

**Friday v City of New York**

2013 NY Slip Op 33512(U)

November 13, 2013

Supreme Court, New York County

Docket Number: 101924/2011

Judge: Kathryn E. Freed

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

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

PART 5

Index Number : 101924/2011  
FRIDAY, LENA  
vs.  
CITY OF NEW YORK  
SEQUENCE NUMBER : 003  
STRIKE ANSWER *Call # 27*

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). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_


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

**FILED**  
NOV 14 2013  
NEW YORK  
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER

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

Dated: 11-13-13  
NOV 13 2013

  
\_\_\_\_\_, J.S.C.

HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT

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

LENA FRIDAY,

Plaintiff,

DECISION/ORDER  
Index No. 101924/2011  
Seq. No. 003

-against-

THE CITY OF NEW YORK,

Defendant.

-----X

KATHRYN E. FREED, JSC:

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

PAPERS

- NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....
- ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
- ANSWERING AFFIDAVITS.....
- REPLYING AFFIDAVITS.....
- EXHIBITS.....
- OTHER.....

NUMBERED  
**FILED**  
 .....1-2.....  
 .....3... NOV 14 2013  
 .....4.....  
**NEW YORK**  
**COUNTY CLERK'S OFFICE**

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

Plaintiff moves for an Order striking defendant the City of New York's Answer pursuant to CPLR§3126, due to defendant's failure to adequately respond to plaintiff's Supplemental Notice for Discovery and Inspection dated December 28, 2012 and also due to defendant's failure to respond to plaintiff's Supplemental Notice for Discovery and Inspection dated May 1, 2013. Plaintiff also seeks to have the time to file its Note of Issue and Certificate of Readiness extended. Defendant opposes.

After a review of the papers presented, all relevant statutes and case law, the Court **denies** the motion in part and **grants** the motion in part.

Factual and procedural background:

Plaintiff seeks to recover monetary damages for serious injuries she sustained on October 22, 2010, when she tripped and fell in the crosswalk at the intersection of East 54<sup>th</sup> Street and Third Avenue, New York County, due to an allegedly defective portion of the roadway surrounding a manhole cover. Consequently, the instant action was commenced via the service of a Summons and Complaint upon defendant on March 15, 2011. Defendant served its Answer and various discovery demands on or about March 29, 2011.

On April 11, 2011, plaintiff served a Verified Bill of Particulars and a Response to defendant's Combined Demands. On October 25, 2011, a case scheduling order was issued, followed by a compliance conference occurring on January 3, 2012. On that day, the parties entered into a stipulation wherein it was agreed *inter alia*, that depositions would be conducted on January 15, 2012 at the Office of Corporation Counsel. Additionally, it was agreed that plaintiff would provide HIPAA authorizations for New York Presbyterian Hospital, Visiting Nurse Service of New York and Chala Bodi, P.T., within 30 days. Said stipulation also stated "[o]ver the City's objections, City to respond to plaintiff's D&I dtd 4/11/12 w/l 30 days. Upon city responding, plaintiff's motion to strike City's Answer returnable on 2/3/12 will be deemed resolved and plaintiff shall withdraw said motion." ( Motion, Exh. E).

Plaintiff's counsel asserts that she served upon defendant, a Notice for Discovery and Inspection dated March 1, 2012 and a Notice to Admit, dated March 7, 2012. On March 28, 2012, the depositions of plaintiff and defendant were held. A further deposition of plaintiff was subsequently held on June 13, 2012. Thereafter, plaintiff served a Notice for Discovery and Inspection on June 16, 2012 and Post Deposition Demands on July 3, 2012. On July 3, 2012, at a compliance conference, the parties entered into another stipulation wherein the City was to respond

to the Notices for Discovery and Inspection dated March 1, 2012 and June 26, 2012 within 45 days. Plaintiff's counsel asserts that on August 20, 2012, she forwarded a letter to defendant advising that it had still failed to comply with the July 3, 2012 stipulation. Since defendant failed to respond to plaintiff's various demand, plaintiff had no recourse but to file a Motion to Strike defendant's Answer.

Said motion was argued before this Court on January 29, 2013 and resolved by stipulation wherein it was agreed that defendant would provide plaintiff with copies of the legends/keys for the sewer and water maps annexed to defendant's Affirmation in Opposition as Exhibit G within 30 days, to the extent they exist. (*Id.* Exh. M). On January 30, 2012, plaintiff's counsel forwarded a letter to defendant as a reminder that she was still awaiting a response to the Supplemental Notice of Discovery and Inspection dated December 28, 2012. However, defendant failed to respond. Thereafter, plaintiff's counsel mailed a follow-up letter dated March 11, 2012, reminding defendant that a response to the Supplemental Notice for Discovery and Inspection dated December 28, 2012 was still outstanding. Since no response was received, a third letter was sent. On April 10, 2013, defendant served a Response to Supplemental Notice for Discovery & Inspection dated December 28, 2012.

In its response, defendant objected to every demand made by plaintiff, asserting that the Demand is "partially irrelevant" and that it has provided a response in the past. Plaintiff argues that defendant has in fact, only provided responses for a search period of two years prior to the date of loss, when its demands were specifically for a period of five years. Thus, defendant is not in compliance. On May 1, 2013, plaintiff's counsel served a Supplemental Notice for Discovery and Inspection requesting inspection reports conducted of the subject manhole in the possession of the Department of Environmental Protection ("DEP") and Department of Transportation ("DOT"). To

date, plaintiff has not received any response from defendant, nor has defendant made any request for an extension of time to comply. Plaintiff argues that defendant's conduct is a willful and purposeful attempt to evade discovery, and as such, striking its answer is an appropriate remedy.

Defendant responds that plaintiff is merely making another attempt to commence discovery anew, and is now demanding the same type of records that have already been exchanged for five years prior to and including the day of her accident. Defendant asserts that it has already exchanged records from the DOT, the Highway Inspection & Quality Assurance Office of DOT (HIQA), and the DEP, based on the two year search period mandated by the Case Scheduling Order. It also asserts that it has produced several witnesses for depositions, ie. Cynthia Howard, a record searcher from DOT; Victor Green, a Training Coordinator from HIQA; and George Trimarco from DEP.

Defendant also asserts that in response to the CSO, it performed a DOT roadway search for the location of East 54<sup>th</sup> Street between Third and Lexington Avenues, for the period of October 22, 2008 to October 22, 2010. It has also provided Sewer and Water Records from the DEP for said location and the search period of October 22, 2008 to October 22, 2010. Furthermore, defendant asserts that it has exchanged manhole embargo permits for the manholes located in the crosswalk of the intersection of East 54<sup>th</sup> Street and Third Avenue for a period of three years prior to and including plaintiff's accident. It also asserts that it exchanged the results of the inspection conducted by a HIQA employee regarding the manholes located in the crosswalk of the intersection of East 54<sup>th</sup> Street and Third Avenue.

Defendant argues that any additional searches beyond the two year search period mandated by the CSO is immaterial and unnecessary to this litigation.

Conclusions of law:

While the nature and degree of the penalty to be imposed pursuant to CPLR§ 3126 is a matter

of discretion with the court, striking an answer is considered a drastic remedy and should only be granted where there is a clear showing that the failure to comply is willful, contumacious or in bad faith (*Herrera v. City of New York*, 238 A.D.2d 475; *Harris v. City of New York*, 211 A.D.2d 663; *Cianciolo v. Trism Specialized Carriers*, 274 A.d.2d 369. This must be affirmatively established by the moving party (*Pimental v. City of New York*, 246 A.D. 2d 467, whereupon the burden shifts to the nonmoving party to establish a reasonable excuse, with appropriate findings to be made by the court (*Corner Realty 30/7, Inc. v. Bernstein Management Corp.*, 249 A.D.2d 191,193; *Palmenta v. Columbia University*, 266 A.D.2d 90 [1<sup>st</sup> Dept. 1999] ).

In the case at bar, the Court finds that defendant has sufficiently complied with the necessary discovery demands. Indeed, the Court agrees that plaintiff's request for additional searches based on a five year search period are unjustified and unduly burdensome.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that the component of plaintiff's motion to strike defendant's answer is denied; and it is further

ORDERED that the component of plaintiff's motion to extend the time for it to file its Note of Issue is granted in that it has 30 days from the date of this order to file said Note of Issue; and it is further

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

DATED: November 13, 2013

NOV 13 2013

**FILED**

NOV 14 2013

**NEW YORK  
COUNTY CLERK'S OFFICE**

ENTER:

Hon. Kathryn E. Freed  
**HON. KATHRYN E. FREED**  
**JUSTICE OF SUPREME COURT**