

Sheryll v United Gen. Constr.
2013 NY Slip Op 33938(U)
December 2, 2013
Supreme Court, New York County
Docket Number: 101932/2007
Judge: Margaret A. Chan
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN

Justice

PART 52
Interim Order

Index Number : 101932/2007
SHERYLL, ANDREA
vs.
UNITED GENERAL CONSTRUCTION
SEQUENCE NUMBER : 006
STRIKE ANSWER

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for Sanctions / Summary Judgment
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1-2
Answering Affidavits — Exhibits _____ | No(s). 3
Replying Affidavits _____ | No(s). 4

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

*the motion is decided in accordance with the
annexed memorandum order.*

*The cross-motion is not addressed on the merits herein, and
the parties are provided with a briefing schedule for the
cross-motion.*

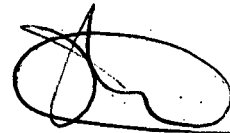
MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

SEP 26 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/2/13



J.S.C.
HON. MARGARET A. CHAN

- 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 — NEW YORK COUNTY

PRESENT: Hon. Margaret A. Chan
Justice

PART 52
INDEX 101932-2007

ANDREA SHERYLL, RICHARD SHERYLL, KUM
JA CHOI and SEON HWAN KIM,
Plaintiffs,

- vs. -

UNITED GENERAL CONSTRUCTION, AFZAL
CHOUDRY D/B/A UNITED GENERAL
CONSTRUCTION, AFZAL CHOUDRY,
INDIVIDUALLY, RASHIN MOSTAFIZUR, THE
CITY OF NEW YORK, and 34TH STREET
PARTNERSHIP, INC.,
Defendants.

FILED
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In this personal injury matter, Andrea and Richard Sheryll (collectively, plaintiff) moved to renew their motion to strike the Answer of defendant, The City of New York (the City), for its failure to comply with discovery orders. The City opposed the motion and cross-moved for summary judgment dismissing the complaint, which, of course, all the other plaintiffs in this matter opposed.

FACTS

Briefly, plaintiff Andrea Sheryll¹ sustained personal injuries in the afternoon of November 10, 2006 when she was struck on the sidewalk on Broadway between 32nd and 33rd Streets in Manhattan by a vehicle owned by Afzal Choudry d/b/a United General Construction and driven by Rashin Mostafizur, co-defendants in this matter. It was alleged that the car drove up the extended sidewalk which was expanded when the City made plans to make Herald Square pedestrian friendly. Plaintiff claims that the City is liable because the design and construction of the expanded sidewalk created a hazard. Thus, plaintiff demanded from the City, discovery related to the planning, design and construction of the extended pedestrian area in Herald Square.

MOTION TO STRIKE ANSWER

The motion to strike the City's Answer is not the first one brought by plaintiff. Plaintiff's prior motions dated November 12, 2010, and August 15, 2011, resulted in two orders both denying the relief sought. One order directed the City to, *inter alia*, "provide 10-year search results for all applicable

¹Plaintiff Richard Sheryll's claim is for loss of services.

DOT [Department of Transportation] records and DDC [Department of Design and Construction] records for the subject location and any other records related to the project” and that “[if] the City does not comply w[ith] this order, its answer will be stricken” (Order entered January 24, 2011, Hon. Cynthia Kern). The second order found that the City had largely complied to the extent that it could, but required it to provide a revised affidavit regarding the completeness of the search conducted and state what was and what was not found (Order entered December 2, 2011, Hon. Cynthia Kern). Both decisions were appealed, and the Appellate Division, First Department, modified Justice Kern’s orders agreeing that while the City’s non-compliance with court-ordered discovery did not warrant the “ultimate penalty” of having the City’s Answer stricken, the sanction on the City should be stronger for its “unexcused conduct and pattern of delay” (*Sheryll v United General Construction*, 95 AD3d 780 [1st Dept 2012]; Pltf’s Motion, Exh B). Thus, by its order dated May 31, 2012, the Appellate Division, First Department directed the City to pay \$10,000.00 for plaintiff’s attorney’s costs (*id.*).

Plaintiff is now urging this court to enforce the condition stated in the January 24, 2011 order to strike the City’s Answer as plaintiff claims the City did not fully comply with the order. Plaintiff supports this allegation with the September 6, 2012 deposition of Miranda Wade, the City’s witness who conducted searches of documents requested. Plaintiff claims that Wade’s testimony revealed that the City never conducted the searches it had averred to have been made. The City, however, responded that it provided all the relevant documents requested even if Ms. Wade was not the one who searched it because those documents were maintained by other divisions and units.

Discovery has stirred up a hornet’s nest in this case to say the least. In fact, this court required an additional appearance on plaintiff’s motion to strike the City’s Answer as it is unclear as to what items were not produced. However, the additional appearance did not make this matter any clearer. Plaintiff’s argument focuses on Miranda Wade’s testimony as to what she did not search, such as documents that are archived at a location that cannot be accessed because of asbestos related issues; or files that maintained elsewhere; or files that she could not find in her office. From plaintiffs’ argument, they still want produced those absent files, along with - as succinctly as possible -

- all contracts, writings, *etc.* between the City and their agents;
- all invoices, permits for work performed;
- all maintenance contracts between the 34th Street Partnership and the City;
- all contracts between all defendants and all contractors;
- all daily progress reports and photographs of the construction and improvement;
- copies of all schematics, drawings and blueprints of the design and construction of the sidewalk and roadway;
- copies of all design studies and engineering reports;
- copies of all design studies, schematics, drawings and blueprint of the establishment of traffic pattern for vehicular and pedestrian traffic;
- all progress photographs of the performance of the work;
- all plan sheets, *etc.* related to placing of street planters;
- all documents related to the use of planters as barriers; and
- all documents related to the design of sidewalk extension.

The City provided plaintiffs with the following:

- sidewalk and roadway records from the Office of Litigation Services for ten years prior to the accident;
- Agreement between 34th Street Partnership and the City from the Division of Franchises, Concessions and Consents;
- 34th Street planter submission and approval from the City Art Commission;
- Roadway marking drawings and orders from the Bureau of Traffic Operations/ Highway Design (and a witness);
- Parking Sign and Intersection Sign records from the Manhattan Borough Engineering Office (and a witness);
- Traffic count records from the Research, Implementation and Safety Unit;
- Gangsheets from RRM
- Herald Square Reconfiguration Final Report from January 2005 from Wade's unit, which she testified was a draft was the 2006 Final Report;
- Herald Square Reconfiguration Study from October 2006 from Wade's unit;
- Herald Square Reconfiguration Project Implementation Plan from Wade's unit.

The City adds that its searches for pedestrian projects records, planning record, red light camera records, fatal accident records, and street furniture records turned up nothing, which was disclosed to plaintiffs.

Considering this action concerns a pedestrian knockdown by a motor vehicle in the roadway, and the plaintiffs sought discovery of "information concerning the planning for, and installation of, the subject sidewalk extension/addition on the East side of Broadway between W. 33rd Street and W. 32nd Streets [sic]" (Pltfs' Aff., p.3), it is not clear how or why the documents already provided do not suffice. It is also unclear how the requested documents, to wit, contracts between all defendants and contractors, progress reports, invoices and permits, are relevant to the issue at hand. Further, the crux of plaintiff's renewal motion for sanctions is Wade's deposition testimony - especially about the archived documents at the Battery Maritime building. However, Wade was equivocal about whether and what Herald Square project documents were there as her knowledge was based on hearsay. However, she was certain about non-accessability of the asbestos-laden Battery Maritime building. Thus, in that the plaintiff's concern appears to be somewhat speculative about the absent records as to their case, discovery, as such, is complete.

In sum, plaintiff's motion to renew the motion for sanctions is denied as defendants complied with discovery demands as much as they could. Plaintiffs are instructed to file Note of Issue by January 31, 2014.

CROSS-MOTION FOR SUMMARY JUDGMENT

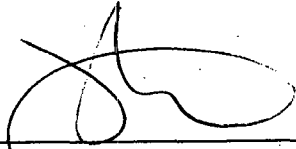
The City argues that based on the EBT testimony of defendant Mostafizur, it is clear that the City was not the proximate cause of plaintiff's injury. Plaintiff argues that the City's cross-motion should be rejected as it is defective pursuant to CPLR 2214(b), and it is premature as discovery is not

complete. Plaintiffs Kum Ja Choi and Seon Hwan Kim also asked the court to reject the cross-motion or extend the time for them to oppose it.

Rather than rejecting the cross-motion, plaintiffs are granted additional time to oppose it. Plaintiffs are to serve and file their respective opposition by December 16, 2013; defendants have until December 23, to submit reply, if there is one. The motion will be taken on submission.

This constitutes the decision and order of the court.

Dated: December 2, 2013



Margaret A. Chan, J.S.C.

FILED

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