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

JAFFE BARBARA JAFFE J.S.C.

PART 5

Index Number : 116523/2005

SIMPSON, VANESSA

VS

CITY OF NEW YORK

Sequence Number : 003

VACATE

CAL # 112

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

FILED

JUL 07 2011

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

Dated: 7/1/11

JUL 01 2011

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

VANESSA SIMPSON,

Plaintiff,

-against-

THE CITY OF NEW YORK, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., and MANHATTAN BUSINESS INTERIORS,

Defendants.

----------x

Index No. 116523/05

Mot. Arg.: 4/26/11
Mot. Seq. No.: 003
Cal. No.: 112

DECISION AND ORDER

BARBARA JAFFE, J.:

For plaintiff:
Scott A. Steinberg, Esq.
Greenberg & Stein, P.C.
275 Madison Ave., Ste. 1100
New York, NY 10016
212-681-2535

For defendants:
Andrew Lucas, ACC
Michael A. Cardozo
Corporation Counsel
100 Church St., 4th Fl.
New York, NY 10007
212-788-0560

By notice of motion dated December 2, 2010, defendant City moves pursuant to CPLR 2221 for an order vacating a prior decision and order dated November 16, 2010 and, pursuant to CPLR 3103, issuing a protective order precluding plaintiff from filing letter applications. Plaintiff opposes the motion.

I. PERTINENT BACKGROUND

On September 1, 2004, plaintiff stepped off the sidewalk and onto the street near 300 West 125th Street in Manhattan, and her foot slid on gravel in the street, causing her to fall and sustain physical injuries. (Affirmation of Andrew Lucas, ACC, dated Dec. 2, 2010 [Lucas Aff.], Exh. 1). In her verified bill of particulars, plaintiff alleged that her fall occurred approximately

one inch from the curb in front of 300 West 125th Street. (*Id.*, Exh. 1D).

By discovery response dated October 12, 2010, City served on plaintiff: (1) a corrective action report (CAR) dated May 11, 2006, for the location of 301-07 West 125th Street, which reflects that Consolidated Edison (Con Ed) had received a permit to perform work at that location, that a two-inch hole was found in a Con Edison trench in front of the Kentucky Fried Chicken at 301 West 125th Street, and that the defect failed a re-inspection on October 1, 2006; and (2) two Department of Environmental Protection notices of violation (NOV), dated November 17, 2005 and October 19, 2006 respectively, which were both issued to Con Ed and reflect that at 301 West 125th Street a "wearing course" was not flush with the surrounding area; the issuing officer for the October 2006 NOV was City HIQA employee Dean Mojica. (*Id.*, Exh. 4).

By compliance conference order dated November 16, 2010, City was directed, as pertinent here, to produce for an examination before trial (EBT) either Mojica or another HIQA witness with knowledge and to conduct a search for the photographs attached to the NOVs provided in City's October 2010 response. I also permitted plaintiff to file a letter application related to the scope of City's search for applicable HIQA records. (*Id.*, Exh. 5).

II. CONTENTIONS

City argues that Mojica's testimony and the photographs annexed to the NOVs are irrelevant as the NOVs pertain to a location far from where plaintiff fell, relying on photographs taken by plaintiff immediately after her accident and those taken recently which show that the location of her accident is across the street from the location as set forth in the NOVs and separated by six lanes of traffic, and as they were issued after plaintiff's accident, thus rendering

them inadmissible and undiscoverable. City also objects to the letter application process. (Lucas Aff.).

Plaintiff denies having requested that Mojica be produced for an EBT but instead sought the EBT of Tufus Williams or Pierre Simpson, both of whom were identified as potentially having pertinent knowledge during a prior EBT of a HIQA witness, and argues that City counsel's assertion that the records are irrelevant does not constitute competent evidence, and that plaintiff is entitled to depose a witness who can competently testify about the NOVs. Plaintiff also requests either the results of a search of City's documents from 1998 to the date of the accident or if no records are found, an affidavit providing specific details of the records search. (Affirmation of Scott A. Steinberg, Esq., dated Feb. 14, 2011).

In reply, City maintains that Mojica's testimony would be irrelevant as the NOV that he issued is dated after the accident, and the post-accident records relate to a different location and are thus inadmissible and irrelevant. (Reply Affirmation, dated Mar. 8, 2011).

III. ANALYSIS

The Court of Appeals has held that CPLR 3101(a), which provides for full disclosure of all matters material and necessary in the prosecution or defense of an action, should be "interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason." (*Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403 [1968]). Moreover, "'[p]retrial disclosure extends not only to admissible proof but also to testimony or documents which may lead to the disclosure of admissible proof . . .'" (*Polygram Holding, Inc. v Cafaro*, 42 AD3d 339 [1st Dept 2007], *quoting Fell v Presbyt. Hosp. in the City*

of New York at Columbia-Presbyt. Med. Ctr., 98 AD2d 624 [1st Dept 1983]). The party seeking disclosure must show that "the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims." (*Abrams v Pecile*, 83 AD3d 527 [1st Dept 2011], *quoting Vyas v Campbell*, 4 AD3d 317 [2d Dept 2004]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]).

Here, absent any dispute that the NOVs produced by City in its October 2010 response were issued after the accident and pertain to a location different than where plaintiff fell, plaintiff has not shown that photographs related to the NOVs would result in the disclosure, or is reasonably calculated to lead to the discovery, of relevant evidence. Moreover, plaintiff has not demonstrated that testimony from Mojica or another HIQA witness would lead to relevant evidence inasmuch as a HIQA witness has already testified and identified pertinent documents. (*See Giordano v New Rochelle Mun. Hous. Auth.*, 84 AD3d 729 [2d Dept 2011] [to show additional depositions are warranted, moving party must establish that witnesses already deposed had insufficient knowledge or substantial likelihood that additional witnesses possess material and necessary information]). Thus, the November 2010 order is modified to the extent of vacating these demands.

However, to the extent that plaintiff seeks to hold City liable on the ground that it had prior written notice of the defect on which she fell, City is directed to search for and provide records related to the accident location for five years prior to and including the date of the accident. (*See Weissman v City of New York*, 29 Misc 3d 1064 [Sup Ct, Queens County 2010] [no authority for proposition that prior written notice must be less than five years old to be effective]; *Oppenheim v Village of Great Neck Plaza, Inc.*, 10 Misc 3d 1070[A], 2006 NY Slip

Op 50034[U] [Sup Ct, Nassau County] [defendant submitted evidence that search of records for five years prior to accident revealed no prior written notice of defect]; *see also Glaser v City of New York*, 79 AD3d 600 [1st Dept 2010] [search conducted of records dating back three years from accident date]). If no new records are found, City must provide an affidavit detailing the scope of the search. (*Cf Rivera-Irby v City of New York*, 71 AD3d 482 [1st Dept 2010] [affidavit as to search for prior incident reports was insufficient as it did not set forth "where the relevant reports were likely to be kept; what efforts, if any, were made to preserve them; whether such reports were routinely destroyed; or whether a search had been conducted in every location in which incident reports were likely to be found"]).

City relies on *Sholes v Meagher*, 100 NY2d 333 (2003) for the proposition that letter applications are impermissible. In *Sholes*, the issue before the Court was whether a party may appeal from an order arising from an *ex parte* motion, and the court determined that it could do so by moving to vacate the order and then appealing the denial of that motion. (CPLR 5701[a][3] [appeal may be taken upon order refusing to vacate or modify prior order]). In contrast to the procedure discussed in *Sholes*, when I grant a party permission to file a letter application, the application is not made *ex parte*. Rather, the moving party is directed to file and serve a letter application on both the court and opposing counsel and the opposing party is permitted to file and serve a response, thus giving both parties an opportunity to be heard. And to the extent that a party wishes to appeal my resulting decision, it may do so in accordance with the decision in *Sholes*. Moreover, letter applications have been accepted by other courts. (*See eg Schwimmer v Schwimmer*, 26 Misc 3d 1213[A], 2009 NY Slip Op 52716[U] [Sup Ct, New York County 2009] [letter application permitted by court to address limited issue]; *Lipp v Zigman*, 18 Misc 3d

1127[A], 2008 NY Slip Op 50215[U] [Sup Ct, Nassau County 2008] [deciding letter application to compel production of tax returns]; *DH Holdings Corp. v Marconi Corp. PLC*, 10 Misc 3d 530 [Sup Ct, New York County 2005] [directing letter application if party requests further deposition]). Thus, absent any pertinent authority to the contrary, City has not demonstrated that the submission of letter applications is impermissible.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant City of New York's motion to vacate and for a protective order is granted to the extent of modifying the November 16, 2010 order to direct City to provide plaintiff, within 45 days of the date of this order, with the discovery specified above, and is otherwise denied.

FILED

JUL 07 2011

NEW YORK
COUNTY CLERK'S OFFICE

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: July 1, 2011
New York, New York

JUL 01 2011