

Cheng v New York City Tr. Auth.

2009 NY Slip Op 33065(U)

December 23, 2009

Supreme Court, New York County

Docket Number: 114238/2001

Judge: Harold B. Beeler

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

HAROLD BEELER

J.S.C.

PRESENT: _____
Justice

PART 2 /

Index Number : 114238/2001
CHENG, WANLA
VS.
TRANSIT AUTHORITY
SEQUENCE NUMBER : 005
SUMMARY JUDGMENT

INDEX NO. 114238/01
MOTION DATE _____
MOTION SEQ. NO. 005
MOTION CAL. NO. _____

n this motion to/for _____

PAPERS NUMBERED

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 ~~to~~ for summary judgment
is denied without prejudice,
as per annexed decision and

FILED
DEC 24 2009
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/23/09

[Signature]
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
WALLA CHENG,

Plaintiffs,

-against-

**Index No. 114238/2001
SEQUENCE MS005 and MS006
DECISION & ORDER**

NEW YORK CITY TRANSIT AUTHORITY,
METROPOLITAN TRANSIT AUTHORITY OF THE
STATE OF NEW YORK, METROPOLITAN TRANSIT
AUTHORITY, VERIZON COMMUNICATIONS, INC.,
CITY OF NEW YORK, CONSOLIDATED EDISON
COMPANY OF NEW YORK, INC., OUTDOOR SYSTEMS,
INC., VIACOM OUTDOOR, INC., and AQUA PLUMBING
AND HEATING, INC.,

Defendants

-----X

FILED
DEC 24 2009
NEW YORK
COUNTY CLERK'S OFFICE

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

Defendant Consolidated Edison Company of New York, Inc. ("Con Edison") moves for summary judgment dismissing the claims against it. Plaintiff opposes the motion, and moves separately to strike defendant City of New York's ("City") answer. City opposes plaintiff's motion.¹

On March 12, 2001, plaintiff was a passenger on a bus operated by defendant New York City Transit Authority ("Transit Authority"). In her summons and complaint, Plaintiff alleges that the bus stopped with its rear door away from the curb, and opened onto the roadway near a pothole in front of the south end of 1995 Broadway, between 67th and 68th Streets, approximately 26 ½ feet east from the point where the front facades of 1991 Broadway and 1995 Broadway meet. Plaintiff fell into an allegedly defective portion of the roadway near a pothole, resulting in her injuries. At a subsequent deposition, plaintiff identified the precise location of

¹ By order of J. Rakower, February 16, 2007, the claims against defendants Verizon Communications, Inc., Outdoors Systems, Inc., and Outdoors Systems, Inc. were dismissed.

her fall.

On June 13, 2007, Con Edison's Senior Coordinator Mario Smith was deposed. He testified that he conducted a search of records for work conducted at Broadway between West 67th and 68th Streets, for a period two years prior and two years subsequent to the accident. The search revealed opening tickets, paving orders, permits and emergency tickets for work in the roadway in front of 1981 Broadway and 1983 Broadway at 67th Street and Broadway, but not in the area where plaintiff fell. At a second deposition on August 17, 2007, Smith confirmed that the record reflects no work performed by Con Edison in the roadway on Broadway between 67th and 68th Streets in front of the premises 1991 Broadway through 1994 Broadway. These depositions are annexed to Con Edison's motion papers, without signature or execution, and without indication that they were forwarded to Smith for such signature and execution.

On August 29, 2008, Joseph Ajar, Civil Service Supervisor for the City, was deposed. He testified that the City conducted pothole repairs at the subject location and within the time frame of plaintiff's accidents, referring to exhibits that were marked at the deposition. However, at numerous times, Ajar was unable to identify or explain documents indicating work done in the area, or to identify who prepared the documents.

Approximately one hour and 40 minutes into the deposition, a discussion took place off the record, and, thereafter, it was announced that Ajar was sick and therefore unable to continue with the deposition.

The following exchange then took place:

CITY'S COUNSEL: The deposition is over.

PLAINTIFF'S COUNSEL: Wait a minute. Listen. The witness has left prior to the completion of the deposition, and there's a pending issue as to whether or not the witness will be directed to mark photographs at this deposition, with a call in to the Court. This deposition is not completed. We will complete it on another

date, and, in addition, as well as this witness Defendant shall produce if they have any witnesses who can talk about the records here that this witness had no knowledge of...that he could not identify, including the records from work that appear to be done on December 19, 2000, and also information regarding the scope of the search that was done as directed by the Court in connection with the search response that was done that was attached to Defendants' Response to the Order of the Honorable Robert D. Lippmann, mandated June 6, 2006, and the new search actually produced additional records which was conducted on August 19, 2008; for that reason, I don't consider the deposition of this witness or this Defendant to be complete. They will be completed on another date.

CITY'S COUNSEL: Okay. The City does not agree, and objects to any —

PLAINTIFF'S COUNSEL: What is—

CITY'S COUNSEL: Excuse me. Excuse me. Thank you. And then I think we can leave. The City does not agree with what Plaintiff's Counsel has just said. The City thinks that Plaintiff's counsel has had ample opportunity to ask many questions regarding this. We believe the deposition as to this witness is completed. As to any further complaints you have for the Court, send the City—

PLAINTIFF'S COUNSEL: The witness' deposition is not complete.

Discussion

Con Edison's motion

Con Edison argues that because Smith testified that Con Edison performed no work at the location at where plaintiff fell, Con Edison cannot be liable as matter of law. Plaintiff argues that Con Edison's motion is premature, because the deposition of City's witness is not completed, and his testimony regarding the documentary evidence may reveal that Con Edison performed work at the site. Moreover, plaintiffs argue that Con Edison has not submitted admissible evidence in support of its motion, and therefore cannot be granted summary judgment. *See*

Martinez v. 12-16 Liberty Ave. Realty Corp. 47 A.D.3d 901 (2d Dept 2008); *Pina v. Flik Int'l Corp.*, 25 A.D.3d 772 (2d Dept 2006).

NY CPLR 3116(a) requires that the transcript of a deposition must be submitted to the witness for examination, and then signed by the witness before any officer authorized to administer an oath. Where a transcript is not signed and sworn by the witness, it is not admissible. *Pina*, 25 A.D.3d at 773. Therefore, a motion for summary judgment supported only by unsigned, unsworn deposition transcripts must be denied, because it is not supported by admissible evidence. *Id.*

Con Edison argues that CPLR 3116 does not require that the transcript be signed and sworn to, so long as the party seeking to introduce the transcript has sent the transcript to the witness for signature. CPLR 3116 does provide that if a deposition is not returned by the witness within 60 days, it may be used by a proponent as if it were signed. However, Con Edison presents no evidence that it was submitted to its witness for signature.

Therefore, although the contents of the deposition transcripts may absolve Con Edison of liability, the motion for summary judgment must be denied without prejudice, because Con Edison fails to submit admissible evidence in support.

Plaintiff's motion

Plaintiff argues that she needs to continue Ajar's deposition to determine what Ajar knows about which defendants did what construction or repairs at the area of the defective roadway. She does not question that Ajar was ill on the day of testimony, but argues that City may not unilaterally declare the deposition to be completed. Plaintiff notes that the deposition had been taking place for approximately two and a half hours, during which time there were repeated efforts to call the Court for rulings, for marking and review of new documents produced for the first time at deposition, and extensive off-the-record discussion amongst counsel. In

addition to plaintiff's being prejudiced by incomplete testimony, she is prejudiced by not being able to request discovery of documents that may have been brought to light by the subsequent deposition.

City argues that plaintiff is not entitled to another deposition, because Ajar has already testified as to the Department of Transportation records, the policies and procedures of the DOT Street Maintenance, and photographs shown by plaintiff's counsel. Subsequent to this deposition, there have been no new issues and no new documents have been exchanged.

City misses the essential point of plaintiff's motion. Plaintiff is not asking for a new deposition based on new information, although she may have been entitled to one had new information arose. Rather, plaintiff is asking for the first deposition to be resumed. At the point where Ajar's deposition was abruptly terminated, plaintiff's counsel was still in the process of asking him questions. Although no party argues that the deposition was intentionally terminated to avoid further questioning, plaintiff would have continued to ask Ajar questions had the deposition continued. There is no reason to believe that the deposition was complete, or that plaintiff had no further non-duplicative questions to ask.

Accordingly, it is hereby

ORDERED that Con Edison's motion for summary judgment is denied without prejudice,
and its further

ORDERED that defendant City of New York shall present Joseph Ajar for a continued
deposition.


This constitutes the decision and order of the court.

All express not expressly granted herein is denied.

Dated: New York, New York

December 23, 2009

ENTER:

A handwritten signature in black ink, appearing to be 'H. Beeler', written over a horizontal line.

Harold B. Beeler, JSC

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