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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

JAFFE BARBARA JAFFE
J.S.C.

Index Number : 119145/2006
BADIA, BENITO
VS
CITY OF NEW YORK
Sequence Number : 003
COMPEL DISCLOSURE

CALL # 9

PART 5

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1
Answering Affidavits — Exhibits _____ | No(s). 2
Replying Affidavits _____ | No(s). 3

Upon the foregoing papers, it is ordered that this motion is

FILED

NOV 07 2011

NEW YORK
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

RECEIVED
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IAS MOTION SUPPORT OFFICE
NYS SUPREME COURT-CIVIL

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

Dated: 10/20/11 OCT 20 2011

_____, J.S.C.
BARBARA JAFFE

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

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BENITO BADIA,

Plaintiff,

-against-

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

Defendants.

----------x

Index No. 119145/06

Motion Subm.: 8/2/11
Motion Seq. No.: 003

DECISION & ORDER

BARBARA JAFFE, JSC:

For plaintiff:
Charen Kim, Esq.
Ginarte O'Dwyer Gallardo *et al.*
225 Broadway, 13th Fl.
New York, NY 10007
212-601-9700

For defendant City:
Peter C. Lucas, Esq.
Michael A. Cardozo
Corporation Counsel
100 Church St., 4th Fl.
New York, NY 10007-2601
212-442-0398

By notice of motion dated February 25, 2011, plaintiff moves pursuant to CPLR 3124 for an order compelling defendant City to provide discovery, or granting the delivery at trial of an adverse inference charge, or pursuant to CPLR 3126 striking City's answer for failing to provide discovery.

I. PERTINENT BACKGROUND

On October 5, 2005, plaintiff was allegedly injured when, while walking on the street at the intersection of Seaman Avenue and West 214th Street in Manhattan, he tripped and fell on a raised, broken, and cracked section of the street surrounding a manhole or water vault cover (manhole). (Affirmation of Charen Kim, Esq., dated Feb. 25, 2011 [Kim Aff.]).

On or about June 17, 2008, plaintiff served on City a notice to produce including a request for repair records for the manhole for two years prior to and including the date of his

accident. (*Id.*, Exh. A). On or about April 28, 2009, City served a response with no repair records. (*Id.*, Exh. B).

On February 2, 2010, John Caccavale, a City Department of Environmental Protection (DEP) employee, testified at an examination before trial (EBT) and identified the manhole as one owned or used by DEP and containing a water valve used to shut off a nearby fire hydrant. Although he did not know if the manhole had been repaired, he answered plaintiff's counsel's hypothetical questions about possible repairs and stated that "if" such repairs had been made, they would have been made by DEP or DEP contractors, and that a work ticket would have been generated. (*Id.*, Exh. C).

Following Caccavale's EBT, plaintiff served City with a demand for all work records for the manhole for the two years before and after the accident. (*Id.*, Exh. D). By response dated October 6, 2010, City provided the affidavit of a DEP employee attesting to a fruitless search of DEP's maintenance and repair records for the two years prior to and including the date of the accident date. (*Id.*, Exh. F).

By decision and order dated January 28, 2011, I denied plaintiff's letter application seeking the repair records. (*Id.*, Exh. I).

II. CONTENTIONS

Plaintiff now argues that repair records created before his accident are relevant to whether City created the dangerous condition of the street and/or manhole, and that Caccavale's testimony establishes the existence of such records which City has willfully failed to produce. He also contends that post-accident repair records are relevant to whether City created the dangerous condition before the accident or had actual prior notice of the condition or to a

determination of the condition of the manhole at the time of the accident. (Kim Aff.).

City denies that Caccavale's testimony establishes that the repair records exist, observing that Caccavale testified only as to repairs that may have been made and did not testify that any repairs were actually made by City or DEP or that the condition was caused by work performed by City or DEP. City argues that it provided all relevant documents and cannot produce non-existent repair records. (Affirmation of Peter C. Lucas, Esq., dated Apr. 21, 2011).

In reply, plaintiff reiterates his prior arguments. (Reply Affirmation, dated May 2, 2011).

III. ANALYSIS

Pursuant to CPLR 3124, a party may move to compel disclosure from another party that has not responded or complied with any discovery request and, pursuant to CPLR 3126, if a party refuses to obey a court order to provide discovery, the court may preclude that party from submitting evidence at trial or strike its pleadings.

Here, City has submitted proof that there exist no records relating to repairs of the manhole in the two years before plaintiff's accident. Caccavale's testimony does not demonstrate the existence of such records as he did not testify that the manhole was repaired or that a work ticket had been generated. Plaintiff has thus failed to demonstrate that City willfully failed to produce records reflecting repairs to the manhole or street performed in the two years before his accident.

It is well-established that evidence of post-accident repairs is neither admissible nor discoverable in a negligence case. (44 NY Jur 2d, Disclosure § 218 [2011]; *Hinton v City of New York*, 73 AD3d 407 [1st Dept 2010], *lv denied* 15 NY3d 715; *McConnell v Santana*, 30 AD3d 481 [2d Dept 2006]). While discovery of post-accident repairs has been permitted to establish

the condition of an injury-causing object, it has been granted only when modifications to the object changed its condition and the plaintiff is not otherwise able to prove the condition at the time of the accident. (*See eg Mercado v St. Andrews Hous. Dev. Fund Co., Inc.*, 289 AD2d 148 [1st Dept 2001] [in slip and fall case, where alleged defective condition of sidewalk on accident date cannot otherwise be proven, plaintiff entitled to records of post-accident repairs or modifications]; *Longo v Armor El., Co., Inc.*, 278 AD2d 127 [1st Dept 2000] [following accident, defendants repaired elevator and discarded parts including those which allegedly caused dangerous condition]; *Kaplan v Einy*, 209 AD2d 248 [1st Dept 1994] [finding evidence of post-accident repairs admissible "so that plaintiff will be able to ascertain the condition of the elevator prior to the admitted modifications, this being especially necessary in light of the fact that defendants refuse to state that their own photographs represent the condition of the elevator doors at the time of the incident"]).

Here, plaintiff does not allege that the manhole has been modified to an extent that he cannot ascertain or prove its condition on the date of the accident, and he claims to possess photographs of the dangerous condition.

Moreover, proof of post-accident repairs may not be used to establish that City negligently created the condition before the accident. (*See* Prince, Richardson on Evidence § 4-612 [Farrell 11th ed] ["Evidence of repairs made after an accident is inadmissible if offered as an admission of negligence or culpability in causing the injury, because the inference is unjust and public policy forbids it."]).

And, as I stated in my prior order, proof that City had actual notice of the condition is irrelevant to whether it had received prior written notice. (*Walker v City of New York*, 34 AD3d

226 [1st Dept 2006] [no actual notice exception for prior written notice requirement]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion to compel is denied in its entirety; and it is further

ORDERED, that plaintiff is directed to file a note of issue by November 21, 2011.

ENTER:

Barbara Jaffe, JSC

DATED: October 20, 2011
New York, New York

OCT 20 2011

FILED
NOV 07 2011
BARBARA JAFFE
J.S.C.
NEW YORK
COUNTY CLERK'S OFFICE