SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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WILSON DIAZ-RODRIGUEZ,

DECISION AND ORDER

Plaintiff(s), Index No: 305225/11

- against -

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF SANITATION, ARTHUR MONDELLA, JR., JUAN R. HERNANDEZ, AND RAMON L. HERNANDEZ,

Defendant(s).

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In thIs action for alleged personal injuries arising from a motor vehicle accident, plaintiff moves seeking an order pursuant to CPLR § 3126, striking the answer of defendants THE CITY OF NEW YORK (the City), NEW YORK CITY DEPARTMENT OF SANITATION (DOS), and ARTHUR MONDELLA, JR (Mondella) on grounds that they have willfully and contumaciously failed to provide discovery allegedly ordered by this Court. Specifically, plaintiff alleges that the City, DOS, and Mondella were ordered to produce traffic signal timing records for multiple traffic signals and to date, have only provided records for only one signal. Alternatively, plaintiff seeks an order pursuant to CPLR § 3124 compelling the City, DOS, and Mondella to provide the discovery allegedly ordered by this Court. The City, DOS and Mondella oppose plaintiff's motion averring,

inter alia, that they fully complied with all court orders requiring disclosure. Specifically, the City, DOS, and Mondella assert that they were only ordered to provide traffic signal timing records for one traffic signal, which records were provided.

For the reasons that follow hereinafter, plaintiff's motion is granted, in part.

The instant action is for alleged personal injuries sustained as a result of a motor vehicle accident. Plaintiff's complaint alleges that on January 10, 2011, plaintiff - a pedestrian traversing the intersection located at East 172nd Street and Jerome Avenue, Bronx, NY - was struck by a vehicle owned by the City and DOS, and operated by Mondella, and by a vehicle owned and operated by defendants JUAN R. HERNANDEZ and RAMON L HERNANDEZ. Plaintiff alleges that the defendants were negligent in the maintenance, ownership and operation of their respective vehicles and that the City was further negligent in the design and maintenance of the traffic lights at the location herein. Specifically, plaintiff alleges that the City improperly timed the traffic lights along the subject streets where the instant accident allegedly occurred. As a result of the foregoing negligence, plaintiff alleges that he sustained serious injuries.

As per the Preliminary Conference Order dated, August 7, 2012, the City was ordered "to provide any records regarding traffic signal settings cycles and timing for 2 traffic signals in both

directions along Jerome Avenue from 172nd Street." On November 9, 2012, the City provided a response to the Preliminary Conference Order, stating that traffic signal timing records for the intersection of Jerome Avenue and East 172nd Street were annexed. With the aforementioned response, the City provided a document appearing to indicate the timing of a traffic light located at Jerome and East 172nd Street on January 10, 2011. On October 22, 2013, within this Court's Compliance Conference Order, it appears that a directive requiring the City to produce "signal settings and timing of the lights for the subject intersection [and] 2 intersections in either direction along Jerome Ave," was denied, with plaintiff reserving his right to make a motion for those records.

Plaintiff's motion seeking to strike the City, DOS, and Mondella's answer is denied, but his motion seeking to compel disclosure of the timing records for the traffic signal immediately preceding the intersection of Jerome Avenue and East 172nd Street, in either direction on Jerome Avenue is granted. Contrary to the assertion by the City, DOS, and Mondella, the foregoing records are material and necessary to plaintiff's cause of action inasmuch as he alleges, within his complaint, that this accident was caused, in whole or in part, by the City's negligence in improperly timing the traffic lights along the subject streets.

"The purpose of disclosure procedures is to advance the

function of a trial to ascertain truth and to accelerate the disposition of suits" (*Rios v Donovan*, 21 AD 2d 409, 411 [1st Dept. 1964]). Accordingly, our courts possess wide discretion to decide whether information sought is "material and necessary" to the prosecution or defense of an action (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). The terms

> material and necessary, are, in our view, 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. CPLR 3101 (subd. [a]) should be construed, as the leading text on practice puts it, to permit discovery of testimony which is sufficiently related to the issues in litigation to make the effort to obtain it in preparation for trial reasonable

(*id.* at 406 [internal quotation marks omitted]). Accordingly, whether information is discoverable does not hinge on whether the information sought is admissible and information is, therefore, discoverable if it "may lead to the disclosure of admissible proof" (*Twenty Four Hour Fuel Oil Corp. v Hunter Ambulance*, 226 AD2d 175, 175 [1st Dept 1996]).

CPLR § 3124 allows a court to compel disclosure "[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question, or order." Thus, when a party responds to discovery demands but provides inadequate responses, the proper remedy is a motion to compel pursuant to CPLR § 3124 as

opposed a motion to strike or preclude pursuant to CPLR § 3126 (*Double Fortune Property Investors Corp. v Gordon*, 55 AD3d 406, 407 [1st Dept 2008] ["Plaintiff having responded to defendant's discovery requests, the proper course for defendant, rather than moving to strike the complaint pursuant to CPLR 3126, was first to move to compel further discovery pursuant to CPLR 3124."]).

It is well settled that "[t]he nature and degree of a penalty to be imposed under CPLR 3126 for discovery violations is addressed to the court's discretion" (*Zakhidov v Boulevard Tenants Corp.*, 96 AD3d 737, 738 [2d Dept 2012]). However, since striking a party's pleading for failure to provide discovery is an extreme sanction it is only warranted when the failure to disclose is willful and contumacious (*Bako v V.T. Trucking Co.*, 143 AD2d 561, 561 1st Dept 1999]). Similarly, since the discovery sanction imposed must be commensurate with the disobedience it is designed to punish, the sanction of preclusion is also only appropriate when there is a clear showing that a party has willfully and contumaciously failed to comply with court-ordered discovery (*Zakhido* at 739; *Assael v Metropolitan Transit Authority*, 4 AD3d 443, 444 [2d Dept 2004]; *Pryzant v City of New York*, 300 AD2d 383, 383 [2d Dept 2002]). Accordingly, where the failure to disclose is neither willful nor contumacious, and instead constitutes a single instance of non-compliance for which a reasonable excuse is proffered, the extreme sanction of striking of a party's pleading is unwarranted (*Palmenta*

v. Columbia University, 266 AD2d 90, 91 [1st Dept 1999]). Nor is the striking of a party's pleadings warranted merely by virtue of "imperfect compliance with discovery demands" (*Commerce & Industry Insurance Company v Lib-Com, Ltd*, 266 AD2d 142, 144 [1st Dept 1999]). Because willful and contumacious behavior can be readily inferred upon a party's repeated non-compliance with court orders mandating discovery (*Pryzant v City of New York*, 300 AD2d 383, 883 [2d Dept 202]), only when a party adopts a pattern of willful non-compliance with discovery demands (*Gutierrez v Bernard*, 267 AD2d 65, 66 [1st Dept 1999]) and repeatedly violates discovery orders, thereby delaying the discovery process, is the striking of pleadings warranted(*Moog v City of New York*, 30 AD3d 490, 491 [2d Dept 2006]; *Helms v Gangemi*, 265 AD2d 203, 204 [1st Dept 1999]).

Here, inasmuch as the directive within this Court's Preliminary Conference Order is vague insofar as it doesn't make it clear that the City was to provide records for traffic signals at multiple intersections, the City's response - providing records only for the traffic lights at the intersection where the accident is alleged to have occurred - was in all respects proper and compliant with the Court's order. Moreover, while this Court's Compliance Conference Order contains a more clear directive - requiring the City to produce records for the traffic signals at multiple intersections - it appears, as conceded by the parties - that this Court obviated compliance with this directive, requiring

plaintiff to make the instant motion instead. Thus, because striking a party's pleading is only appropriate when the failure to disclose is willful and contumacious (*Bako* at 561), here, where it is clear that the City complied with the Preliminary Conference Order and was not required to comply with the Compliance Conference Order, this Court cannot conclude that the City has failed to comply with its directives, let alone that it has been willful or contumacious.

Notwithstanding the foregoing, it is clear that given the allegations within plaintiff's complaint - namely his allegation of negligence with respect to the timing of the traffic signals along Jerome Avenue at and around its intersection with East 172nd Street - that records regarding the timing of the traffic signals at the intersection immediately prior and subsequent to the intersection of East 172nd Street and Jerome Avenue, on Jerome Avenue are material and necessary to plaintiff's allegations of negligence. While the City, DOS and Mondella, in opposition, assail the viability of plaintiff's claims regarding the traffic signals, averring that the City has no duty to with respect to the timing of its traffic lights and that, in any event, the evidence adduced thus far fails to establish that the signals at issue were the proximate cause of the instant accident, these arguments are unavailing.

In fact, in Weiss *v Fote* (7 NY2d 579, 584 [1960]), the seminal

case on this issue, the Court dealt with traffic signal timing and while ruling in favor of the municipality, did not foreclose liability for such a theory under the right circumstances. To be sure, in *Weiss*, plaintiffs sued the City of Buffalo as a result of a motor vehicle accident occurring at an intersection which plaintiffs claimed was caused, in part, by an inadequate clearance interval - the time elapsing from the point after which the light within the traffic signal turned red and before the light within the same signal turned green for intersecting traffic (*id.* at 583). Specifically, plaintiffs claimed that the clearance interval - 4 seconds - was too short, thereby, prematurely green-lighting vehicles to enter the intersection before intersecting traffic had fully cleared the intersection (*id.*) The case was tried and submitted to a jury on, *inter alia*, the theory that the City of Buffalo was negligent in designing the lights at the intersection because the clearance interval was inadequate. The jury returned a verdict in plaintiffs' favor and on appeal, the Court of Appeals vacated the jury's verdict against the City of Buffalo, noting that the evidence at trial established that the lights had been designed and installed by the City of Buffalo after ample study of the traffic conditions at the intersection, including numerous traffic checks (*id.* at 586). In promulgating the law applicable to suits assailing a municipality's design of its streets, the court stated that

> [t]he rule is well settled that where power is conferred on public officers or a municipal corporation to make improvements, such as streets, sewers, etc., and keep them in repair, the duty to make them is quasi judicial or discretionary, involving a determination as to their necessity, requisite capacity, location, etc., and for a failure to exercise this power or an erroneous estimate of the public needs, no civil action can be maintained

(*id.* at 584 [internal quotation marks omitted). As noted by the court in *Weiss*, a municipality, is not completely immune from suit for injuries stemming from the design of its streets because liability would have been appropriate had there been evidence that due care was not exercised in the preparation of the design therein, had it been shown that no reasonable official would have adopted the design implemented, or upon a showing that while the design was proper at its inception, the municipality had been notified of a change in the conditions at the location at issue, *e.g.*, accidents, and did nothing to address and/or remedy the conditions (*id.* at 584-588). Thus, here, the contention that plaintiff's cause of action as against the City for the way it timed the traffic signals along Jerome Avenue is not viable as a matter of law, is meritless.

Similarly mertitless is the City, DOS, and Mondella's contention that the evidence here, rules out the signals as the proximate cause of plaintiff's accident. While it is true that the defendants here did not testify that the signals at the

intersection of Jerome Avenue and East 172nd Street were afflicted with a timing issue, it is equally true that the video provided by plaintiff in support of his instant motion evinces that the signals at the instant intersection was timed differently than the others on Jerome Avenue. On this record, this not only precludes any decision on the issue of proximate causation, but more importantly, warrants that the City provide signal timing records for the lights at intersections on Jerome Avenue immediately preceding East 172nd Street and immediately subsequent thereto. After all, the test is whether the material sought is material and necessary to the a cause of action or a defense (*Allen* at 406). Clearly the discovery sought is material and necessary to plaintiff's negligent design cause of action.

It is hereby

ORDERED that the City provide traffic signal timing records for the traffic Signals located on Jerome Avenue immediately after and before the intersection of East 172nd Street and Jerome Avenue as they existed for the date of plaintiff's accident, namely January 10, 2011, within thirty (30) days of service of this order with notice of entry. It is further

ORDERED that the City provide a witness who can testify about the search conducted for traffic signal timing records and who can interpret those records within sixty (60) days of service of this order with notice of entry. It is further

ORDERED that plaintiff serve a copy of this Decision and Order with Notice of Entry upon the City, DOS, and Mondella within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated : October 15, 2014
Bronx, New York

Mitchell J. Danziger, ASCJ