

Gil v City of Yonkers

2014 NY Slip Op 32984(U)

November 20, 2014

Supreme Court, Westchester County

Docket Number: 50046/13

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

-----x
ROSA GIL,

Plaintiff,

DECISION & ORDER

-against-

Index No. 50046/13
Motion Date: Oct. 20, 2014

THE CITY OF YONKERS,

Seq. No. 1

Defendant.
-----x

LEFKOWITZ, J.

The following papers were read on this motion by plaintiff for an order compelling defendant City of Yonkers (hereinafter "defendant City") to produce certain demanded discovery and/or precluding defendant City from offering any evidence or testimony in the matter.

- Order to Show Cause - Affirmation in Support - Exhibits A-L
- Affirmation in Opposition - Exhibits A-J
- Affidavit in Opposition of Dominic Micka
- Affidavit in Opposition of John Michalak
- Affidavit of Service

Upon the foregoing papers and the proceedings held October 20, 2014, the motion is decided as follows:

In the present action, plaintiff seeks damages for personal injuries which she sustained when she tripped and fell upon an alleged defect in the sidewalk located on the eastern side of North Broadway at the intersection of North Broadway and Quincy Place on August 28, 2012. Plaintiff contends that she tripped on a "metal protrusion" in the sidewalk. Plaintiff asserts that a photograph annexed as an exhibit shows that a circular metal object was installed in the sidewalk, was cut at a level above grade, then paved over and filled with concrete. Plaintiff further asserts that the photograph establishes that the metal defect is surrounded by three flags of concrete which appeared to have been repaired since they are a different color than the remaining flags of the sidewalk. Accordingly, plaintiff contends that this is evidence of a repair or maintenance in the area of the accident, and that the paving over and the paving of the inside of the hardware was contemporaneous with the repair to the sidewalk.

On the present motion, plaintiff seeks to compel defendant City to provide records regarding the work on the area of the sidewalk containing the defect or for an order precluding

defendant City from offering evidence or testimony. Plaintiff contends that defendant City is in possession of records of this work, namely either the removal, repair, maintenance and/or installation of the hardware and surrounding concrete paving, but has failed to produce it. Plaintiff contends that defendant City, who has asserted that it has no relevant records in its possession, has failed to provide the necessary discovery insofar as it only searched records for the two years prior to the accident. Plaintiff also contends the discovery response was woefully inadequate in light of the deposition testimony and photographs.

Specifically, plaintiff contends that defendant City's sidewalk inspector testified, in relevant part, as follows: (1) he had tailored his search for records to public works records for two years prior to the accident and found no work orders; (2) it is possible defendant City worked on a sidewalk and no work order would be in the system; (3) he did not look for work permits or construction permits; (4) he did not know who would keep records of the removal of poles, rails or anything of that kind on the sidewalk; (5) he did not know who removes poles and could only testify about work done by public works; (6) he did not search the City's sign shop records or the engineering department records; (7) the photograph of the area of the defect showed the concrete was different from the surrounding concrete and the metal object was embedded but protruding from the concrete; and (8) any entity doing work on the sidewalk would require a permit.

Plaintiff also contends that the circumference of the circular metal object upon which plaintiff tripped is similar to that of a street name sign and that there is no Quincy Place sign at the subject intersection. Plaintiff also notes that a diagram exchanged by defendant City dated "2/24/11" lists a 10th Battalion Road instead of Quincy Place. Accordingly, plaintiff contends that the evidence indicates that defendant City knows that the street sign for Quincy Place was removed when the name of the road was either renamed or co-named 10th Battalion Road and had purposefully hidden this fact and sign removal from plaintiff. Plaintiff also annexes two Google map views, one for 2004 and one for 2010, which plaintiff contends shows a different and prior repair to the sidewalk.

Plaintiff, therefore, contends that she is entitled to records and further depositions regarding the facts surrounding the circumstances of the hardware, the two concrete repairs, and the existence of 10th Battalion Road. Plaintiff asserts that defendant City should be directed to conduct a search of all relevant records without time limit as to maintenance, repair, installation and inspection work of any work done on subject area, including removal of hardware, and resolutions, orders directives, documents and hearings regarding naming or co-naming Quincy Place to 10th Battalion Road.

Defendant City opposes the motion. Defendant City notes that plaintiff's demand was limited to a two year search by the Preliminary Conference Stipulation, which was so ordered by this court. Defendant City contends that a search was conducted and they responded to plaintiff that no records were found. Defendant City contends that, thereafter, in response to plaintiff's additional Notice of Discovery and Inspection, which demanded work orders and inspection records for the subject area for a two year period prior to the date of the accident, defendant City produced records to the extent they existed. Defendant City also asserts that it responded to plaintiff's further Notice of Discovery and Inspection seeking maps, diagrams, drawings,

schematics, etc., depicting poles, lamp posts, sign posts, hydrants, etc., placed on the sidewalk at the subject location, by producing those items in its possession. Defendant City also asserts that it produced numerous contracts relating to sidewalk repairs performed by outside contractors. Defendant City also allowed plaintiff to inspect the City's Engineering Department files relating to sidewalk repair work performed by outside contractors for the years preceding the plaintiff's accident, but no relevant records were found despite hours of review of the files by the parties. Defendant City further notes that it produced two witnesses, including the sidewalk inspector, who testified as to the absence of any records regarding the subject location. Accordingly, defendant City objects to plaintiff's accusations that defendant City is "stonewalling" with respect to discovery.

Defendant City also objects to plaintiff now seeking to compel an open ended search of all records without time frame limitations or, alternatively, to preclude defendant City from offering any evidence on the subject. Defendant City contends that plaintiff has not shown a good faith basis for this demand, and such demand is clearly overbroad and unduly burdensome. Defendant City further contends that plaintiff's counsel's argument that defendant City must have records relating to the work or must have performed the work is based upon purely conclusory speculation.

Nevertheless, without waiving its objections, defendant City conducted a ten year search of its records relating to street sign installation and removal at the subject intersection and found no records. Defendant City annexes the affidavit of Dominic Micka, defendant City's Director of Traffic Engineering, who oversees the installation and removal of street signs. He avers in his affidavit that he conducted a search of the Traffic Engineering records for records relating to street sign installation and/or removal work that may have been performed by defendant City at the subject intersection for a ten year period, including the date of plaintiff's accident, and no records were found. Therein, Mr. Micka also avers that the name 10th Battalion Road appears interchangeably for Quincy Place, since the street borders the New York National Guard Armory. He further avers that the crossroad is utilized only as an access road/driveway to the armory and is not a dedicated City of Yonkers right of way, such that a street name sign would not be maintained at the subject intersection.

Defendant City also annexes to its opposition papers the affidavit of John Michalak, PE, an engineer for defendant City's Engineering Department. In his affidavit, Mr. Michalak avers that he conducted a ten year search of permit records prior to the date of the accident and found two permits relating to work on the roadway and eastern sidewalk at the subject intersection. The permits are also annexed to the opposition papers. One permit was issued November 20, 2008 to Cablevision Systems Westchester Corp. to install telephone conduit and fiber. The second permit was issued on December 15, 2008 to Extenet Systems, Inc. for telecommunications installation work to be performed by Rosciti Construction Co., Inc. Mr. Michalak also avers in his affidavit that all contractors performing work on a City right of way are required to obtain a permit from the Engineering Department, but there are times when contractors unlawfully perform work without obtaining a permit.

In view of the foregoing, defendant City contends that it has conducted extensive discovery in good faith and has produced responsive documents in its possession. Accordingly, defendant City asserts that there is no basis to impose sanctions as it has complied with all court orders and responded to all discovery demands to the extent the documents were in its possession.

CPLR 3101(a) requires “full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.” The phrase “material and necessary” is “to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason” (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 406 [1968]; *Foster v Herbert Stepy Corp.*, 74 AD3d 1139 [2d Dept 2010]). The court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Mironer v City of New York*, 79 AD3d 1106, 1108 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]), as well as impose penalties upon a party which “refuses to obey an order for disclosure” or “wilfully fails to disclose information which the court finds ought to have been disclosed” (CPLR 3126). The penalties, although not exhaustive, include deciding the disputed issue in favor of the prejudiced party, precluding the disobedient party from producing evidence at trial on the disputed issue, striking the pleadings of the disobedient party, or rendering a default judgment against the disobedient party (*DiDomenico v C & S Aeromatik Supplies*, 252 AD2d 41, 48-49 [2d Dept 1998]). The penalties are designed “to prevent a party who has refused to disclose evidence from affirmatively exploiting or benefiting from the unavailability of the proof during the pending civil action” (*Sands v News Am. Publ.*, 161 AD2d 30, 37 [1st Dept 1990]; see *Matusiewicz v Jo Jo’s Auto Parts*, 18 AD3d 828 [2d Dept 2005]; *DiDomenico*, 252 AD2d at 49).

The present record demonstrates that the City has complied with all court orders and demands regarding discovery. Accordingly, preclusion is not appropriate. Moreover, insofar as defendant City has now submitted evidence that it has conducted searches of the Engineering Department’s records for permits for work to the subject intersection by private contractors, as well as for records regarding the installation and removal of street signs at the subject intersection, and has provided the permits located, defendant City has more than adequately responded to plaintiff’s demand for records regarding such work. Notably, the affidavits of the engineers employed by defendant City which were submitted in opposition to the motion establish that the cross road at the subject intersection was interchangeably known by two different names and defendant City would not maintain a street name sign at the intersection since the cross road was not a public right of way. Additionally, although defendant City correctly contends that the Preliminary Conference Stipulation and Order only required it to conduct a search for records for a two year period prior to plaintiff’s accident, which it did, the present records demonstrates plaintiff’s entitlement to work orders, if they exist, for a broader period of time prior to the date of the accident. Accordingly, the motion is granted only to the extent that defendant City is directed to search its public works records for work orders and documents relating to any work performed on the sidewalk by defendant City for an additional 8 years prior to the accident.

In view of the foregoing, it is

ORDERED that the branch of the motion seeking an order compelling defendant City to provide additional discovery is granted only to the extent that defendant City, on or before November 14, 2014, shall conduct a search of its public works records for work orders and documents regarding any work performed by defendant City on the sidewalk located on the eastern side of North Broadway at the intersection of North Broadway and Quincy Place for an additional eight years prior to plaintiff's accident, and produce any relevant work orders or documents or, if no relevant work orders or documents are found, an affidavit setting forth the details of the search undertaken and that no relevant work orders or documents are in defendant City's possession; and it is further

ORDERED that the branch of the motion seeking an order precluding defendant from offering evidence or testimony at trial is denied; and it is further

ORDERED that counsel are directed to appear for a conference in the Compliance Part, Courtroom 800, on November 18, 2014 at 9:30 A.M.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
October 20, 2014


HON. JOAN B. LEFKOWITZ, J.S.C.

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