

**Reyes v Consolidated Edison Co. of N.Y.**

2013 NY Slip Op 30868(U)

April 16, 2013

Supreme Court, NY County

Docket Number: 113626/2009

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Freed HON. KATHRYN FREED JUSTICE OF SUPREME COURT  
Justice

PART 5

RAMONA ROYES

- v -

CON ED

INDEX NO. 113626/09

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

**FILED**

Upon the foregoing papers, it is ordered that this motion

APR 25 2013

COUNTY CLERKS OFFICE  
NEW YORK

DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER

Dated: 4-16-13  
APR 16 2013

[Signature]  
HON. KATHRYN FREED J.S.C.  
JUSTICE OF SUPREME COURT

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

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

-----X  
RAMONA REYES,

Plaintiff,

-against-

CONSOLIDATED EDISON COMPANY OF  
NEW YORK,

Defendant.  
-----X

HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR §2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF  
THIS MOTION.

PAPERS

NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	.....1.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	.....2.....
ANSWERING AFFIDAVITS.....	.....
REPLYING AFFIDAVITS.....	.....
EXHIBITS.....	.....
STIPULATIONS.....	.....
OTHER.....	.....

DECISION/ORDER  
Index No.: 113626/2009  
Seq. No.: 001

PRESENT:  
Hon. Kathryn E. Freed  
J.S.C.

**FILED**  
**APR 25 2013**  
**COUNTY CLERKS OFFICE**  
**NEW YORK**

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

Defendant moves for an Order permitting it to present newly discovered eyewitness' testimony at the trial of this action. Plaintiff opposes.

After a review of the papers presented, all relevant statutes and case law, the Court denies the Order To Show Cause.

Factual and procedural background:

Plaintiff sues for monetary damages for serious personal injuries she allegedly sustained on January 9, 2009, when she tripped and fell on a metal plate in the crosswalk of Thayer Street and

Broadway in Manhattan. On October 19, 2010, she appeared for a deposition, and testified, *inter alia*, that she did not know the names of any potential witnesses to her accident. She also testified that an ambulance responded to the scene and transported her to Harlem Hospital. Plaintiff further testified that she recalled that a couple of people were waiting at a nearby bus stop, when her accident occurred. However, she claimed not to know their names and would not be able to identify them.

On July 25, 2011, ten months after the completion of her deposition, plaintiff served a "Notice to Take Deposition Upon Oral Examination of Non-Party Witness," Emelly Garcia. Defendant asserts that this was plaintiff's first disclosure of the name of an apparent witness to the accident. A non-party deposition of Ms. Garcia was held on September 12, 2011. Ms. Garcia testified that she was an eye witness to plaintiff's accident. She also testified that immediately following the accident, she gave her name and phone number to plaintiff on a piece of paper. Ms. Garcia also testified that the first time she was contacted about her knowledge of the accident, was via plaintiff's counsel in June 2011, approximately two and a half years subsequent to the date of the accident.

Plaintiff ultimately served a Second and Third Supplemental Verified Bill of Particulars, alleging that plaintiff had suffered additional injuries and had undergone surgery. She then appeared for a second deposition on September 27, 2011. However, plaintiff's counsel, Claire Garcia, Esq., refused to permit plaintiff to respond to any questions regarding Emelly Garcia. Defendant's counsel, Rita C. Marin, Esq., advised Claire Garcia that as a result of this lack of cooperation, she would be requesting another deposition of plaintiff.

Consequently, on November 15, 2011, all parties appeared in court for a conference, wherein Ms. Marin requested that an additional deposition of plaintiff be conducted specifically to obtain information regarding Emelly Garcia. Her request was denied. On November 28, 2011, plaintiff filed her Note of Issue. Ms. Marin asserts that was under the impression that all discovery had been completed, when Con Ed's Law Department informed her that it was able to obtain a copy of the 911 sprint report, which indicates the cell phone number of an anonymous female caller. Defendant continued to investigate and eventually determined that the name of said female was Rachel Hinton and her address was 89 Thayer Street, Apt. 3D, New York, N.Y. 10040. Ms. Hinton resides approximately one block away from where the alleged accident occurred.

Defendant attempted to contact Ms. Hinton, and when it finally accomplished this, a meeting was scheduled, but necessitated postponement due to a snow storm. The meeting was rescheduled for February 15, 2013. At that time, Ms. Hinton informed an investigator from Ms. Marin's office, that she was indeed, an eye witness to the accident and that it was she who called 911 for an ambulance for plaintiff, from her cell phone. She also informed the investigator that she did not observe plaintiff trip on a metal plate in the roadway, but observed her to be in a different cross walk at the time of her accident. Ms. Hinton agreed to appear for a non-party deposition.

Ms. Marin asserts that on February 19, 2013, following the holiday weekend and as soon as she was informed of this newly discovered evidence, she contacted plaintiff's attorney's firm. She was informed that Jonathan Michaels, Esq., would be handling the case, but was out of the office. Ms. Marin left a detailed voice mail message for Mr. Michaels, who never returned the call. On February 20, 2013, all parties appeared for a conference before Justice George Silver. Ms. Marin apprised Mr. Wells, who was appearing for plaintiff, and Justice Silver, of the discovery of the new

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eye witness and said witness' agreement to be deposed. Mr. Wells stated that he was not interested in conducting this deposition. The trial was adjourned to February 27, 2013, to permit motion practice regarding this issue.

Plaintiff asserts that she filed her Note of Issue on November 10, 2011. Prior to this filing, a Preliminary Conference Order was held on April 19, 2010, wherein all parties were instructed to provide the names and addresses of all witnesses. Subsequently, all parties appeared on August 24, 2010, February 22, 2011, April 28, 2011, June 28, 2011, October 4, 2011 and November 15, 2011 for discovery conferences. Plaintiff asserts that at no time during these conferences, did defendant disclose the existence of a witness to the accident.

Plaintiff also asserts that subsequent to the filing of her Note of Issue, all sides appeared in April 2012 and May 2012 as part of an Early Settlement Conference. Moreover, all sides appeared on September 19, 2012 and November 14, 2012 before Justice Silver in the Trial Ready Part. However, defendant failed to disclose knowledge of any new eyewitness to the accident. On May 17, 2012, all parties executed a stipulation discontinuing this matter as against the City of New York. Plaintiff further asserts that counsel was apprised of this information for the very first time, via telephone, about this new witness and also asserts that said witness' name and address were not revealed at that time. On February 20, 2013, plaintiff was prepared for trial when counsel for Con Ed advised everyone of said witness, but conveniently did not have said witness' name or address.

Positions of the parties:

Defendant asserts that Rachel Hinton's testimony is absolutely critical to its defense to the instant suit. It argues that in the interests of justice, it should be permitted to present Ms. Hinton's testimony at trial and that plaintiff "should not be permitted to benefit from her testimony that was

6] apparently meant to mislead the defendant, and prevent the discovery of eyewitness to the alleged accident” ( Marin Aff. ¶ 15) ). However, defendant fails to proffer any legal authority in support of its position.

Plaintiff argues that there are two distinct methods to conduct any discovery post Note of Issue, and that defendant has failed to comply with the requirements promulgated by both. These methods are set forth in 22 NYCRR§ 202.21(e) and 22 NYCRR§ 202.21(d). Plaintiff also argues that defendant’s contention that Ms. Hinton is a newly discovered eye witness is disingenuous, in that Ms. Hinton’s identity and address was obtained via a Sprint sheet that was created on the date of the instant accident, January 9, 2009. Thus, plaintiff emphatically contends that since this information was available on the date of the accident, over four years ago, it certainly could have been obtained via a FOIL request. Moreover, plaintiff argues that defendant fails to annex an affidavit as to when it obtained the 911 Sprint Sheet and an affidavit revealing how it knew Ms. Hinton’s address prior to speaking with her.

Conclusions of law:

There are only two methods available to a party who seeks to obtain disclosure after the filing of a Note of Issue ( *see* Tirado v. Miller, 75 A.D.3d 153 [2d Dept. 2010]; Audiovox Corp. v. Benyamini, 265 A.D.2d 135 [2d Dept. 2000]; Singh v. Finneran, 100 A.D.3d 735, 737 [2d Dept. 2010]; Sereda v. Sounds of Cuba, Inc., 95 A.D.3d 651 [1<sup>st</sup> Dept. 2012] ).

According to 22 NYCRR§ 202.21(d) Pretrial proceedings, “Where a party is prevented from filing a note of issue and certificate of readiness because a pretrial proceeding has not been completed for any reason beyond the control of the party, the court, upon motion supported by affidavit, may permit the party to file a note of issue upon such conditions as the court deems

appropriate. Where unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice, the court, upon motion supported by affidavit, may grant permission to conduct such necessary proceedings.”

According to 22 NYCRR §202.21(e) Vacating note of issue, “Within 20 days after service of a note of issue and certificate of readiness, any party to the action or special proceeding may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect. However, the 20-day time limitation to make such motion shall not apply to tax assessment review proceedings. After such period, except in a tax assessment review proceeding, no such motion shall be allowed except for good cause shown. At any time, the court on its own motion may vacate a note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect. If the motion to vacate a note of issue is granted, a copy of the order vacating the note of issue shall be served upon the clerk of the trial court.”

In the case at bar, the Court agrees with plaintiff that NYCRR 202.21 (e) is inapplicable as plaintiff filed her Note of Issue on November 10, 2011, almost two years ago, a fact which is not in dispute. Additionally, the Court also finds that as per NYCRR§ 202.21 (d), defendant has failed to “demonstrate unusual or unanticipated circumstances and substantial prejudice absent the additional discovery” ( *see Tirado v. Miller, supra* ). The Court has reviewed the 99 Sprint Sheet appended to plaintiff’s Affirmation In Opposition as Exhibit #5. Said document was clearly created on January

9, 2009, the date of the accident. Thus, the Court agrees that its contents do not constitute "newly discovered" evidence, in that it certainly could have been acquired during the pendency of defendant's investigation, and not after the investigation was completed.

The Court finds that defendant has failed to demonstrate any "unusual or unanticipated circumstances" to warrant its requested relief. Nor, has it even attempted to explain to the Court why its O.S.C. should be granted in the interests of justice.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that defendant's O.S.C. allowing it to present newly discovered eyewitness testimony at trial is denied; and it is further

ORDERED that the instant matter be set down for trial in the immediate future; and it is further

ORDERED that plaintiff shall serve a copy of this order on defendant and the Trial Support Office at 60 Centre Street, Room 158; and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: April 16, 2013

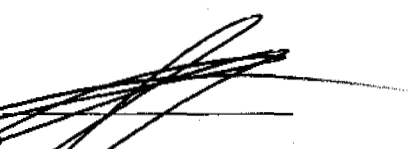
ENTER:

APR 16 2013

**FILED**

APR 25 2013

**COUNTY CLERKS OFFICE  
NEW YORK**



Hon. Kathryn E. Freed  
J.S.C.

**HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT**