

**Givotovsky v Hudson Riv. Park Trust**

2015 NY Slip Op 31229(U)

July 16, 2015

Supreme Court, New York County

Docket Number: 150834/13

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 36

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ANDREI GIVOTOVSKY,

Plaintiff,

-against-

Index No.: 150834/13

HUDSON RIVER PARK TRUST,

Motion Seq. No.: 003

Defendant.  
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**LING-COHAN, J.:**

Plaintiff Andrei Givotovsky moves, pursuant to CPLR 3124, to compel defendant Hudson River Park Trust, to provide a “meaningful and complete response” to plaintiff’s post-deposition notice of discovery and inspection dated September 9, 2014. Plaintiff also moves to compel defendant to provide a “meaningful and complete response” to plaintiff’s supplemental notice of discovery and inspection dated October 20, 2014.<sup>1</sup>

**FACTUAL ALLEGATIONS**

In this action, plaintiff seeks damages for personal injuries as a result of a bicycle accident which took place on August 13, 2012. Plaintiff alleges that he was riding his bicycle on a bicycle path southbound in Hudson River Park, near the intersection of Canal Street and West Street in Manhattan, when he ran over an area of the path which caused him to fall.

Plaintiff was deposed on October 1, 2013. At his deposition, plaintiff testified that the subject bicycle path on which he was traveling was made of asphalt, with the shoulder area composed of stone. He states that the bicycle path had a four to five inch paved strip between the

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<sup>1</sup> Defendant Hudson River Park Trust contends that plaintiff’s motion is procedurally defective because it does not include an affirmation of good faith pursuant to Title 22, Part 202.7 (a), of New York Codes, Rules and Regulations. However, pursuant to an order dated December 18, 2014, plaintiff was given permission to file the motion because the discovery issues could not be resolved during the status conference.

stone shoulder and the white line painted on the path. At the time of his accident, plaintiff maintains that he was on the four to five inch paved strip, between the shoulder and the painted white line, when he began to cross over onto the shoulder, pulling off of the path. Plaintiff testified that his bike began to violently shake and that he was thrown off onto the ground. When asked what caused him to fall, plaintiff testified that he observed that a ten to fifteen foot section of the paved strip, between the shoulder and painted white line, was comprised of dark dirt instead of asphalt.

Plaintiff maintains that as a result of the subject accident, he suffered injuries to his left leg, left arm, left hand, and left toe. Plaintiff had a distal radial fracture of his right arm, requiring two surgical procedures. Plaintiff also broke a toe on his left foot.

Victor Stambouljian (Stambouljian) testified on November 15, 2013. Stambouljian works for defendant and assists in lawn maintenance, tree pruning, weeding, planting, snow removal, and gardening. He maintains that he assisted plaintiff following the subject accident. Stambouljian testified that after the accident, he noticed missing asphalt in the vicinity of where plaintiff fell. He reported this issue to Frank Smith (Smith), a mason whom fixes stone and pavers in the park.

On May 7, 2014, Smith was deposed. At the time of plaintiff's accident, Smith worked in defendant's maintenance and operations department and was supervised by Kemraj Mangroo (Mangroo). Smith testified that Mangroo was the individual who assigned maintenance tasks to the other member of the maintenance and operations department. Smith testified that although he would conduct periodic inspections and would correct minor problems, he would report problems which were not within his job responsibilities to Mangroo. Work for larger scale problems would be contracted out. He maintains that "segment 3" of the park includes the

intersection of Canal and West Street.

On August 26, 2014, Debra Kustka (Kustka), vice-president of operations of defendant Hudson River Park testified. Kustka's work duties include the general maintenance and operation of Hudson River Park. Her testimony includes a discussion regarding the maintenance of the bicycle path. Kustka testified that both defendant and the New York State Department of Transportation are responsible for maintaining the bikeway pursuant to a memorandum of understanding/maintenance agreement. Kustka testified:

"Q. What kind of records does the Hudson River Park Trust keep with respect to bikeway maintenance?

A. At the time they were the daily e-mail tasks that staff generated when work was conducted.

Q. Do you know if the Hudson River Park Trust keeps the daily task e-mails that the staff generated back in August of 2012?

A. Yes.

Q. Where are those kept?

A. On the server."

Kustka tr at 46.

Kustka further testified:

"Q. What kind of records did the Hudson River Park Trust keep with respect to issues or hazards that are identified on the bikeway?

A. From what I recall, e-mails and the daily work tasks.

Q. Are e-mails and daily work tasks, are those the only records that would be generated back in August of 2012 with respect to the inspection of the bikeway?

A. I don't know."

*Id.* at 47. Kustka maintains that in August of 2012, the daily e-mail tasks, which the staff generated, was the method utilized for record keeping. *Id.* at 55.

Kustka also testified that she took part in a walk-through of the park, prior to its opening in July of 2008. She testified:

"Q. Do you have any independent recollection of the condition of the bikeway at Canal Street when you did the walk-through?

A. Yes.

Q. What is your recollection of the condition of the bikeway?

A. That there were gaps between the finished portion of the park and the existing bikeway that needed to be filled.

Q. Where were those gaps located?

A. They were at or near Canal Street and then Laight Street, I believe there was a portion.

Q. Was it between the bikeway wall and the cornerstones or somewhere else?

A. It was between the bikeway wall swale and existing edge of the bikeway.”

*Id.* at 108.

Kustka maintains that as a result of the walk-through, a “punch list” was generated which identified areas that needed work. Work including the filling of the gap between the wall and the cornerstones was completed on September 3, 2008. Kustka testified that the gaps were filled prior to the park’s opening.

Kutska maintains that Steve Bell (Bell) was the facilities engineer who was in charge of facilities and maintenance of the bikeway. She testified that the maintenance includes “[t]rash collection, snow removal, debris sweeping, swale paver repair.” *Id.* at 43. She also testified that the operations and maintenance department was responsible for maintaining the bikeway, and that James Koth (Koth) was the vice-president. Kutska maintains that in August of 2012, Mangroo reported to Koth and Bell.

### **DISCUSSION**

CPLR 3124 provides that “[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response.”

CPLR 3101, subdivision (a), provides that “[t]here shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof . . . .” See *Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 406-407 (holding that

“[t]he words, “material and necessary”, are . . . 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”).

Plaintiff moves to compel defendant to provide a “meaningful and complete response” to plaintiff’s post-deposition notice of discovery and inspection dated September 9, 2014.

Defendant objects to paragraphs 16, 17, and 18 of plaintiff’s post-deposition notice of discovery and inspection dated September 9, 2014. Paragraph 16 demands “[c]opies of the ‘daily tasks’ emails or lists assigned to Kemraj Mangroo by either Steve Bell, Facilities Engineer or Jim Koth, Vice President of Operations and Maintenance, for work within Segment 3 of the park from 2008 to the date of the occurrence complained of.” Paragraph 17 demands “[c]opies of any ‘daily tasks’ emails or lists assigned by Kemraj Mangroo for work within Segment 3 of the park from 2008 to the date of the occurrence complained of.” Paragraph 18 demands “[c]opies of any ‘daily task’ emails or lists received by Frank Smith for work within Segment 3 of the park from 2008 to the date of the occurrence complained of.”

Plaintiff contends that his requested demands are for “daily task” emails or lists assigned by, or received by those individuals responsible for the maintenance and repair of the subject accident location. Plaintiff argues that the requests are limited to segment 3 of the bikeway of the park, from 2008 when Kustka testified that she first noticed the missing asphalt during her walk-through, to the date of the subject accident. Plaintiff maintains that he should be entitled to a meaningful response as these demands were based upon the testimony of Kustka.

Defendant contends that plaintiff’s requests are overbroad as they seek four years worth of e-mails. Defendant submits an affidavit from Laura Blackman, Esq. (Blackman), deputy counsel for defendant. Blackman states that requiring the “IT department or the requested

individuals to search all of their e-mails for 4 years is incredibly burdensome, as this easily includes tens of thousands of e-mails, which is a massive undertaking for our staff.” Blackman affidavit, ¶ 3. She further maintains that defendant “has already exchanged all information and documentation within its possession regarding the subject occurrence, as well as all documentation regarding any asphalt work to the bikepath at the accident locus.” *Id.*, at ¶ 4. Defendant maintains that the search should be limited to the bicycle path at Canal Street, and limited in scope for “asphalt work.”

The requested information, specifically copies of the “daily task” e-mails or lists limited to the work at segment 3 of the park may be relevant, because the information may demonstrate if the area where plaintiff’s accident took place had any defects. While defendant maintains that the search may be voluminous, the court will limit the “daily task” e-mails and lists. The search will be limited to those “daily task” e-mails and lists which discuss work in segment 3, specifically the area which encompasses Canal Street, for asphalt-related repair work. Defendant must provide plaintiff with copies of the “daily task” emails or lists assigned to Kemraj Mangroo by either Steve Bell or Jim Koth; assigned by Kemraj Mangroo; or received by Frank Smith, for work within Segment 3, at Canal Street, from January 1, 2008 to August 13, 2012, the date plaintiff’s subject accident.

Plaintiff also contends that he is entitled to a meaningful response to his October 20, 2014 demands which are based on the explicit language of the Ninth Supplemental Agreement for Property Management Services between the Hudson River Park Trust and the New York State Department of Transportation.

Paragraph 1 requests “[a]ll records produced by Defendant when it routinely inspected and monitored the Bikeway within Segment 3 of the Hudson River Park to determine whether it

was in good repair and maintenance between January 1, 2008 and September 30, 2012, pursuant to the Ninth Supplemental Agreement for Property Management Services between Defendant and the New York State Department of Transportation.” As records discussing whether the subject area was in good repair and maintained are relevant, the court will permit such records to be provided, but will limit the records to the area of Canal Street in the segment 3 location.

Plaintiff maintains that he is entitled to records of the maintenance and repair of the bicycle path through September 30, 2012, more than one month after the subject accident. While it is true that, generally, post accident repair records are neither admissible, nor discoverable, except under limited circumstances (*Hualde v Otis Elevator Co.*, 235 AD2d 269, 270 [1st Dept 1997]), where, as here, the records are being sought to establish the condition of the defect at the time of the accident, post accident repairs are discoverable.<sup>2</sup> See *Mercado v St. Andrews Hous. Dev. Fund, Co., Inc.*, 289 AD2d 148 (1st Dept 2001); *Giannelli v Montgomery Kone, Inc.*, 175 Misc 2d 32 (Sup Ct, Westchester County 1997) (holding "records of post-accident repairs can shed light on the condition of equipment or machinery at the time of an accident, there is no reason why that information should be cloaked in secrecy").

Paragraph 2 demands “[a]ll reports Defendant sent to the New York State Department of Transportation concerning the condition of the Bikeway within Segment 3 of the Hudson River Park between January 1, 2008 and September 30, 2012.” As plaintiff’s accident allegedly took place due to a defect in the bicycle pathway, such records, limited to the Canal Street area, should be provided by defendant.

Paragraph 3 demands “[a]ll certified applications for payment and accompanying

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<sup>2</sup> Whether such records are admissible at the trial of this case, is not the issue before this Court; such question is preserved for the trial judge.

documents sent by Defendant to the New York State Department of Transportation between January 1, 2008 and September 30, 2012, pursuant to the Ninth Supplemental Agreement for Property Management Services between Defendant and the New York State Department of Transportation.” Plaintiff fails to explain why the applications for payment would be relevant. Therefore, because plaintiff failed to meet its burden and demonstrate why such information may be relevant, the court declines to compel such request.

### CONCLUSION AND ORDER

Accordingly, it is

ORDERED that plaintiff Andrei Givotovsky’s motion to compel defendant Hudson River Park Trust, to provide a “meaningful and complete response” to plaintiff’s post-deposition notice of discovery and inspection dated September 9, 2014 and October 20, 2014 is granted in part, pursuant to the above directives; and it further

ORDERED that the emails, lists, and records which the court compeled plaintiff to provide above, must be supplied to plaintiff, within 30 days of service of a copy of this order, with notice of entry; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon all parties, with notice of entry.

Dated: \_\_\_\_\_

7/16/15



Doris Ling-Cohan, J.S.C.