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

PRESENT: HON. EILEEN A. RAKOWER PART Part 5

Index Number : 117792/2005

SIMMONS, SIMONE

VS.

CITY OF NEW YORK

SEQUENCE NUMBER : 001

STRIKE ANSWER

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

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

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED

AUG 18 2009

COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

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

Dated: 8/13/09

HON. EILEEN A. RAKOWER

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

SIMONE SIMMONS,

Plaintiff,

-against-

THE CITY OF NEW YORK,

Defendant.

----------X

Index. No. 117792/05

DECISION and ORDER

Mot. Seq. 001

HON. EILEEN A. RAKOWER

Plaintiff Simone Simmons ("Plaintiff") brings this action to recover for personal injuries allegedly sustained when she tripped and fell on a catch basin located at the corner of Grand Street and West Broadway in New York, New York. Plaintiff alleges that her injuries were the result of the Defendant City of New York's ("City") negligent maintenance of the catch basin. Presently before the court are Plaintiff's motion to strike the City's answer for its alleged failure to comply with court-ordered discovery and the City's cross-motion for summary judgment.

Plaintiff filed her summons and complaint on December 23, 2005. The City joined issue by service of its answer on or around January 19, 2006. A case scheduling order ("CSO") was issued on September 20, 2007, which, *inter alia*, provided that depositions were to be held on March 6, 2008. Depositions were adjourned by the City on March 5, 2008, due to the City's inability to produce a witness with knowledge of the accident location, according to Plaintiff. Depositions of City witnesses were rescheduled to June 12, 2008, pursuant to a so-ordered stipulation entered into by the parties at an April 1, 2008 compliance conference.

The City produced Bruce Robinson, a Principal Administrative Associate with the City Department of Environmental Protection ("DEP") on June 13, 2008. Robinson testified that, in that capacity, Robinson is responsible for conducting searches for water and sewer records, maintenance, repairs and complaints. He further testified that, at the request of the New York City Law Department, he performed a computerized search for records pertaining to the location of West Broadway between Grand Street and Watts Street for the period from July 12, 2003 up to and including July 12, 2005 - the date of the accident. Robinson testified that the search disclosed no records for that location for the two year period up to and

including the date of Plaintiff's accident. He further testified that the DEP is responsible for the cleaning, maintenance and repair of catch basins, and that any complaints about a catch basin and/or the area surrounding it would be addressed to DEP. In short, Robinson indicated that, had there been any complaints to DEP about the accident location in that two year period, they would have been disclosed by his search.

Plaintiff claims that the City violated the 4/1/08 compliance conference stipulation by producing Robinson, in that Robinson did not have any specific knowledge as to the accident location and catch basins in general. At the conclusion of Robinson's deposition, Plaintiff demanded that the City produce, Jason Seminara, a DEP District Supervisor. Robinson testified that Seminara is in charge of the DEP Sewer Yard, and sends DEP employees out to clean, maintain, and/or repair catch basins, when records indicate that such work is required.

At a June 17, 2008 compliance conference, the parties entered into a so-ordered stipulation, wherein the City agreed to produce Seminara, or another witness with knowledge regarding installation, inspection, and maintenance of catch basins for deposition on September 2, 2008. The City also agreed to conduct a search for "programmatic" records, and other records regarding the cleaning, maintenance, installation, and repair of the subject catch basin for the period of two years prior to and including the date of the accident within 30 days.

At a July 22, 2008 compliance conference, the parties entered into a similar so-ordered stipulation.

On September 2, 2008, the City produced Thomas Tripoulas, a DEP Construction Laborer with the Sewer Maintenance division. Jason Seminara is Tripoulas' supervisor. Tripoulas testified that his division is responsible for cleaning catch basins. Sewer Maintenance does not perform installations of catch basins. Tripoulas testified that, if DEP received a complaint about a catch basin, Seminara would go out and inspect it. He would not perform any repairs or maintenance, but would send a group out to clean the basin if necessary. Tripoulas testified that he never personally performed maintenance on the catch basin at issue in this lawsuit, and stated that Seminara might know the identity of DEP personnel who have.

The parties entered into another so-ordered stipulation at an October 7, 2008 compliance conference, wherein the parties agreed that the City would produce Jason Seminara or another witness with knowledge regarding the installation, inspection, and maintenance of catch basins for deposition on November 20, 2008. In addition, the City again stipulated to conduct a search for "programmatic" records, and any records regarding the cleaning, maintenance, installation and repair of the subject catch basin for the same period of time within 30 days.

Plaintiff states that the November 20, 2008 deposition was adjourned on November 19th due to the City's failure to produce the programmatic records.

At a December 2, 2008 compliance conference, the parties entered into a so-ordered stipulation, wherein the parties agreed that the City would provide Plaintiff with "previously demanded" inspection records pertaining to the catch basin or, if no such records were located, an affidavit stating that no records were obtained after performing a search. Plaintiff also reserved the right to demand a deposition of Seminara.

On December 16, 2008, The City produced an affidavit from Robinson ("Robinson Affidavit"). The Robinson Affidavit clarified that DEP "programmatic" records, rather than being records independent of those searched for by Robinson, are in fact encompassed within those records. Thus, had programmatic records for the subject accident area for the period of two years prior to and including the accident date existed, Robinson's search would have uncovered them.

At a February 3, 2009 compliance conference, the court ordered the City to produce Seminara for deposition on March 26, 2009 over the City's objection.

On March 25, 2009, the City advised Plaintiff that it would not be producing Seminara for deposition. Plaintiff states that the reason given by the City for its refusal to produce Seminara on March 26th was that the City was anticipating filing a dispositive motion.

Plaintiff now moves for an order striking the City's answer for what Plaintiff describes as the City's deliberate, willful, and contumacious behavior. Plaintiff has submitted an affirmation in support of her motion. Annexed to the affirmation as

exhibits are Plaintiff's notice of claim; Plaintiff's summons and complaint; the City's answer; Plaintiff's RJI; the 9/20/07 CSO; the 4/1/08 compliance conference stipulation; Robinson's deposition transcript; the 6/17/08 compliance conference stipulation; the 7/22/08 compliance conference stipulation; Tripoulas' deposition transcript; the 10/7/08 compliance conference stipulation; the 12/2/08 compliance conference stipulation; the Robinson Affidavit; the 2/3/09 compliance conference order; an eLaw printout; a 3/25/09 letter from Plaintiff's counsel to the City regarding the scheduled deposition of Seminara; and a 3/26/09 statement on the record from Plaintiff's counsel regarding the Seminara deposition.

The City cross-moves for dismissal pursuant to CPLR §3211, or alternatively, for summary judgment pursuant to CPLR §3212, arguing that the case must be dismissed because the City neither had prior written notice of the defect which caused Plaintiff's injuries, nor caused or created the condition by way of an affirmative act of negligence. The City has submitted an affirmation in support of its cross-motion and in opposition to Plaintiff's motion. Annexed to the affirmation as exhibits are the City's 3/24/08 response to the CSO; a supplemental response to the CSO dated 5/23/09; a further supplemental response dated 5/30/09; the exhibits marked at Robinson's deposition; the exhibits marked at the Tripoulas deposition; Plaintiff's bill of particulars; and Plaintiff's 50-h transcript.

Turning first to Plaintiff's motion to strike, CPLR §3216 provides, in pertinent part:

> "If any party... refuses to obey an order for disclosure... the court may make such orders with regard to the failure or refusal as are just, among them:
>
> (3) an order striking out pleadings or parts thereof...

Under 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]). The burden then shifts to the non-moving party to provide a reasonable excuse for its non-compliance. (*Reidel v. Ryder TRS, Inc.*, 13 AD3d 170 [1st Dept. 2004]) (where the court issued a conditional order striking the defendant's answer after it found that defendant's failure to appear at three court-ordered depositions was willful and defendant failed to offer a reasonable excuse for its non-compliance).

However, the decision to strike a party's pleading for its failure to appear for depositions rests within the broad discretion of the court (*Reidel* at 171), and there is a "strong preference in our law that matters be decided on their merits" (*Rosen v. Corvalon*, 309 A.D.2d 723 [1st Dept. 2003]).

Applying the foregoing principles to the case at bar, the court finds that the extreme sanction of striking the City's answer is unwarranted based upon the record before it. First the matter of long-outstanding discovery in the form of programmatic records appears to be a misunderstanding of terms rather than a withholding of information. Although the City agreed to provide programmatic records in compliance conferences post-dating the Robinson deposition, it was later clarified in the Robinson Affidavit that any such records would have been encompassed in Robinson's initial records search. Nor was the production of Tripoulas in lieu of Seminara on September 2, 2008 in violation of the compliance conference stipulations predating it, as those stipulations contemplated either Seminara, or another DEP employee.

The City's refusal to produce Seminara on March 26, 2009 is more problematic. While the City stated that it took the position that the deposition of Seminara was unnecessary, Seminara's deposition was *ordered* to be held on March 26th at the February 3, 2009 compliance conference. And while the City states its belief that the Court Attorney overseeing compliance conferences ordered the deposition "despite [the] lack of evidence for the necessity of [the] deposition," it should be plainly obvious to the City that the court's orders are binding upon it - like every other litigant - even when the City does not agree with the outcome.

While the court would be inclined to render a conditional order striking the City's answer unless the City produces Seminara for deposition within a set period of time, upon reflection, and with the entire record before the Court (the entire record was not available at the compliance conference), it is clear that the deposition was ordered as a result of continued failure to produce Seminara as requested, rather than as a result of a demonstrated need.

To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Di Menna & Sons v. City of New York*, 301 N.Y. 118, 92 N.E.2d 918 [1950]). This drastic remedy should not be granted where there is any doubt as to the existence of such issues (*Braun v. Carey*, 280 App.Div. 1019, 116 N.Y.S.2d 857 [3rd Dept. 1952]), or where the appeal is "arguable" (*Barrett v. Jacobs*, 255 N.Y. 520, 522, 175 N.E. 275 [1931]); "issue-finding, rather than issue-determination, is the key to the procedure" (*Esteve v. Abad*, 271 App.Div. 725, 727, 68 N.Y.S.2d 322 [1st Dept. 1947]).' (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404, 165 N.Y.S.2d 498, 144 N.E.2d 387 [1957])." (*Ramsammy v. City of New York,* 216 A.D.2d 234, 236-237, 628 N.Y.S.2d 693 [1st Dept. 1995].)

Upon a *prima facie* showing of the movant's entitlement to summary judgment, "[t]he party opposing the motion must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests." (*Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 967, 525 N.Y.S.2d 793, 520 N.E.2d 512 [1988].) Bald, conclusory allegations, even if believable, are not enough. (*Id.*; *Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255, 309 N.Y.S.2d 341, 257 N.E.2d 890 [1970]; *Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252, 538 N.Y.S.2d 249 [1st Dept. 1989]).

New York City Administrative Code §7-201(c)[2] provides:

> No civil action shall be maintained against the city for damage to property or injury to person or death sustained in consequence of any street, highway, bridge, wharf, culvert, sidewalk or crosswalk, or any part or portion of any of the foregoing including any encumbrances thereon or attachments thereto, being out of repair, unsafe,

> dangerous or obstructed, unless it appears that written notice of the defective, unsafe, dangerous or obstructed condition, was actually given to the commissioner of transportation or any person or department authorized by the commissioner to receive such notice, or where there was previous injury to person or property as a result of the existence of the defective, unsafe, dangerous or obstructed condition, and written notice thereof was given to a city agency, or there was written acknowledgement from the city of the defective, unsafe, dangerous or obstructed condition, and there was a failure or neglect within fifteen days after the receipt of such notice to repair or remove the defect, danger or obstruction complained of, or the place otherwise made reasonably safe.

Absent prior written notice made upon the City under Admin. Code §7-201, the City may only be held liable for a defect in a City sidewalk if the plaintiff can demonstrate that either (1) that the City affirmatively created the defect through an act of negligence; or (2) that a special use of the sidewalk conferred a special benefit upon the City (*Yarborough v. City of New York*, 10 N.Y.3d 726, 728 [2008]). The affirmative negligence exception is limited to work by the City that immediately results in the existence of a dangerous condition, as opposed to a condition which develops over an extended period of time (*id.*; *Bielecki v. City of New York*, 14 A.D.3d 301 [1st Dept. 2005]).

Here, the City submits the most current Big Apple Map containing the location of the accident, and notes that there is no indication therein which places the City on notice of the alleged defect in the sidewalk.[1] In addition, the City relies upon Robinson's deposition testimony and the Robinson Affidavit, which both indicate that after a search of DEP records, no documents were found which placed the City on notice of the alleged defect. This is sufficient to "make a prima facie showing of entitlement to judgment as a matter of law;" and thus Plaintiff must provide "evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" in order to withstand

[1]While there is an "X" marked on the map which is in the vicinity of the catch basin, the marking "X" indicates a "broken, misaligned, or uneven curb."

summary judgment (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324; 501 N.E.2d 572, 574; 508 N.Y.S.2d 923, 925 [1986]). In addition, the City's submission of evidence that it had not performed maintenance or repairs at the accident location for a period of two years prior to the accident also sufficiently establishes, *prima facie*, that the City did not cause or create the defect at issue herein (*see Gruska v. City of New York*, 292 A.D.2d 498, 499 [2nd Dept. 2002]; *Elstein v. City of New York*, 209 A.D.2d 186, 187 [1st Dept. 1994]).

Where facts essential to justify opposition to a motion for summary judgment are within the exclusive knowledge and possession of the moving party, summary judgment should be denied. (*see* CPLR 3212[f]). However, it is incumbent upon the party opposing a motion on CPLR 3212(f) grounds to provide a proper evidentiary basis supporting its request for further discovery.(*Global Minerals & Metal Corp. v Holmes*, 35 AD3d 93[1st Dept. 2006]).

Here, the Seminara deposition cannot be expected to provide evidence of written notice of the defect. Tripoulas merely states that Seminara might know the identity of DEP personnel who have performed maintenance on the basin at issue. Such statement is taken out of context. It pre-supposes that maintenance was performed at the basin in question within a relevant time period, which Robinson already stated was not the case. No records support an inspection or maintenance at the subject basin within a two year period prior to and including the date of this accident. Plaintiff's assertion that additional discovery is required fails to rise above the level of speculation, and it is well settled that a motion for summary judgment will not be denied on the grounds that it is premature based on the mere hope that additional discovery will yield useful information (*see Fulton v. Allstate Ins. Co.*, 14 A.D.3d 380, 381[1st Dept. 2005]).

Plaintiff in opposition has failed to produce evidentiary proof which creates an issue of fact as to either the issue of prior written notice or whether the City caused or created the defect.

Wherefore, it is hereby

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

ORDERED that the City's motion for summary judgment is granted and the complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the court. All other relief requested is denied.

Dated: August 13, 2009

EILEEN A. RAKOWER, J.S.C.