

Bohan v City of New York
2012 NY Slip Op 30952(U)
April 10, 2012
Supreme Court, New York County
Docket Number: 116997/05
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JAFFE Justice

PART 5

Index Number : 116997/2005
BOHAN, NICHOLAS
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 004
DISMISS

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

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

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

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

ORDER OF THE COURT
IN RE: BOHAN, NICHOLAS
vs. CITY OF NEW YORK

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

FILED

APR 11 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/10/12
APR 11 2012

BARBARA JAFFE, 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
NICHOLAS BOHAN AN INFANT UNDER THE AGE
OF FOURTEEN (14) YEARS BY HIS MOTHER AND
NATURAL GUARDIAN, JESSICA COBO AND
JESSICA COBO, INDIVIDUALLY,

Plaintiffs,

-against-

THE CITY OF NEW YORK,

Defendant.

-----X
BARBARA JAFFE, JSC:

For plaintiffs:

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Index No. 116997/05

Motion Subm.: 1/3/12

Motion Seq. No.: 004

DECISION & ORDER

FILED

APR 11 2012

NEW YORK
COUNTY CLERK'S OFFICE

For City:

Stacy L. Cohen, ACC
Michael A. Cardozo
Corporation Counsel
100 Church St., 4th Fl.
New York, NY 10007-2601
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By notice of motion dated August 5, 2011, defendant City moves pursuant to CPLR 3211 for an order dismissing plaintiff Cobo's complaint, pursuant to CPLR 3103 for a protective order, and pursuant to CPLR 2221(a) for an order vacating portions of a June 14, 2011 compliance conference order (Order). Plaintiffs concede that Cobo's individual claims are time-barred, but oppose the remainder of City's motion.

A. PERTINENT BACKGROUND

On August 12, 2003, the infant plaintiff was injured when he allegedly drove his scooter into a crack on the sidewalk in front of premises located at 632 and 640 West 171st Street in Manhattan (premises). (Affirmation of Jessica Wisniewski, ACC, dated Aug. 5, 2011

[Wisniewski Aff.], Exh. A). In a notice of claim served on City on November 10, 2003, plaintiffs allege that the accident occurred on the sidewalk and/or tree well in front of the premises. (*Id.*). In their summons and complaint dated December 2, 2005, plaintiffs allege that the accident occurred on the sidewalk in front of the premises. (*Id.*, Exh. B). In a verified bill of particulars dated April 21, 2007, plaintiffs again assert that the accident occurred on the sidewalk and/or tree well in front of the premises. (*Id.*, Exh. D).

At an examination before trial (EBT) held on November 28, 2005, Cobo testified, as pertinent here, that a crack in the sidewalk caused the infant plaintiff to fall, and that after he fell, she saw that the wheel of his scooter was stuck in the crack, which she described as a portion of cement that was missing from the sidewalk, approximately six to twelve inches long and two to three inches deep. She recalled that there was a tree near the crack but not in the same cement slab or flag as the crack. (*Id.*, Exh. E). The infant plaintiff has not testified at an EBT.

At an EBT conducted on September 11, 2008, a City Department of Transportation (DOT) witness testified as to various records found during a search of DOT's files for records related to the accident location. (*Id.*, Exh. F).

At an EBT held on August 26, 2009, William Steyer, a City Department of Parks and Recreation (Parks) witness, testified as to a search of Parks's documents. (*Id.*, Exh. G).

On May 26, 2010, a Highways and Sewer inspector employed by DOT testified at an EBT as to various work done at the location. (*Id.*, Exh. H).

At an EBT held on September 22, 2010, Roy Commer, an assistant civil engineer in DOT's Sidewalk Management Unit, testified as to various DOT documents and stated that the director of the Unit is Ali Sadriyoun. While plaintiffs' counsel proceeded with Commer's EBT,

he objected to City's failure to produce Sadriyoun and did not waive his EBT. (*Id.*, Exh. I).

In the June 2011 Order, City was directed to produce Sadriyoun for an EBT, along with the continued EBTs of Steyer and Commer, and an EBT of a witness from City's Department of Design and Construction (DDC). (*Id.*, Exh. J).

B. CONTENTIONS

City contends that it has already produced several witnesses for deposition, along with numerous documents, without plaintiffs having specified the exact location and/or cause of the accident, observing that if the accident occurred on the sidewalk, any testimony from Parks's employees as to a treewell at the location is irrelevant. City thus requests that plaintiffs identify the exact cause and/or location of the accident before any further depositions are held, and that if more depositions are ordered, that plaintiffs' questions be limited to new documents provided by City. It also objects to producing Sadriyoun as his testimony is duplicative of Commer's, observing that Commer testified that his knowledge of the relevant issues is equivalent to Sadriyoun's. (Affirmation of Jessica Wisniewski, ACC, dated Aug. 5, 2011).

Plaintiffs deny that City presents any grounds for vacating the Order, observing that it was written after extensive oral argument, or that City has complied with numerous discovery requests and court orders, thus meriting sanctions. They also contend that they have sufficiently and consistently identified the accident location as the area "where the treewell meets the sidewalk in front of the premises." (Affirmation of Robert Genis, Esq., dated Nov. 3, 2011).

In reply, City denies having failed to provide discovery, that plaintiffs have adequately identified the location of the defect, or that sanctions are warranted. (Reply Affirmation, dated Dec. 12, 2011).

C. ANALYSIS

Here, City states no grounds for vacating the Order, and plaintiffs sufficiently identify the accident location as the sidewalk and/or treewell in front of the premises. Indeed, City offers no evidence that it has been cannot seek relevant records based on plaintiffs' description of the location.

Moreover, having agreed to produce Sadriyoun and the DDC witness, and as it is undisputed that the EBTs of Steyer and Commer are continued based on newly-produced documents and/or new records searches, City has not established its entitlement to a protective order. However, plaintiffs' examination of Steyer and Commer is hereby limited to new questions and any new documents produced by City.

I decline to *sua sponte* award sanctions against City absent evidence that it engaged in conduct "undertaken primarily to delay or prolong the resolution of the litigation." (22 NYCRR 130-1.1[c][2]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant City of New York's motion is granted only to the extent of dismissing plaintiff Jessica Cobo's individual claims against it.

ENTER:

APR 11 2012

NEW YORK
COUNTY CLERK'S OFFICE
BARBARA JAFFE
J.S.C.

DATED: April 10, 2012
New York, New York

APR 10 2012