

**Huang v New York City Transit Auth.**

2014 NY Slip Op 32044(U)

July 31, 2014

Sup Ct, New York County

Docket Number: 100416/2007

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 NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN  
*Justice*

PART 21

Index Number : 100416/2007  
HUANG, JANICE  
VS.  
TRANSIT AUTHORITY  
SEQUENCE NUMBER : 007  
STRIKE ANSWER

INDEX NO. 100416/2007  
MOTION DATE 12/12/13  
MOTION SEQ. NO. 007

The following papers, numbered 1 to 7, were read on this motion to strike defendants' answer.

Notice of Motion — Affirmation — Exhibits A-W—Affirmation of Service;	No(s). <u>1-3</u>
Affirmation in Opposition — Exhibits A-D —Affirmation of Service	No(s). <u>4-5</u>
Reply Affirmation — Exhibit X —Affidavit of Service	No(s). <u>6-7</u>

Upon the foregoing papers, plaintiff's motion for an order striking defendants' answer, and other relief is decided in accordance with the annexed memorandum decision and order.


## FILED

AUG 05 2014

HON. MICHAEL D. STALLMAN

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 7/31/14  
New York, New York

  
J.S.C.

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

1. Check one:.....
2. Check if appropriate:..... MOTION IS:
3. Check if appropriate:.....
- |  |   |
|--|---|
| <input type="checkbox"/> CASE DISPOSED         | <input checked="" type="checkbox"/> NON-FINAL DISPOSITION |
| <input type="checkbox"/> GRANTED               | <input type="checkbox"/> DENIED                           |
| <input type="checkbox"/> SETTLE ORDER          | <input checked="" type="checkbox"/> GRANTED IN PART       |
| <input type="checkbox"/> DO NOT POST           | <input type="checkbox"/> SUBMIT ORDER                     |
| <input type="checkbox"/> FIDUCIARY APPOINTMENT | <input type="checkbox"/> REFERENCE                        |

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

-----X  
JANICE HUANG,

Plaintiff,

- against -

Index No. 100416/2007

THE NEW YORK CITY TRANSIT AUTHORITY,  
THE METROPOLITAN TRANSIT AUTHORITY,  
AND THE CITY OF NEW YORK,

Decision and Order

Defendant.

-----X

HON. MICHAEL D. STALLMAN, J.:

In this action, plaintiff alleges that, on February 1, 2006, at approximately 11:30 a.m., she was injured while trying to enter the 8th Street subway station in Manhattan through a high entrance exit turnstile.

Plaintiff now moves to strike defendants' answer on the ground of spoliation, or in the in the alternative, for an order resolving plaintiff's claims and defendants' defenses in favor of plaintiff, and precluding defendants from producing any items or testimony concerning the issues herein.

**BACKGROUND**

**FILED**

AUG 05 2014

COUNTY CLERK'S OFFICE  
NEW YORK

According to plaintiff, a notice of claim was served on defendants in or about April 2006. (Reiff Affirm. ¶ 14.) Plaintiff commenced this action on January 10, 2007.

The complaint alleges that, on February 1, 2006, at approximately 11:30 a.m., plaintiff entered the 8<sup>th</sup> Street subway station “near the east side of Broadway between Astor Place and Waverly Place in Manhattan in order to take an uptown train.” (Reiff Affirm., Ex B [Verified Complaint] ¶ 7.) Plaintiff alleged swiped her unlimited metrocard at the “floor-to-ceiling ‘high wheel’-type turnstile, “the turnstile mechanism signaled for plaintiff to proceed, displayed a green light, and the word ‘Go’ appeared on the turnstile mechanism readout.” (*Id.* ¶¶ 10-11.) However, when plaintiff allegedly attempted to proceed through the turnstile, the turnstile allegedly failed to turn, and “[t]his caused one of the metal ‘arms’ to make contact with plaintiff’s face”, resulting in facial injuries and loss of her two front teeth. (*Id.* ¶ 12.)

In a First Notice of Discovery and Inspection dated September 12, 2007, plaintiff demanded “all documents concerning installation of, maintenance of and/or repairs to the turnstiles located at the 8<sup>th</sup> Street Station.” (Reiff Affirm., Ex C, at 7-8.) By a letter dated September 17, 2007, defendants indicated that they would hold their response to plaintiff’s discovery demands in abeyance until plaintiff responded to their demand for

a bill of particulars. (Reiff Affirm., Ex D.) According to plaintiff, a verified bill of particulars dated September 11, 2007 was served on September 24, 2007. (Reiff Affirm. ¶ 18; Reiff Affirm., Ex E.)

By a letter dated June 17, 2008, defendants responded to plaintiff's First Notice of Discovery and Inspection dated September 12, 2007. The response states, in pertinent part:

**“Documents concerning the installation, maintenance and repair of the turnstiles located at the 8<sup>th</sup> Street Station:** Defendants object to this demand on the grounds that it is overly broad and unduly burdensome since no time frame and no high wheel have been specified. Notwithstanding, since plaintiff testified at her statutory hearing that her alleged accident occurred on the uptown side of the station, annexed hereto are copies of the following New York City Transit Authority records pertaining to the high wheel located on the northbound platform (near booth A038): Service Call Records from February 18, 2004 through January 13, 2006; Preventive Maintenance Records from July 28, 2004 through January 19, 2006, and Special Assignment Records from April 6, 2004 through January 3, 2006. In addition, enclosed is the code interpretation key for said records.”

(Ehrlich Opp. Affirm., Ex A.)

By a decision and order dated August 4, 2008, Justice Walter Tolub granted, on default, plaintiff's motion to strike defendants' answer. (Reiff Affirm., Ex G.) However, by a decision and order dated December 10, 2008, Justice Tolub vacated his prior decision and order, restored plaintiff's motion

to strike, and denied the motion on the merits. (Reiff Affirm., Ex H.) Justice Tolub also transferred the matter to Justice Donna Mills in the Transit Part.

According to the court's own records, Justice Mills held discovery conferences on June 12, 2009 and October 29, 2009. Thereafter, discovery conferences were held before Justice Stallman on April 8, 2010, and June 24, 2010. On April 8, 2010, the parties stipulated, "EBT of TA to be held on May 11, 2010 at 10 at 130 Livingston St. (Witness: MSII Kesho Bachan). Plaintiff reserves right to seek further documents after EBT." (Reiff Affirm., Ex I.) On June 24, 2010, the parties stipulated as follows:

- (1) EBT of TA MSII Kesho Bachan to be held on 8/5/10 at 10 am at 130 Livingston St.  $\Pi$  reserves right to seek further documents after said EBT.
- (2)  $\Pi$ 's counsel represents that he sent a copy of  $\Pi$ 's credit card number which is believed to have been used to purchase  $\Pi$ 's metrocard. TA to conduct search to determine  $\Pi$ 's metrocard # and to advise  $\Pi$ 's counsel of search results + provide report w/in 45 days."

(Reiff Affirm., Ex J.)

On August 5, 2010, plaintiff deposed Kesho Bachan, a NYCTA employee in the position of Maintenance Supervisor, Level 2. (Reiff Affirm., Ex K.) Bachan testified as follows:

- "Q. Is there anywhere that the worker records what work was actually performed on that visit?  
A. On that visit, no.

Q. Yes.

A. No. Only the maintenance report would give you that.

Q. That's not input into the computer system.

A. No. It's closed as a 90. If it's a PM work order, it's a PM work order. A PM is preventive maintenance work order. If you're asking for other work orders, you're looking at service call or special assignment."

(Reiff Affirm., Ex R [Bachan 8/5/10 EBT], at 99.)

In a letter dated August 5, 2010, plaintiff demanded several categories of documents, number 1-7. (Reiff Affirm., Ex K.) In addition to the seven numbered categories, the letter further demanded,

"all documents relating to the service and maintenance of the HEET unit used by the plaintiff from the date of its installation to be produced. TA has only produced the documents for a period of two years. The records produced thus far show what the witness acknowledged to be a high number of error/fault occurrences for the HEET unit resulting in the generation of eight special assignment orders. It is important that we be able to be able [*sic*] to evaluate the entire history of this unit, as those records may further show that this was an especially problematic unit."

(*Id.*) At a court conference on November 18, 2010, the parties agreed to discovery, in relevant part, as follows:

"(1) Defendants will provide the following documents, if in existence, in response to plaintiff's 8/5/10 letter demanded for documents within 45 days:

- a) Documents as requested in items 2, 4 +5
- b) Documents as relate to the HEET unit used by plaintiff for the period two years prior to 2/1/06 as requested in items 1, 3, 6, 7.

2. Plaintiff reserves all rights to seek to compel the remainder of the documents requested and for the time requested. Plaintiff also reserves the right to assert that objections to the re:8/5/10 document request have been waived. The parties will attempt to resolve any issues relating to the balance of the documents requested.

(3) Continued EBT of Δ's witness Kesho Bachman [*sic*] to be scheduled once documents have been supplied.

(Reiff Affirm., Ex M.)

At a court conference on June 16, 2011, the parties scheduled Bachan's continued deposition. (Reiff Affirm., Ex N.) The conference stipulation also states, in pertinent part: "Plaintiff reserves all rights to seek to compel any documents not produced and other rights as set forth in the 11/18/10 compliance order and to serve supplemental demands after the deposition of Kesho Bachman [*sic*] is completed." (*Id.*)

Bachan was deposed again on July 21, 2011. At his later deposition, he testified:

"Q. With regard to that specific work order, in general is there some other document that is generated that would contain the information regarding this work order as to what actually happened?

A. This is a history of this work order. That's all you're going to have on the work orders.

Q. The last time we were here you mentioned that there were work orders. The work order would have handwritten information from the maintainer?

A. That's the maintenance report. The maintainer is dispatched to that call and he would have a work report for that call.

Q. Is that what is called a work report?

A. It's a report. A work order report.

Q. A work order report?

A. Yes, which is actually work performed by that maintainer.

Q. Is there a work order report that is generated for all maintenance or repair work that is performed on a HEET unit?

A. Yes."

(Reiff Affirm., [Bachan EBT], at 115.)

By a letter dated December 8, 2011, plaintiff demanded, among other documents, "Original Work Reports for the HEET unit prepared by the maintenance workers for the period three years prior to the incident-(not just the summaries that were produced." (Reiff Affirm., Ex R.) By a so-ordered stipulation dated March 8, 2012, defendants agreed to respond to plaintiff's letter dated December 8, 2011 within 45 days. (Reiff Affirm., Ex T.) According to plaintiff's attorney, defendants did not, and by a so-ordered stipulation dated May 3, 2012, the parties agreed, in pertinent part, that

"Plaintiff shall have the right to apply for the entry of an order that Defendants' Answer shall be stricken and defendants shall be precluded from introducing any evidence in defense of this action unless, within 45 days of this stipulation/order defendants shall:

1. Produce to plaintiff the documents set forth in plaintiff's 12/8/11 letter DNI demand within defendants' possession or control. . . or supply an affidavit as to any documents no within Δs possession."

(Reiff Affirm., Ex T.)

By decision and order dated January 31, 2013, this Court directed defendants to produce, among other things, the original work reports for the

HEET unit at issue on or before March 14, 2013, or an affidavit of search if any of the documents to be produced were not within the NYCTA's custody, possession, or control.

By a letter dated March 8, 2013, defendants responded that the records demanded were destroyed pursuant to a records retention schedule.

The letter states, in pertinent part:

"1. Original Work Reports for the HEET unit at issue prepared by the maintenance workers for three years prior to incident: None. Please be advised that original copies of defendants Automated Fare Collection (hereinafter referred to as "AFC") maintenance reports are retained by six years, as per the New York City Transit's Corporate Records Administration Records Retention Schedule . . . pertaining to "Turnstile Maintenance Records and Reports", annexed hereto."

(Reiff Affirm., Ex W.)

## DISCUSSION

"Under the common-law doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence, the responsible party may be sanctioned under CPLR 3126. The court may, under appropriate circumstances, impose a sanction "even if the destruction occurred through negligence rather than wilfulness, and even if the evidence was destroyed before the spoliator became a party, provided it was on notice that the evidence might be needed for future litigation."

(*Ortiz v Bajwa Dev. Corp.*, 89 AD3d 999, 999 [2d Dept 2011] [internal citations and quotation marks omitted].)

Plaintiff argues that defendants allowed relevant documents to be destroyed even while they were put on notice of the relevance of the documents by the notice of claim, by plaintiff's First Notice of Discovery and Inspection in September 2007, and by plaintiff's continuous efforts to obtain compliance with her discovery demands and repeated discovery orders.

Defendants maintain that summaries of these records in the form of computerized reports were exchanged in 2007 and 2008. Defendants contend that the original HEET records were not first requested until more than 5½ years after the alleged incident. Defendants argue that striking the pleadings is not warranted because the spoiled evidence is not crucial to plaintiff's case.

Plaintiff has not demonstrated that defendants had a duty to preserve the original work reports of the HEET unit at issue upon service of a notice of claim. Neither is the Court persuaded that a duty to preserve the original work reports of the HEET unit at issue upon service plaintiff's First Notice for Discovery and Inspection in September 2007.

The original work reports of the HEET unit at issue are documents relating to the service and maintenance of the HEET unit. Plaintiff's letter dated August 5, 2010 placed the NYCTA on notice that the original work reports might be needed for future litigation before they were destroyed. The

NYCTA, as the custodian of the records, therefore had the obligation in August 2010 to take steps to prevent the scheduled destruction of any original work reports of the HEET unit at issue, and the NYCTA's failure to do so constituted spoliation. (*Strong v City of New York*, 112 AD3d 15 [1st Dept 2013].)

The elements of a spoliation claim under New York common law having been demonstrated, the Court turns to consideration of the appropriate sanction. "The Supreme Court has broad discretion in determining the appropriate sanction for intentional or negligent spoliation of evidence. In making this determination, the court must consider the degree to which the spoliation prejudiced the party aggrieved." (*Shayovich v 800 Ocean Parkway Apt. Corp.*, 77 AD3d 814, 815 [2d Dept 2010].)

Nothing in the record supports an inference that the destruction of the original work reports of the HEET unit at issue was willful or in bad faith such as would justify the striking of a pleading. (*Strong*, 112 AD3d at 16.) The unavailability to plaintiff of the original work reports for the HEET unit at issue might have impaired plaintiff's ability to establish that defendants possessed the requisite notice of a defective condition of the HEET unit that might have caused the turnstile not to turn when plaintiff allegedly swiped her metrocard and received a "Go" signal.

Had the NYCTA issued a litigation hold in August 2010 to prevent the destruction of the original work reports, any original work reports from 2004 and 2005—two years prior to the alleged incident—would not yet have been destroyed pursuant to the records retention schedule, and therefore might have been available to plaintiff. Under these circumstances, the appropriate sanction warranted is an adverse inference, rather than preclusion, to prevent defendants from using the absence of the original work reports to their own advantage and “to restore balance to the matter.” (*Minaya v Duane Reade Intl.*, 66 AD3d 402, 402-403 [1st Dept 2009]; see also *Alleva v United Parcel Service, Inc.*, 112 AD3d 543 [1st Dept 2013].) Plaintiff is entitled to an adverse inference charge at trial, if sought, as to the NYCTA.

Although defendants asserted that the computerized summaries that were previously produced to plaintiff contain the information that was in the original work reports, Bachan’s deposition testimony appears to indicate just the opposite. Bachan testified as follows:

“Q. Is there anywhere that the worker records what work was actually performed on that visit?

A. On that visit, no.

Q. Yes.

A. No. Only the maintenance report would give you that.

Q. That’s not input into the computer system.

A. No. It’s closed as a 90. If it’s a PM work order, it’s a PM work order. A PM is preventive maintenance work order. If you’re asking for other work orders, you’re looking at service call or special assignment.”

(Bachan EBT, at 98-99.)

**CONCLUSION**

Accordingly, it is hereby

ORDERED that plaintiff's motion is granted only to the extent that plaintiff is entitled to an adverse inference charge at trial as to defendant New York City Transit Authority.

Dated: ~~August~~ <sup>July 31</sup>, 2014  
New York, New York

ENTER:



J.S.C.

HON. MICHAEL D. STALLMAN

**FILED**

AUG 05 2014

COUNTY CLERK'S OFFICE  
NEW YORK