

Corrigan v New York City Tr. Auth.

2014 NY Slip Op 33814(U)

August 11, 2014

Supreme Court, New York County

Docket Number: 106473/2011

Judge: Michael D. Stallman

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

-----X
SEAN MARK CORRIGAN & MEGAN FOLEY
CORRIGAN,

Plaintiffs,

- against -

Index No.
106473/2011

NEW YORK CITY TRANSIT AUTHORITY &
METROPOLITAN TRANSPORTATION
AUTHORITY,

Decision and Order

Defendants.

FILED
-----X

AUG 15 2014

HON. MICHAEL D. STALLMAN, J.:

COUNTY CLERK'S OFFICE
NEW YORK

In this action, plaintiffs allege that, on March 8, 2010, at approximately 2:00-2:15 p.m., plaintiff Sean Corrigan was struck in the head by a moving local no. 6 train on the uptown 4-5-6 platform at the Union Square subway station.

Plaintiffs now move for an order striking defendants' answer, granting a default judgment and directing an inquest, and awarding costs and attorneys' fees pursuant to 22 NYCRR 130-1.1. In the alternative, plaintiffs seeks an order dismissing defendants' affirmative defenses and an order granting summary judgment in favor of plaintiffs based upon the order of

preclusion. According to plaintiffs, defendants and their counsel failed to comply with court-ordered discovery.

Defendants oppose the motion.

I.

A preliminary conference was held in this case on March 1, 2012. Eight additional discovery conferences were held on July 19, 2012, October 4, 2012, November 29, 2012, January 17, 2013, May 9, 2013, August 8, 2013, October 17, 2013, and on December 19, 2013. At these discovery conferences, the parties entered into so-ordered stipulations concerning discovery. (See Panzella Affirm., Exs 2-10.)¹

Prior to the preliminary conference, plaintiffs served "Plaintiffs PRELIMINARY CPLR Demands" dated December 1, 2011. (See Panzella Affirm., Ex 11.) In September 2012, plaintiffs moved to strike defendants' answer on the ground that defendants had not complied with the preliminary conference order and so-ordered stipulation dated July 19, 2012.

By letter dated October 26, 2012, defendants served a response to these demands and to the October 4, 2012 so-ordered stipulation. (Granata Opp. Affirm., Ex B.) Defendants supplemented their October 26, 2012

¹ Plaintiffs submitted copies of the stipulations, but those submitted copies were not so-ordered. The Court takes judicial notice that the originals of the stipulations were so-ordered and filed with the County Clerk.

responses in letters dated November 7 and 14, 2012, January 9, 2013, February 12, 2013, and April 11, 2013. (*Id.*) Plaintiffs' motion to strike was withdrawn pursuant to a so-ordered stipulation dated August 8, 2013.

Meanwhile, plaintiffs served a notice for discovery and inspection dated August 7, 2013 for "inspection of the Union Square/14th Street Station northbound platform of/for the #4, #5 express and the #6 local trains." (Panzella Affirm., Ex 12.) Plaintiffs also served "Plaintiffs' CPLR Demands" dated November 6, 2013.

In discovery responses dated October 26, 2012, defendants identified "J. Smith # 834585" as the operator of the train that struck plaintiff Sean Corrigan, and "A. Sepulveda #808457" as the train conductor. (See Granata Opp. Affirm., Ex B. [¶ 8].) Defendants also exchanged, among other documents, a "Department of Subways Train Incident Report" about the incident, on which appears the name "Robert Williams Jr., DESK SUPT." on the last page. (Panzella Reply Affirm., Ex 2). The incident report notes, among other things, that "Train Service Supervisor Martin" was notified. (See *id.*)

Defendants also exchanged a memorandum dated March 8, 2010 from "Faith E. Williams, Zone Superintendent - # 5 Line" to "Vito Delio, #5 Line

Deputy General Manager." (Panzella Reply Affirm., Ex 4.) The memorandum states, in pertinent part,

"The following personnel were on the scene at the 14th Street Station:

Customer Service - #5 AGM Faith E. Williams #966402, S/S II, Helen Osgood #476115, CTA Angela Grant #335162 and G. Mangar #010972, S/A in Booth R221, 14th Street, Jean Wiltshire #973380

Transportation - # 4 LGM Stephone Montgomery, RTO # 4 DGM. J. Kwon #870754, TSS Higgins #392624,

C&E – RCI Giardella # 692493

Police – Police District #4, Deputy Inspector Connoly, Sgt. Kelsch #33, Officer Almodovar #8188 and various other Police

Detectives – Smart #4518 and Imhauser #544

EMS EMTP #2325

District #2 Desk Supervisor, S/S II, James Temples III and the RCC were kept abreast of the incident.

All pertinent Customer Service reports reviewed, and faxed to the RCC, 125th Support Office, Union Port Tower LGM and GGM David Knights by PM S/S I, Choudhury."

(Panzella Reply Affirm., Ex 4.)

According to defendants, they voluntarily produced for depositions: CTA Angela Grant, Station Supervisor II Helen Osgood, train conductor Johnny Dones, train operator Edward Rivera, Station Supervisor Level I Mohammed Choudhury, Train Service Supervisor Yvonne Higgins,

Station Agent Jean Wiltshire, Road Car Inspector Carmine Giardella, and Stephone Montgomery. (Granata Opp. Affirm. ¶ 7.) Defendants also provide a cleaning report of CTA Angela Grant at a discovery conference on October 17, 2013. (Granata Opp. Affirm., Ex B; see also Panzella Affirm., Ex 3.)

It is undisputed that depositions have not been held as to train operator "J. Smith # 834585", train conductor "A. Sepulveda #808457", Desk Superintendent Robert Williams, Jr., Train Service Supervisor "E. Martin", AGM Faith E. Williams, DGM "J. Kwon #870754" and "GGM David Knights". The record contains no written response from defendants to plaintiffs' "CPLR Demands" dated November 6, 2013.

At a discovery conference on February 13, 2014, the Court issued an order adjourning the discovery conference and extending plaintiffs' deadline to file the note of issue. (Panzella Affirm., Ex 1.) The order also memorialized the following:

"Π's [Plaintiffs] attorney informed Δ atty [defendants' attorney] that she will file a motion to strike Δs answer for Δs failure to comply w/ multiple court orders; Π's counsel agrees that she will adjourn the motion should Δs comply with all outstanding court order/directive within 20 days."

(Id.)

II.

"CPLR 3126 provides that if a party 'refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed ..., the court may make such orders ... as are just.'" (*Fish & Richardson, P.C. v Schindler*, 75 AD3d 219, 220 [1st Dept 2010].) 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 wilful 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.*, 75 AD3d 219; *Bryant v New York City Hous. Auth.*, 69 AD3d 488 [1st Dept 2010]; *Figiel v Met Food*, 48 AD3d 330 [1st Dept 2008].) If a discovery sanction is warranted, it should be "appropriately tailored to achieve a fair result." (*Krin v Lenox Hill Hosp.*, 88 AD3d 597 [1st Dept 2011][citation and quotation marks omitted].)

A.

Plaintiffs have demonstrated that a pattern of defendants' non-compliance with discovery that was agreed upon in at least two or more prior so-ordered stipulations. Defendants have not produced the train operator and conductor, "J. Smith" and "A. Sepulveda", for depositions, in violation of six so-ordered stipulations dated July 9, 2012 (*Panzella Affirm.*, Ex 9 ¶ 3),

November 29, 2012 (Panzella Affirm., Ex 7 ¶ 4), January 17, 2013 (Panzella Affirm., Ex 6 ¶ 5), August 8, 2013 (Panzella Affirm., Ex 4 ¶ 13), October 17, 2013 (Panzella Affirm., Ex 3 ¶ 2), and December 19, 2013 (Panzella Affirm., Ex 2 ¶¶ 5, 8). Defendants offer no explanation as to why their depositions, which were rescheduled on multiple occasions, were not held.

Defendants did not produce Faith E. Williams and Train Service Supervisor E. Martin for depositions, notwithstanding two so-ordered stipulations dated May 9, 2013 (Panzella Affirm., Ex 5 ¶¶ 3, 6) and December 19, 2013 (Panzella Affirm., Ex 2 ¶¶ 5, 8). Neither did defendants produce Desk Superintendent Robert Williams, Jr. and District General Manager J. Kwon for a deposition, notwithstanding two so-ordered stipulations dated August 8, 2013 (Panzella Affirm., Ex 4 ¶¶ 9, 11), and December 19, 2013 (Panzella Affirm., Ex 2 ¶¶ 5, 8).

Defendants assert that they had difficulty locating Faith Williams, J. Kwon, and E. Martin because their full names and badge numbers were not provided. (Granata Opp. Affirm. ¶ 17.) This explanation is inadequate. The memorandum dated March 8, 2010 from Faith Williams, which defendants themselves produced in discovery, identified the badge numbers of Faith Williams, J. Kwon, and Train Service Supervisor E. Martin. (See Panzella Reply Affirm., Ex 4.)

However, it appears that Faith Williams, Desk Superintendent Robert Williams, Jr. and Train Service Supervisor E. Martin have retired. According to Stephone Montgomery, who was a deputy line general manager for the 4 and 5 line on the date of the occurrence (Panzella Reply Affirm., Ex 15A at 105), Deputy General Manager Jeannie Kwon "still works for the MTA. She works at capital construction." (*Id.* at 110.) Thus, it appears that Faith Williams, Robert Williams, Jr., E. Martin, and J. Kwon (which Montgomery apparently testified now works at MTA Capital Construction Company) are no longer in defendants' employ, even though defendants appear to have agreed to produce these individuals for depositions in the so-ordered stipulation dated December 19, 2013. (See Panzella Reply Affirm., Ex 2 ¶¶ 5, 8.)

It appears that defendants were aware that Faith Williams and Desk Superintendent Robert Williams, Jr. had retired, because they agreed to provide their last known address and last dates of employment, but defendants failed to do so in violation of so-ordered stipulations dated August 8, 2013 (Panzella Affirm., Ex 4 ¶ 3) and October 17, 2013 (Panzella Affirm., Ex 3 ¶ 3). Defendants have not explained why their last known addresses and last dates of employment had not been provided previously.

Defendants did not provide an affidavit as to whether there was any video footage of the uptown platform of the 6 train at Union Square subway station from March 8, 2010, for the period of 1:17 p.m-3:17 p.m., in violation of a so-ordered stipulation dated October 17, 2013 (Panzella Affirm., Ex 3 ¶ 7.) Defendants had previously agreed to provide a "Jackson Affidavit regarding cameras moving or still on platform [within] 45 days" in a so-ordered stipulation dated May 9, 2013. (Panzella Affirm., Ex 5 ¶ 2.)

According to defendants,

"initially it was believed that these cameras were New York City Police Department cameras, however, the non-party witnesses from the NYPD have stated they were Transit Cameras. To this extent, Mr. Harding Williams has informed me that he is looking into this discrepancy and will advise your affirmant as soon as information becomes available. According to Mr. Williams, it is possible that these cameras do not record any footage, though he could not say for certain. As such, he is performing a search for more information and if such search proves unfruitful, defendants are willing to provide an affidavit of search to plaintiff's counsel."

(Granata Opp. Affirm. ¶ 25.)

B.

Given defendants' pattern of non-compliance, which defendants did not adequately explain, the Court finds that plaintiffs are entitled to a conditional order concerning the discovery discussed above. If defendants do not provide the discovery as directed, then plaintiffs are entitled to a

missing witness or evidence charge at trial with respect to each item of discovery that is not provided, which is the appropriately tailored sanction. Plaintiffs have not demonstrated that the drastic remedy of striking the answer is warranted because it is unclear from the circumstances of the incident, as presented on this motion before the Court, that the operation of the train was likely negligent.

Plaintiffs point out that an inspection of train cars #7480 and 7479 and an inspection of the northbound platform have not occurred, notwithstanding so-ordered stipulations dated October 17, 2013 and December 19, 2013. (Panzella Affirm., Ex 3 ¶¶ 5-6, Ex 2 ¶ 8.) In the so-ordered stipulation dated October 17, 2013, the Court ordered that "Within 60 days, NYCTA shall make available for inspection subway cars #7480 and #7479 at the railyard." (Panzella Affirm., Ex 3.)

Defendants state that an inspection can only be conducted by a "Track Certified" individual, a safety requirement in place for all rail tracks due to the high voltage running through all tracks. (Granata Opp. Affirm. ¶ 24.) Plaintiffs' attorney contends that a "Track Certified" individual is not required because the inspection of train cars #7480 and 7479 will not involve any inspection of train tracks, and the inspection will involve photographs and

measurements of a stationary train car in the train yard. (Panzella Reply Affirm. ¶¶ 15-16.)

The Court accepts defendants' explanation as to why they did not go forward with the inspections.

In paragraph 7 of the so-ordered stipulation dated December 19, 2013, the parties agreed, "CCTV person with most knowledge to be produced ("TARU") for EBT on or before 1/26/14; (SYSTEM)." (Panzella Affirm., Ex. 2.) This directive is unclear. To the extent that defendants were to produce an individual from TARU, such an individual would not be within the control of defendants, because the Technical Assistance Response Unit appears to be a unit within the New York City Police Department. (See *Handschu v Special Services Div.*, 475 F Supp 2d 331, 336 n 3 [SD NY 2007] ["TARU stands for the NYPD's Technical Assistance Response Unit."], *vacated on reconsideration, Handschu v Special Services Division*, 2007 WL 1711775 [SD NY 2007].) What the parties intended must be clarified at next court discovery conference.

Finally, plaintiffs point out that defendants did not "comply with [plaintiffs'] CPLR demands of 11/6/13", in violation of the so-ordered stipulation dated December 19, 2013. (Panzella Affirm., Ex 2 ¶ 9.) Insofar as some of these demands were made for the first time, and were not the

subject any other prior so-ordered stipulations, plaintiffs have not demonstrate a pattern of non-compliance warranting a discovery sanction for those demands. The Court also notes that several of the demands cannot be enforced as written, in that those demands seek documents "to the extent not already provided" and are therefore ambiguous.

Defendants apparently agreed to produce "FRA training materials for train 'engineer'/operator" in the so-ordered stipulation dated December 19, 2013. It appears from Stephone Montgomery's deposition that FRA refers to the Federal Railroad Administration, which regulates the Long Island Railroad. (Montgomery EBT, at 270.) To the extent that plaintiffs demanded training materials for the locomotive engineers who operate the trains along Long Island Railroad, their relevance to this lawsuit is not apparent to the Court. However, defendants agreed to provide these "FRA training materials", thus waiving any objection based on relevance, and the Court will enforce this directive, to the extent that such materials are in defendants' possession, custody, or control.

Plaintiffs' request for sanctions against defendants pursuant to 22 NYCRR 130-1.1 is denied. Plaintiffs did not demonstrate that defendants' belated discovery responses and failure to comply with discovery was "undertaken primarily to delay or prolong the resolution of the litigation." (22

NYCRR 130-1.1 [c] [2].) The other definitions of frivolous conduct in Rule 130 are not applicable to the circumstances presented.

III.

Accordingly, it is hereby **ORDERED** that plaintiffs' motion is granted in part, as follows:

- (1) Within 90 days, defendants shall produce "J. Smith" and "A. Sepulveda" for depositions, if they are still employees. If defendants do not timely produce "J. Smith" and "A. Sepulveda" for depositions, as directed, then plaintiffs are entitled to a missing witness charge at trial with respect to the witness who was not produced for a deposition.

If either J. Smith or A. Sepulveda are no longer employees, then defendants must provide the last known address of the former employee(s) within 90 days. If the last known address of the former employee(s) is not provided, then plaintiffs are entitled at trial to a missing witness charge with respect to the former employee(s) whose address was not provided.

- (2) Within 90 days, defendants shall provide the last known addresses and the last day of employment of Faith E. Williams, Train Service Supervisor E. Martin, Desk Superintendent Robert Williams, Jr., and AGM Jeannie Kwon.

If defendants do not timely provide the last known addresses of the Faith E. Williams, E. Martin, Robert Williams, Jr., or J. Kwon, then plaintiffs will be entitled to a missing witness charge at trial with respect to the former employee(s) whose address was not disclosed.

- (3) Within 90 days, defendants shall provide an affidavit(s) of search for any video footage in their custody, possession or control of the uptown platform of the 6 train at Union Square subway station for March 8, 2010, for the period of 1:17 p.m.-3:17 p.m. (See *Jackson v City of New York*, 185 AD2d 768, 586 N.Y.S.2d 952 [1992]).

If defendants do not timely provide the affidavit(s), then plaintiffs will be entitled to a missing evidence charge at trial with respect to video footage;

- (4) Within 90 days, defendants shall:
- (a) Produce Chief Track Office GGM David Knights for a deposition
 - (b) Produce any "track speed bulletins" for northbound 6 trains entering and leaving Union Square subway station in effect on March 8, 2010
 - (c) Produce any training materials issued, printed, or mandated by the Federal Railroad Administration for locomotive engineers in effect on March 8, 2010
 - (d) Produce the report of Road Car Inspector Giardella, as testified to at his deposition
 - (e) Produce all manuals for the Kawasaki Rail Car R142A, manufactured by KHI in 2000-2001
 - (f) Provide another full size copy of station plans of the platform and mezzanine levels that were marked as plaintiffs' exhibits 5 and 6 at EBTs.
 - (g) If the documents directed to be produced in (4) (b), (c), (d) and (e) above are not in defendants' custody, possession or control, then defendants must provide, within 90 days, an affidavit from the person who conducted the search, detailing the means and methods used to conduct the search. (See *Jackson v City of New York*, 185 AD2d 768, 586 N.Y.S.2d 952 [1992]).
 - (h) Provide an affidavit as to the means and methods of the search conducted "for individual who cleaned blood off train car", as previously agreed to in paragraph 12 of the so-ordered stipulation dated August 8, 2013. (See *Jackson v City of New York*, 185 AD2d 768, 586 N.Y.S.2d 952 [1992]).


(i) Respond to items #1, #7 of plaintiffs' "CPLR Demands" dated November 6, 2013; and it is further

ORDERED that plaintiffs' motion is otherwise denied.

Copies to counsel.

Dated: August 11, 2014
New York, New York

ENTER:



J.S.C.

HON. MICHAEL D. STALLMAN

FILED

AUG 15 2014

COUNTY CLERK'S OFFICE
NEW YORK