

<b>Asim v City of New York</b>
2013 NY Slip Op 33661(U)
January 25, 2013
Sup Ct, Bronx County
Docket Number: 303982/08
Judge: Larry S. Schachner
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX - PART IA3

-----X  
CELESTE ASIM,

Plaintiff,

- against -

INDEX NO. 303982/08

THE CITY OF NEW YORK, METROPOLITAN  
TRANSPORTATION AUTHORITY, NEW YORK  
CITY TRANSIT AUTHORITY, MANHATTAN  
AND BRONX SURFACE TRANSIT OPERATING  
AUTHORITY and JOHN DOE,

DECISION/ORDER

Defendants.

-----X  
HONORABLE LARRY S. SCHACHNER

Motion and cross motion are consolidated and decided as follows:

On May 22, 2007, plaintiff, an employee of Cablevision was laying cable wire on Brush Avenue in Bronx County when a police car later identified as an MTA police vehicle allegedly sped over the wire lying on the road while plaintiff was still holding it causing plaintiff to be dragged six to ten feet resulting in personal injuries. Plaintiff has moved for summary judgment on liability. In response to the opposition submitted by defendants NYCTA, MTA and MABSTOA (The Authority) plaintiff has also submitted a motion to strike the answer of the Authority,

precluding the testimony of Officer Perez, as well as, sanctions and costs against the Authority and their counsel.

Procedural History

Plaintiff filed her Notice of Claim on August 16, 2007. The Notice of Claim included the name of the officer (Officer Perez), who was operating the vehicle. On May 15, 2008 plaintiff filed her summons and complaint alleging that the Authority owned, operated, and controlled the vehicle that drove over the cable. The Authority's answer served May 22, 2008 denied ownership, operation, and control of the vehicle. Neil Redmond, Esq. the Authority's in house counsel verified the Authority's answer. Plaintiff served discovery demands on June 23, 2009 and a Preliminary Conference was held on November 17, 2009. The Preliminary Conference order directed all defendants to exchange any incident or accident reports, as well as witnesses to the subject incident. Shortly thereafter the City moved for summary judgment. Without responding to either the Discovery Demands or the Preliminary Conference Order the Authority cross moved for summary judgment. In its motion counsel for the Authority stated that his client denied ownership of the subject vehicle involved in the accident and argued that since the Authority did not own, manage, operate, or maintain the subject vehicle, it was not a proper party to this action. Counsel claimed that plaintiff's

case was based upon pure speculation. On November 8, 2010 this court denied all motions as premature.

On February 15, 2011, a Compliance Conference was held. The Authority was once again directed to comply with the Preliminary Conference Order of November 17, 2009, provide all incident reports, police reports, aided reports, memo book reports created for the subject incident; the full name and badge number of Officer Perez; the identity of all personnel on behalf of the defendant who were present at the scene of the incident on the date of the accident; the identity of the driver of the car involved in the incident; all records of all communications between the operator of the vehicle involved in the incident; an affidavit from someone from the Authority detailing the searches done involving the subject incident if the Authority were to continue to argue that the vehicle involved in the incident, and depicted on the video previously, was not an Authority vehicle.

In March 2011 the Authority served a response to the compliance conference order which was verified by Mr. Redmond. In it the Authority maintained that it was not in possession of any photographs or accident reports, nor were they aware of any witnesses other than those mentioned at the 50-h hearing. The response goes on to state that the Authority was continuing to search for names, addresses, and identities of personnel who were present at the scene of the accident.

In June 2011 the City moved to renew its motion for summary judgment. Plaintiff cross moved for summary judgment as to the owner of the offending vehicle. The Authority did not oppose the motions. The City's motion was granted. With regard to plaintiffs' cross motion the Court held:

Plaintiff's cross motion against the Authority is granted. The documentation before the Court, including the sworn testimony, affidavit, and photographs indicate that the offending vehicle was an MTA Police vehicle. No opposition has been submitted to raise an issue of fact.

The Authority, now appearing by outside counsel, for the first time identifies the driver of the MTA vehicle as Josef Perez, and provides an affidavit from him dated May 31, 2012 in opposition to the motion.

#### Discussion

All parties and their counsel have an obligation to make good faith efforts to fulfill their discovery and disclosure obligations and to resolve all discovery and disclosure disputes, before seeking judicial intervention. Dilatory tactics, evasive conduct and/or a pattern of non-compliance with discovery and disclosure obligations may give rise to an inference of willful and contumacious conduct, and may result in severe adverse consequences and sanctions. Sanctions for non-compliance with discovery which have been upheld by the First Department include dismissal of a complaint or answer. See Rodriguez v United Bronx

Parents, Inc., 70 AD3d 492 (1<sup>st</sup> Dept 2010); Figdor v City of New York, 33 AD3d 560 (1<sup>st</sup> Dept 2006); Jones v Green, 34 AD3d 260 (1<sup>st</sup> Dept 2006).

Based upon the record before the court, plaintiff's motion to strike the Authority's answer for their willful failure to provide discovery is granted. The Authority was required to provide the discovery at issue for over three years. Repeated demands and discovery orders were not complied with. However, what is more egregious in this situation is that since the inception of this case the Authority maintained through its in house counsel that it had no involvement in this matter, that they did not own, operate, or control the subject vehicle, and that there were no police incident or accident reports. Now after denying involvement, not complying with discovery, and moving for summary judgment on the grounds of lack of ownership, control, and involvement, the Authority produces an affidavit from the operator of the MTA vehicle and police/incident reports from at or around the time of the incident, without any reasonable explanation from their newly retained outside counsel, or its in house attorney.

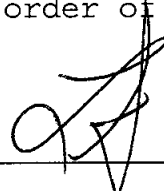
On this record it is clear that at the very least the Authority failed to make a reasonable search for the discovery demanded years ago. Moreover, the failure to comply with discovery for over three years taken together with the lack of

ownership and involvement defense allows this court to infer willfulness and evasive conduct on the part of the Authority which warrants the striking of their answer.

The request for monetary sanctions against both Mr. Gossett and Mr. Redmond is denied. Plaintiff's motion for summary judgment on liability is denied as moot.

This constitutes the decision and order of the court.

Dated: January 25, 2013



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LARRY S. SCHACHNER, JSC