SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN PART 21
Justice

Index Number : 100416/2007
HUANG, JANICE
vs.
TRANSIT AUTHORITY
SEQUENCE NUMBER : 005
STRIKE ANSWER

INDEX NO. 100416/07
MOTION DATE 11/29/12
MOTION SEQ. NO. 005

The following papers, numbered 1 to 7 were read on this motion to strike answer

Notice of Motion— Affirmation — Exhibits A-S—Affirmation of Service	No(s). 1-3
Affirmation in Opposition — Exhibit A —Affirmation of Service	No(s). 4-5
Reply Affirmation —Affirmation of Service	No(s). 6-7

Upon the foregoing papers, it is ORDERED that plaintiff's motion for an order striking defendants' answer, or in the alternative, for other relief, is denied except as provided herein; and it is further

ORDERED that, on or before the next court conference on March 14, 2013, defendant New York City Transit Authority shall produce the documents listed in items 1, 2, 9, 10, 11, and 12 of the letter of plaintiff's counsel dated December 8, 2011; and it is further

ORDERED that, if any of the documents to be produced are not within the custody, possession, or control of defendant New York City Transit Authority, it shall provide an affidavit detailing the means and methods of the search that was conducted for the documents, as described in *Jackson v City of New York* (185 AD2d 768, 770 [1st Dept 1992]).

In this action, plaintiff alleges that, on February 1, 2006, at approximately 11:30 a.m., she was injured when she collided with a high entrance exit turnstile (HEET) in the 8th Street subway station between Astor Place and Waverly Place in Manhattan. According to plaintiff, she swiped her metrocard and saw a "go" signal, but the turnstile allegedly did not turn. One of the metal arms of the turnstile allegedly made contact with plaintiff's face, causing facial injuries.

(Continued . . .)

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

Plaintiff moves for an order striking the answer of defendants New York City Transit Authority and Metropolitan Transit Authority (the Authorities), due to their failure to provide discovery.[1] In the alternative, plaintiff seeks an order resolving plaintiff's claims in her favor and resolving defendants' defenses against them, and prohibiting defendants from supporting their defenses or opposing plaintiff's claims. Plaintiff also seeks a conditional order for the relief sought should the Court decline to issue an immediate order for the relief or alternative relief sought.

"The drastic remedy of striking an answer is inappropriate, absent a clear showing that defendant's failure to comply with discovery demands was willful or contumacious." (*DaimlerChrysler Ins. Co. v Seck*, 82 AD3d 581, 582 [1st Dept 2011].) A pattern of noncompliance with court orders and discovery demands and failure to offer a reasonable excuse for the noncompliance may give rise to an inference of wilful and contumacious conduct. (*See e.g. Henderson v Manhattan and Bronx Surface Tr. Operating Auth.*, 74 AD3d 654 [1st Dept 2010]; *Fish & Richardson, P.C. v Schindler*, 75 AD3d 219 [1st Dept 2010]; *Bryant v New York City Hous. Auth.*, 69 AD3d 488 [1st Dept 2010]; *Figiel v Met Food*, 48 AD3d 330 [1st Dept 2008].)

Here, plaintiff recounts a history of defendants' belated compliance with prior so-ordered stipulations and discovery demands. However, as defendants' counsel indicates, the thrust of plaintiff's current motion is the Authorities' failure to comply with plaintiff's letter dated December 8, 2011 (Bierman Affirm., Ex R), and a subsequent so-ordered stipulation dated March 8, 2012, which extended defendants' time to respond to the letter. (Bierman Affirm., Ex S.)

It is undisputed that defendants provided no response to plaintiff's letter dated December 8, 2011. Defendants' counsel requests more time to respond to plaintiff's demands.

(Continued . . .)

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[1] Although the notice of motion seeks, on its face, to strike defendants' answer (as if there was one answer on behalf of all defendants),the only answer submitted on this motion is the answer of the Authorities. (Bierman Affirm., Ex A.)

By a notice of substitution dated April 25, 2007, filed with the County Clerk on April 27, 2007, Wallace D. Gossett, Esq. was substituted as counsel for Michael A. Cardozo, Corporation Counsel, for defendant City of New York.

To the extent that defendants seek additional time to object to plaintiff's discovery demands, defendants' plea for additional time is denied. "[T]he failure of a party to challenge the propriety of a notice for discovery and inspection within the time prescribed by the CPLR forecloses inquiry into the propriety of the information sought, [but] there is an exception with regard to requests that are palpably improper." (*Accent Collections, Inc. v Cappelli Enter.*, 84 AD3d 1283, 1284 [2d Dept 2011]; *Duhe v Midence*, 1 AD3d 279, 280 [1st Dept 2003].)

Plaintiff's working theory of the case is that the HEET unit at issue "was an especially problematic unit." (Bierman Affirm., Ex K.) However, the demands in items 3-8 of plaintiff's letter dated December 8, 2011 were palpably improper on their face, in that they either sought irrelevant information or were overly broad. Therefore, the Court declines to strike the Authorities' answer based on their failure to respond to these demands. (*Bettan v Geico Gen. Ins. Co.*, 296 AD2d 469, 471 [2d Dept 2002].)

Items 3, 4, and 5 sought documents "referring to or concerning TA's efforts to assess, determine and address malfunction/failure of HEET" due to either burn out of electronic boards, adequacy of maintenance of reader heads, or damper unit malfunction or failure. Plaintiff has not explained the relevance of these categories of documents or their likelihood to lead to admissible evidence, inasmuch as plaintiff does not appear to be claiming, on this motion, that the HEET unit at issue malfunctioned due to malfunctioning electronic boards, reader heads or a damper unit.

Items 6 and 7 seek documents concerning the maintenance of HEET units and the replacement or upgrade of reader heads for HEET units "on a system wide basis." Item 8 demands documents referring to or concerning "changes in malfunction/failure rates of dampers for HEET units." It would appear that, in seeking this information about HEET units "system wide," plaintiff is attempting to show that the incidence of reported problems for this HEET unit was statistically greater than the incidence of problems system wide.

"Under our discovery statutes and case law, competing interests must always be balanced; the need for discovery must be weighed against any special burden to be borne by the opposing party." (*Kavanagh v Ogden*

(Continued . . .)

Allied Maintenance Corp., 92 NY2d 952, 954 [1998][quotation marks and citation omitted].) To direct the Authorities to amass documents concerning the maintenance of all HEET units in the subway system, and concerning their reader heads and dampers, is unreasonable and overly burdensome when balanced against the speculative probative value of the plaintiff's contention that the Authorities would have realized that, from a statistical standpoint, the subject HEET unit required more maintenance than the average HEET unit.

With respect to the remaining items of the letter dated December 8, 2011 from plaintiff's counsel, plaintiff has not established a pattern of noncompliance to support the inference of willfulness. The so-ordered stipulation dated May 31, 2012 was not a clear directive requiring the Authorities to produce the discovery sought. Rather, in the so-ordered stipulation dated May 31, 2012, the parties agreed that "plaintiff shall have the right to apply for the entry of an order that defendants' answer shall be stricken and defendants shall be precluded from introducing any defense of this action," unless defendants produced all the documents demanded in plaintiff's letter dated December 8, 2011. (Bierman Affirm., Ex A.)

However, defendant New York City Transit Authority is directed to produce the documents listed in items 1, 2, 9, 10, 11, and 12 of the letter of plaintiff's counsel dated December 8, 2011 on or before the next court conference on March 14, 2013.[2] The documents demanded in items 1, 2, 9, and 11 of the letter shall be limited to documents concerning the subject HEET unit.

If any of the documents to be produced are not within the custody, possession, or control of defendant New York City Transit Authority, it shall provide an affidavit detailing the means and methods of the search that was

(Continued . . .)

[2] It makes no sense to compel the Metropolitan Transportation Authority, sued herein as Metropolitan Transit Authority, to comply with the demand. "It is well settled, as a matter of law, that the functions of the MTA with respect to public transportation are limited to financing and planning, and do not include the operation, maintenance, and control of any facility." (*Cusick v Lutheran Med. Ctr.*, 105 AD2d 681, 681 [2nd Dept 1984].) Neither does it make sense to compel the City, which does not operate the subways, to produce the documents demanded.

conducted for the documents, as described in *Jackson v City of New York* (185 AD2d 768, 770 [1st Dept 1992].)

Copies to counsel.

Dated: 1/31/13
New York, New York

_____, J.S.C.
HON. MICHAEL D. STALLMAN

1. Check one: ..... ☐ CASE DISPOSED ■ NON-FINAL DISPOSITION
2. Check if appropriate:..... MOTION IS: ☐ GRANTED ■ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE