

**Burnett v City of New York**

2009 NY Slip Op 33050(U)

December 22, 2009

Supreme Court, New York County

Docket Number: 109318/2007

Judge: Harold B. Beeler

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

**HAROLD BEELER**

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

PART 21

Index Number : 109318/2007  
**BURNETT, FITZROY**  
 vs.  
**CITY OF NEW YORK**  
 SEQUENCE NUMBER : 001  
 STRIKE

INDEX NO. 109318/07  
 MOTION DATE \_\_\_\_\_  
 MOTION SEQ. NO. 001  
 MOTION CAL. NO. \_\_\_\_\_

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED  
**FILED**  
 DEC 24 2009

Cross-Motion:  Yes  No

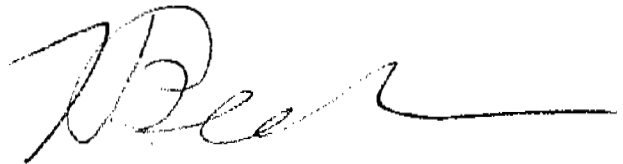
NEW YORK  
 COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

*is decided as per annexed decision and order.*

*Parties are to meet for  
 a status conference on  
 2/4/2010 @ 230p  
 111 Centre St. rm ~~400~~ 949*

Dated: 12/22/09



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

-----X  
FITZROY BURNETT and MICHELLE BURNETT,  
Plaintiff,

-against-

CITY OF NEW YORK  
Defendants  
-----X

Index No. 109318/20067  
SEQUENCE MS001  
DECISION & ORDER

**FILED**  
DEC 24 2009  
NEW YORK  
COUNTY CLERK'S OFFICE

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

Plaintiff moves to compel discovery from defendant, on penalty of sanctions. Defendant  
City of New York opposes the motion.

Plaintiff Fitzroy Burnett was a track worker employed by the New York City Transit Authority ("Transit Authority"). On March 24, 2007, Burnett, while in the scope of his employment, slipped and fell at track C-2 South of the 155th Street train station.

Plaintiff timely filed a Summon and Complaint against City of New York on July 6, 2007, alleging violations of New York Labor Law §§ 240 and 241(6).

On March 19, 2009, parties held their preliminary conference. Included in the resulting order, as part of the conference form's template, is a direction that "all parties, on or before 45 days, shall exchange names and addresses of all eye witnesses and notice witnesses, statement of opposing parties, and *photographs*, or, if none, provide an affirmation to that effect." (emphasis added)

Transit Authority conducted an investigation of the accident, and completed an On The Job Injury Form, signed by superintendent Anthony Ancilleri. On the form, a box was checked "yes" to indicate that photographs were taken. On July 29, 2009 Ancilleri was deposed, and he confirmed that photographs of the accident were taken.

On July 22, 2009, plaintiff served a demand for outstanding discovery, which included a request for the photographs indicated on the On The Job Injury Form. On September 11, 2009, City provided written responses to these plaintiff's requests, which stated that "a search is being conducted for photographs." Following receipt of defendant's responses, plaintiff filed the instant motion. In response and opposition to the motion, defendant provided most of the outstanding discovery.

As to the photographs, on October 9, 2009, defendant submitted an affidavit by Stephen Perez, a Safety Manager in Subways, formerly a division of Maintenance of Way, Office of Employee Support & Safety, of Transit Authority. Perez averred that he has access to all Maintenance of Way employee accident files dating back to 2004. He stated that he conducted a search of Burnett's accident file for photographs pertaining to the accident, and found none. After producing this affidavit, defendant wrote to plaintiff requesting that plaintiff withdraw the motion to compel.

Discussion

Plaintiff argues that the photographs taken of the scene, which have previously been ordered, are discoverable and necessary for litigation. Plaintiff argues that defendant's failure to produce the photographs, which defendant conceded to have existed, warrants sanctions for spoliation. Defendant argues that it has produced the outstanding items, including an affidavit as to the photographs, and that plaintiff's counsel has made no effort to resolve the matter in good faith.

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).

Here, defendant has frustrated plaintiff's prosecution of the case, by failing to produce

photographs that are relevant and critical for the litigation. The record evidence indicates, and defendant does not dispute, that photographs were taken of the accident location for the purpose of investigating the accident. These photographs should have been preserved so that they could be made available to plaintiff. These photographs may have provided support for plaintiff's claims, which require plaintiff to demonstrate that the work site was unsafe. A subsequent affidavit, that the photographs cannot now be found, is an insufficient substitute. Moreover, any further pursuit by plaintiff, in the absence of the motion, would have been proven futile considering defendant's current position that the photographs cannot be found.

The appropriate remedy is to permit an adverse inference as to the missing photographs. *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). Although there is no evidence that defendant has intentionally or recklessly caused the photographs to become missing, defendant's non-production nevertheless has created an unfair obstacle to plaintiff's case. Plaintiff is unable to reproduce or replicate the condition of the work site at the time of the accident, and reasonably expected that it would receive the photographs indicated on the On The Job Injury Form.

Accordingly it is hereby ORDERED that the sanction of a negative inference is to be given at trial with respect to photographs taken at the scene of the accident.

All other relief not expressly granted herein is denied.

This constitutes the decision and order of the court.

Dated: New York, New York  
December 22, 2009

ENTER:



Harold B. Beeler, JSC

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

**FILED**  
DEC 24 2009  
NEW YORK  
COUNTY CLERK'S OFFICE