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| Goldman v New York City Tr. Auth. |
| 2016 NY Slip Op 30100(U) |
| January 20, 2016 |
| Supreme Court, New York County |
| Docket Number: 150283/14 |
| Judge: Michael D. Stallman |
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21**

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MARGOT GOLDMAN AND JAN GOLDMAN,

Plaintiffs,

Index No. 150283/14

- against -

Motion Seq. No. 002

THE NEW YORK CITY TRANSIT AUTHORITY,
MANHATTAN AND BRONX SURFACE
OPERATING AUTHORITY and THE CITY OF
NEW YORK,

Decision and Order

Defendants.

-----X
HON. MICHAEL D. STALLMAN, J.:

In this personal injury action, plaintiffs Margot Goldman and Jan Goldman move to strike the answer(s) of defendants New York City Transit Authority (NYCTA) and Manhattan and Bronx Surface Operating Authority (MABSTOA) (collectively, Transit defendants) pursuant to CPLR 3126, based on the alleged repeated discovery violations by Transit defendants. (Pl. Moving Affirm. ¶ 2; see also *id.* ¶¶ 4-15 [alleging violations of multiple court orders].)

DISCUSSION

Plaintiffs allege a history of discovery violations by Transit defendants, including belated discovery responses, repeated failures to

designate a doctor to examine plaintiff Margot Goldman, and repeated failures of Transit defendants to produce a witness for deposition. (See Pl. Moving Affirm. ¶¶ 4-15.)

Plaintiffs previously moved to strike the answer of Transit defendants for failing to appear for a deposition and for failing to provide discovery. (Pl. Moving Affirm. ¶ 11; see also Ex. K [Court's Motion Seq. No. 001 Order denying motion to strike answer].) In response to that first motion for sanctions, Transit defendants argued that the subject "noncompliance was not willful, contumacious, or in bad faith, because the delay was 'attributable to the file being transferred to several attorneys before being transferred to your Affirmant, as well as defendants' heavy caseload.'" (Pl. Moving Affirm. Ex. K at 3, quoting Motion Seq. No. 001 Def. Affirm. ¶ 4.)

In that first motion, the Court denied sanctions, finding that Transit defendants' "explanation (essentially law office failure) undermines the presumption that the [Transit defendants'] pattern of noncompliance was willful, contumacious, or in bad faith." (*Id.*) However, the Court noted that if the deposition of Transit defendants' repair and maintenance witness, scheduled for June 25, 2015, "does not go forward because of the [Transit defendants'] fault, then plaintiff may renew the application to strike the [Transit defendants] answer, or seek a lesser sanction." (*Id.*)

On Wednesday, June 24, 2015, the parties confirmed the deposition of Transit defendants' witness, Ralph Rogers, for the following day. (Pl. Moving Affirm. ¶ 13; see also Def. Affirm. ¶ 4 [stating that Rogers confirmed his plan to attend with Transit defendants counsel on Monday, June 22, 2015].) However, on Thursday, June 25, 2015, Rogers did not appear, and plaintiffs' counsel waited onsite until 12:00 p.m. for Rogers to appear. (Pl. Moving Affirm. ¶ 13.) In the following weeks, the parties' counsel discussed the matter, but plaintiffs allege that Transit defendants' counsel was unaware of the details of Rogers's medical condition, "when said witness would be available, or if there was another witness with similar knowledge available to testify." (*Id.* ¶ 14.)

Transit defendants' counsel asserts that Rogers "became ill and was hospitalized" on Tuesday, June 23, 2015 and was not discharged until Thursday, June 25, 2015 at 1:21 a.m. (Def. Affirm. ¶ 5.)¹ Transit defendants' counsel provides a copy of Rogers's alleged hospital discharge papers, attached to his motion papers as Exhibit A, and further offers, that "[i]f necessary, Defendant can supplement Exhibit A with an affidavit of Mr.

¹ Transit defendants' opposition was not properly e-filed. NYSCEF Document No. 32 consists of only one page, the litigation back to their opposition papers.

Ralph Rogers at a later date.” (*Id.* ¶ 5 n 1.) Transit defendants’ counsel claims that he did not become aware of Rogers’s “medical excuse” until Friday, June 26, 2015. (*Id.* ¶ 6.)

In reply, plaintiffs assert that Transit defendants’ “opposition consists merely of an attorney’s affirmation containing hearsay statements as to why a witness was not produced for the Court Ordered deposition. There is no affidavit from the purported witness, Ralph Rogers.” (Pl. Reply Affirm. ¶ 3.) Plaintiffs further argue that the “Discharge Instruction Summary” attached as Exhibit A to the opposition papers “is not certified, or otherwise in admissible form.” (*Id.*) Moreover, plaintiffs contend that even if there was a medical excuse for Rogers’s absence, “there is no explanation why [Transit defendants] did not reschedule Rogers’s deposition for another day, or offer to produce a different person with knowledge for the deposition.” (*Id.* ¶ 4.)

According to the discharge summary printout from the emergency department, Rogers was discharged on Thursday, June 25, 2015 at 1:21 A.M., hours before his scheduled deposition was to take place. (Def. Affirm. Ex. A.) If Rogers was, in fact, too ill to attend his deposition, such grounds

would excuse his non-attendance.² However, the discharge summary alone is insufficient to establish that Rogers was physically unable to attend his deposition. Indeed, the record discloses no information concerning the circumstances surrounding Rogers's hospitalization. Neither does the record disclose whether Rogers called in sick or failed to call in sick between Tuesday, June 23 and Thursday, June 25, 2015. In essence, the Court is left with a deficit of information, and Transit defendants are asking the Court to give them the benefit of the doubt, when their track record of discovery compliance in this action is disappointing, and the prior excuse of noncompliance was thin.

Moreover, the Court agrees with plaintiffs that, when the parties discussed Rogers's non-attendance on July 7, 2015, the Transit defendants' counsel could have then rescheduled Rogers's deposition for another day, or offered to produce a different person with knowledge for the deposition.

Nonetheless, there is also a strong preference in this state for deciding cases on the merits, and thus "the harsh penalty of striking pleadings should only be imposed where the failure to comply was willful,

² Plaintiffs also might have been willing to reschedule Rogers's deposition if they were aware of what had transpired.

contumacious or due to bad faith.” (*Carter v Baldwin Transp. Corp.*, 215 AD2d 256 [1st Dept 1995]; see also *Ayala v Lincoln Med. & Mental Health Ctr.*, 92 AD3d 542 [1st Dept 2012] [“In light of the strong preference that matters be decided on the merits, the court providently exercised its discretion in imposing a less drastic sanction.” (internal citation omitted)].)

Here, Transit defendants’ counsel has submitted some circumstantial evidence of a non-contumacious explanation behind Rogers’s failure to attend his deposition—that he was discharged from the emergency room several hours before the scheduled time for the deposition. Based on this circumstantial evidence and the strong preference in this state for deciding cases on their merits, the Court denies the branch of plaintiffs’ motion that seeks to strike Transit defendants’ answer. (See *Metflex Corp. v Klaffer*, 123 AD2d 845, 846 [2d Dept 1986] [finding that defendant’s “delinquent behavior certainly merited the imposition of sanctions, but since he did provide some proof of his illness, in the form of a doctor’s note given to the plaintiff, the sanction of striking the answer was too severe” and imposing “more appropriate” sanctions].)

As a catch-all alternative, plaintiffs requested “such other and further relief as this Court deems just and proper.” (Notice of Motion at 1.) Here, plaintiffs’ counsel incurred unnecessary expense and time in appearing for

an unattended deposition because of a failure of communication by Transit defendants. Moreover, after the unfortunate events of June 25, Transit defendants should have promptly rescheduled the deposition with a suitable repair and maintenance witness, whether Rogers or someone else.

Given all the above, Transit defendants must bear the expense and costs resulting from their noncompliance. Under CPLR 3126, the Court “may make such orders with regard to the failure or refusal” to obey an order for disclosure “as are just.” Therefore, the Court exercises its discretion to direct Transit defendants to reimburse plaintiff attorneys’ fees and costs incurred in: (1) the time plaintiff counsel’s spent appearing at the scheduled June 25, 2015 deposition which Rogers failed to attend, but in no event to be more than \$500 total; and (2) and the court reporter fee for the June 25, 2015 deposition. The Court also awards plaintiffs’ counsel \$45 as costs on this motion. (CPLR 8101, 8202.)

Furthermore, a conditional discovery penalty is warranted. The deposition of Transit defendants’ repair and maintenance witness shall be held within ninety (90) days. If said deposition is not held, then the issue of notice of the alleged condition of the sidewalk shall be resolved against the Transit defendants and in plaintiff’s favor. (*See Kramme v Town of Hempstead*, 100 AD2d 447, 451 [2d Dept 1984] [affirming trial court’s order

resolving issue of control and ownership of the situs of accident against county defendant after county defendant repeatedly failed to produce requested information regarding this issue].) Thus, if the deposition is not held on or before April 19, 2016, then it shall be deemed as a fact, for both motion practice and at trial, that the Transit defendants as the alleged abutting owners or lessees had actual and constructive notice of the condition of the subject sidewalk where plaintiff allegedly tripped and fell on March 23, 2013.

CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiffs' motion for an order pursuant to CPLR 3126 striking the answer, is DENIED in part to the extent requesting that the answer be stricken; and it further

ORDERED that, within 30 days, plaintiffs' counsel shall submit to Transit defendants' counsel a bill of reasonable costs and fees incurred in: (1) the time plaintiff counsel's spent appearing at the scheduled June 25, 2015 deposition which Rogers failed to attend, but in no event to be more than \$500 total; and (2) and the court reporter fee for the June 25, 2015 deposition; and (3) the \$45 motion fee for this motion; and it is further


ORDERED that Transit defendants shall pay said costs and fees within 30 days of receipt of said bill; and it is further

ORDERED that the deposition of Transit defendants repair and maintenance witness shall be held within ninety (90) days, and if it is not held, then it shall be deemed as a fact, for both motion practice and at trial, that the Transit defendants as the alleged abutting owners or lessees had actual and constructive notice of the condition of subject sidewalk where plaintiff allegedly tripped and fell on March 23, 2013; and it is further

ORDERED that Transit defendants' counsel shall e-file his entire affirmation in opposition to the motion.

Dated: January 20, 2016
New York, New York

ENTER:



J.S.C.

MICHAEL D. STALLMAN
J.S.C.