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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 : 116666/2007
CHERNOW, BARBARA
VS
CITY OF NEW YORK
Sequence Number : 007
STRIKE ANSWER
CAL #12

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
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 ...	1, 2, 3
Answering Affidavits — Exhibits _____	4, 5
Replying Affidavits _____	

Cross-Motion: ☒ **Yes** ☐ **No**

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

MAR 30 2011

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 3/28/11
MAR 28 2011

BARBARA JAFFE *J.S.C.*
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

BARBARA CHERNOW,

Plaintiff,

-against-

THE CITY OF NEW YORK, RONALD WINSTON, and CORINA LAMOTTE,

Defendants.

----------x

Index No. 116666/07

Motion Date: 2/15/11
Motion Seq. No.: 007
Motion Cal. No.: 12

DECISION AND ORDER

BARBARA JAFFE, JSC:

For plaintiff:
Vito A. Cannavo, Esq.
Sullivan Papain Block McGrath
and Cannavo, P.C.
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212-732-9000

For defendant City:
Jessica Wisniewski, ACC
Michael A. Cardozo
Corporation Counsel
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By notice of motion dated October 25, 2010, plaintiff moves pursuant to CPLR 3126 for an order striking defendant City's answer for failing to comply with discovery orders and demands. City opposes and, by notice of cross-motion dated November 15, 2010, moves for an order imposing sanctions on plaintiff pursuant to 22 NYCRR 130-1.1 and issuing a protective order pursuant to CPLR 3103, deeming discovery compete, and adding the action to the trial calendar.

I. BACKGROUND

On August 20, 2007, plaintiff was allegedly injured when she tripped on a defective area of a sidewalk. (Affirmation of Vito A. Cannavo, Esq., dated Oct. 25, 2010 [Cannavo Aff.]). On September 21, 2009, City produced a witness for a deposition, and on October 7 and 19, 2009, City and defendant Winston, against whom the action has now been dismissed, served discovery

demands. (*Id.*, Exhs. G, H). By compliance conference order dated December 22, 009, City was directed to respond to the demands within 30 days. (*Id.*, Exh. I). On December 23, 2009, City served its response to plaintiff's demands. (Affirmation of Jessica Wisniewski, ACC, dated Nov. 14, 2010 [Wisniewski Aff.], Exh. D).

By compliance conference order dated March 23, 2010, City was directed to respond to the demands within 20 days to the extent that a response had not yet been provided. (Cannavo Aff., Exh. J). By compliance conference order dated May 18, 2010, City was directed to fax courtesy copies of its response by August 1, 2010, pending a decision on City's motion to dismiss. (*Id.*, Exh. K). City faxed the response timely. (Wisniewski Aff.).

By compliance conference order dated August 3, 2010, City was finally directed to provide a response within 45 days, to the extent that it had not yet done so. (*Id.*, Exh. L). By compliance conference order dated October 5, 2010, plaintiff was directed to serve a motion to strike within 30 days. (*Id.*, Exh. M).

II. CONTENTIONS

Plaintiff argues that City's failure to respond to four court orders evidences its willful and contumacious behavior. (Cannavo Aff.). In his affirmation of good faith, plaintiff's counsel asserts that he has been unable to obtain City's voluntary compliance to four court orders without providing any detail as to what efforts he made to contact City to resolve the issues before filing the instant motion. (*Id.*).

In opposition to plaintiff's motion and in support of its motion, City maintains that it responded to plaintiff's demands more than a year ago, and observes that the court orders after December 2009 direct it to provide courtesy copies of its response, thereby implicitly

acknowledging that a response had been provided. City also contends that plaintiff's affirmation of good faith is defective and contains a material falsehood as plaintiff's counsel never contacted defense counsel to discuss outstanding discovery, thus warranting sanctions, and that all discovery is complete. (Wisniewski Aff.).

In reply, plaintiff asserts that City's response was inadequate and that plaintiff's counsel made a good faith effort to resolve the discovery dispute by appearing at four court conferences and sending two letters to defense counsel, dated May 20, 2010 and August 10, 2010, respectively. The May letter requests that City provide post–accident repair records without referring to City's response, while in the second letter, counsel states that he has not yet received the response. (Affidavit of Vito A. Cannavo, Esq., dated Dec. 1, 2010, Exhs. I, J).

In reply to plaintiff's reply, City observes that plaintiff did not deny that it served a response or that counsel failed to contact defense counsel to discuss the discovery dispute. City also argues that plaintiff has not shown entitlement to the discovery demanded and that all relevant documents have been produced. (Reply Affirmation, dated Dec. 8, 2010).

III. ANALYSIS

Pursuant to CPLR 3126(3), the court may issue an order striking a party's pleading if the party refuses to obey 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 [1st Dept 2010]).

As City established that it served its response within one day of the December 2009 order, and that all subsequent orders directed it only to serve courtesy copies of the response, plaintiff

has not established that defendant failed to comply with its discovery obligations or court orders, and thus did not demonstrate that City's actions were willful, deliberate, or contumacious. While plaintiff may believe that City's discovery response is inadequate or insufficient, that issue is properly addressed in a motion to compel, not in a motion to strike. (*See Double Fortune Prop. Invs. Corp. v Gordon*, 55 AD3d 406 [1st Dept 2008] [as plaintiff responded to discovery requests, proper course for defendant was to move to compel further discovery rather than moving to strike]; *Barber v Ford Motor Co.*, 250 AD2d 552 [1st Dept 1998] [plaintiff's resort to motion to strike not proper procedure to address deficiencies in responses; if parties unable to resolve differences, proper procedure is to move to compel]; *see also Zletz v Wetanson*, 67 NY2d 711 [1986] [dismissal of complaint was abuse of discretion as defendants never sought order compelling disclosure]; *Charter One Bank, FSB v Houston*, 300 AD2d 429 [2d Dept 2002], *lv denied* 99 NY2d 651 [2003] [movant not entitled to sanctions pursuant to CPLR 3216 without first moving to compel discovery]).

Moreover, plaintiff's affirmation of good faith is insufficient absent any indication of "the time, place and nature of the consultation [with opposing counsel] and the issues discussed and any resolutions, or . . . good cause why no such conferral with counsel for opposing parties was held." (22 NYCRR 202.7[c]; *see Mironer*, 79 AD3d at 1106 [good faith affirmation insufficient absent reference to communications between parties showing that plaintiffs made diligent effort to resolve discovery dispute]; *148 Magnolia, LLC v Merrimack Mut. Fire Ins. Co.*, 62 AD3d 486 [1st Dept 2009] [affirmation deficient as it did not indicate time, place, and nature of consultation]). Plaintiff's submission of two letters sent to defense counsel does not remedy the insufficiency absent any indication that counsel followed up on the letters and as the letters do

not address the alleged inadequacy of City's response. (*See Yargeau v Lasertron*, 74 AD3d 1805 [4th Dept 2010] ["affirmation of plaintiffs' attorney established that plaintiffs made a good faith effort to obtain the initial responses from defendant, but it did not establish that they had made any good faith effort to resolve the 'present dispute,' i.e., the alleged inadequacy of defendant's responses"]; *Amherst Synagogue v Schuele Paint Co., Inc.*, 30 AD3d 1055 [4th Dept 2006] [sending two letters to plaintiff demanding responses did not demonstrate diligent effort to resolve dispute]). Thus, the deficiency of plaintiff's good faith affirmation constitutes an independent ground upon which to deny plaintiff's motion. (*See Chichilnisky Trustees of Columbia Univ. in City of New York*, 45 AD3d 393 [1st Dept 2007] [defendant's motion for discovery sanctions properly denied for lack of sufficient good faith affirmation]; *Tine v Courtview Owners Corp.*, 40 AD3d 966 [2d Dept 2007] [motion to strike answer should not have been granted as affirmation deficient]). To the extent that plaintiff contends that City's response was inadequate, and as plaintiff has the right to move to compel, City's motion for a protective order is premature. While City argues that the discovery sought by plaintiff is immaterial or irrelevant, plaintiff did not and was not required to address this issue in the instant motion, especially as City raised it only in its reply papers. Similarly, City has failed to establish that sanctions against plaintiff are warranted.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion and defendant's cross-motion are denied.

ENTER:

BARBARA JAFFE, J.S.C.

BARBARA JAFFE
J.S.C.

Dated: March 28, 2011
New York, New York