

Perkins v New York City Tr. Auth.

2016 NY Slip Op 30408(U)

March 14, 2016

Supreme Court, New York County

Docket Number: 151935/2013

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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MARGARET PERKINS,

Plaintiff,

Index No. 151935/2013

- against -

NEW YORK CITY TRANSIT AUTHORITY,
MAHATTAN AND BRONX SURFACE TRANSIT
OPERATING AUTHORITY and JOHN DOE,

Decision and Order

Defendants.

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HON. MICHAEL D. STALLMAN, J.:

Plaintiff alleges that, on December 7, 2012, at approximately 11:30 a.m, she was injured while boarding a M3 bus, Bus 6395, at the bus stop on St. Nicholas Avenue between West 124th and West 125th Streets in Manhattan. Plaintiff now moves to compel defendants to produce documents demanded in two notices to produce. Defendants oppose the motion.

BACKGROUND

According to plaintiff, the bus operator had deployed the wheelchair ramp, and plaintiff fell while walking on the ramp. At her deposition, plaintiff testified as follows:

“Q. How many passengers before you began your attempt to board before you—

A. Well, what I could see was about maybe about three or four people getting up there.

Q. And they boarded without incident, yes?

A. Right?

Q. Then did you begin to board the M3?

A. Yes.

Q. What happened?

A. Then I lost my balance and I fell.

* * *

Q. Do you know what caused you to fall off the ramp?

A. The only thing I know I lost my balance.”

(Chang Opp. Affirm., Ex B [Plaintiff’s EBT], at 15, 18.)

Plaintiff argues that the defendants were negligent in operating the ramp, in not assisting plaintiff, and in allowing use of the ramp. Plaintiff appears to argue that the bus operator should not have permitted plaintiff to board onto the wheelchair ramp. Lastly, plaintiff asserts that the wheelchair ramp that plaintiff should not have been permitted to walk on ought to have handrails.

Arthur Roscher, a Superintendent of Buses, testified at his deposition that, when he was a Surface Line Dispatcher, he prepared a four page report

about the incident, on a form entitled "Supervisor's Accident/Crime Incident Report." (Kapelman Affirm., Ex I [Roscher EBT], at 21; see also Kapelman Affirm., Ex K [Report].) According to Roscher, the model of Bus 6395 was an Orion VII Hybrid low floor bus, which means that there are no steps in front of the bus. (Roscher EBT, at 20.) Plaintiff's counsel states that the year of Bus 6395 is 2002. (Kapelman Reply Affirm. ¶ 12.)

DISCUSSION

Plaintiff now moves to compel defendants to produce the items demanded in plaintiff's notice to produce dated July 1, 2014 (Kapelman Affirm., Ex D) and plaintiff's notice to produce dated May 14, 2015 (Kapelman Affirm., Ex L.) Defendants oppose the motion.

At a compliance conference on March 10, 2016, the parties resolved items 1 and 2 of plaintiff's notice to produced dated May 14, 2015 pursuant to a so-ordered stipulation dated March 10, 2016.

Plaintiff is entitled to an inspection at the bus depot of Bus 6395 and its wheelchair ramp (CPLR 3120 [1] [i], [ii]), which may be deployed at the request of plaintiff's counsel. Plaintiff intends to take measurements, which is reasonably calculated to lead to admissible evidence as to the issues of this action. The Court rejects defendants' argument that an inspection of the bus is unduly burdensome because the bus will have to be taken out of

service for the inspection. Contrary to defendants' contention, plaintiff is not seeking to have the bus inspected at the location of the occurrence. (Kapelman Reply Affirm. ¶ 10.) Plaintiff's motion to compel is granted as to item 1 of the notice to produce dated July 1, 2014.

Plaintiff is entitled to a copy of the operating manual for the wheelchair ramp, if defendants are in possession of the manual. If the operating instructions are in the manual for Bus 6395 or for an Orion VII Hybrid low floor bus, then defendants need only produce those pages of the manual that pertain to the instructions for operating the wheelchair ramp, along with the cover, cover page, and table of contents of such manual. Plaintiff appears to seek the operating manual of Bus 6395 for information about the operation and maintenance of its wheelchair ramp. Because plaintiff alleges negligent operation of the wheelchair ramp, instructions about the ramp's operation is reasonably calculated to lead to admissible evidence.

Because Roscher identified the model of the bus as the Orion VII Hybrid low floor bus, defendants may produce a copy of the manual for the bus model in lieu of any operating manual that might have been come specifically with Bus 6395. Thus, plaintiff's motion to compel is granted as to item 2 of the notice to produce dated July 1, 2014.

Plaintiff claims that she is seeking post-accident repair records to determine if the wheelchair ramp of Bus 6395 was replaced since the accident, before the inspection of the ramp takes place.

Generally speaking, “evidence of subsequent repairs is not discoverable or admissible in a negligence case” (*Hualde v Otis El. Co.*, 235 AD2d 269, 270 [1st Dept 1997], quoting *Klatz v Armor El. Co.*, 93 AD2d 633 [2d Dept 1983].) However, there are several limited exceptions: (1) where there is an issue of maintenance or control (see *Del Vecchio v Danielle Assoc., LLC*, 94 AD3d 941 [2d Dept 2012]); (2) where the discovery sought is to show that a particular condition was dangerous (see e.g. *Albino v New York City Hous. Auth.*, 52 AD3d 321 [1st Dept 2008] [repairs of hot water system]); (3) where alleged defective condition on the date of the alleged occurrence could not otherwise be proven (*Mercado v St. Andrews Hous. Dev. Fund Co.*, 289 AD2d 148 [1st Dept 2001]); or (4) where the discovery sought is to ascertain the condition of the instrumentality that allegedly caused the plaintiff’s injuries, prior to the admitted modifications. (*Kaplan v Einy*, 209 AD2d 248, 252 [1st Dept 1994].)

If the wheelchair ramp has been replaced after plaintiff’s alleged accident, then discovery of post-accident records would be permitted under the third exception. However, plaintiff seeks the post-accident repairs to

determine the threshold question of whether the wheelchair ramp had been replaced at all. If this were permitted, then such an exception would swallow the rule entirely, and discovery of post-accident repairs would be permitted in every case simply to determine whether post-accident repairs had occurred.

Irrespective of whether the wheelchair ramp has been replaced since plaintiff's accident, the allegations of this action fall under the fourth exception. However, the Court exercises its discretion to limit discovery of the post-accident repairs to any maintenance or repairs made during the period of three months after the alleged accident, i.e., from December 7, 2012 through and including March 7, 2013. Therefore, plaintiff's motion to compel is granted as to item 6 of the notice to produce dated July 1, 2014, as modified.

Plaintiff seek a copy of a "manual and/or key" to fill out the Supervisor's Accident/Crime Investigation report. Plaintiff's counsel asserts that such a manual and/or key "is also pertinent to determine whether the report was filled out as required." (Kapelman Affirm. ¶ 20.) Defendants objected to this demand as palpably improper, irrelevant, immaterial and not reasonably calculated to lead to the disclosure of admissible material.

The preprinted report contains various acronyms, which plaintiff's counsel inquired about at Roscher's deposition. To the extent that there exists a document in defendants' possession that is a "key"/legend to the Supervisor's Accident/Crime Investigation report, defendants are directed to produce such a document to plaintiff within 60 days.

However, the purported "manual" as to how a dispatcher fills out the Supervisor's Accident/Crime Investigation report is denied. Plaintiff has not explained why this would be relevant or reasonably calculated to lead to admissible evidence. Therefore, plaintiff's motion to compel is granted as to item 5 of the notice to produce dated May 14, 2015, in part, only as to the "key."

Plaintiff's motion to compel as to all other remaining demands are denied.

Plaintiff's demand for documents showing the year of manufacture of Bus 6395 is unduly burdensome. Plaintiff appears to seek these documents to establish the year of manufacture of the wheelchair ramp, to support plaintiff's theory of a design defect (i.e., that the wheelchair ramp ought to have handrails). The date of the manufacture of the wheelchair ramp would be relevant to the question of whether a feasible, safer alternative design of the ramp was available at the time that the ramp was manufactured. (See

Denny v Ford Motor Co., 87 NY2d 248, 257 [1995].) However, plaintiff's counsel states that the year of Bus 6395 is 2002. (Kapelman Reply Affirm. ¶ 12.) Further documents about the year of manufacture of the bus should be sought from the manufacturer of the wheelchair ramp, not the purchaser of the bus. Therefore, plaintiff's motion is denied as to item 3 of the notice to produce dated July 1, 2014.

Plaintiff does not explain how the bus schedules for Bus 6395 and the bus that arrived immediately after Bus 6395 are either relevant, or reasonably calculated to lead to admissible evidence. Therefore, plaintiff's motion is denied as to items 3 and 4 of the notice to produce dated May 14, 2015.

CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiff's motion is granted in part as follows:

Within 60 days, defendants shall provide copies of:

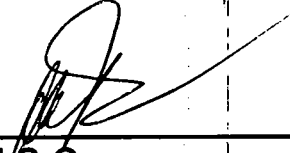
- 1) an operating manual for the wheelchair ramp, if defendants are in possession of the manual. If the operating instructions for the ramp are contained within the manual for Bus 6395 or for an Orion VII Hybrid low floor bus, then defendants need only produce those pages of the manual that pertain to the instructions for operation and maintenance of the wheelchair ramp, along with the cover, cover page, and table of contents of the manual;

2) records of any maintenance or repair to the wheelchair ramp that occurred from December 7, 2012 through and including March 7, 2013;

3) a "key", if any, to the Supervisor's Accident/Crime Report.

Within 90 days, the inspection of the bus and the wheelchair ramp shall take place at the bus depot to which Bus 6395 is assigned, and the remainder of the motion is otherwise denied.

Dated: March 14, 2016
New York, New York

ENTER: 

J.S.C.

MICHAEL D. STALLMAN
J.S.C.