

**Huggins v City of New York**

2014 NY Slip Op 31781(U)

July 8, 2014

Supreme Court, New York County

Docket Number: 103537/09

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN  
Justice

PART 7

HERMAN HUGGINS, JR. and DESIREE HUGGINS,  
Individually and as Husband and Wife,

Plaintiff,

- against-

INDEX NO. 103537/09

MOTION SEQ. NO. 004

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT  
OF TRANSPORTATION, CEMUSA, INC.,  
CEMUSA, NY, LLC., SHELTER EXPRESS CORP.,  
CONSOLIDATED EDISON COMPANY OF NEW YORK,  
INC., A/K/A CON EDISON, A/K/A EDISON  
SOLUTIONS, INC., A/K/A CONSOLIDATED  
EDISON ENERGY, INC., A/K/A CONSOLIDATED  
EDISON DEVELOPMENT INC. A/K/A CON EDISON,

Defendants.

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The following papers were read on this motion by plaintiff to strike defendants' answer.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits (Memo) \_\_\_\_\_  
Replying Affidavits (Reply Memo) \_\_\_\_\_

PAPERS NUMBERED

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Cross-Motion:  Yes  No

Plaintiffs Herman Huggins, Jr. (Huggins) and Desiree Huggins (collectively, plaintiffs), individually and as husband and wife, move, pursuant to CPLR 3126, (1) to strike the answers of defendants City of New York (City), New York City Department of Transportation (DOT), Cemusa, Inc., Cemusa, NY, LLC. (collectively, Cemusa), and Shelter Express Corp. (Shelter) for failure to comply with discovery, and to preclude defendants from using physical evidence to disprove injury, or (2) to resolve the issues of liability and injury causation in favor of plaintiffs and against defendants. Plaintiffs also move, pursuant to CPLR 2004, to extend the time to file a Note of Issue.

## BACKGROUND

Plaintiffs commenced this action seeking to recover damages from defendants for injuries sustained by Huggins on January 24, 2008, when he was struck by a falling, shattered glass wall while waiting at a bus shelter. The bus shelter is located at the southwest corner of West 110<sup>th</sup> Street and Columbus Avenue, in Manhattan. Plaintiffs claim that the glass wall of the bus shelter gave way and shattered, causing broken glass to strike Huggins, who allegedly suffered lacerations to his right hand, neck, back, and shoulder.

The complaint alleges that the City and DOT owned or operated the bus shelter; that defendants Consolidated Edison Company of New York, Inc. a/k/a Con Edison, a/k/a Edison Solutions, Inc., a/k/a Consolidated Edison Energy, Inc., a/k/a Consolidated Edison Development Inc. a/k/a Con Edison (collectively, Con Ed) had been performing work in the vicinity of the bus shelter; and that Cemusa and Shelter designed or manufactured the bus shelter. Plaintiffs allege causes of action for negligence against Con Ed (first cause of action); negligence against the City, DOT, Cemusa, and Shelter (second cause of action); strict products liability against the City, DOT, Cemusa, and Shelter (third cause of action); breach of warranty against the City, DOT, Cemusa, and Shelter (fourth cause of action); failure to warn of a dangerous condition against the City, DOT, Cemusa, and Shelter (fifth cause of action); negligent hiring, retention, and supervision against all defendants (sixth cause of action); and loss of consortium on behalf on Desiree Huggins against all defendants (seventh cause of action).

Defendants, who were initially represented by separate counsel, answered, essentially denying the factual allegations, asserting affirmative defenses, and alleging cross-claims for contribution or indemnification against co-defendants.

Plaintiffs twice amended the complaint and, by that time, defendants were all represented by the same counsel. Defendants filed a joint answer, denying the allegations

against them, asserting numerous affirmative defenses that were essentially unchanged, and requesting an apportionment of liability if they are ultimately found liable for plaintiffs' injuries. On January 17, 2011, the parties stipulated to discontinue the action against Con Ed (Stipulation, Notice of Motion, exhibit V).

Plaintiffs filed notices for discovery and inspection on April 27, 2010 and April 28, 2010 (see Notice of Motion, exhibits K, L, M). By this motion, plaintiffs seek sanctions against defendants, including striking their answers, precluding evidence, and resolving the issue of liability against them, for failure to comply with the discovery notices, as well as with three scheduling orders issued by the Court (see Notice of Motion, exhibits A; P; S). The most recent scheduling order, dated June 11, 2011, instructed the City and Cemusa to hold depositions by June 15, 2011, directed defendants to respond to plaintiffs' discovery demands by June 30, 2011, and directed plaintiffs to file a Note of Issue by August 31, 2011 (see Notice of Motion, exhibit S).

#### DISCUSSION

The nature and degree of the sanction to be imposed on a motion pursuant to CPLR 3126 is a matter of discretion for the Court (see *Rizzuti v Laucella*, 57 AD3d 755, 757 [2d Dept 2008]). The striking of a pleading may be an appropriate sanction against a party who refuses to obey an order of disclosure or wilfully fails to disclose information that the court has found should have been disclosed (see *Byam v City of New York*, 68 AD3d 798, 801 [2d Dept 2009]). However, the drastic remedy of striking a pleading for failure to comply with court-ordered disclosure should be granted only where the conduct of the resisting party is shown to be willful and contumacious (*id.*).

Here, defendants argue that their disclosure efforts were hindered during the time when they were represented by the same counsel, and an apparent conflict of interest arose involving a whistle-blower lawsuit filed by an employee of one of the defendants. Defendants maintain

that they informed plaintiffs of the situation, and that it took some time for the insurance carriers to resolve the issue and find alternate counsel. Defendants further claim that after the issue was resolved and new counsel assigned, they proceeded to comply with plaintiffs' 639-paragraph discovery request and the court-ordered disclosure. The submissions include several responses to plaintiffs' discovery requests (see Affirm in Opp, exhibits A; B; C; D).

Plaintiffs nevertheless insist that defendants' noncompliance was willful and contumacious. They assert that the claimed conflict involved only two of the defendants, and should not serve to excuse the others from complying with their discovery requests and the court-ordered disclosure. However, plaintiffs do acknowledge that defendants have made partial production of the documents.

The Court is not satisfied that defendants failure to comply with discovery was willful or contumacious. Even where the proffered excuse is less than compelling, there is a strong preference in our law that matters be decided on the merits (see *Catarine v Beth Israel Med. Ctr.*, 290 AD2d 213, 215 [1st Dept 2002]).

In fact, defendants produced some documents after resolving a conflict among them that necessitated the substitution of counsel. Moreover, the submissions do not indicate that defendants were warned that their answers might be stricken for noncompliance. As such, the Court does not believe that the extreme sanctions of striking defendants' answers, precluding evidence, or resolving the matter without the benefits of full disclosure and trial are appropriate (see *Allstate Ins. Co. v Buziashvili*, 71 AD3d 571, 573 [1st Dept 2010]). Thus, the branch of the motion that seeks to impose sanctions on defendants for failure to comply with plaintiffs' discovery notices and court-ordered disclosure is denied.

The request to extend the time for plaintiff to file a Note of Issue is also denied, as academic. The June 11, 2011 scheduling order directed plaintiffs to file a Note of Issue by August 31, 2011, and, as is evident from the decision herein, the parties have not yet

completed discovery.

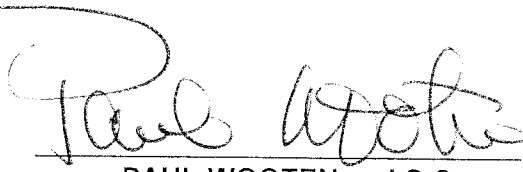
CONCLUSION

For these reasons and upon the foregoing papers, it is,  
ORDERED that plaintiffs' motion is denied in its entirety; and it is further,  
ORDERED that the parties are directed to appear for a status conference on September  
24, 2014 at 11:00 a.m. in Part 7, 60 Centre Street, Room 341.

This constitutes the Decision and Order of the Court.

Dated: 7-8-14

Enter:

  
PAUL WOOTEN, J.S.C

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate: :  DO NOT POST  REFERENCE

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