

**Sarna v City of New York**

2011 NY Slip Op 30202(U)

January 26, 2011

Sup Ct, New York County

Docket Number: 106676/07

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 : 106676/2007

SARNA, MARIA

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

vs

CITY OF NEW YORK

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

Sequence Number : 003

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

STRIKE ANSWER

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

CAL # 97

The following papers, numbered 1 to 3 were read on this motion to/for strike

PAPERS NUMBERED

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

1

Answering Affidavits — Exhibits \_\_\_\_\_

2

Replying Affidavits \_\_\_\_\_

3

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER

FILED

JAN 26 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 1/26/11  
JAN 26 2011

[Signature]  
BARBARA JAFFE 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 : PART 5

-----X

MARIA SARNA,

Plaintiff,

-against

Index No. 106676/07

Motion date: 11/30/10

Motion seq. No.: 003

**DECISION & ORDER**

CITY OF NEW YORK, CONSOLIDATED EDISON CO.  
OF NEW YORK, INC., EMPIRE CITY SUBWAY CO.,  
LTD., and DELANEY ASSOCIATES L.L.P.,

Defendants.

-----X

BARBARA JAFFE, JSC:

**FILED**

**JAN 28 2011**

**NEW YORK  
COUNTY CLERK'S OFFICE**

**For plaintiff:**  
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**For defendants:**  
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By notice of motion dated September 3, 2010, plaintiff moves for an order striking defendant City's answer for failure to provide discovery. City opposes the motion.

**I. BACKGROUND**

Plaintiff commenced this action to recover damages for personal injuries she sustained on August 3, 2006 when she tripped and fell in a hole in the street. (Affirmation of Charles E. Green, Esq., dated Sept. 7, 2010 [Green Aff.]). On January 26, 2010, the parties appeared for a compliance conference and City agreed, as pertinent here, to respond to a request to provide, by February 26, 2010, Department of Environmental Protection (DEP) records for the location of plaintiff's accident for two years prior to and after the accident date. (*Id.*, Exh. C). It is

undisputed that City did not respond to the request or produce the records by February 26, 2010.

By compliance conference order dated April 27, 2010, City again agreed to respond to a request to produce the records by May 28, 2010 (*id.*, Exh. D), but failed to do so.

By compliance conference order dated June 29, 2010, City again agreed to respond to a demand to produce the records by July 29, 2010. (*Id.*, Exh. E). On or about July 7, 2010, City sent its response to the June 2010 compliance order, stating that while it had already provided DEP records for two years up to and including the date of plaintiff's accident for the pertinent location and would do an additional search for records for two years up to and including the date of plaintiff's accident for a nearby location, it objected to producing any post-accident records. (*Id.*, Exh. F).

## II. CONTENTIONS

Plaintiff argues that City's objection is untimely and was waived by their having agreed to produce the records in three compliance conference orders. She contends that the records are relevant as there are issues as to control of the accident location and as to which entity made post-accident repairs to the hole. (Green Aff.).

City denies that there is an issue of control in this action, asserting that no matter who created the hole, City had a duty to repair it if it had notice of it, and that therefore, the records are irrelevant and inadmissible. City also denies that it agreed to produce the records, relying on the orders which reflect its agreement only to respond to a request for the records. (Affirmation of Andrew Lucas, ACC, dated Sept. 24, 2010).

In reply, plaintiff maintains that City agreed in two compliance conference orders from 2008 to produce the records and that she reserved her right to the records during City's

deposition in May 2009. (Reply Affirmation, dated Oct. 11, 2010, Exhs. A, B, C).

### III. ANALYSIS

Pursuant to CPLR 3126(3), the court may issue an order striking a party's pleading if the party refuses to comply with a discovery order or willfully fails to disclose information. The party moving to strike a pleading must establish that the other party's failure to comply with a discovery order was willful, contumacious, or in bad faith. (*Rodriguez v United Bronx Parents, Inc.*, 70 AD3d 492 [1<sup>st</sup> Dept 2010]).

While it is undisputed that City failed to comply with the January 2010 and April 2010 compliance orders, the orders reflect that City did not agree to produce the records, but rather agreed to respond to the request for the records, which it did in July 2010. Plaintiff has thus failed to establish that City's delay in responding to the orders was willful, deliberate, or contumacious. (See *Glaser v City of New York*, 912 NYS2d 221, 2010 NY Slip Op 09395 [1<sup>st</sup> Dept 2010] [motion court properly found that City's failure to produce repair records was not willful and contumacious as City responded adequately to discovery demands "albeit in response to several orders calling for production, as well as motions to strike"]; *Mironer v City of New York*, 79 AD3d 1106 [2d Dept 2010] [court should not have stricken defendant's answer as record shows that it "substantially, albeit tardily, complied with court-ordered discovery"]; *Mendoza v City of New York*, 68 AD3d 482 [1<sup>st</sup> Dept 2009] [striking of defendant's answer was properly denied as plaintiff failed to show that defendant's delays in responding to discovery requests were willful or contumacious]; *Zouev v City of New York*, 32 AD3d 850 [2d Dept 2006] [plaintiff did not demonstrate that defendant's extended delay in producing discovery was willful or contumacious]).

Plaintiff's reliance on the 2008 conference orders and a 2009 deposition transcript is improper as they are submitted for the first time in her reply papers. (*See De La Cruz v Lettera Sign & Elec. Co.*, 77 AD3d 566 [1<sup>st</sup> Dept 2010] [defendants could not rely on affidavit submitted for first time in reply papers]; *Edwards v Great Atl. & Pac. Tea Co., Inc.*, 71 AD3d 721 [2d Dept 2010] [climatological data was submitted improperly in reply papers]; *Encarnacion v Smith*, 70 AD3d 628 [2d Dept 2010] [defendants' contentions referred to material submitted improperly for first time in reply papers]; *Schirmer v Athena-Liberty Lofts, LP*, 48 AD3d 223 [1<sup>st</sup> Dept 2008] [court erred in considering factual argument and associated materials raised for first time in reply papers]).

Moreover, plaintiff's failure to file an affirmation of good faith as required by 22 NYCRR 202.7 also warrants denial of the motion. (*Walter B. Melvin, Architects, LLC v 24 Aqueduct Lane Condominium*, 51 AD3d 784 [2d Dept 2008] [court erred in striking answer as plaintiff's motion was unsupported by affirmation of good faith]; *Dunlop Dev. Corp. v Spitzer*, 26 AD3d 180 [1<sup>st</sup> Dept 2006] [court properly denied discovery motion as plaintiff failed to include affirmation of good faith]; *Dennis v City of New York*, 304 AD2d 611 [2d Dept 2003] [motion to strike properly denied as plaintiff failed to provide affirmation of good faith]).

To the extent that plaintiff's motion may be deemed one to compel the post-accident repair records, such evidence in a negligence action is neither admissible nor discoverable (*Hinton v City of New York*, 73 AD3d 407 [1<sup>st</sup> Dept 2010], *lv denied* 2010 WL 5110085, 2010 NY Slip Op 90741), absent an issue of control (*Fernandez v Higdon El. Co.*, 220 AD2d 293 [1<sup>st</sup> Dept 1995]).

Here, plaintiff's conclusory allegations are insufficient to establish the existence of an

\* 6]

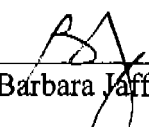
issue of control in this action, especially as City concedes its a duty to maintain the street in a safe condition. (*See Orlando v City of New York*, 306 AD2d 453 [2d Dept 2003] [court providently exercised discretion in denying plaintiff's motion to compel post-accident maintenance records]; *Sosa v City of New York*, 281 AD2d 469 [2d Dept 2001] [evidence of post-accident repairs was properly disregarded by court]; *Angerome v City of New York*, 237 AD2d 551 [2d Dept 1997] [as defendants admitted to maintaining and controlling traffic light at issue, plaintiff not entitled to post-accident repair records]; *compare Gordon v City of New York*, 245 AD2d 184 [1<sup>st</sup> Dept 1997] [post-accident repair estimates were discoverable as relevant to issue of who controlled or maintained sidewalk where plaintiff fell]).

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion to strike is denied.

ENTER:

  
\_\_\_\_\_  
Barbara Jaffe, JSC  
**BARBARA JAFFE**  
**J.S.C.**

DATED: January 26, 2011  
New York, New York

JAN 26 2011

**FILED**

JAN 28 2011

NEW YORK  
COUNTY CLERK'S OFFICE