

Allison D. v New York City Tr. Auth.

2014 NY Slip Op 33653(U)

October 22, 2014

Supreme Court, New York County

Docket Number: 110307/2010

Judge: Michael D. Stallman

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

EA
10/24/14
E

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 21

ALLISON D., an infant by her mother and natural guardian JANET D., individually,

INDEX NO. 110307/2010

MOTION DATE 5/1/14

Plaintiffs,

MOTION SEQ. NO. 004

NEW YORK CITY TRANSIT AUTHORITY and ELVIS E. WASHINGTON,

Defendants.

(And two third-party actions).

RECEIVED
OCT 24 2014
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

The following papers, numbered 1 to 13, were read on this motion and cross motion

Notice of Motion—Affirmation of Good Faith—Affidavit of Service; Affirmation — Exhibits A-G

No(s). 1-3; 4

Notice of Cross Motion—Affirmation in Opposition — Exhibit A-C—Affidavit of Service

No(s). 5-7

Affirmation in Opposition—Affidavit of Service

No(s). 8-9

Reply Affirmation — Exhibits —Affidavit of Service

No(s). 10-11

Reply Affirmation —Affidavit of Service

No(s). 12-13

FILED
OCT 24 2014
NEW YORK COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that defendants'/third-party plaintiffs' motion and third-party defendants' cross motion are decided in accordance with the annexed memorandum decision and order.

Dated: 10/22/14
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:.....

- CASE DISPOSED
- NON-FINAL DISPOSITION
- GRANTED DENIED GRANTED IN PART OTHER
- SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

HON. MICHAEL D. STALLMAN

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

-----X
ALLISON D., an infant by her mother and natural
guardian JANET D., Individually,

Plaintiffs,

- against -

Index No.
110307/2010

NEW YORK CITY TRANSIT AUTHORITY and ELVIS
E. WASHINGTON,

Defendants.

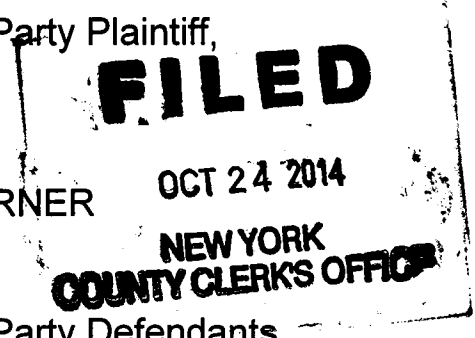
Decision and
Order

-----X
NEW YORK CITY TRANSIT AUTHORITY

Third- Party Plaintiff,

- against -

COLUMBIA UNIVERSITY and TURNER
CONSTRUCTION COMPANY,



Third- Party Defendants.

-----X
NEW YORK CITY TRANSIT AUTHORITY

2nd Third- Party Plaintiff,

- against -

REGIONAL SCAFFOLDING & HOISTING CO., INC.,

2nd Third- Party Defendant.

-----X

HON. MICHAEL D. STALLMAN, J.:

In this action, plaintiff alleges that, on March 31, 2010, a bus driven by defendant Elvis E. Washington struck a stationary concrete barrier, also known as a Jersey barrier, which then fell upon plaintiff's right foot. Defendant New York City Transit Authority (NYCTA) impleaded third-party defendants Columbia University and Turner Construction Company (Columbia and Turner) and second third-party defendant Regional Scaffolding & Hoisting Co., Inc. (Regional).

The NYCTA now moves to strike the Columbia and Turner's answer on the ground that they did not comply with a notice for discovery and inspection dated January 10, 2013. (Motion Seq. No. 004.) Columbia and Turner cross-move to strike the third-party complaint on the ground that the NYCTA failed to provide court-ordered discovery. The NYCTA separately moves to strike Regional's answer on the ground that Regional did not comply with notices of discovery and inspection dated January 10, 2013 and April 3, 2013. (Motion Seq. No. 005.)

This decision addresses both motions and the Columbia and Turner's cross motion.

BACKGROUND

By an agreement dated as of June 1, 2006, Columbia retained Turner as a construction manager for the construction of a new research building at the corner of Broadway and 120th Street, with research laboratories devoted to research in biology, chemistry and physics. (See Boyar Affirm., Ex D.) By an agreement dated as of August 17, 2007, Columbia hired Regional to perform hoist/sidewalk bridge work for the “Columbia University Northwest Science Building project.” (See *id.*) William Sabino, a Turner superintendent, testified at his deposition Regional installed the Jersey barrier. (See Boyar Affirm., Ex G [Sabino EBT], at 31.)

Columbia and Turner assert that the Jersey barrier was properly stationed completely within the right lane of Broadway and West 120th Street, which was closed, and that Washington simply misjudged the distance he needed to complete the turn of the bus onto West 120th Street from Broadway. However, the NYCTA's own professional engineer opines that the Jersey barrier should have been embedded or anchored into the asphalt pavement to create a rigid barrier system, so as to prevent its movement. (See Boyar Affirm., Ex F [Derector Aff.] ¶ 15.)

By decision and order dated November 19, 2012, this Court denied Columbia and Turner's motion for summary judgment to dismiss the third-

party action. The Court ruled that Columbia and Turner did not meet their prima facie burden of demonstrating that placement and installation of the Jersey barrier at issue was not negligent. Columbia and Turner also argued that Washington's purportedly negligent operation of the bus was a superseding/intervening cause of plaintiff's accident. However, this Court ruled that the issue of superseding/intervening cause could not be determined as a matter of law because of the unresolved question of whether the Jersey barrier was placed within the closed lane. The decision was affirmed on appeal. (*Allison D. v New York City Tr. Auth.*, 115 AD3d 576 [1st Dept 2014].)

The NYCTA's discovery demands on Columbia and Turner

On January 10, 2013, the NYCTA served a notice for discovery and inspection upon the third-party defendants, demanding nine categories of documents. (Boyar Affirm., Ex C.) Columbia and Turner responded to the January 10, 2013 demand on September 30, 2013, and supplemented their response on November 20, 2013. (Boyar Affirm., Exs D, E.) Columbia and Turner produced documents for item nos. 1, 2, 3 and 5 of the NYCTA's discovery demand and objected to the other demands.

The NYCTA's discovery demands on Regional

On January 10, 2013, the NYCTA served a notice for discovery and inspection upon Regional, demanding eight categories of documents. (Boyar Affirm., Ex E.) The documents largely mirrored the kind of documents that the NYCTA had sought from Columbia and Turner, such as daily construction reports, an accident report, progress photos, etc. On April 3, 2013, the NYCTA also served demands for photographs, for expert witness disclosure, for the names and addresses of all witnesses, for statements, and for insurance information. (Boyar Affirm., Ex F.)

On April 22, 2014, Regional responded to the January 10, 2013 demand and the NYCTA's combined demands. (Andresen Affirm., Exs A, B.) Regional produced a copy of its contract with Columbia, but as to the other demands, Regional mostly stated that it was not in possession of the documents sought.

Columbia and Turner's discovery demands on the NYCTA

On May 15, 2012, Columbia and Turner served a supplemental discovery request on the NYCTA for ten items. (Ruggiero Affirm., Ex H.) The NYCTA responded to their request on June 13, 2012. (*Id.*, Ex J.) As to item nos. 1-4 and 10, the NYCTA responded, "Am conducting a search. Will forward under separate cover if any." (*Id.*) The NYCTA objected to item nos.

6 and 9, and asked Columbia and Turner to clarify the demand in item no. 5. (*Id.*)

Meanwhile, in additional directives dated May 24, 2012, this Court directed the NYCTA to serve a second supplemental bill of particulars as to, among other things, items 5, 15 and 17 (d). Item 5 demanded the NYCTA to state separately for each third-party defendant, the act or omissions constituting negligence. Item 15 demanded the NYCTA to set forth each statute, law, rule, regulation or ordinance that the third-party defendants allegedly violated. (Ruggiero Affirm., Ex D.) Item 17 (d) demanded the NYCTA to state “The names of each and every person who performed said acts of alleged negligence on behalf of Third-Party Defendants. If the names are not known, describe the physical appearance of such person[.]” (*Id.*)

In a supplemental bill of particulars dated June 18, 2012, the NYCTA responded to item nos. 5 and 15. Item no. 5 states, “A failure to maintain jersey barrier. Placement of barrier too far in the roadway and asked such that contact was given the highly trafficked location, unavoidable.” (Ruggiero Affirm., Ex K.) Item no. 15 states, “All applicable local and state, laws, statutes, and ordinances have been violated. Including but not limited to vehicle and traffic laws, administrative codes, and DOT regulations. Defendant Authority reserves the right to supplement this response.”

(Ruggiero Affirm., Ex K.) The NYCTA did not supplement its bill of particulars as to item no. 17 (d).

On July 25, 2013, Columbia and Turner served a notice for discovery and inspection demanding 13 items. (Ruggiero Affirm., Ex L.) The first 10 items reiterated Columbia and Turner's prior supplemental discovery request. Item no. 13 requested a supplemental bill of particulars "as per Judge Stallman's Order." (*Id.*)

On November 8, 2013, the NYCTA responded to Columbia and Turner's notice for discovery and inspection. (Ruggiero Affirm., Ex N.) The NYCTA objected to item nos. 1 and 4, even though the NYCTA had previously responded in June 2012, "Am conducting a search. Will forward under separate cover if any." (See Ruggiero Affirm., Ex J.) The NYCTA reiterated its objections to item nos. 6 and 9, and did not answer item no. 13, which demanded a supplemental bill of particulars.

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. Willful and contumacious behavior can be inferred by a failure to comply with court orders, in the absence of adequate excuses."

(Henderson-Jones v City of New York, 87 AD3d 498, 504 [1st Dept 2011]

[internal citation and quotation marks omitted].)

The NYCTA's motion against Columbia and Turner (Motion Seq. No. 004)

The NYCTA seeks the following items from Columbia and Turner, designated as item nos. 4-9 of its disclosure demand dated January 10, 2013:

“The daily construction reports for Turner Construction and/or any of their subcontractors that Turner Construction and/or Columbia University has for six months prior and one month subsequent;

The accident report filled and filed by Mr. William Sabino on behalf of Turner Construction Co. for the accident involving Allison D[.] on or about March 31, 2010;

Any documentation maintained by Turner Construction about the installation and use of jersey barriers in the City of New York that was in effect for one year prior to including the date of March 31, 2010;

Any progress photos taken of the area where the accident occurred and the construction site for six months prior and one month subsequent to the date of accident, March 31, 2010 by Turner Construction Co., Columbia University and/or any of their subcontractors, engineers, architects, workers that are in the possession of Turner Construction Co. and/or Columbia University;

Any documents between Regional Scaffolding and Turner Construction Co. and/or Columbia University or any other subcontractor in the possession of the third-party defendants regarding the placement of jersey barriers, the maintenance of

jersey barriers, the upkeep of jersey barriers at the construction site for six months prior and one month subsequent to the date of accident and/or any proposal, plans or documents that were submitted by Regional Scaffolding for the placement, construction, and maintenance of jersey barriers at the job site for the same period of time;

The safety logs/reports by the site safety personnel and/or subcontractors' site safety reports for six months prior to March 31, 2010 and one month subsequent."

(Boyar Affirm., Ex C.)

Columbia and Turner provided an accident report prepared by Darrell Fullerton (See Boyar Affirm., Ex E), which is not an accident report "filled and filed" by William Sabino. The NYCTA insists that Sabino prepared an accident report, based on his deposition. Sabino testified at his deposition as follows:

"Q. Did you fill out an accident report or anybody on your behalf fill out an accident report on this case?

A. Yes.

Q. Was there more than one accident report filed by anybody from Turner Construction on this case?

A. Not that I am aware of.

* * *

Q. Do you know who made up the accident report?

A. I would have signed it."

(Boyar Affirm., Ex G [Sabino EBT], at 29.) Based on Sabino's testimony, only one accident report exists. Sabino did not unequivocally state that he filled out an accident report, but he did testify that he would sign it. Although Columbia and Turner produced a copy of an accident report, that accident

report does not bear Sabino's signature. Thus, the unresolved question is not whether Sabino prepared an accident report in addition to the report that Darrell Fullerton prepared, but rather whether Sabino did, in fact, sign Fullerton's report. To resolve this question, the NYCTA is granted leave to conduct a further deposition of Sabino with respect to the accident report that Columbia and Turner disclosed.

Columbia and Turner objected to the NYCTA's demands for the other items on, among other things, grounds that the demands were vague, ambiguous, overly broad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible or relevant evidence. (Boyar Affirm., Ex E.) However, Columbia and Turner provided 30 days of daily construction reports, for the period of March 1, 2010 through March 31, 2010. (*Id.*)

Columbia and Turner's objections as to the NYCTA's demands for daily construction reports, progress photographs, and safety logs/reports are sustained. Although the NYCTA's demands are apparently intended to elicit documentary evidence concerning either the usual manner in which a Jersey barrier would be installed, or the position of the Jersey barrier at issue, the demands are overly broad in subject matter and time frame. Progress photographs of the construction of the new research building are irrelevant to the installation of the Jersey barrier and its position on the roadway. The

daily construction reports detail the work of other subcontractors that were not hired to install the Jersey barrier. The NYCTA does not explain why records for the month after the occurrence would bear on the installation of the Jersey barrier or its position on the date of the occurrence. While the NYCTA's demands can be narrowed, "it is not the court's obligation to prune those pre-litigation devices." (*Kimmel v Paul, Weiss, Rifkind, Wharton & Garrison*, 214 AD2d 453, 453-454 [1st Dept 1995].)

The NYCTA assumes that the installation of the Jersey barrier or its position in the roadway would constitute a dangerous site condition that a site safety inspector might note in safety reports. It would be unduly burdensome for Columbia and Turner to look through all of the safety reports to confirm the NYCTA's assumption. The discovery sought is not reasonably calculated to lead to admissible evidence.

Therefore, the NYCTA's motion to strike Columbia and Turner's answer, or in the alternative, to compel them to provide discovery, is denied.

Columbia and Turner's cross motion against the NYCTA (Motion Seq. No. 004)

The branches of Columbia and Turner's cross motion for an order striking the NYCTA's third-party complaint, either immediately or conditionally, is denied. Columbia and Turner have not met their burden of

demonstrating that the NYCTA's failure to comply with their discovery demands was either willful or contumacious.

The branch of Columbia and Turners' cross motion to compel the NYCTA to provide discovery is granted in part. NYCTA's supplemental bill of particulars is non-responsive as to item nos. 15 and 17 (d). "It is well settled that in a tort action, where the complaint alleges a statutory violation, the pleader is required to specify each statute, law, rule and regulation claimed to have been violated." (*Alvarado v New York City Hous. Auth.*, 302 AD2d 264, 265 (1st Dept 2003). The NYCTA did not provide any particulars as to item 17 (d). If the NYCTA presently lacks sufficient knowledge to furnish particulars with respect thereto, it shall state so under oath and shall promptly serve a further supplemental bill of particulars upon Columbia and Turner if and when the requisite knowledge to answer these items of the demand is acquired. (*Pole v Frame Chevrolet, Inc.*, 126 AD2d 531, 532 (2d Dept 1987); see *Waldman v Allen*, 87 AD2d 817, 818 [2d Dept 1982]; *Schondorf v Stein-Tex, Inc.*, 28 AD2d 835 [1st Dept 1967].) Therefore, NYCTA is directed to serve a supplemental bill of particulars as to items 15 and 17 (d) within 45 days.¹

¹ The Court notes that the NYCTA's professional engineer opined that the allegedly improper installation of the Jersey barrier constituted a violation of the 2008 New York City Building Code

Item no. 5 of the NYCTA's supplemental bill of particulars is adequate. "While responses must specify the acts of negligence as to each defendant, a general statement of the acts or omissions constituting the negligence claimed is sufficient." (*Graves v County of Albany*, 278 AD2d 578, 579 (3d Dept 2000)). A bill of particulars "need not set forth a matter that is evidentiary in nature, which is more appropriately obtained through depositions and expert disclosure." (*Harris v Ariel Transp. Corp.*, 37 AD3d 308, 309 [1st Dept 2007].)

Notwithstanding the fact that the NYCTA initially answered that it will forward responses to item nos. 1, 2, and 4 of Columbia and Turner's supplementary discovery request, the NYCTA's subsequent objections to item nos. 1, 2, 4, and 6 and 9 of Columbia and Turner's supplementary discovery request (reiterated as item nos. 1, 2, 4, 6 and 9 of Columbia and Turner's subsequent notice for discovery and inspection) are sustained. Item nos. 1, 2, and 3 seek Washington's driving records, including any traffic infractions, violations, warnings, or citations, both prior to and after the collision with the Jersey barrier. Item 6 demands "documents evidencing Washington's passing of the retraining process for two years prior to March

section 3307.6.4 (2). At the very least, the NYCTA could have included that section in its supplemental bill of particulars.

31, 2010”; item no. 9 demands “Washington’s performance evaluations for two years prior to March 31, 2010.” (Ruggiero Affirm., Exs H, L.) Columbia and Turner apparently sought these documents to establish the NYCTA’s “direct” negligence. (See Ruggiero Affirm., Ex Q.)

To the extent that Columbia and Turner are asserting that the NYCTA itself negligently hired, trained, or supervised Washington, these are not viable theories of liability against the NYCTA.

“Generally, where an employee is acting within the scope of his or her employment, thereby rendering the employer liable for any damages caused by the employee's negligence under a theory of respondeat superior, *no claim may proceed against the employer for negligent hiring or retention*. This is because if the employee was not negligent, there is no basis for imposing liability on the employer, and if the employee was negligent, the employer must pay the judgment regardless of the reasonableness of the hiring or retention or the adequacy of the training.”

(*Karoon v New York City Tr. Auth.*, 241 AD2d 323, 324 [1st Dept 1997] [citation omitted and emphasis supplied; *Segal v St. John's Univ.*, 69 AD3d 702 [2d Dept 2010]; *Drisdom v Niagara Falls Mem. Med. Ctr.*, 53 AD3d 1142, 1143 [4th Dept 2008]; *Coville v Ryder Truck Rental, Inc.*, 30 AD3d 744 [3d Dept 2006].)

Karoon controls here. It cannot be seriously disputed that Washington was acting within the scope of his employment at the time of plaintiff was allegedly injured. In their answer, the NYCTA and Washington did not deny

the allegations of paragraphs 9 and 10 of the complaint, which alleged that Washington operated the motor vehicle with the NYCTA's permission and knowledge. (See Boyar Affirm., Ex B.)

Karoon recognized an exception, “where the injured plaintiff is seeking punitive damages from the employer based on alleged gross negligence in the hiring or retention of the employee.” (*Karoon*, 214 AD2d at 324.) However, the exception does not apply to the NYCTA, because “the State and its political subdivisions, as well as public benefit corporations such as the instant Transit Authority defendants, are not subject to punitive damages.” (*Id.*)

Given that Washington operated the bus in the scope of his employment, Washington's driving record, and the records concerning Washington's retraining and his performance evaluations are not discoverable. (*Neiger v City of New York*, 72 AD3d 663 [2d Dept 2010] [because the bus driver was acting within the scope of his employment when the accident occurred, “the personnel records of the bus driver were not discoverable”].) Columbia and Turner's demands for these documents are palpably improper on their face.

Columbia and Turner's reliance on *Scott v Metropolitan Transportation Authority* (10 Misc 3d 1058 [A] [Sup Ct, Nassau County 2005]) and *Okoro v*

City of New York (2007 WL 2814050 [Sup Ct, Queens County 2007]) is misplaced. In *Scott*, the court directed production of the personnel file because the court ruled that statements in the personnel file about the accident at issue were discoverable. Here, Columbia and Turner seek discovery for the period prior to Washington's collision with the Jersey barrier. In *Okoro*, the bus operator assaulted a passenger who exited the bus, and the NYCTA, MABSTOA, and MTA maintained that the assault was outside of the bus operator's scope of employment.

The NYCTA's motion against Regional (Motion Seq. No. 005)

The NYCTA's motion against Regional is denied. The NYCTA has not shown that Regional failed to comply with the NYCTA's discovery demands. In response to the NYCTA's document demands, Regional stated that it was not in possession of almost all of the documents sought.

However, the Court directs Regional to provide, within 45 days, an affidavit detailing the means and method of the search conducted for the demanded documents. (*See Jackson v City of New York*, 185 A.D.2d 768, 586 N.Y.S.2d 952 [1st Dept 1992].)

CONCLUSION

Accordingly, it is hereby

ORDERED that defendants' motion to compel third-party defendants Columbia University and Turner Construction Company to comply with a notice for discovery and inspection dated January 10, 2013 (Motion Seq. No. 004) is denied; and it is further

ORDERED that defendants are granted leave to conduct a further deposition of William Sabino limited to an accident report prepared by Darrell Fullerton; and it is further

ORDERED that the third-party defendants' cross motion (Motion Seq. No. 004) is granted in part as follows:

Within 45 days, third-party plaintiff New York City Transit Authority shall serve a third supplemental bill of particulars as to items 15 and 17 (d);

and the cross motion is otherwise denied; and it is further

ORDERED that defendants' motion to compel second third-party defendant Regional Scaffolding & Hoisting Inc. to comply with notices for discovery and inspection dated January 10, 2013 and April 3, 2013 (Motion Seq. No. 005) is denied; and it is further

ORDERED that, within 45 days, second third-party defendant Regional Scaffolding & Hoisting Inc. shall provide to defendants' counsel an affidavit detailing the means and method of the search conducted for the documents demanded in defendants' notice for discovery and inspection dated January

10, 2013.

Dated: October 22, 2014
New York, New York

ENTER:



J.S.C.

HON. MICHAEL D. STALLMAN

FILED
OCT 24 2014
NEW YORK
COUNTY CLERK'S OFFICE