

Jimenez v City of New York

2010 NY Slip Op 32162(U)

August 11, 2010

Supreme Court, New York County

Docket Number: 104105/2006

Judge: Barbara Jaffe

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

PRESENT: JAFFE BARBARA JAFFE
J.S.C.

PART 5

Index Number : 104105/2006

JIMENEZ, LEIDA

vs
CITY OF NEW YORK

Sequence Number : 004

STRIKE ANSWER

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

CAL #62

The following papers, numbered 1 to _____ were read on this motion to ~~for~~ *renew & reargue + cross-motion to compel*

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

Answering Affidavits — Exhibits *notice of cross-motion*

Replying Affidavits *Opp to cross-motion*

PAPERS NUMBERED

1

2

3

FILED

AUG 16 2010

NEW YORK
COUNTY CLERK'S OFFICE

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):

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

Dated: 8/11/10

AUG 11 2010

[Signature]

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 5

-----X
LEIDA JIMENEZ,

Plaintiff,

-against-

Index No. 104105/06

Motion Date: 6/22/10
Motion Seq. No. 004
Motion Cal. No. 62

THE CITY OF NEW YORK, ARCHDIOCESE OF
NEW YORK, and CHURCH OF ST. PAUL THE
APOSTLE,

Defendants.
-----X

DECISION AND ORDER

FILED
AUG 16 2010
NEW YORK
COUNTY CLERK'S OFFICE

BARBARA JAFFE, JSC:

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By notice of motion dated February 26, 2010, defendants Archdiocese of New York (Archdiocese) and Church of St. Paul the Apostle (Church) (collectively, Church defendants) move for an order granting them leave to renew and reargue a prior decision and order dated January 22, 2010 and upon re-argument, granting their prior motion to strike defendant City's answer. Plaintiff joins in the Church defendants' request. City opposes and, by notice of cross-motion dated April 15, 2010, moves pursuant to CPLR 3124 for an order compelling the Church defendants to provide discovery.

I. BACKGROUND

On September 13, 2005, plaintiff was allegedly injured when she tripped and fell on the sidewalk on the west side of Ninth, or Columbus, Avenue in Manhattan, approximately 20 to 60

feet south of its intersection with West 60th Street and in front of the Ninth Avenue entrance to the Church. (Affirmation of Brian Delamere Clarke, Esq., dated Feb. 20, 2010 [Clarke Aff.], Exh. A).

By order dated February 24, 2009, City was ordered to search its records and those of the Parks Department and the Forestry Department for complaints, violations, and citations issued between September 13, 2002 and September 13, 2005 pertaining to trees and tree-wells on the west side of Ninth Avenue between 59th and 60th Streets. City was to produce the results of its search on March 4, 2009 at the examination before trial (EBT) of a witness from the Forestry Department. Church was directed to produce, within 30 days of the date of the order, its records for the two years following plaintiff's accident and relating to the installation of fencing, contracts for the planting of flowers and the installation of fencing, and other maintenance and purchase records for fencing, plants, and the subject tree and tree well, or an affidavit attesting that no such records exist for two years after the accident. By order dated April 7, 2009, City and Church were again directed to produce the aforesaid documentation, with City to produce it at the EBT rescheduled for May 26, 2009, and Church within 30 days of the date of the order.

On May 26, 2009, William E. Steyer, the Director of the Forestry Department, testified at a deposition that Florence Ellis Ward, his secretary and office aide, wrote a letter to City dated March 4, 2009 detailing her search for the documentation, that he reviewed the letter and signed it, that Ward searched for tree records by means of a special software program, that her search was based on 1996 census data, and that 2006 census data was not yet available. (Clarke Aff., Exh. A). He also testified that Fiona Watt was the Director of Central Forestry, that she had supervisory authority over city-wide tree management, that she would have information related to

the 2006 census, and that the 2006 census data was given to her office. (*Id.*).

By order dated August 4, 2009, City was directed to produce, within 10 days of the date of the order, a printout of census and software records reflecting trees planted and located on both sides of the following streets:

- A) Columbus Avenue between West 59th and West 60th Streets;
- B) Ninth Avenue between West 59th and West 60th Streets;
- C) West 60th Street between Columbus and Amsterdam Avenues;
- D) West 60th Street between Ninth and Tenth Avenues;
- E) West 60th Street between Columbus and Tenth Avenues; and
- F) West 60th Street between Ninth and Amsterdam Avenues.

The searches were to be performed based on 1996 and 2006 tree census data, with the results of the 2006 census search to be provided within 45 days.

In the same order, the Church defendants were directed to produce, within 10 days, records for two years after the accident relating to the installation of fencing, contracts for planting flowers and installation of fencing, and other maintenance and purchase records for fencing, plants, subject tree and subject tree well, or within 30 days an affidavit attesting that no such records exist. Finally, plaintiff and the Church defendants were permitted to reserve their right to depose Ward and Watt.

By response dated August 18, 2009, the Church defendants produced three documents relating to the tree and tree well and fencing. (*Id.*).

In a compliance conference order dated October 6, 2009, City represented that it had served the other parties with tree records from the 1995 and 2005¹ tree censuses pursuant to the August 2009 order. The other parties did not acknowledge same.

¹ Apparently, the 1995 tree census is the 1996 tree census, and the 2005 tree census is the 2006 tree census.

By response dated October 8, 2009, well-beyond the due date, City provided the results of its search for the 1995 and 2005 tree census records. (*Id.*, Exh. B). For the 1995 results, City provided a letter dated October 6, 2009 from an employee of the Parks Department setting forth and annexing the results of a 1995 Street Tree Census Record Search as follows:

- 1) Columbus Avenue between West 59 and West 60 Streets; no tree records;
- 2) Ninth Avenue between West 59 and West 60 Streets; no tree records;
- 3) West 60th Street between Columbus and Amsterdam Avenues; 42 tree records;
- 4) West 60th Street between Ninth and Columbus Avenues; invalid parameters;
- 5) West 60th Street between Columbus and Tenth Avenues; see #3 (same block); and
- 6) West 60th Street between Ninth and Amsterdam Avenues; see #3 (same block).

(*Id.*, Exh. B).

For the 2005 tree census results, the City provided the same letter but with reference to the 2005 Street Tree Census Record Search with the same results as the 1995 results except that no tree records were found as a result of the search for West 60th Street between Columbus and Amsterdam Avenues. (*Id.*).

In response to City's prior cross-motion to compel, Church produced an affidavit dated December 7, 2009 from the Church's pastor, Reverend Gilbert Martinez, CSP, who attested to his search for documents per the August 2009 order which yielded the three documents previously produced. (*Id.*, Exh. C).

By decision and order dated January 22, 2010, I found that the Church defendants had identified only one item that City had failed to address in its response to the August 2009 order, and thus granted their motion to strike to the extent of directing City, within 10 days of service on it of a copy of the order with notice of entry, to provide records reflecting trees planted and located on both sides of West 60th Street between Ninth and Tenth Avenues. I denied City's

cross-motion to strike as the Church defendants had demonstrated their compliance with the August 2009 order.

By so-ordered stipulation dated February 2, 2010, City agreed to provide all records reflecting trees planted and located on both sides of West 60th Street between Ninth and Tenth Avenues on or before February 12, 2010. The Watt and Ward depositions were scheduled to be held on or before March 12, 2010.

By response dated February 16, 2010, City stated that it found no records of any trees planted and located on both sides of West 60th Street between Ninth and Tenth Avenues. (*Id.*, Exh. F).

II. MOTION TO STRIKE CITY'S ANSWER

A. Contentions

The Church defendants argue that I erred in the January 2010 order in finding that City had only failed to produce one item and in failing to address the City's unexplained delay in responding to the August 2009 order, why the City's searches were not conducted based on both the 1995/1996 and 2005/2006 census data and did not contain printouts from the software program showing the search parameters, and why it did not specify whether both sides of the streets were searched. (*Clarke Aff.*). As another justice of this court issued the August 2009 order, the Church defendants also argue that their prior motion to strike should have been referred to that justice.

City argues that I did not overlook any facts or law in determining the prior motion, that the Church defendants failed to show that it engaged in any willful or contumacious conduct, that it was never ordered to provide an affidavit, and that it has provided numerous documents. City

also submits the affidavit of Ward, in which she discusses her search of the relevant records for the following locations: (1) 415 West 59th Street; (2) West 60th Street between Ninth and Tenth Avenues; (3) Columbus Avenue between West 59th and West 60th Streets; and (4) West 59th Street between Ninth and Tenth Avenues. (Lucas Aff., Exh. A). Finally, City disputes the Church defendants' contention that the justice who issued the August order should decide their motion for leave to renew and reargue.

In reply, the Church defendants maintain that City has still not produced discovery related to the 2006 census or explained its delay in producing its responses.

B. Analysis

Although denominated a motion for leave to renew and reargue, the Church defendants actually seek leave to reargue, which motion "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." (CPLR 2221[d][2]).

As the Church defendants allege that I overlooked their arguments that many of the City's responses were inadequate, leave to reargue is granted. Upon re-argument and a review of the court orders and the City's responses, I find that City complied, albeit in an untimely fashion, with the August 2009 order by producing affidavits relating to the 1995/1996 and 2005/2006 tree census and its search for the locations directed in the August 2009 order except for West 60th Street between Ninth and Tenth Avenues, as well as all relevant documents. As the 2005/2006 tree census search yielded in no relevant documents, there is nothing that City failed to produce. And as the Church defendants will have the opportunity to depose Ward, they will be able to examine the bona fides of her claim that she searched both sides of the street. (*See infra*. IV).

For West 60th Street between Ninth and Tenth Avenues, City is directed, within 10 days of service on it of a copy of this order with notice of entry, to supplement its February 16, 2010 response by providing an affidavit detailing the search for records at the location, including its parameters, to specify whether the search encompassed both the 1995/1996 and 2005/2006 censuses and both sides of the street, and to include any relevant records. If both censuses were not searched, City must do an additional search, within 10 days, of both censuses and provide an affidavit as specified above.

While the Church defendants contend that City unreasonably delayed in providing the ordered discovery, they too have delayed. Although ordered to produce certain records in the February 2009, April 2009, and August 2009 orders, they did not do so until August 2009 and Martinez's affidavit was only served in December 2009 in response to City's cross-motion to compel. Moreover, while City was dilatory in producing the discovery, "mere lack of diligence in furnishing some of the requested materials may not be grounds for striking a pleading" (*Elias v City of New York*, 71 AD3d 506 [1st Dept 2010]), and, as I have found, City has produced all of the ordered documents to date.

Thus, the Church defendants have not established that City's delay in producing the records warrants the striking of their answer. However, in light of City's failure to explain its delay, a monetary sanction of \$1,000 is warranted. Moreover, City's failure to serve the affidavit or results of the search in a timely fashion will result in the striking of City's answer upon the Church defendants' affirmation of non-compliance without need for further motion practice.

III. CITY'S CROSS-MOTION TO COMPEL

City contends that the Church defendants have not provided an affidavit attesting to their

search for records as directed in the August 2009 order. (Lucas Aff.). The Church defendants argue that they complied with the order by providing Martinez's affidavit. (Reply Aff.).

As Martinez's affidavit describes his search for all of the ordered documents, the Church defendants have complied with the August 2009 order.

IV. CITY'S CROSS-MOTION TO VACATE

City seeks the vacatur of the February 2, 2010 order in which it agreed to produce Ward and Watt for depositions. It argues that Ward's affidavit, in which she details her search efforts, renders her deposition moot. City also contends that Watt is a high-ranking official within the Parks Department, who would not have knowledge of the documents at issue here, and that the other parties have not shown that she possesses information that is unavailable from other sources. City thus argues that it should be permitted to produce a witness, other than Watt office with knowledge of the documents.

The Church defendants assert that City has already agreed to produce Ward and Watt for depositions, that Ward's affidavit does not render her deposition moot, and that, having searched for the records at issue here, Ward's testimony is relevant and material. (Reply Aff.). They also deny that Watt is a high-ranking official and argue that even if she is, she has relevant personal information about the 2006 tree census, which Steyer was unable to provide. (*Id.*, Exhs. I, J).

As Ward performed the searches at issue here, the Church defendants have shown that she has relevant and material knowledge. Moreover, the Church defendants are entitled to ask her questions under oath.

City has not shown that Watt is a high-ranking government official, and even if she is, she has relevant personal information about the 2005/2006 tree census and city-wide tree

management, whereas Steyer does not. (*Cf Colicchio by Colicchio v City of New York*, 181 AD2d 528 [1st Dept 1992] [plaintiff not entitled to depose commissioner of department of transportation absent proof that witnesses already deposed had insufficient knowledge or that their testimony was inadequate]).

In other cases, depositions have been taken of officials of ranks equivalent to Watt's. (*See eg Rapps v City of New York*, 54 AD3d 923 [2d Dept 2008] [deposition taken of assistant commissioner for division of code enforcement of New York City Department of Housing Preservation and Development]; *Rosenthal v City of New York*, 2 Misc 3d 451 [Sup Ct, New York County 2003] [deputy commissioner of operations for Parks Department]; *Suson v NYP Holdings, Inc.*, 19 Misc 3d 1116[A], 2008 NY Slip Op 50730[U] [Civ Ct, New York County 2008] [deputy commissioner of public information for New York City Fire Department]). Thus, City's motion for an order vacating or amending the February 2, 2010 order is denied.

V. CONCLUSION

Accordingly, it is hereby

ORDERED, that the Church defendants' motion for leave to reargue is granted, and upon re-argument, their motion to strike is granted to the extent indicated above; it is further

ORDERED, that City shall pay \$1,000 to the Church defendants' attorneys within 20 days of service on it of a copy of this order with notice of entry; it is further

ORDERED, that City's failure to comply timely with this order will result in the striking of its answer upon the submission of an affirmation of non-compliance; it is further

ORDERED, that City's motion to compel is denied; it is further

ORDERED, that City's motion to vacate or amend the February 2010 order is denied and

it is directed to produce Florence Ellis Ward and Fiona Watt for depositions on or before September 24, 2010; and it is further

ORDERED, that the compliance conference scheduled for August 24, 2010 is rescheduled for September 28, 2010.

ENTER:



Barbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

DATED: August 11, 2010
New York, New York

AUG 11 2010

FILED
AUG 16 2010
NEW YORK
COUNTY CLERK'S OFFICE