

**Minde v Port Auth. of N.Y. & N.J.**

2010 NY Slip Op 31635(U)

June 29, 2010

Supreme Court, New York County

Docket Number: 0102107/2008

Judge: Louis B. York

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

**LOUIS B. YORK**  
J.S.C.

PRESENT: \_\_\_\_\_

PART 2

Index Number : 102107/2008

MINDE, JOSEPH

vs.

PORT AUTHORITY

SEQUENCE NUMBER : 005

COMPEL DISCLOSURE

INDEX NO. \_\_\_\_\_

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

MOTION SEQ. NO. \_\_\_\_\_

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

on 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

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

**FILED**

JUN 29 2010

NEW YORK COUNTY CLERK'S OFFICE

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

\_\_\_\_\_  
**LOUIS B. YORK** J.S.C.

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 7

-----X  
JOSEPH MINDE,

Plaintiff,

-against-

Index No.: 102107/08

PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Defendant.

**FILED**

JUN 29 2010

-----X  
NEW YORK  
COUNTY CLERK'S OFFICE

YORK, J.:

This action involves personal injuries which Joseph Minde, plaintiff, allegedly sustained on July 10, 2007, after he tore his Achilles tendon of the right ankle, while riding an escalator at the Port Authority Bus Terminal in Manhattan. Plaintiff moves, pursuant to CPLR 3124, to compel defendant, Port Authority of New York and New Jersey, to provide all maintenance and repair records for escalator number 9, the escalator allegedly involved in plaintiff's accident, for the three years prior to the date of the accident. In the alternative, plaintiff moves, pursuant to CPLR 3126, to strike defendant's answer.

Plaintiff maintains that, during the course of this litigation, a demand was made for the maintenance and repair records for the escalator on which plaintiff allegedly fell. At a compliance conference held on February 3, 2010, defendant agreed to provide the maintenance and repair records which were not previously produced, for October 12, 2006 through July 10, 2007. The records were to be provided no later than March 5, 2010. If defendant could not locate any of the records, defendant was to provide an affidavit from the individual who conducted the search, stating that the documents do not exist, the efforts made to locate such

documents, and the locations searched. On February 9, 2010, plaintiff moved by order to show cause to extend the time for the note of issue to be filed because certain documents were not provided by defendant, including the maintenance and repair records. The court granted an extension for the end date of disclosure, and the note of issue was to be filed on or before March 22, 2010, 10 days after the escalator records were to be provided.

Pursuant to the February 3, 2010 compliance conference order, Bern D'Aleo, the Port Authority's contract administrator for all vertical transportation maintenance and repair contracts, conducted a search and provided plaintiff with an affidavit dated March 26, 2010. D'Aleo's affidavit states that after conducting a search for the records regarding the subject escalator, and upon reviewing the Port Authority's files, defendant is not in possession of the escalator's maintenance and/or repair records, or for any of the escalators in the bus terminal's north wing, for the period of October 2006 to July 5, 2007. Defendant contends that plaintiff has known since the deposition of D'Aleo, that the maintenance and repair of the Port Authority's escalators was performed by Otis Elevator Company (Otis), prior to July 1, 2007, and by Kone Inc. (Kone), after July 1, 2007.

Although the defendant provided an affidavit from D'Aleo, the affidavit fails to discuss what specific files and records were searched, when the search took place, or address the scope of the search. The affidavit also does not state whether the requested records were ever in the possession of defendant.<sup>1</sup> While D'Aleo testified at his deposition that Kone took over the maintenance and repair of the escalators on July 1, 2007, counsel for defendant submitted a

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<sup>1</sup> The court notes that plaintiff obtained several escalator records from defendant's prior counsel, so presumably defendant was in possession of relevant documents at some point in time.

maintenance record for the subject escalator (Affirmation in opposition, ex. B), which was drafted by Otis and dated July 5, 2007. This record contradicts the statements made by both D'Aleo and by the counsel for defendant, because on July 5, 2007, Otis was allegedly no longer providing escalator maintenance and repair services for defendant.

D'Aleo's affidavit also does not comply with the compliance conference order, because he states that the search for the records was conducted for the period of October 12, 2006 through July 5, 2007, and not through July 10, 2007, the date which was set out in the order. D'Aleo does not provide any explanation as to why the search stopped five days early.

Therefore, because the affidavit is incomplete and does not comply with the compliance conference order, and because of the discrepancy raised by the July 5, 2007 record from Otis, defendant must provide a new affidavit from D'Aleo or the individual(s) responsible for the search. The affidavit must discuss what files and records were searched, when the search took place, the scope of the search, whether or not the requested records were previously in its possession, and should also clarify the confusion of what date Otis stopped working for defendant. The affidavit must be provided to plaintiff within 30 days of notice of entry of this order. Also, despite plaintiff's request that he be provided with the repair and maintenance records of the subject escalator for July of 2004 through October of 2006, the court will not extend the dates set out in the compliance conference order because plaintiff was already provided with records from Otis for that time period.

While plaintiff has failed to demonstrate that defendant's inability to provide the maintenance and repair records for the subject escalator was willful, contumacious or in bad faith, the court may consider striking the answer of defendant if the new affidavit does not

comply with the above directives. See *Weissman v 20 East 9<sup>th</sup> St. Corp.*, 48 AD3d 242, 243 (1st Dept 2008); *Christian v City of New York*, 269 AD2d 135, 137 (1st Dept 2000).

Plaintiff also contends that defendant has failed to comply with paragraphs 1, 2, 4, and 9, of the February 3, 2010 compliance conference order. However, defendant did not have an opportunity to respond to this argument, because the argument was raised for the first time in the reply papers. Accordingly, the Court will not deal with this issue.

Accordingly, it is

ORDERED that that portion of plaintiff's motion to compel disclosure is granted in accordance with the above directives; and it is further

ORDERED that that portion of plaintiff's motion to strike defendant's answer is denied.

Dated: June 30, 2010

ENTER:

  
\_\_\_\_\_  
J.S.C.

LOUIS B. YORK  
J.S.C.

**FILED**  
JUN 29 2010  
NEW YORK  
COUNTY CLERK'S OFFICE