SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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JOHN TRUBIA and KATHRYN TRUBIA,

Plaintiffs,

-against-

THE CITY OF NEW YORK,

Defendants.

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Part C-2

Present:

HON. THOMAS P. ALIOTTA

DECISION AND ORDER

Index No. 80413/2005

Motion Nos. 3932-003
743-004

The following papers numbered 1 to 4 were fully submitted on the 24th day of March, 2010:

	Papers Numbered
Notice of Motion by Plaintiffs (Affirmation, Affidavit Exhibits in Support)	1
Notice of Cross Motion by Defendant (Affirmation and Exhibits in Support)	2
Reply Affirmation in Further Support of Plaintiffs' Motion and in Opposition to Defendant's Cross-Motion	3
Affirmation in Reply and in Further Support of the City's Cross Motion for a Protective Order	4

Upon the foregoing papers, the motion (No. 3932) of plaintiffs John and Kathryn Trubia for an order striking the answer of defendant the City of New York (hereinafter the "City") or, in the alternative, compelling the City to produce certain additional person(s) and documents for, *inter alia*, deposition, discovery and inspection, is denied; the City's cross motion (Motion No. 743) for a protective order is granted to the extent that plaintiffs are precluded from serving further discovery demands without the prior written approval of the Court.

This matter arises out of an accident which occurred on September 15, 2004, when Police

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Officer John Trubia, (hereinafter plaintiff) allegedly injured his back while engaged in a rescue operation[1] on Launch #36, a New York City Police Department vessel. As applicable, Trubia claims that the wake of a passing Fire Department vessel caused the moveable swim platform on which he was standing at the rear of the police launch to suddenly lurch, throwing him into the water. As a result, plaintiff claims to have suffered extensive personal injuries including, *inter alia*, a herniated disc at L4-5, and exacerbation of a herniated disc at C6-7, for which he has had to undergo surgery. Following the accident, plaintiff was forced into disability retirement from the police department (*see* Plaintiffs' Verified Bill of Particulars, Supplemental Verified Bill of Particulars, Second Supplemental Verified Bill of Particulars, Third Supplemental Verified Bill of Particulars, Plaintiffs' Exhibit W).

It is undisputed that prior to the service of this motion, plaintiffs had taken the depositions of twelve City witnesses and served at least nine discovery notices containing over 140 demands.[2] It is undisputed that the City provided hundreds of pages of documentation in answer to plaintiffs' discovery demands, as well as access to and inspection of its Harbor Unit logs and copies of the relevant radio transmissions.

In support of the motion to strike defendant's answer or compel further discovery, plaintiffs' counsel attaches his 48-page July 6, 2009 letter to the City setting forth the additional items of

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[1]It is claimed that within the territorial waters of the State of New York, plaintiff responded to a radio call that an emotionally disturbed woman had jumped off the Staten Island Ferry near the St. George Ferry Terminal.

[2]Further, it appears that two months prior to plaintiffs' service of this motion, the City had provided them with a copy of their surveillance video showing Officer Trubia working at Paparazzi Pasta and Pizza, a restaurant which he owns in Lynn Haven, Florida.

discovery claimed necessary in order to adequately prepare plaintiffs' case (Plaintiffs' Exhibit Z). Insofar as it appears, counsel is attempting to formulate a viable theory of liability in the absence of any concession of, *e.g.*, negligence, on the part of the City (*see e.g.* Plaintiffs' Reply Affirmation, page 3). In addition, plaintiffs have persisted in demanding that the City provide them with so-called "Jackson" affidavits attesting to the non-existence of certain documents which the City has already conceded do not exist. Likewise, plaintiffs are demanding that the City produce for deposition a witness from the fire department's communications division by the name of Judith Salgado. In opposition, the City maintains that the testimony of this witness will be redundant to that of her superior, Henry Dingman, the Deputy Director of Fire Dispatch Operations, who has already been deposed.

It is well settled that actions should be resolved on the merits whenever possible, and the nature and degree of any penalty to be imposed pursuant to CPLR 3126 is a matter of discretion for the court (*see* Pascarelli v. City of New York, 16 AD3d 472; Espinal v. City of New York, 264 AD2d 806). In addition, it is familiar law that striking an answer is a drastic remedy that is inappropriate absent a "clear demonstration" that the opposing party's failure to comply with the movant's discovery demands is willful and contumacious (*see* Harris v. City of New York, 211 AD2d 663; Lestingi v. City of New York, 209 AD2d 384).

In this case, neither the fact that the City refuses to concede liability, nor the fact that the recollections of certain City witnesses differ from plaintiff's version of the events does not, as plaintiffs would like to infer, render the proffered evidence false or the refusal to comply with their subsequent voluminous demands willful or contumacious. Accordingly, plaintiffs' motion to strike

the City's answer is denied.

Finally, those branches of plaintiffs' motion which seek alternative relief in the form of an order compelling the City to provide additional discovery is denied as lacking in any proof that the disclosure heretofore provided is inadequate or incomplete, or that there is a substantial likelihood that the requested witnesses/documents possess information that is material and necessary to the prosecution of their case (Saxe v. City of New York, 250 AD2d 751).

Accordingly, the City's cross motion for a protective order is granted.

CPLR 3103 provides, in pertinent part, that "[t]he Court may at any time on its own initiative, or on motion of a party...from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device." It is clear to this Court from the voluminous exhibits annexed to the papers before it that the City has acted in good faith to provide plaintiffs with meaningful discovery, including the myriad of City witnesses who have been produced to testify under oath that certain of the documents, records and recordings requested by plaintiffs simply do not exist. Thus, the City's request to preclude plaintiff from serving any additional notices for deposition and/or the discovery of these or other documents or witnesses without prior court approval is granted.

If required, a referee will be appointed to supervise the completion of discovery in order to prevent abuse and/or delay, and to allow this matter to proceed to a resolution on the merits in a timely manner.

Accordingly, it is

ORDERED, that plaintiffs' motion is denied in its entirety, and it is further

ORDERED, that the cross motion of defendant City of New York is granted, and it is further

ORDERED, that the plaintiffs are precluded from serving any further notices for discovery pursuant to CPLR Article 31 upon the City, without the prior written approval of this Court or any referee, who may be appointed to supervise the completion of discovery.

E N T E R,

Dated: June 14, 2010

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Hon. Thomas P. Aliotta

J. S. C.