

Herman v New York City Transit Auth.

2014 NY Slip Op 32047(U)

July 31, 2014

Sup Ct, New York County

Docket Number: 114593/11

Judge: Michael D. Stallman

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

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 21

Index Number : 114593/2011
HERMAN, ROBIN S.
vs.
NEW YORK CITY TRANSIT
SEQUENCE NUMBER : 001
STRIKE ANSWER

INDEX NO. 114593/11
MOTION DATE 5/29/14
MOTION SEQ. NO. 001

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

- | | |
|---|------------|
| Notice of Motion — Affirmation in Support — Exhibits 1-4 | No(s). 1-2 |
| Affirmation in Opposition — Exhibits A-B | No(s). 3 |
| Reply Affirmation — Exhibit 5 | No(s). 4 |
| Affirmation in Further Support (Sur-Reply Affirmation) — Exhibits A-E | No(s). 5 |
| Supplemental Affirmation in Opposition (Sur-Reply Affirmation in Opposition) — Exhibits A-B | No(s). 6 |
| Affirmation in Further Support (Sur-Sur-Reply Affirmation) — Exhibit A | No(s). 7 |

Upon the foregoing papers, this motion is decided in accordance with the annexed memorandum decision and order.

FILED

AUG 05 2014

COUNTY CLERK'S OFFICE
NEW YORK

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

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

[Signature], J.S.C.

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

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

FILED

AUG 05 2014

-----X
ROBIN S. HERMAN and GLEN A. HERMAN,

COUNTY CLERK'S OFFICE
NEW YORK

Plaintiffs,

- against -

Index No. 114593/11

NEW YORK CITY TRANSIT AUTHORITY,

Defendant.

Decision and Order

-----X
HON. MICHAEL D. STALLMAN, J.:

Plaintiffs move to strike defendant's answer for defendant's alleged failure to adhere to the preliminary conference order dated October 11, 2012, or in the alternative seek to compel defendant to provide a response to plaintiffs' combined demands dated October 17, 2012. Plaintiffs also seek costs for the motion. Defendant opposes the motion.

BACKGROUND

In this personal injury action, plaintiffs allege that on October 30, 2011 plaintiff Robin Herman sustained injuries when she tripped and fell on wires on the sidewalk near the subway entrance in front of 85 West Broadway at the corner of Chambers Street in Manhattan.

Plaintiffs move to strike defendant's answer and impose costs against defendant for making the motion on the ground that defendant failed to comply with the preliminary conference order dated October 11, 2012. (See

Schwartz Affirm. Ex. 3.) In the alternative, plaintiffs seek and order directing defendant to respond to plaintiffs' combined demands dated October 17, 2012. (*See id.* Ex. 4.)

Defendant opposes the motion arguing, that defendant responded to and complied with the preliminary conference order on December 10, 2012. (Blythe Opp. Affirm. Ex. B.) Defendant also notes that the preliminary conference order only stated that plaintiffs would serve their combined demands on defendant, but did not include a time frame by which defendant had to respond to the combined demands. (*See id.*)

Plaintiffs note that they provided a time frame in which defendant should have responded to their combined demands in the combined demands – twenty-one days following service of the notice. (Schwartz Affirm. Ex. 4.)

In summer 2013, plaintiffs obtained new counsel. (Roth Sur-Reply Affirm. ¶ 3.) Plaintiffs submitted a sur-reply dated November 20, 2013 noting that defendant still had not responded to plaintiffs' combined demands as of that date. (*See id.* ¶ 4.) Plaintiffs also argue that the motion was adjourned six times – 12/14/12, 1/9/13, 1/24/13, 2/12/13, 3/21/13, and 5/23/13, purportedly to allow defendant to comply and therefore, each adjournment

should be considered a separate order with which defendant failed to comply. (See *id.* ¶¶ 4, 8.)

In defendant's sur-reply in opposition dated December 12, 2013, defendant argues that the Court should not consider each individual adjournment as a separate order as plaintiffs provide no evidence of the reason for each adjournment. (Berkowitz Opp. Sur-Reply Affirm. ¶ 15.) Defendant also contends that on May 23, 2013, the parties entered into a so-ordered stipulation mirroring plaintiffs' combined demands (*Id.* Ex. A), which defendant responded to on November 19, 2013 (*Id.* Ex. B), and therefore, the issue of this outstanding discovery is now moot. Defendant also argues again that the basis of this motion was not failure to comply with plaintiffs' combined demands but rather failure to comply with the preliminary conference order, which defendant contends it responded to and complied with on December 10, 2012. (See *id.* ¶¶ 4-6.)

In plaintiffs' sur-sur-reply dated December 15, 2013, plaintiffs argue that defendant's response to plaintiffs' combined demands is incomplete because defendant did not provide "records about the how, when, why of the communication wires being all over the sidewalk, the dates, times, personnel that actually placed the wires and repaired the condition, who was actually working on the job, who started the job, who finished the job, all of the

different employees of the defendants involved nor have they supplemented any of their responses with the names of any people knowledgeable about the condition.” (Roth Sur-Sur-Reply Affirm. at 4.)

DISCUSSION

“[I]t 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” (*McGilvery v New York City Tr. Auth.*, 213 AD2d 322, 324 [1995].) A pattern of noncompliance with court orders and discovery demands and failure to offer a reasonable excuse for the noncompliance may give rise to an inference of willful and contumacious conduct. (See *e.g. Henderson v Manhattan and Bronx Surface Tr. Operating Auth.*, 74 AD3d 654 [1st Dept 2010]; *Fish & Richardson, P.C. v Schindler*, 75 AD3d 219 [1st Dept 2010]; *Bryant v New York City Hous. Auth.*, 69 AD3d 488 [1st Dept 2010]; *Figiel v Met Food*, 48 AD3d 330 [1st Dept 2008].)

Here, plaintiffs have not demonstrated that defendant's failure to comply with the Court's prior preliminary conference order was either willful or contumacious. Plaintiffs have not shown a pattern of non-compliance with prior court orders from which willfulness may be inferred. As

defendant accurately notes, plaintiffs' motion to strike defendant's answer is based on defendant's "failure to adhere to the Preliminary Conference Order of the Court that was held on October 11, 2012." (Notice of Motion). Generally speaking, the deadline agreed to by counsel in the preliminary conference order for certain document discovery was 60 days. Defendant responded to the preliminary conference order within 60 days on December 10, 2012. (Blythe Opp. Affirm. Ex. B.)

As to plaintiffs' combined demands, the preliminary conference order only states, "Plaintiffs will serve formal demand" (Schwartz Affirm. Ex. 3.), which plaintiffs served on October 17, 2012. Plaintiffs contend that the motion was adjourned six times – 12/14/12, 1/9/13, 1/24/13, 2/12/13, 3/21/13, and 5/23/13, purportedly to allow defendant to comply, but only provide the compliance conference order dated May 23, 2013, which mirrored plaintiffs' original combined demands. Plaintiffs also note without any explanation that they substituted counsel in or about summer 2013, and it is not clear if this substitution was related to the multiple adjournments. Thus, the other adjournments cannot be considered as separate orders for purposes of defendant's alleged noncompliance. Moreover, defendant responded to plaintiffs' combined demands on November 19, 2013. "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].)

However, defendant did not completely respond to four of the nine items listed in plaintiffs' combined demands. Therefore, the Court directs defendant to do as follows:

- Respond to item 4 by providing a legible version of the names and job titles of all employees working at the subject station on the day of the alleged incident;
- Respond to item 6 by conducting a new search for all repair and maintenance records for the subject wires, providing an affidavit from an employee with personal knowledge documenting when and how the search was performed, and providing a certification stating that all records found, if any, are all the records that exist;
- Respond to item 7 by conducting a new search for all records including but not limited to work orders, work tickets, contracts, memos, log books, documents, and computer records regarding the installation, placement and removal of the subject wires, providing an affidavit from an employee with personal knowledge

documenting when and how the search was performed, and providing a certification stating that all records found, if any, are all the records that exist;

- Respond to item 8 by providing a legible version of the names and job titles of all employees involved in the installation and / or placement of the subject wires at the location of the alleged incident, and if any of the said employees are no longer employed by defendant, then defendant must provide their last known addresses.

As to plaintiffs' request for costs, under CPLR 8106, the Court exercises its discretion not to award costs.

CONCLUSION

Accordingly, it is hereby

ORDERED that the branch of plaintiffs' motion to strike defendant's answer for defendant's failure to adhere to the preliminary conference order dated October 11, 2012 is denied; and it is further

ORDERED that the branch of plaintiffs' motion compelling defendant to provide a response to plaintiffs' combined demands dated October 17, 2012 is granted to the extent that, within 45 days from entry of this order,

defendant shall respond to items 4, 6, 7, and 8 of plaintiffs' combined demands as delineated in this decision; and it is further

ORDERED that the remainder of the motion is denied.

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

ENTER: 

J.S.C.

HON. MICHAEL D. STALLMAN

FILED

AUG 05 2014

COUNTY CLERK'S OFFICE
NEW YORK