

**Chaney v City of New York**

2012 NY Slip Op 30047(U)

January 5, 2012

Supreme Court, New York County

Docket Number: 105304/10

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: BARBARA JAFFE *Jaffe*  
J.S.C. Justice

PART 5

Index Number : 105304/2010  
**CHANEY, LENTON**  
vs.  
**NEW YORK CITY POLICE**  
SEQUENCE NUMBER : 001  
STRIKE ANSWER  
  
*CAL. #17*

INDEX NO. 105304/10  
MOTION DATE 10/18/11  
MOTION SEQ. NO. 001

Motion to/for Strike answer  
\_\_\_\_\_  
No(s). 1  
\_\_\_\_\_  
No(s). 2  
\_\_\_\_\_  
No(s). \_\_\_\_\_

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

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

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

**FILED**  
JAN 12 2012  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 1/5/12  
JAN 05 2012

BARBARA JAFFE, J.S.C.  
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

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

-----X

LENTON CHANEY,

Plaintiff,

-against-

Index No. 105304/10  
Argued: 10/18/11  
Motion Seq. No.: 001  
Motion Cal. No.: 17

**DECISION AND ORDER**

THE CITY OF NEW YORK, THE NEW YORK CITY  
POLICE DEPARTMENT, and ADONIS D. LONG,

Defendants.

-----X  
BARBARA JAFFE, J.S.C.:

**For plaintiff:**

Gregory P. Haegele, Esq.  
Steven Smedresman, P.C.  
41 Madison Ave., 40<sup>th</sup> Floor  
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212-571-5022

**FILED**

**JAN 12 2012**

**For defendants:**

Suzanne K. Colt, ACC  
Michael A. Cardozo  
Corporation Counsel  
100 Church Street, 4<sup>th</sup> Floor  
New York, NY 10007-2601  
212-788-0611

NEW YORK

COUNTY CLERK'S OFFICE

By notice of motion dated July 19, 2011, plaintiff moves pursuant to CPLR 3126(3) for

an order striking defendants' answer. Defendants oppose.

I. BACKGROUND

On January 25, 2010, plaintiff was hit by a police department vehicle driven by defendant New York City Police Department (NYPD) Officer Adonis D. Long. (Affirmation of Gregory P. Haegele, Esq., dated July 19, 2011 [Haegele Aff.]). Sometime thereafter, plaintiff commenced the instant action with the filing of a summons and complaint, and defendants joined issue with service of their answer. (*Id.*).

By case scheduling order dated July 28, 2010, I ordered defendants to provide plaintiff with, *inter alia*, all "photographs taken in the ordinary course of business" and "photographs of damage to [the] City vehicle" within 90 days. (*Id.*, Exh. 1).

By compliance conference order dated October 19, 2010, defendants were ordered to provide certain documents relating to the accident within 45 days. (*Id.*, Exh. 4).

On August 13, 2010, defendants responded to the case scheduling order, stating that no photographs pertaining to the case were taken in the ordinary course of business. (*Id.*, Exh. 2).

At a deposition held on November 29, 2010, Long testified that he used his personal cell phone to call his supervisor after the accident occurred and that he and others took photographs of the accident scene. (*Haegele Aff.*).

On December 3, 2010, plaintiff served defendants with a supplemental demand for discovery and inspection, requesting the following:

1. All photos taken at scene of accident by NYPD, as testified to by [ ] Long, including NYPD "accident photos envelope # J842033" along with voucher detailing the contents of the envelope. . . ;
2. Photos and repair cost to the damage to NYPD vehicle . . . ;
3. Aided report prepared in course of business by [ ] Long, as testified to at deposition of November 29, 2010;
4. Copy of personal cellular phone bill of [ ] Long detailing calls made from scene, as testified to by [ ] Long at deposition . . . ;
5. Copies of Sprint reports or other records documenting all radio calls made from Central to [Long's] vehicle [ ] from the start of tour to end of tour involving [ ] Long on January 25, 2010.
6. Copies of audio recordings between [C]entral and NYPD vehicle [ ], January 25, from time that 10-39 was called in to end of tour of duty. . . .

(*Id.*, Exh. 5).

By compliance conference order dated January 4, 2011, defendants were ordered to respond to plaintiff's December 3 supplemental demand within 45 days. (*Id.*, Exh. 6). On March 15, 2011, defendants served plaintiff with their response, asserting general objections and stating that the photographs, report, cell phone bill, Sprint reports, and audio recordings "have been requested and will be exchanged as soon as [they] are received." (*Id.*, Exh. 7). No documents

were annexed to their response. (*Id.*).

By compliance conference order dated May 3, 2011, defendants were ordered to “supplement [their] response to [plaintiff’s supplemental demand] within 30 days as to items 1, 2, 4, and 5.” (*Id.*, Exh. 8). Subsequently, plaintiff withdrew his request for Long’s cell phone bills. (Haegele Aff.).

On August 2, 2011, defendants served plaintiff with a supplemental response stating that photographs of the scene and the NYPD vehicle damage and repair invoices were requested and would be exchanged upon receipt. They objected to the request for all Sprint records, although they annexed Sprint records from the time of the accident and an excerpt from the memo book of Officer Russell T. Rivera, who was a passenger in Long’s vehicle when the accident occurred. (Affirmation of Suzanne K. Colt, ACC, in Opposition, dated Aug. 23, 2011 [Colt Opp. Aff.], Exh. D)

By certification dated August 12, 2011, an employee of the NYPD Highway District Accident Investigation Squad states that he conducted a fruitless search of its records for envelope number J842033 and any related vouchered items. (*Id.*, Exh. C).

By affidavit dated August 17, 2011, Rivera states that he neither saw nor vouchered any photographs of the accident scene, that Long had retired in March 2011, and that he has had no contact with him since then. (*Id.*, Exh. A).

Court records reflect that plaintiff has not moved for an order compelling defendants to provide discovery.

## II. CONTENTIONS

Plaintiff claims that defendants’ repeated failure to respond to his December 3

supplemental demand in violation of multiple court orders was willful, contumacious, and in bad faith. (Haegele Aff.).

In opposition, defendants deny that they acted willfully, contumaciously, or in bad faith, as they provided plaintiff with all requested discovery except for photographs of the accident scene which are not contained within their records and which have not been able to be obtained given Long's retirement. (Colt Opp. Aff.). They assert that counsel has unsuccessfully attempted to contact Long by telephone, as he is out of the country and has called back after business hours. (*Id.*).

### 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 [1<sup>st</sup> Dept 2010]).

As defendants responded to plaintiff's supplemental demand twice and now offer a certification reflecting that envelope number J842033 and any related vouchered items are not in NYPD's records, plaintiff has not shown that defendants have failed to comply with court-ordered discovery obligations.

To the extent that plaintiff challenges the sufficiency of defendants' responses, such a challenge is properly addressed on a motion to compel, not a motion to strike. (*See W&W Glass, LLC v 1113 York Ave. Realty Co.*, 83 AD3d 438 [1<sup>st</sup> Dept 2011] [plaintiff's motion to strike premature, as she had yet to file motion to compel discovery]; *Double Fortune Prop. Invs. Corp.*

\* 6]

*v Gordon*, 55 AD3d 406 [1<sup>st</sup> Dept 2008] [as plaintiff responded to discovery requests, defendant should have moved to compel further discovery rather than moving to strike]; *Barber v Ford Motor Co.*, 250 AD2d 552 [1<sup>st</sup> Dept 1998] [plaintiff's resort to motion to strike was 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]). However, in the interest of judicial economy, I deem plaintiff's motion a motion to compel.

In order to demonstrate that requested discovery is unavailable, a party must supply an affidavit:

document[ing] a thorough search conducted in good faith. It should include details such as "where the subject records were likely to be kept, what efforts, if any, were made to preserve them, whether such records were routinely destroyed, [and] whether a search [was] conducted in every location where the records were likely to be found.

(*Henderson-Jones v City of New York*, 87 AD3d 498, 505 [1<sup>st</sup> Dept 2011]).

Here, as the employee's certification reflects neither the methods and location of his search nor NYPD's efforts to preserve the envelope, and as defendants offer insufficient evidence demonstrating that Long is out of the country, and the assertion that he cannot be contacted because he returns calls after business hours demonstrates that he can indeed be reached, they have failed to demonstrate that the photographs of the accident scene and the damage to Long's vehicle are unavailable.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion to strike defendants' answer is denied; and it is further

ORDERED, that defendants must provide plaintiff with the photographs requested in his December 3, 2010 supplemental demand, or if unavailable, an affidavit describing the methods and location of the search and their efforts to contact defendant Adonis D. Long, within 30 days of service by plaintiff of this decision and order, with notice of entry; and it is further

ORDERED, that the note of issue must be filed within 60 days of the date of this decision and order.

ENTER:

  
BARBARA JAFFE, J.S.C.

**BARBARA JAFFE**  
J.S.C.

Dated: January 5, 2012  
New York, New York

JAN 05 2012

**FILED**

JAN 12 2012

NEW YORK  
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