

**Sheehan v New York City Tr. Auth.**

2014 NY Slip Op 30906(U)

April 4, 2014

Supreme Court, New York County

Docket Number: 153916/2012

Judge: Michael D. Stallman

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 21**

-----X  
MICHAEL SHEEHAN,

Plaintiff,

- against -

Index No. 153916/2012

NEW YORK CITY TRANSIT AUTHORITY, THE CITY OF  
NEW YORK, METROPOLITAN TRANSPORTATION  
AUTHORITY and MTA/NEW YORK CITY TRANSIT,

**Decision and Order**

Defendants.

-----X

**HON. MICHAEL D. STALLMAN, J.:**

The factual background of this action were set forth in the Court's prior decision and order dated November 26, 2013. Plaintiff alleges that, on March 14, 2012, he was injured while performing construction work at a ditch/trench under 11th Avenue in Manhattan, at Site K of the 7-line Subway Extension project. The complaint alleges, among other things, violations of Labor Law §§ 200, 240 (1), and 241 (6).

Plaintiff now moves for an order striking the answer of defendants, or in the alternative, for an order compelling defendants to respond to plaintiff's combined demands, notice for discovery, and demand for a bill of particulars as to their affirmative defenses. (Motion Seq No. 003). Plaintiff also moves for an order striking the answer of defendants, or in the alternative, for an order compelling defendants

to proceed with plaintiff's deposition. (Motion Seq No. 004). Pursuant to 22 NYCRR 103-1.1, defendants cross-move for sanctions and costs, including attorneys' fees, on the grounds that plaintiff's discovery motions lack merit and were procedurally defective.

This decision addresses both discovery motions, and defendants' cross motion for sanctions and costs.

### DISCUSSION

As a threshold matter, defendants indicate that plaintiff did not substantively comply with the requirements of 22 NYCRR 202.7, which requires the parties to confer with each other and engage in a good faith effort to resolve the issues raised by the discovery. The affirmations of good faith for both motions conclusorily stated that plaintiff's counsel made "good faith efforts to proceed with disclosure," but did not indicate that plaintiff's counsel actually conferred with his adversary in a good faith attempt to resolve the dispute. (*241 Fifth Ave. Hotel, LLC v GSY Corp.*, 110 AD3d 470, 472 [1st Dept 2013].) Although the affirmation of good faith submitted in plaintiff's first motion (Motion Seq. No. 003) refers to a letter sent to defendants' counsel on August 14, 2013, such a letter was not e-filed with the motion.

On the merits, plaintiffs' discovery motions must be denied.

"it is well settled that the drastic remedy of striking a party's pleading

pursuant to CPLR 3126 for failure to comply with a discovery order is appropriate only where the moving party conclusively demonstrates that the non-disclosure was willful, contumacious or due to bad faith. Willful and contumacious behavior can be inferred by a failure to comply with court orders, in the absence of adequate excuses.”

(*Henderson-Jones v City of New York*, 87 AD3d 498, 504 [1st Dept 2011].) “Belated but substantial compliance with a discovery order undermines the position that the delay was a product of willful or contumacious conduct.” (*Cambry v Lincoln Gardens*, 50 AD3d 1081, 1082 [2d Dept 2008]; see also *Gradaille v City of New York*, 52 AD3d 279, 284 [1st Dept 2008].)

Here, plaintiff did not demonstrate a pattern of noncompliance with the prior court orders concerning plaintiff’s discovery demands, coupled with an absence of adequate excuses for the noncompliance. Defendants have demonstrated that they served responses to plaintiff’s combined demands, notice for discovery, and demand for a bill of particulars as to their affirmative defenses. (Sudol Affirm., Exs D-F.)

Plaintiff’s second motion to strike is based on defendants’ failure to go forward with plaintiff’s deposition on October 11, 2013, as agreed to by counsel in the preliminary conference order. Again, plaintiff did not demonstrate either a pattern of noncompliance or the absence of an adequate excuse. Indeed, plaintiff’s counsel states that his adversary was not ready to proceed with plaintiff’s deposition due to missing medical records. (Rogers Affirm. ¶ 4.) Although plaintiff’s counsel states

that he offered to supply copies of medical records from his own file, it is not clear from the record before the Court that those copies were the missing records that defendants' counsel was still waiting to receive.

In any event, it appears that plaintiff's deposition was held. The Court takes judicial notice that, at a discovery conference on November 14, 2013, four days before plaintiff's second discovery motion was submitted, the parties entered into a so-ordered stipulation to hold plaintiff's deposition on or before January 15, 2014. The Court also takes judicial notice that, three months later, at a discovery conference on February 28, 2014, the parties entered into a so-ordered stipulation to hold the defendants' depositions on or before March 28, 2014.

Therefore, plaintiffs' motions to strike, or in the alternative to compel, are denied.

Turning to the cross motion, defendants do not contend that they timely responded to plaintiff's document discovery demands. Neither do defendants assert that plaintiff's deposition went forward on October 11, 2013. The gist of defendants' cross motion is that plaintiff should be sanctioned for not conferring in good faith with defendants' counsel to resolve their discovery disputes, which would have obviated the time and expense of motion practice on discovery motions that were highly unlikely to be granted, at least with respect to plaintiff's request for an order

striking defendants' answer.

In the exercise of discretion, the Court denies defendants' cross motion for sanctions and costs against plaintiff.

**CONCLUSION**

Accordingly, it is hereby

ORDERED that plaintiff's motions (Seq Nos. 003 and 004) are denied; and it is further

ORDERED that defendants' cross motion is denied.

**Dated:** April 4, 2014  
New York, New York

**ENTER:**



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J.S.C.

**HON. MICHAEL D. STALLMAN**