[* 1]

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

PRESENT: MARTIN SHULMAN J.S.C. PART 1

Index Number : 109353/2005
NG, LIU SHUN
vs
TRANSIT AUTHORITY
Sequence Number : 001
STRIKE ANSWER

INDEX NO. 109353/05
MOTION DATE
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits A-S	1
Answering Affidavits — Exhibits A+B	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED

DEC 01 2010

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: NOV 29 2010

MARTIN SHULMAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

----------x

LIU SHUN NG,

Plaintiff,

-against-

NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY and HARVEY KENNETH,

Defendants.

----------x

Index No: 109353/05

Decision and Order

Hon. Martin Shulman, J.

Plaintiff Liu Shun Ng ("Plaintiff" of "Ng") moves pursuant to CPLR §3126 to strike the answer of defendants New York City Transit Authority, Manhattan and Bronx Surface Transit Operating Authority and Harvey Kenneth (collectively, "Defendants," or "TA") for failure to comply with court-ordered discovery or, alternatively, barring non-party witnesses, Deveria Dickens ("Dickens") and Sherry Fisher ("Fisher"), from testifying at trial. Plaintiff further seeks sanctions pursuant to 22 NYCRR § 130-1.1 against TA's outside counsel for engaging in frivolous and dilatory conduct. Defendants oppose the motion.

Relevant Factual and Procedural Background

Ng started this personal injury action for damages as a result of injuries she sustained on April 14, 2004, while allegedly trying to board a TA bus (the "Bus"). Plaintiff specifically alleged the Bus wheel chair lift mechanism struck her left foot causing injury.

During the next five years, the parties engaged in ongoing discovery skirmishes, unusual for this otherwise non-complex matter. Pursuant to a pre-printed provision contained in the November 5, 2007 preliminary conference order (Exhibit G to Motion)[1], Defendants were required to turn over the names and addresses of eye-witnesses, if any, to the Bus accident.

In April 2008, TA turned over a copy of a Supervisor's Accident/Crime Investigation Report ("TA Report") which identified/listed three eye witnesses but, as appeared from the annexed copy, redacted all contact information (Jaroslawicz Aff. in Support of Motion at ¶ 5)(*see also,* Exhibits H and P to Motion). In letters and at various discovery compliance conferences, Plaintiff repeatedly requested addresses and telephone numbers for the eye witnesses, any written statements they may have provided to TA and duplicate color photocopies of the Bus accident photographs (*Id.* at ¶¶ 6-7).

For Plaintiff, the sticking point was/is TA's purported persistent tactic to disregard various compliance orders and belatedly disclose *inter alia* contact information of the alleged eye witnesses to Ng's accident as well as statements two eye witnesses furnished to Defendants well after the time Defendants were required to do so. In fact, it was not until June 2010, and after a full day of jury selection, that TA's outside counsel turned "over two typewritten statements dated October 15, 2004 for witnesses Deveria

---

[1] The preliminary conference order states, in relevant part:

"(6) **Other Disclosure**:
(a) All parties, on or before 30 days, shall exchange names and addresses of all eye witnesses and notice witnesses, statements of opposing parties, and photographs, or, if none, provide an affirmation to that effect."

Dickens and Sherry Fisher (Exhibit 'L' [to Motion]) . . ." (emphasis supplied in the original)(*Id.* at ¶ 8).

Plaintiff immediately moved to strike TA's answer and on June 30, 2010, after making a record, Justice Gische issued the following decision and order (Exhibit M to Motion):

> It is hereby
> ORDERED that the plaintiff's motion to strike the TA's answer for the late production of non-party eye witnesses' statements is granted only to the following extent:
> Sherry Fisher is directed to appear for an EBT on July 2, 2010 at 10:00 am at the Supreme Courthouse in NY Co.
> Deveria Dickens is directed to appear for an EBT on July 8, 2010 at 10:00 am at the Supreme Courthouse in NY Co.
> In the event either or both of these witnesses fail to appear, the court reserves the right to preclude their testimony and/or disband the jury, and/or mistry [sic] the case (if trial has started). This constitutes the decision and order of the court.

During the respective depositions which took place on July 9, 2010, Plaintiff's counsel learned from one of the non-party witnesses (i.e., Fisher) for the first time that she had prepared hand-written statements which she turned over to the TA six years ago (Exhibit N to Motion). A few weeks later, TA furnished an unredacted copy of the TA Report (Exhibit P to Motion) which now contained eye witness(es) contact information. In her present motion, Plaintiff claims prejudice as a result of this belated disclosure, *inter alia*, because her counsel's "eleventh hour" efforts to contact Marisol Otero, a listed eye witness using the telephone number finally provided six years later on July 22, 2010, proved unsuccessful as that number was disconnected (*Id.* at ¶ 12).

To further support a claim of prejudice and basis for her alternative application to preclude either Fisher or Dickens from testifying, Plaintiff argues that TA's purported,

wilful non-production of these alleged hand-written statements (now non-existent) forecloses Ng from discerning any inconsistencies between the hand written statements and the prepared typed statements these eye witnesses signed that could ostensibly minimize the damaging effect of these eye-witnesses' trial testimony (Jarosloawicz Reply Aff. at ¶ 10). Finally, Plaintiff's counsel seeks sanctions for TA's trial counsel's alleged impermissible conduct which not only frustrated Plaintiff's discovery rights, but also prevented jury selection and the ensuing trial from going forward.

In opposition, TA's trial counsel summarily dismisses Plaintiff's perceived hyperbole and succinctly counters that: Dickens and Fisher have been deposed pursuant to Justice's Gische's Decision and Order; in their typed statements and at their depositions, these witnesses consistently "state[d] that plaintiff was not struck by the wheel chair lift. In fact, the witnesses raise the distinct possibility that the claimed accident . . . [was] staged and phony . . ."(bracketed matter added)(Barrett Opp. Aff. at ¶ 7); and Plaintiff has always had a complete copy of the TA Report, "with the exception of witness phone numbers." (*Id.* at ¶ 11), and this inadvertent omission of contact information occurred when a TA staff attorney obtained a copy of this report from a "FOIL response, which routinely redacts witness contact information . . ." (*Id.* at ¶ 12).

In response to Plaintiff's perceived prejudice, Defendants' counsel further advised that "Plaintiff received contact information from defendant for Ms. Dickens when her non-party deposition busted three years ago . . . Plaintiff chose not to make any contact with Ms. Dickens at that time. . . In fact, plaintiff never undertook any effort whatsoever to locate the witnesses, presumably knowing they were adverse." (*Id.* at

¶¶ 14-16). Counsel then pointed out that Defendants never had any witnesses' hand-written statements to turn over, but rather the witnesses "gave some handwritten information in an interview to an investigator, which was subsequently incorporated into their signed typed statements . . ." and these statements, otherwise privileged work product, were turned over prior to the scheduled depositions (*Id.* at ¶¶ 26 and 29). Lastly, Defendants' trial counsel impliedly stated that at no time did Defendants' trial counsel intentionally act to thwart Plaintiff's discovery rights or prevent jury selection and the ensuing trial from going forward this past summer.

Discussion

CPLR § 3126 states, in pertinent part:

> If any party . . . refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:
>
> 1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
> 2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses . . . ; or
> 3. an order striking out pleadings or parts thereof, . . . or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

Where a party disobeys a court order and by conduct frustrates the disclosure scheme provided by the CPLR, dismissal of the party's pleadings is within the broad discretion of the trial court. *Zletz v Wetanson*, 67 NY2d 711 (1986); *Berman v Szpilzinger*, 180 AD2d 612 (1st Dept 1992)(even though afforded ample opportunity to comply with discovery, plaintiff's repeated failure in this regard warranted dismissal of the complaint).

While the penalty of striking a pleading for failure to comply with disclosure is extreme, the courts nonetheless have held that dismissing the pleading is the appropriate remedy where the failure to comply has been "clearly deliberate or contumacious." *Henry Rosenfeld, Inc. v Bower & Gardner*, 161 AD2d 374 (1st Dept 1990); *Kutner v Feiden, Dweck & Sladkus*, 223 AD2d 488, 489 (1st Dept 1996), *lv to app den*, 88 NY2d 802 (1996).

Regardless of Plaintiff's counsel's varied demand letters for requested discovery and witness contact information, Plaintiff makes her application to strike Defendants' answer and/or preclude the eye-witnessess' testimony for the first time this past June 2010 during the course of jury selection, five years after Ng started this action and almost two years after she filed her Note of Issue. [2] No trial was started then, and because of her CPLR §3126 motion, Plaintiff did get a conditional dismissal order granting her a full and fair opportunity to confront non-party witnesses, Dickens and Fisher, at scheduled depositions. *See Gendusa v Chen*, 71 AD3d 1085, 1086 (2nd Dept 2010)("prejudice . . . avoided by granting an adjournment of trial to allow the . . . [Plaintiff] to depose the witness[es] . . ." [bracketed matter added]). After learning about certain hand-written, non-producible information either eye witness may have furnished TA, Plaintiff's counsel on this motion resorts to speculation about what such

---

[2] The Note of Issue was filed on December 2, 2008 and *inter alia* contained a non-waiver statement. It is true that Plaintiff specifically stated she did not waive any outstanding discovery required to be provided pursuant to Justice Mills' October 23, 2008 Decision and Order (e.g., contact information, witness statements, colored photographs, etc.)(Exhibit K to Motion). Still, on the Note of Issue's certificate of readiness, Plaintiff's counsel checked off that "Discovery proceedings now known to be necessary[ ][were] completed," and "[t]here has been compliance with any order issued pursuant to the Precalendar Rules (22 NYCRR 202.12)."

hand-written information may have contained. However, Ng simply cannot demonstrate "a clear showing that . . . [Plaintiff] seeking that evidence is 'prejudicially bereft of appropriate means to confront a . . . [defense] with incisive evidence' . . ." (bracketed matter added). *Lamb v Maloney*, 46 AD3d 857, 858 (2nd Dept 2007).

In a different vein, Plaintiff suggests TA intentionally redacted the contact information to prevent Plaintiff from timely obtaining potentially favorable witness information (i.e., unlike Dickens and Fisher, Marisol Otero might have been a corroborating witness for Ng) and TA's delay in finally furnishing this contact information ultimately proved to be a "dead end." But, during the course of its investigation in 2004, TA's ability to contact this potential eye witness to take a formal statement may have also been futile. We will never know. What we do know is Plaintiff made no attempt to compel TA to produce contact information and/or seek CPLR §3126 relief at any time prior to jury selection this past summer. This court does recognize Plaintiff's frustration, nonetheless, the *Sturm und Drang* nature of Plaintiff's motion has not convinced this court that Defendants' trial counsel's conduct prior or subsequent to the scheduled jury selection dates was willful and contumacious (*see Brown v United Christian Evangelistic Assn.*, 270 AD2d 378, 379 [2nd Dept 2000])(on that record, a party's failure to produce full addresses of witnesses was found not wilful). There is simply no basis to either strike TA's answer or preclude any eye witness testimony at the trial. *See Soto v New York City Transit Auth.*, 25 AD3d 546 [2nd Dept 2006]).

Nor does this court conclude that TA's trial counsel sought to obtain any tactical advantage with this potentially unfavorable testimony. In this context, when jury selection was scheduled for the second time in August 2010, the parties' attorneys and

this court learned that Dickens and Fisher, presently employees of New York State's Unified Court System, were not available for trial. And, it is undisputed that TA had no control over these witnesses and reasonably sought to rely on their deposition transcripts. However, Plaintiff's counsel in colloquy in open court made herself perfectly clear that she would not be deprived of her right to cross-examine either of these witnesses at trial. Thus, it was precisely for this reason that this court adjourned the jury trial to October 2010 to ensure the availability of these eye witnesses. Under these facts and circumstances there is no basis to even support an order precluding these witnesses from testifying. But for this second round of CPLR §3126 motion practice Plaintiff initiated almost two and one-half months after court ordered depositions were taken (*see* Exhibit N to Motion), Ng could have started and finished her jury trial. Based on the foregoing, Plaintiff's motion for preclusion and/or sanctions is denied, in its entirety.

The parties are directed to appear at the Jury Assembly Room on the 4th floor of this courthouse at 60 Centre Street, New York, New York on December 6, 2010, at 9:30 a.m. for jury selection and proceed immediately thereafter to what is conceded to be a short trial. This is a **final** marking against the parties for all purposes.

This constitutes this court's Decision and Order. Courtesy copies of same have been provided to counsel for the parties.

DATED: New York, New York
November 29, 2010

HON. MARTIN SHULMAN, J.S.C.