

**Williams v City of New York**

2011 NY Slip Op 31484(U)

June 3, 2011

Sup Ct, NY County

Docket Number: 106371/05

Judge: Barbara Jaffe

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

PRESENT: JAFFE

PART 5

Index Number : 106371/2005

WILLIAMS, ANITA M

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

vs

CITY OF NEW YORK

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

Sequence Number : 002

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

VACATE NOTE OF ISSUE/ READINESS

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

CAL # 137

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for vacate note of issue

PAPERS NUMBERED

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

1

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

2

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

Cross-Motion:  Yes  No

**FILED**

Upon the foregoing papers, it is ordered that this motion

JUN 07 2011

NEW YORK  
COUNTY CLERK'S OFFICE

DECIDED BY AGREEMENT WITH

\_\_\_\_\_

Dated: 6/3/11

BARBARA JAFFE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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  
 ANITA WILLIAMS,

Plaintiff,

- against -

Index No. 106371/05

Motion Date: 3/22/11  
 Motion Seq. Nos.: 002,

**DECISION AND ORDER**

**FILED**

JUN 07 2011

THE CITY OF NEW YORK and NEW YORK CITY  
 DEPARTMENT OF TRANSPORTATION,

Defendants.  
 -----X

BARBARA JAFFE, JSC:

NEW YORK  
 COUNTY CLERK'S OFFICE

**For plaintiff:**

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 718-892-0400

**For City:**

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 Michael A. Cardozo  
 Corporation Counsel  
 100 Church St., 4<sup>th</sup> Fl.  
 New York, NY 10007  
 212-442-6851

By notice of motion dated October 18, 2010, defendants move pursuant to CPLR 2221 for an order vacating a prior decision and order of the court dated September 13, 2010. By notice of motion dated October 19, 2010, defendants move pursuant to 22 NYCRR 202.21(e) for an order vacating plaintiff's note of issue or, in the alternative, precluding plaintiff from introducing certain evidence at trial or compelling her to provide discovery. Plaintiff opposes both motions.

I. MOTION TO VACATE ORDER

By decision and order dated September 13, 2010, upon plaintiff's letter application and City's default in opposing it, I found that City had willfully and contumaciously failed to comply with prior court orders requiring it to provide discovery, and thus struck its answer and ordered an assessment of damages against it.

City now argues that it was never served with a copy of plaintiff's letter application, thus requiring vacatur of the order, and that its conduct was neither willful nor contumacious as it has attempted to comply with discovery orders in good faith and provided discovery and produced witnesses for deposition. It contends that only the March 30, 2010 order required it to produce records and that it requested the records on April 30, 2010 and provided them on June 22, 2010, and that at the July 13, 2010 compliance conference it offered to provide affidavits and/or witnesses to provide testimony regarding the records. (Affirmation of Peter C. Lucas, ACC, dated Oct. 18, 2010).

Plaintiff submits proof of service on City of the letter application, and maintains that City was neither diligent nor compliant with numerous court orders, and that it did not demonstrate any legal ground upon which to vacate the September 2010 order, having failed to show that the court misapplied the law or the facts or that there are any new facts that would change the court's determination. (Affirmation of David L. Engelsher, Esq., dated Nov. 3, 2010, Exh. A).

As plaintiff demonstrates that City was served with the letter application, vacatur of the order is not required on that ground. To the extent that City's opposition contains new facts that were not offered on the prior motion, City has not provided a reasonable explanation for its failure to offer these facts in opposition to plaintiff's letter application.

Even if I were to grant leave to renew, City still fails to address its numerous delays and repeated failures to adhere to the deadlines set forth in many compliance conferences, to wit:

- (1) At a March 17, 2009 compliance conference, City was directed to respond to plaintiff's March 11, 2009 discovery demands within 60 days, but failed to do so;
- (2) At a May 23, 2009 compliance conference, City was again directed to respond to plaintiff's March 11 demands within 20 days, but failed to do so;

- (3) At a July 14, 2009 compliance conference, City was again directed to respond to plaintiff's March 11 demands, but failed to do so;
- (4) After City moved for summary judgment, by order dated January 4, 2010, another justice of this court denied the motion as premature as City had failed to respond to discovery, and ordered City to "comply with all outstanding discovery, as directed by the compliance conference orders dated May 23, 2009 and July 14, 2009 within 30 days" of service of a copy of the order with notice of entry;
- (5) On February 12, 2010, City responded to plaintiff's March 2009 demands by objecting to produce various documents or stating that it was searching for documents and would produce them, and no documents were annexed to the response;
- (6) At a March 30, 2010 compliance conference, City was ordered to provide documents responsive to certain of plaintiff's March 2009 demands by May 14, 2010;
- (7) On April 30, 2010, City requested that a search for the documents be conducted;
- (8) At a May 18, 2010 compliance conference, City had still not produced the documents and was ordered to do so by June 11, 2010; and
- (9) On June 22, 2010, City served its response, annexing documents responsive to some but not all of the demands.

Thus, City's conduct is summarized as follows: (1) between March 2009 and July 2009, it failed without explanation to respond to three court orders; (2) its response to the court order of January 2010 was late and incomplete as no documents were produced; (3) although ordered on March 30, 2010 to produce documents by May 14, 2010, it only requested a search for the documents on April 30 and failed to produce the documents by May 14; and (4) although ordered to produce the documents by June 11, 2010, it served its response late and did not produce all of the ordered documents.

Based on this history, City has not demonstrated that it attempted to comply with court orders diligently and in good faith or that its behavior was neither willful nor contumacious,

absent any explanation for why it ignored three court orders entirely, failed to request a search in a timely fashion, and produced incomplete and late responses. Moreover, some discovery remains outstanding. (See eg *Daniels v City of New York*, 78 AD3d 883 [2d Dept 2010] [motion to strike City's answer granted as City's willful and contumacious conduct could be inferred from repeated failures to comply with court orders directing discovery and insufficient excuses to justify failures]; *Maiorino v City of New York*, 39 AD3d 601 [2d Dept 2007] [same]; *Espinal v City of New York*, 264 AD2d 806 [2d Dept 1999] [City failed to offer reasonable excuse for its repeated failures to comply with discovery demands and court orders]; *Lantigua v City of New York*, 254 AD2d 218 [1<sup>st</sup> Dept 1998] [court properly granted motion to strike City's answer as it failed to comply with court orders]).

City has thus failed to establish that new facts warrant an order vacating my prior decision and order striking its answer.

## II. MOTION TO STRIKE NOTE OF ISSUE

City also moves to strike plaintiff's note of issue, arguing that plaintiff has not provided it with copies of fully executed HIPAA-compliant authorizations for some of her medical providers and for her employment and tax records, and it requests that it be permitted to reserve its right to conduct a vocational rehabilitation examination (VRE) of plaintiff at any time before the trial. (Affirmation of Peter C. Lucas, ACC, dated Oct. 19, 2010).

In opposition, plaintiff observes that City never raised the issue of any outstanding discovery on her part despite numerous compliance conferences and that she previously provided authorizations for St. Luke's Roosevelt Hospital, Rite Aid Pharmacy, and Town Drug. (Affirmation of David L. Engelsher, Esq., dated Nov. 3, 2010, Exhs. G, H).

As the court's compliance scheduling order required plaintiff to provide City with authorizations for all of her treating providers and employment or tax records, and to the extent that they have not been provided, plaintiff is directed to do so.

Moreover, while City did not previously request a VRE, an inquest date has not yet been set and City has established that a VRE is material and necessary to its defense. (*See Kavanagh v Ogden Allied Maintenance Corp.*, 92 NY2d 952 [1998] [as plaintiff claimed damages related to inability to work, vocational rehabilitation assessment material and necessary for defendant to rebut claim]; *Wilkerson v Korbl*, 75 AD3d 470 [1<sup>st</sup> Dept 2010] [as plaintiff claimed future lost wages, vocational examination appropriate]; *Diaz v Elrac, Inc.*, 40 AD3d 515 [1<sup>st</sup> Dept 2007] [court should not have denied motion to compel plaintiff to undergo vocational examination as it would not have delayed trial]).

### III. CONCLUSION

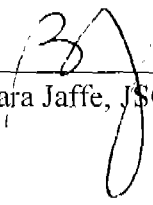
Accordingly, it is hereby

ORDERED, that defendants' motion for an order granting leave to renew is denied; it is further

ORDERED, that defendants' motion to vacate plaintiff's note of issue is granted unless plaintiff provides defendants, within 30 days of service on her of a copy of this order with notice of entry, with HIPAA-compliant authorizations for all of her treating medical providers that have not yet been provided, as well as authorizations for her employment or tax records for the year of, year before, and year after the date of her accident and the period of time allegedly lost from work as a result of the accident. If plaintiff fails to comply timely, defendants may submit an affirmation of non-compliance; and it is further

ORDERED, that plaintiff to directed to appear for a vocational rehabilitation examination, and City is directed to process plaintiff's authorizations for her employment records or tax returns within 10 days of their receipt, to notice the examination within 30 days of its receipt of the records, and to conduct the examination within 30 days after it is noticed. If City fails to comply timely with any of these deadlines, the examination will be deemed waived.

ENTER:

  
\_\_\_\_\_  
Barbara Jaffe, JSC

DATED: June 3, 2011  
New York, New York

**FILED**

JUN 07 2011

NEW YORK  
COUNTY CLERK'S OFFICE