/09."

After the January 13th conference Scott contacted the City by correspondence dated January 27, 2009 to start scheduling further depositions, and indicated that it was amenable to starting with witnesses whom the City did not object to producing. Scott again contacted the City by correspondence dated February 9, 2009 after it received no response to it's January 27th letter, requesting that depositions of the already agreed upon City witnesses be scheduled. In addition, Scott requested that the City provide the written discovery requested in Scott's January 9th correspondence.

Thereafter, the deposition of firefighter Randall Cole was scheduled to take place on March 10, 2009; and the deposition of City witness William Mundy was scheduled to take place on March 31, 2009. No other depositions were scheduled. However, while Mr. Cole's deposition took place as scheduled, Scott claims that the City unilaterally cancelled Mr. Mundy's deposition on March 25, 2009.

On March 4, 2009, prior to Mr. Cole's deposition, Scott sent yet another letter to the City seeking to schedule additional depositions, and requesting that the City respond to Scott's requests for written discovery. Scott did not receive a response to its March 4th letter from the City. On April 6, 2009, one day prior to the next scheduled compliance conference, Scott sent further correspondence to the City by facsimile and e-mail, identifying outstanding discovery still owed by the City.

At the compliance conference on April 7th, the City agreed to produce two witnesses for deposition within sixty days, and to provide the last known contact information for several other witnesses within thirty days. The stipulation further provided that Scott was to move to compel any and all additional witnesses it sought to depose by order to show cause. The stipulation also provided that the City was to produce several items of written discovery within sixty days.

Scott claims that the City should be compelled to produce all of the materials and witnesses identified in its April 6th correspondence. Scott submits an Affidavit in Support of its order to show cause with the following annexed thereto as exhibits: a so-ordered compliance conference stipulation dated 9/9/08; Scott's 10/9/08 correspondence seeking to depose thirty-eight City witnesses; Scott's 11/19/08 correspondence regarding the scheduling of depositions; Scott's 1/9/09 correspondence to the City; Scott's correspondence dated 1/12/09; a so-ordered compliance conference stipulation dated 1/13/09; an email dated 1/27/09 concerning the scheduling of witnesses for deposition; Scott's 2/9/09 correspondence to the City; Scott's 3/4/09 correspondence to the City; Scott's 4/6/09 correspondence to the City; and a so-ordered compliance conference stipulation dated 4/7/09.

Plaintiff has submitted an Affirmation in Support of Scott's motion, wherein Plaintiff joins in seeking an order compelling disclosure by the City and sanctioning the City for its alleged failure to provide disclosure.

The City in opposition states that, contrary to Scott's assertions, the City has been diligent and forthcoming in the course of discovery. Specifically, the City states

that it has produced five witnesses for deposition. These witnesses were:

- Supervising Fire Marshall Wendell Williams who, by his own admission, had little knowledge as to the facts of the case at bar;
- Deputy Chief John Lynn, a Supervising Fire Marshall at the fire at issue in this lawsuit who conducted an investigation into the cause and origin of the fire;
- Lt. Kevin Harrison, Brick's direct supervisor who went into the warehouse to respond to the fire with Brick;
- Firefighter Randall Cole, who also responded to the warehouse fire with Brick; and
- Fire Chief William Mundy of the Mask Services unit who, according to the City, testified that he was involved in the inspection of the PASS and SCBA units after the incident.

The City contends that production of these witnesses for deposition was sufficient, and that Plaintiff has failed to demonstrate the propriety of conducting further depositions of City witnesses.

As for document discovery, the City has provided a response to Scott's requests contained in the April 7, 2009 stipulation, appending it as an exhibit in its opposition papers. Further, the City claims that it previously provided substantial document discovery on February 26, 2007, when the City provided its combined response to the preliminary conference order and Scott's notice for discovery and inspection. Annexed to the City's opposition as exhibits are the following: Plaintiff's summons and verified complaint; the City's third party summons and complaint; the City's response to the 4/7/09 compliance conference stipulation; the deposition transcript of Wendell Williams; the deposition transcript of John Lynn; the deposition transcript of Kevin Harrison; and Plaintiff's demand for discovery and inspection.

Scott submits a Reply Affirmation, wherein Scott asserts that it is entitled to additional depositions in order to adequately defend itself against the City's products liability claims against it. Scott does not appear to contest the sufficiency of the City's document production, in that it does not set forth specific deficiencies with the City's response.

CPLR 3124 provides:

> 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.

Where a party seeks to compel the deposition testimony of additional City witnesses, that party must demonstrate both that the witnesses already deposed possessed insufficient knowledge, and that there is a substantial likelihood that the additional deposition testimony will yield information which is material and necessary to the prosecution or defense of the action (*Zollner v. City of New York*, 204 A.D.2d 626, 627 [2nd Dept. 1994]; *see also Ayala v. City of New York*, 169 A.D.2d 530, 531 [1st Dept. 1991]).

Scott directs the court's attention to its January 9, 2009 letter to the City, wherein Scott lists the names of persons Scott seeks to depose and their connection with the incident and/or their knowledge of purportedly critical information. These include several firefighters who responded to the scene with Brick, members of an FDNY rescue team who located Brick, Chief Medical Examiner Thomas Gilson, FDNY officers who trained or had knowledge of Brick's FDNY training; Supervising Fire Marshalls who took part in the investigation of the incident; FDNY Safety chief Alan Hay; and "[e]veryone from the FDNY Mask Services Unit that performed work on [Brick's] SCBA unit and PASS device...."

The court finds that Scott has made the requisite showing of entitlement to depose two additional City witness. Scott may depose Firefighters Steve Naso and John O'Connell, members of Rescue 3, who went into the premises to find Brick and located him. According to Scott, Naso reported that when he located Brick, he, at one point, removed Brick's mask. O'Connell, also among the group who located Brick, reported that Brick did not have his mask on when he was located. Clarification as to whether Brick had his mask on is critical to Scott's potential liability in the instant matter. The court finds that Scott has failed to demonstrate its entitlement to conduct depositions of the additional persons set forth in its January 9, 2009 correspondence.

Turning now to Scott's motion to sever the action pursuant to CPLR 603, the First Department has observed that

> To avoid the waste of judicial resources and the risk of inconsistent verdicts, it is preferable for related actions to be tried together such as in a tort case where the issue is the respective liability of the defendant and the third-party defendant for the plaintiff's injury.

(*Sichel v. Community Synagogue*, 256 A.D.2d 276-77 [1st Dept. 1998]) (citing

Rothstein v. Milleridge Inn, Inc., 251 A.D.2d 154 [1st Dept 1998]) .

The court finds that severance of the City's third party action against Scott is unwarranted, and that the interest of judicial economy outweighs Scott's desire for what it believes will be a more expeditious resolution of its involvement in the instant matter (*see Reyes v. CSX Transp., Inc.*, 2008 N.Y. Slip Op 5566 [1st Dept. 2008]).

Turning to Barta's motion to amend its answer, CPLR 3025(b) provides that "[a] party may amend his pleading... at any time by leave of court.... Leave shall be freely given upon such terms as may be just...." "CPLR 3025 allows liberal amendment of pleadings absent demonstrable prejudice" (*Atlantic Mut. Ins. Co. v. Greater New York Mut. Ins. Co.*, 271 A.D.2d 278, 280 [1st Dept. 2000]). While Scott objects to Barta's proposed amendment on the grounds that it is being made at the "eleventh hour," Scott is unable to demonstrate surprise or prejudice. Barta is asserting essentially the same claims which were interposed by the City as against Scott . Accordingly, the court finds that Barta is entitled to amend its answer in the form of the proposed amended answer annexed to Barta's motion papers as an exhibit.

Wherefore it is hereby

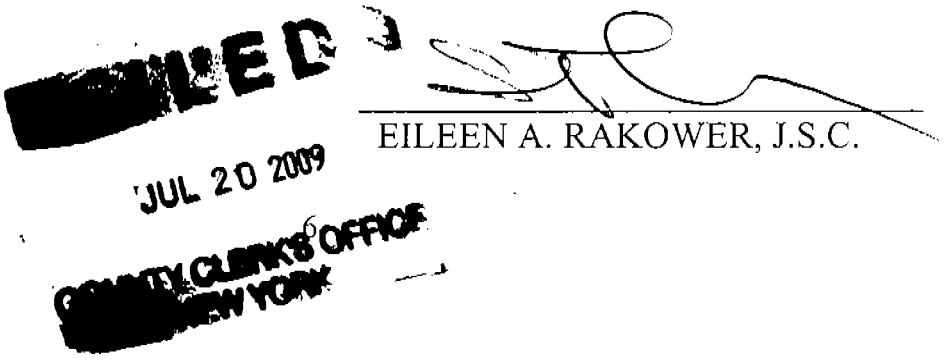
ORDERED that Scott's motion to compel is granted to the extent that the City shall produce Firefighter Naso, and Firefighter O'Connell for deposition within 30 days of service of a copy of this order with notice of entry; and it is further

ORDERED that the cross motion for leave to amend Barta's answer herein is granted, and the amended answer in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that all named parties shall serve an answer to Barta's cross-claims within 20 days from the date of said service.

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

Dated: July 14, 2009



EILEEN A. RAKOWER, J.S.C.