

**Warren v Evans**

2012 NY Slip Op 33911(U)

August 8, 2012

Supreme Court, Nassau County

Docket Number: 21744/10

Judge: Denise L. Sher

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This opinion is uncorrected and not selected for official publication.

**SHORT FORM ORDER**

**SUPREME COURT OF THE STATE OF NEW YORK**

**PRESENT: HON. DENISE L. SHER**  
Acting Supreme Court Justice

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TAMMY WARREN, as Administratrix of the Personal  
Property, Goods, Chattels and Credits which were of  
GRAHAM JAMES WARREN a/k/a GRAHAM WARREN,  
Deceased, and TAMMY WARREN, Individually,

Plaintiffs,

- against -

GREGORY EVANS, COUNTY OF NASSAU and  
CITY OF GLEN COVE,

Defendants.

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TRIAL/IAS PART 31  
NASSAU COUNTY

Index No.: 21744/10  
Motion Seq. Nos.: 01, 02  
Motion Dates: 05/28/12  
07/03/12

**The following papers have been read on these motions:**

	<u>Papers Numbered</u>
<u>Notice of Motion (Seq. No. 01), Affirmation and Exhibits</u>	<u>1</u>
<u>Notice of Cross-Motion (Seq. No. 02), Affirmation, Affidavit and Exhibits</u>	<u>2</u>
<u>Affirmation in Opposition to Motion Seq. No. 01 and Exhibits</u>	<u>3</u>
<u>Reply Affirmation and Opposition to Cross-Motion Seq. No. 02 and Exhibits</u>	<u>4</u>
<u>Reply Affirmation in Support of Motion Seq. No. 01 and Exhibit</u>	<u>5</u>
<u>Reply Affirmation in Support of Cross-Motion Seq. No. 02</u>	<u>6</u>

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Plaintiffs move (Seq. No. 01), pursuant to CPLR § 3124, for an order compelling defendants County of Nassau ("County") and City of Glen Cove ("City") to fully comply and respond to the discovery demands and the Demand for a Verified Bill of Particulars as to their respective affirmative defenses.

Defendant City opposes the motion and cross-moves (Seq. No. 02), pursuant to CPLR §

[\* 2]

3103, for a protective order concerning plaintiffs' Notice for Discovery and Inspection dated January 16, 2012. Plaintiffs oppose the cross-motion.

Defendant County opposes plaintiffs' motion (Seq. No. 01).

This action arises out of fatal personal injuries sustained by plaintiff Tammy Warren's decedent, Graham Warren, as a result of a motor vehicle accident which occurred on Forest Avenue, at its intersection with the entrance to the Glen Cove Shopping Center in Glen Cove, New York, on August 29, 2009. It is alleged that the motor vehicle owned and operated by defendant Gregory Evans came into contact with the motor cycle being operated by decedent Graham Warren.

Briefly, plaintiffs commenced suit on November 22, 2010. *See* Plaintiffs' Affirmation in Support Exhibit A. Defendants City and County served their Demands for a Bill of Particulars upon plaintiffs and, in response thereto, plaintiffs particularized the claims against said defendants including, *inter alia*:

negligently adopting a traffic control management system and/or plan without any adequate study, analysis and/or review;

failing and omitting to undertake any reasonable study, analysis and/or review of the aforementioned intersection and the surrounding areas leading to and from said location for the purpose of alleviating any danger thereat; and,

negligently, carelessly and recklessly ignoring and/or disregarding any reasonable analysis of traffic flow at the aforementioned intersection including the volume of vehicular and pedestrian traffic thereat.

Concomitant with serving the Verified Bill of Particulars, on January 16, 2012, plaintiffs served the "First Notice for Discovery and Inspection," as well as the "Combined Demands" and a "Demand for a Verified Bill of Particulars Relative to Defendants' Affirmative Defenses."

In bringing this motion, plaintiffs claim, *inter alia*, that defendant County's responses to the Notice for Discovery and Inspection are palpably improper and fall into three broad

categories of refusal: (i) “vague, overly broad and unduly burdensome;” (ii) responses are improperly and unilaterally limited solely to the traffic signal and are thus “utterly non-responsive;” and (iii) responses are improperly and unilaterally limited to a ten year period. *See* Plaintiffs’ Affirmation in Support ¶ 7. As against defendant City, plaintiffs claim, *inter alia*, that its discovery responses to plaintiffs’ Notice for Discovery and Inspection – particularly its response to Items 16, 18 and 20 – are palpably improper. *See* Plaintiffs’ Affirmation in Support ¶ 52.

Defendant County opposes plaintiffs’ motion (Seq. No. 01) and submits that plaintiffs’ January 16, 2012 Notice for Discovery and Inspection contained demands which were unreasonable in terms of the unlimited time spans and vague and unlimited category of documents demands. Defendant County finds it objectionable that plaintiffs made these demands without conducting one single deposition to determine if any of the items sought even existed. *See* Defendant County’s Affirmation in Opposition ¶ 2. Defendant County also argues that, although some documentation pertaining to the traffic intersection dates back to the early 1990s, defendant County’s Department of Public Works (“DPW”) is permitted to destroy certain documents after six years of their creation; accordingly, some documents are no longer in existence. *See* Defendant County’s Affirmation in Opposition ¶ 5. Finally, defendant County submits that its response, dated June 14, 2012, contains copies of every document that the Deputy Commissioner of Public Works, William Nimmo, was able to set forth in his Affidavit and accordingly, plaintiffs’ motion to compel discovery against defendant County is now “moot” and must be denied. *See* Defendant County’s Affirmation in Opposition ¶ 6. Finally, as to that branch of the plaintiffs’ motion which seeks to compel defendant County to respond to plaintiffs’ January 16, 2012 “Demand for a Bill of Particulars Relative to Defendants’ Affirmative Defenses,” defendant County claims that it has submitted and responded to those demands;

[\* 4]

accordingly, plaintiffs' pending motion to compel such a response should also be rendered "moot" and denied.

Defendant City also opposes plaintiffs' motion to compel (Seq. No. 01) and, in turn, cross-moves (Seq. No. 02), for a protective order concerning plaintiffs' January 16, 2012 Notice for Discovery and Inspection. Defendant City claims that plaintiffs have not offered any factual basis or legal authority to support their position that the objections were improper. Therefore, defendant City argues that plaintiffs' motion to compel should be denied. Furthermore, defendant City claims that, in light of the fact that plaintiffs seek to compel defendant City with overbroad document demands that at best have "questionable," if any, relevance to this case, particularly in light of the evidence previously disclosed, "a protective order should be issued so that this fishing expedition for irrelevant documents [does not] continue." *See* Defendant City's Affirmation in Support of Cross-Motion ¶ 33.

Pursuant to CPLR § 3101(a), full disclosure of all evidence material and necessary for the prosecution or defense of an action, regardless of the burden of proof, is required. *See Allen v. Crowell-Collier Publ. Co.*, 21 N.Y.2d 403, 288 N.Y.S.2d 449 (1968); *Weber v. Ryder TRS, Inc.*, 49 A.D.3d 865, 854 N.Y.S.2d 480 (2d Dept. 2008). Furthermore, pursuant to CPLR § 3124, disclosure provisions are to be liberally construed. Ultimately, a trial court is afforded broad discretion in managing disclosure. *See* CPLR §§ 3124, 3101(a); *Kavanagh v. Ogden Allied Maintenance Corp.*, 92 N.Y.2d 952, 683 N.Y.S.2d 156 (1998).

With respect to defendant County, plaintiffs' motion to compel (Seq. No. 01) is determined as follows. While defendant County appears to have provided some discovery responses, as to the balance of the requested discovery, it claims that it is not in possession of the demanded items. In an effort to explain its failure to produce material and relevant records, defendant County annexes the Affidavit of Deputy Commissioner of Public Works, William Nimmo ("Nimmo"), who states therein that "matters of general correspondence...can be destroyed after 6 years." *See* Defendant County's Affirmation in Opposition Exhibit D ¶ 5. This

[\* 5]  
is insufficient.

Not only does Nimmo fail to indicate that the records pertaining to traffic studies, plans, analysis, installation and/or decision making concerning vehicular and/or pedestrian traffic control devices, *infra*, are “matters of general correspondence,” but he also fails to spell out the length of time that defendant County would be required to maintain said records. Thus, defendant County’s objection to Item 14 of plaintiffs’ January 16, 2012 Notice for Discovery and Inspection as being vague, overly broad or unduly burdensome is unconvincing. Item 14 seeks the following:

“14. Copies of all rules, regulations, codes, procedures and/or standards relied upon by any named Defendant...for the purpose of planning, designing, reviewing, studying and/or investigating traffic management, traffic control and/or any decision made with respect to traffic control devices, road markings and/or road configuration at the above mentioned location on August 29, 2009 and prior thereto.”

*See* Plaintiffs’ Affirmation in Support Exhibit D.

In light of the fact that defendant County never denies the fact that rules, guidelines and standards were in place upon which approval of the traffic control plan were based, and further, in the absence of any showing that this demanded material is not relevant, the Court directs defendant County to produce same.

Equally critical is the furnishing of Item 16 in plaintiffs’ Notice for Discovery and Inspection which states as follows:

“16. Copies of all notices of claim received by any named Defendant...relating to any accident, incident and/or occurrence at the above mentioned subject location and within a one hundred yard distance which were received on August 29, 2009 and during any period of time prior thereto, from the point in time the entrance/exit was created leading to and from the Glen Cove Shopping Center at the location of the subject accident.”

*See* Plaintiffs’ Affirmation in Support Exhibit D.

Initially, defendant County objected to this demand on the grounds that there were “no notices of claim received by the County of Nassau concerning the traffic signal at Forest Avenue and the Glen Cove Shopping Center for the 7 year period prior to August 29, 2009.” Defendant

County now alleges that this demand is overly broad, unreasonably vague and unduly burdensome. The Court is not so persuaded.

A Notice of Claim is a condition precedent to the commencement of an action against a municipality. It is a very specific category of document (not vague or overly broad). Further, the request is limited to a very specific location. This Court finds it difficult to believe that defendant County would not be able to provide plaintiffs with copies of said records given that its Deputy Commissioner of Public Works has already averred that they maintain and keep even "general correspondence records" for a period of six years. Accordingly, plaintiffs' motion to compel defendant County to comply with outstanding Items 14 and 16 as outlined in the Notice for Discovery and Inspection dated January 16, 2012 is hereby **GRANTED**.

Notably, Item 1 in said Notice for Discovery and Inspection demands the following:

1. Copies of all accident/incident/occurrence reports, records, and any other documentation prepared relating to any motor vehicle and/or pedestrian accident at the intersection and within a one hundred yard distance of the entrance/exist to the Glen Cove Shopping Center and Forest Avenue in the City of Glen Cove, County of Nassau and State of New York, for the period of time involving August 29, 2009 and a seven year period of time prior thereto."  
*See Plaintiffs' Affirmation in Support Exhibit D.*

In response to this demand, defendant County states that "accident reports would be maintained by the City of Glen Cove." *See Defendant County's Affirmation in Opposition Exhibit E.* This Court will not explore the merits of this response and will hold the determination of plaintiffs' motion to compel defendant County to produce said records in abeyance pending defendant City's response to said item. Ultimately, if defendant City provides the requested information then plaintiffs' motion to compel defendant County to produce same would be denied.

In response to plaintiffs' motion to compel defendant City to provide a supplemental response to Items 16, 18 and 20 of the January 16, 2012 Notice for Discovery and Inspection, defendant City, in turn, cross-moves (Seq. No. 02), for a protective order.

[\* 7]

CPLR § 3103 provides that the court may, on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning, or regulating discovery. Protective orders are designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice to any person or the courts. *See* CPLR § 3103; *D'Adamo v. Saint Dominic's Home*, 87 A.D.3d 966, 929 N.Y.S.2d 301 (2d Dept. 2011).

Initially it is noted that, in Supreme Court and County Court, all motions relating to disclosure must include an affirmation by the moving lawyer that the lawyer conferred with opposing counsel and made a good faith effort to resolve the issues raised by the motion. *See e.g.* 22 NYCRR § 202.7(a). As the rule states, the movant should attend carefully to this affirmation and see to it that it reflects a genuine effort at resolution. *See* 22 NYCRR § 202.7(c). Here, defendant City fails to proffer any such affirmation. While ordinarily this would provide a basis on which to deny defendant City's motion (*see Eaton v. Chahal*, 146 Misc. 2d 977, 553 N.Y.S.2d 642 (Sup. Ct. Rensselaer County 1990), in light of the fact that the counsel for plaintiffs avers in his Affirmation of Good Faith (submitted as part of his motion to compel) that "[t]he discovery issues were addressed before the Court" and the parties were unable to resolve the discovery issues, this Court will overlook defendant City's otherwise "defective" application.

As to the merits of the plaintiffs' requested Item 16, *supra*, it is clear that defendant City is defending this case on the basis of, *inter alia*, lack of notice. Indeed, in its response to plaintiffs' Demand for a Bill of Particulars as to Affirmative Defenses, defendant City submits that it is alleging "no knowledge or notice of any alleged dangerous conduct/condition...based upon General Municipal Law §50-e and the Glen Cove City Charter §C4-4." *See* Defendant City's Reply Affirmation Exhibit C. Accordingly, defendant City cannot be permitted to allege, on the one hand, that it had no knowledge or notice of any alleged dangerous conduct/condition and, on the other hand, refuse to provide the Notices of Claim which would evidence said knowledge or notice. Moreover, defendant City cites no case law or authority to suggest that a "hundred yard radius of the accident site is too large an area." The Court is not so persuaded. A

hundred yard radius is limited and reasonable particularly in this case where plaintiffs' claims are, *inter alia*:

negligently adopting a traffic control management system and/or plan without any adequate study, analysis and/or review;

in failing an omitting to undertake any reasonable study, analysis and/or review of the aforementioned intersection and the surrounding areas leading to and from said location for the purpose of alleviating any danger thereat; and,

negligently, carelessly and recklessly ignoring and/or disregarding any reasonable analysis of traffic flow at the aforementioned intersection including the volume of vehicular and pedestrian traffic thereat.

Furthermore, given that plaintiffs' Notice for Discovery and Inspection was served upon all defendants, defendant City's argument that the item seeks copies of all Notices of Claim received by any named defendant is absurd; obviously, the demand requests that each defendant provide the Notices of Claim in *their* possession (emphasis added).

That being said, insofar as defendant City argues that plaintiffs' demand is overbroad as it seeks copies of any Notices of Claims - whether they be for trip and fall, raised sidewalk, slip and fall on snow and ice, etc. - the Court agrees. The Court is not convinced that said demand, inasmuch as it pertains to "any notices of claim" is material and necessary. *See Allen v. Crowell-Collier Publ. Co.*, *supra* at 406. An application for a protective order is warranted where, as here, a party demands "documents that are irrelevant to this litigation." *See Latture v. Smith*, 304 A.D.2d 534, 758 N.Y.S.2d 135 (2d Dept. 2003); *Greeman-Pederson, Inc. v. Zurich American Ins. Co.*, 54 A.D.3d 386, 864 N.Y.S.2d 39 (2d Dept. 2008). Accordingly, plaintiffs' demand, outlined as Item 16 in the subject Notice of Discovery and Inspection, is herewith narrowed to "any motor vehicle and/or pedestrian accident" as stated in, for example Item 1.

As to Item 18, it is noted that defendant City does not outright object to the merits of this demand; to wit:

"18. Copies of any communication or correspondence exchanged between any named Defendant, including any agency or department thereunder, as a direct result of the subject accident (excluding any privileged communication involving legal

[\* 9]  
counsel).”

See Plaintiffs’ Affirmation in Support Exhibit D.

Rather, counsel for defendant City avers that “plaintiff’s demand, *as phrased*, is palpably improper as it is vague, overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence (emphasis added).” See Defendant City’s Reply Affirmation in Further Support of Cross-Motion (Seq. No. 02) ¶ 25. This Court agrees that, “as phrased”, this demand encompasses a broad range of items. Accordingly, the Court herewith narrows the demand so as to exclude pleadings or other discovery served by any of the defendants in this action. See Plaintiffs’ Reply Affirmation and in Opposition to Cross-Motion ¶ 10.

Finally, Item 20 seeks:

“20. Copies of all environmental impact studies, including any traffic management, traffic control and/or traffic control device studies, plans, analysis, review, investigation, and/or strategy received by any municipality and/or agency or department thereunder, from any company, individual, agency, and/or other entity on behalf of any owner, operator, and/or manager (managing agent) of the aforesaid Glen Cove Shopping Center on August 29, 2009 and prior thereto.” See Plaintiffs’ Affirmation in Support Exhibit D.

Defendant City argues that this item is also vague, overbroad, unduly burdensome and palpably improper in that it seeks documents not within defendant City’s possession and control. See Defendant City’s Affirmation in Support of Cross-Motion ¶¶ 20, 34-36. Indeed, defendant City proffers the affidavit of William Archambault, Director of Public Works for the City of Glen Cove, wherein he avers that defendant City is not in possession of said documents. Given that a person is not obligated to produce documents belonging to entities other than itself that are not in its possession, custody, or control (*see Blau v. Blau*, 3 A.D.3d 167, 773 N.Y.S.2d 337 (1<sup>st</sup> Dept. 2004); *Corriel v. Volkswagen of America, Inc.*, 127 A.D.2d 729, 512 N.Y.S.2d 126 (2d Dept. 1987)), and in light of the fact that the party has submitted a sworn affidavit to that effect (*see Abbadessa v. Sprint*, 291 A.D.2d 363, 736 N.Y.S.2d 880 (2d Dept. 2002); *Castillo v. Henry Schein, Inc.*, 259 A.D.2d 651, 686 N.Y.S.2d 818 (2d Dept. 1999)), defendant City’s request for a protective order as to Item 20 in plaintiffs’ subject Notice for Discovery and Inspection is hereby

**GRANTED.**

Finally, plaintiffs' demand, as part of the instant motion, for an order compelling defendants County and City to respond to the Demand for a Verified Bill of Particulars as to their Affirmative Defenses is hereby **DENIED as moot**. On June 13, 2012, defendant City supplemented its Bill of Particulars. *See* Defendant City's Affirmation in Support of Cross-Motion Exhibit E. Similarly, defendant County has responded to those demands and has served plaintiffs' counsel, as well co-defendants' counsel, with such response. *See* Defendant County's Affirmation in Opposition Exhibit E. Therefore, this portion of plaintiffs' motion, as against both defendants City and County is hereby **DENIED as moot**.

Therefore, in summary, plaintiffs' motion (Seq. No. 01), pursuant to CPLR § 3124, for an order compelling defendants County and City to fully comply and respond to the discovery demands and the Demand for a Verified Bill of Particulars as to their respective affirmative defenses is **GRANTED in part and DENIED in part**.

Defendant City's cross-motion (Seq. No. 02), pursuant to CPLR § 3103, for a protective order, concerning plaintiffs' Notice for Discovery and Inspection dated January 16, 2012 is also **GRANTED in part and DENIED in part**.

Accordingly, and for the reasons stated above, and in furtherance of the policy favoring a resolution of the action on the merits, the Court hereby directs defendants City and County to serve the outstanding discovery items decided above within thirty (30) days from the date of this Decision and Order. *See Corners Realty 30/7, Inc. v. Bernstein Management Corp.*, 249 A.D.2d 191, 672 N.Y.S.2d 95 (1<sup>st</sup> Dept. 1998).

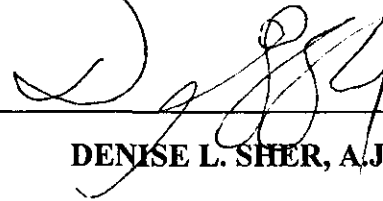
The parties remaining contentions have been considered and do not warrant discussion.

All applications not specifically addressed are hereby **DENIED**.

All parties shall appear for a Certification Conference in IAS Part 31 of the Nassau County Supreme Court, 100 Supreme Court Drive, Mineola, New York, on August 28, 2012, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

**ENTER:**



A handwritten signature in black ink, appearing to read 'D. Sher', is written over a horizontal line.

**DENISE L. SHER, A.J.S.C.**

Dated: Mineola, New York  
August 8, 2012

**ENTERED**  
AUG 10 2012  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE