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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN J.S.C. PART 52

ustice

Index Number : 103226/2009

BITON, SIMONA

VS.

CITY OF NEW YORK

SEQUENCE NUMBER : 002

STRIKE ANSWER

INDEX NO. 103226/09

MOTION DATE

MOTION SEQ. NO. 002

notion to/for

No(s).

No(s).

No(s).

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

is decided in accordance with the annexed decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

FOR THE FOLLOWING REASON(S):

Dated: 9/26/11

CYNTHIA S. KERN J.S.C.

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 52

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SIMONA BITON,

Plaintiff,

Index No. 103226/09

-against-

DECISION/ORDER

CITY OF NEW YORK, ELLIANA 27 E. 92 LLC, ELLIANA PROPERTIES, NEWCADI, INC., JACADI USE, INC. and SC MANAGEMENT GROUP NEW YORK, INC.,

Defendants.

----------x

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Answering Affidavits and Cross Motion	2
Replying Affidavits	3
Exhibits	4

Plaintiff commenced the instant action to recover damages for personal injuries she allegedly sustained when she tripped and fell in a hole in the sidewalk at or near the northwest corner of East 92nd Street and Madison Avenue, New York, New York on September 14, 2008. Plaintiff now moves for an order pursuant to CPLR §3126 striking defendant the City of New York's (the "City") answer for its repeated failure to provide discovery, or in the alternative, compelling the City to provide the outstanding discovery. Defendant Macadi, Inc., formerly known as Newcadi, Inc., a subsidiary of Jacadi USA, Inc. (hereinafter "Macadi") cross-moves for

an order striking the City's answer for its repeated failure to provide discovery or, in the alternative, compelling the City to provide the outstanding discovery. Defendants Elliana 27 E. 92 LLC and Elliana Properties (hereinafter "Elliana") also cross-move for an order striking the City's answer for its repeated failure to provide discovery, or, in the alternative, compelling the City to provide the outstanding discovery. For the reasons set forth below, plaintiff's motion is granted, Macadi's cross-motion is granted and Elliana's cross-motion is granted.

The relevant facts are as follows. Plaintiff alleges that she sustained injuries when she tripped and fell in a hole in the sidewalk near a fire hydrant located in front of 27 East 92nd Street, New York, New York on September 14, 2008. After commencing the instant action, plaintiff served Notices for Discovery and Inspection on the City on November 30, 2010 and December 21, 2010, seeking various maintenance records, work orders, permits, contracts and other relevant records pertaining to any work done at the location of plaintiff's accident. Plaintiff alleges no response was received from the City in regard to these demands.

The first compliance conference in this action was held on January 5, 2011 during which this court ordered the City to comply with plaintiff's two outstanding Notices for Discovery and Inspection within 20 days of that date and provide records for the subject fire hydrant within 60 days. The City did not respond to these outstanding demands at all. The second compliance conference was held on April 6, 2011. As the City had not yet provided the demanded discovery, the court ordered that the City comply with the two outstanding Notices of Discovery and Inspection. The third compliance conference was held on May 25, 2011. At that time, the City still had not responded to plaintiff's written demands at all. Once again, this court ordered the City to comply with the prior orders within 20 days of that conference date, which included

responding to plaintiff's two outstanding Notices for Discovery and Inspection.

Since the third compliance conference, the City has provided a response to plaintiff's two Notices for Discovery and Inspection - one was provided on May 25, 2010 and the other response was provided on May 31, 2010. However, all that was provided to plaintiff as part of the City's response was one document - a fire hydrant record for the wrong location. All other responses consisted of objections to plaintiff's demands as overbroad and burdensome. By letter dated June 14, 2011, plaintiff's counsel reminded the City of its failure to provide the requested discovery despite three previous court orders to do so. However, the requested documents have yet to be produced by the City.

"[I]t is well-settled that the drastic remedy of striking a party's pleading pursuant to CPLR 3126 for failure to comply with a discovery order is appropriate only where the moving party conclusively demonstrates that the non-disclosure was willful, contumacious or due to bad faith." *McGilvery v. New York City Tr. Auth.*, 213 A.D.2d 322, 324 (1st Dept 1995). A defendant that allows discovery to "trickl[e] in [with a] cavalier attitude should not escape adverse consequence." *Figdor v. City of New York*, 33 A.D.3d 560, 561 (1st Dept 2006). While the penalty of striking a defendant's answer is severe, "it serves the important function of deterring obstreporous litigation behavior." *Henderson-Jones v. City of New York*, 2011 WL 3715415 (1st Dept 2011).

In determining what amounts to willful and contumacious behavior, the First Department has stated that such behavior can be inferred by a failure to comply with court orders, in the absence of adequate excuses. *See Henderson-Jones*, 2011 WL 3715415 (1st Dept 2011); *see also Johnson v. City of New York*, 188 A.D.2d 302 (1st Dept 1992). In *Henderson-Jones*, the First

Department specified that when a defendant is ordered by the court, "on no fewer than three occasions, to produce documents" relevant to the case, and that defendant still does not produce said documents, the striking of its answer is the appropriate remedy.

In the instant action, plaintiff's motion for an order striking the City's answer is granted as plaintiff has demonstrated that the City's repeated failure to comply with outstanding discovery demands was willful and contumacious. The City has failed to sufficiently respond to plaintiff's discovery demands and has repeatedly disregarded no fewer than three court orders requiring it to do so. Plaintiff's Notices for Discovery and Inspection requests permits, complaints, work orders and similar documents for the location where plaintiff fell. As these records are routinely requested in most trip and fall cases, the City's objections to providing the records are meritless. Moreover, the City provided plaintiff with the fire hydrant record for the wrong location, despite the fact that the City was informed of the correct location of plaintiff's accident in both the Notice of Claim and the complaint. Finally, the Notice for Discovery and Inspection dated November 30, 2010 requests information specifically discussed at the deposition of the City's witness, George Crimarco, who testified that an index card exists for each street within his purview and that such cards would reflect work performed at a location along with work orders for that location. Although the City asserted that it "experienced difficulty from its client agency in obtaining records for this action, which has resulted in delays in providing certain documentation," this argument is without merit as the City has not put forth any evidence that the records are too burdensome to produce. Difficulty obtaining records from one's client, without further detail regarding the parameters of the search, is an insufficient excuse after three court orders to provide said records. *See Henderson-Jones*, 2011 WL 3715415

(1st Dept 2011). Thus, plaintiff's motion to strike the City's answer must be granted.

Finally, both Macadi's and Elliana's cross-motions for orders striking the City's answer are also granted for the reasons set forth above as both co-defendants have adopted the arguments put forth by plaintiff.

Accordingly, plaintiff's motion for an order striking the City's answer is granted and Macada and Elliana's cross-motions for an order striking the City's answer are also granted. Thus, the City's answer is hereby stricken in this action. This constitutes the decision and order of the court.

Dated: 10/25/07

Enter: _____ J.S.C.
CYNTHIA S. KERN
J.S.C.