

Watson v City of New York

2014 NY Slip Op 33953(U)

November 24, 2014

Supreme Court, Bronx County

Docket Number: 306472/10

Judge: Larry S. Schachner

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART STP**

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JOSHUA WATSON, : Index No. 306472/10

Plaintiff, :

- against - :

DECISION/ORDER

THE CITY OF NEW YORK, DET. FRANK DIAZ : **Present:**
SH.7314, DET. "JOHN" BROWN, FIRST NAME : **Hon. Larry S. Schachner**
BEING FICTITIOUS AND UNKNOWN TO THE : Justice, Supreme Court
PLAINTIFF, HON. ROBERT T. JOHNSON, AND
ADA PISHOY YACOUB, :

Defendants. :

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Recitation, as required by CPLR 2219(a) of the papers considered in the review of these motions to strike and/or for preclusion; for a protective order, modification and/or vacatur; and cross motion for sanctions:

Papers	Numbered
Notice of Motion, Affirmation and Exhibits Annexed	1
Order to Show Cause, Affirmation and Exhibits Annexed	2
Notice of Cross Motion, Affirmation and Exhibits Annexed	3
Affirmation in Opposition and Exhibits Annexed	4, 5
Reply Affirmation	6

Plaintiff commenced this action to recover monetary damages for personal injuries allegedly sustained on October 25, 2007, when plaintiff was allegedly falsely arrested for attempted murder at the approximate location of 1849 Sedgwick Avenue, Bronx, New York.

Plaintiff now moves to strike the answer of Defendant City of New York (City), or in the alternative for preclusion. Defendant City now moves for a protective order vacating or modifying: (1) the order of this court dated August 9, 2013; (2) the "Other Disclosure" section of the Compliance Conference order dated April 24, 2012; and (3) Section IX of the Preliminary Conference order dated May 10, 2011. Plaintiff cross-moves for an order denying the City's

order to show cause and for sanctions against the City for pursuing a frivolous and vexatious motion; striking the City's answer, or in the alternative for preclusion. The motions and cross motion are consolidated for disposition and decided as follows.

The City concedes that its motion is untimely. In addition, although the City's motion seeks a protective order or modification or vacatur of the court's August 9, 2013 decision, it is essentially a motion to renew and an attempt to now submit the supporting proof that it did not submit in opposition at the time of the original motion to compel discovery, and upon which lack of support the court based its decision. The City now seeks to move for a protective order and to include an affidavit from the Bronx District Attorney's Office to assert work product privileges and a table listing the specific items redacted pursuant to attorney work product.

However, even if considered as a belated attempt at renewal, the City has failed to provide a reasonable excuse for its delay in moving for this relief or any explanation as to why this additional proof was not submitted on the prior motion. Renewal is sparingly granted and is not to be used as a second chance freely given to parties who have not exercised due diligence in making their original motion. *Henry v Peguero*, 72 AD3d 600, 602 (1st Dept 2010) (citation omitted).

Moreover, the court in its August 9, 2013 decision specifically stated, in pertinent part:

“The documents should not be redacted. The City has failed to move for a protective order, not particularized the claimed privileges, or provided an affidavit from a representative of the Police Dept or District Attorney. The conclusory bald assertions of privilege is not sufficient to unilaterally redact documents.”

If the City thought the court had erred in the decision on that motion or any of the prior orders, the remedy was to timely seek the appropriate relief, such as reargument, renewal, vacatur

or modification of the court's prior orders dated August 9, 2013, January 15, 2013, April 24, 2012, and May 10, 2011, and not to act beyond the scope of the order(s) and redact documents the court specifically ordered not to be redacted. Plaintiff, in good faith, gave the City additional time to comply with the original order(s) and in return received redacted documents as well as the City's order to show cause for the instant relief.

As the Appellate Division, First Department stated in *Rampersad v New York City Dept. of Educ.*, (30 AD3d 218, 219 [1st Dept 2006] [internal quotation marks omitted] [citation omitted]):

“Their conduct in flouting the court order, without good cause and without contacting the court for relief therefrom, was willful and contumacious conduct, warranting sanction. If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity.”

Moreover, “[w]illful 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 (1st Dept 2011) (citations omitted).

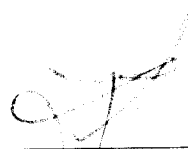
Thus, the City's claims of “substantial compliance” are without merit at this late stage, as the record reveals the City failed to comply with this court's preliminary conference order, two compliance conference orders as well as the order of this court dated August 9, 2013 that specifically directed that the City turn over all documents ordered to be produced in the April 24, 2012 compliance conference order in un-redacted form. In addition, in its order to show cause, the City does not explain the extensive delay in producing the documents and seeking the court's review of its August 9, 2013 decision and other prior orders. Thus, the City's conduct during this discovery process evinces a pattern of dilatory tactics and a willful failure to comply with this

court's orders without adequate excuses.

The belated submission of an affidavit from Assistant District Attorney Robert Sandusky of the Bronx District Attorney's Office to assert work product privileges, is conclusory and not from someone with personal knowledge of the records. With respect to the City's recent submission of a table listing the specific items redacted pursuant to attorney work product, it is long overdue and the City has yet to provide un-redacted copies of the documents even for the court's review in deciding this issue at this time.

Therefore, based on the City's history of a pattern of non-compliance and delay, plaintiff's motion to strike the City's answer is granted, the City's motion is denied, and plaintiff's cross motion for sanctions is denied.

This constitutes the decision and order of the court.



LARRY S. SCHACHNER, J.S.C.

Dated: November 24, 2014