

**Wright v City of New York**

2016 NY Slip Op 31441(U)

July 26, 2016

Supreme Court, New York County

Docket Number: 158540/2014

Judge: Michael D. Stallman

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This opinion is uncorrected and not selected for official publication.

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

-----X  
KRISTI WRIGHT,

Plaintiff,

- against -

Index No. 158540/2014

THE CITY OF NEW YORK, NEW YORK CITY  
TRANSIT AUTHORITY, METROPOLITAN  
TRANSPORTATION AUTHORITY AND FRANCO  
VERDERAME,

**Decision and Order**

Defendants.

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

Plaintiff alleges that, on May 17, 2014, she was a pedestrian struck by a crosstown M14D bus owned by defendants New York City Transit Authority and Metropolitan Transportation Authority, and operated by defendant Franco Verderame (collectively, the Transit Defendants).<sup>1</sup>

Plaintiff now brings two motions for an order striking the Transit Defendants' answer, on the ground that defendants did not provide discovery (Motion Seq. Nos. 002 & 003). Plaintiff also seeks permission to file the note of issue without waiving any rights of discovery. The Transit Defendants oppose the motions. This decision addresses both motions.

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<sup>1</sup> By decision and order dated October 14, 2015, defendant City of New York was granted summary judgment dismissing the action as against it.

## BACKGROUND

Plaintiff alleges that, on the evening of May 17, 2014, a M14D bus traveling westbound on West 14<sup>th</sup> Street operated by defendant Franco Verderame struck plaintiff as she was crossing West 14<sup>th</sup> Street, near Ninth Avenue in Manhattan. According to the Transit Defendants, plaintiff was crossing West 14<sup>th</sup> Street in the middle of the block between Eighth and Ninth Avenues, and the subject bus was bus number 5524.

Plaintiff served a notice for discovery and inspection dated February 10, 2015. (Sosa Affirm. of 12/10/15, Ex B.) A preliminary conference was held on April 2, 2015. Pursuant to the preliminary conference order, the Transit Defendants were to respond to plaintiff's demands within 60 days. (Sosa Affirm. of 12/10/15, Ex D.)

It is undisputed that Verderame was deposed on January 13, 2016. (Sosa Affirm., Ex B [Verderame EBT].) At his deposition, Verderame testified that he was operating his M14 bus route according to a schedule, which he referred to as a paddle report. (*Id.* at 23-24.) When Verderame was asked about a diagram that was marked as Plaintiff's Exhibit 6 (see Sosa Affirm. of 2/29/16, Ex F), Verderame stated that he did not prepare the document, and his attorney objected to questioning about the diagram. (Verderame EBT, at 103-107.)

After Verderame's deposition, plaintiff demanded, among other things, a copy of the paddle report in a notice for discovery and inspection dated February 1, 2016. (Sosa Affirm. of 2/29/16, Ex D.) Plaintiff also demanded the deposition of "Roschel, A, pass/pr# 761827," who purportedly prepared the diagram. (*Id.*) The Transit Defendants objected to production of the paddle report and to Roschel's deposition as irrelevant and immaterial, and not reasonably calculated to lead to admissible evidence. (Sosa Affirm. of 2/29/16, Ex E.) According to the Transit Defendants, Surface Line Dispatcher Luben Nassev prepared the diagram. (Shufer Opp. Affirm. of 5/4/16 ¶ 10.)

In Motion Sequence No. 002, plaintiff asserts that the Transit Defendants have not responded to her notice for discovery and inspection dated February 10, 2015, and that they have not appeared for depositions.

In Motion Sequence No. 003, plaintiff asserts that the Transit Defendants have not responded to her notice for discovery and inspection dated February 1, 2016, and that defendants failed to produce "Roschel, A, pass/pr #761827" for a deposition.

At a court compliance conference May 12, 2016, the parties agreed to adjourn both motions to July 21, 2016, and to hold Luben Nassev's deposition on August 24, 2016. The Transit Defendants also agreed to

produce a photographer who took pictures at the accident site for a deposition on September 1, 2016. On July 21, 2016, the parties' counsel discussed and narrowed the discovery issues raised in plaintiff's motions. Discovery demands that are not specifically discussed in this decision were withdrawn by plaintiff.

### DISCUSSION

"[I]t is well settled that the drastic remedy of striking a party's pleading pursuant to CPLR 3126 for failure to comply with a discovery order is appropriate only where the moving party conclusively demonstrates that the non-disclosure was willful, contumacious or due to bad faith. Willful 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, 504 [1st Dept 2011]*

[internal citation and quotation marks omitted].)

#### Plaintiff's Notice for Discovery and Inspection dated February 15, 2015

The Transit Defendants responded to plaintiff's demands by letter dated December 22, 2015, beyond the additional 60 days directed in the preliminary conference order dated April 2, 2015. (Shufer Opp. Affirm. of 5/26/16, Ex A.) However, "[b]elated but substantial compliance with a discovery order undermines the position that the delay was a product of

willful or contumacious conduct.” (*Cambry v Lincoln Gardens*, 50 AD3d 1081, 1082 [2d Dept 2008].)

Plaintiff did not articulate a valid basis for obtaining the driving record and “DMV records” of Franco Verderame, and for a training manual/training materials. The only possible reason for demanding Verderame’s driving record and the training materials was for the purpose of proving negligent retention or negligent training, which plaintiff may not assert here because the incident occurred while Verderame was acting within the scope of his employment. (*Karoon v New York City Tr. Auth.*, 241 AD2d 323, 324 [1st Dept 1997]; see *Neiger v City of New York*, 72 AD3d 663, 664 [2d Dept 2010].) In their answer, the Transit Defendants admitted, “that at all times mentioned in the verified complaint defendant NEW YORK CITY TRANSIT AUTHORITY owner of the bus bearing New York State license plate number K42354 employed defendant FRANCO VERDERAME as a bus operator who operated buses in the regular scope of his employment with the permission and consent of defendant.” (Sosa Affirm. of 12/8/15, Ex A [Answer] ¶ 4.)

The Transit Defendants’ objection to production of Verderame’s driver’s license is overruled. Production of a copy of the driver’s license issued to Verderame bears on operation of the bus. Vehicle and Traffic Law

§509-b provides that a person is qualified to operate a bus only if, among other things, that person “has been issued a currently valid driver's license or permit which is valid for the operation of the bus in this state.” Therefore, defendants New York City Transit Authority and Verderame must produce a copy of Verderame’s driver’s license within 60 days. They shall redact personally identifying information, such as Verderame’s addresss and date of birth, but they may not redact the ID number nor the driver’s license classification.

The Transit Defendants’ objection to production of maintenance, repair, and inspection records of the subject bus is also overruled. Plaintiff alleges negligent operation of the bus. Maintenance, repair and inspection records that indicate that the bus was in good working order would tend to rule out that the plaintiff was struck due to a mechanical failure, as opposed to human action, if any. Thus, within 60 days, New York City Transit Authority shall produce the maintenance, repair and inspection records of bus number 5524 for the six month period prior to, and including the date of the incident, i.e., November 17, 2013 through May 17, 2014.

Plaintiff's Notice for Discovery and Inspection dated February 1, 2016

Plaintiff's demand for route information about the M14D bus route is denied, because such information about the M14D bus route is publicly available at [www.mta.info](http://www.mta.info). (*Penn Palace Operating, Inc. v Two Penn Plaza Assoc.*, 215 AD2d 231, 231 [1st Dept 1995] [production of documents should not be compelled to the extent that they are available as a matter of public record].)

Plaintiff's demand for training materials for operation of buses is denied. As discussed above, plaintiff sought the training materials for the purpose of proving negligent training, which plaintiff may not assert here because the incident occurred while Verderame was acting within the scope of his employment. (*Karoon*, 241 AD2d at 324 [1st Dept 1997]; see *Neiger*, 72 AD3d at 664.)

The Transit Defendants' objection to plaintiff's demand for the paddle report is overruled. "Liberal discovery is favored and pretrial disclosure extends not only to proof that is admissible but also to matters that may lead to the disclosure of admissible proof." (*Twenty Four Hour Fuel Oil Corp. v Hunter Ambulance*, 226 AD2d 175-176 [1st Dept 1996].) "[T]he acid test for disclosure of information is not whether the party can make out a prima facie case without the evidence, but whether he or she can make out a more

persuasive case with it.” (6-3101 Weinstein-Korn-Miller, NY Civ Prac CPLR ¶ 3101.08. Here, plaintiff’s counsel believes that the paddle report might reveal that the bus was running late, and that the driver might have been rushing to catch up, notwithstanding the Transit Defendants’ assertion that their bus operators are not penalized if their bus runs behind schedule.

#### Deposition of “Roschel, A.”

The Transit Defendants’ objection to the deposition of “Roschel, A.” is overruled. Plaintiff’s counsel sought the deposition of “Roschel, A.” on the belief that this person prepared the diagram marked as Plaintiff’s Exhibit 6 at Verderame’s deposition. “Roschel, A.” and “Pass/PR# 761827”, which were written by hand, appears on the diagram. (Sosa Affirm., Ex F.)

Although the Transit Defendants contend that SLD Luben Nassev prepared the diagram, and Nassev’s deposition is scheduled for August 24, 2016, plaintiff’s counsel articulated a further basis for the deposition “Roschel, A.” at the court conference on July 21, 2016. According to an “OA Brief #1903” about the incident, “SLD Roscher” was at the scene of the incident, and the parties’ counsel suspect that “SLD Roscher” and “Roschel, A” may be the same person. Insofar as that person appears to have been present at the scene of the incident, the Court exercises its discretion to

direct "SLD Roscher"/"Roschel A." to be produced for a deposition within 60 days.

In light of the discovery that the Transit Defendants have provided, and given that some of the objections asserted that the Transit Defendants were sustained, the Court is not persuaded that the Transit Defendants objections to discovery were willful, contumacious or in bad faith. Therefore, striking the answer of the Transit Defendants is not warranted.

Plaintiff is not permitted to file the note of issue while discovery remains incomplete.

### **CONCLUSION**

Accordingly, it is hereby

ORDERED that plaintiff's motion to strike the answer of defendants New York City Transit Authority, Metropolitan Transportation Authority and Franco Verderame (Motion Seq. No. 002) is granted to the extent that within 60 days:

- (1) defendants New York City Transit Authority and Verderame shall produce a copy of Verderame's driver's license. They may redact personally identifying information, such as Verderame's address and date of birth, but they may not redact the ID number nor the driver's license classification;

(2) defendant New York City Transit Authority shall produce the maintenance, repair and inspection records of bus number 5524 for the six month period prior to, and including the date of the incident, i.e., November 17, 2013 through May 17, 2014;

and plaintiff's motion is otherwise denied; and it is further

ORDERED that plaintiff's motion to strike the answer of defendants New York City Transit Authority, Metropolitan Transportation Authority and Franco Verderame (Motion Seq. No. 003) is granted to the extent that, within 60 days, defendant New York City Transit Authority shall provide a copy of the paddle report for the M14 bus operated by Verderame in effect on July 9, 2014, and defendant New York City Transit Authority shall produce "SLD Roscher"/"Roschel A." for a deposition, and plaintiff's motion is otherwise denied.

Dated: July 26, 2016  
New York, New York

ENTER:

  
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J.S.C.

HON. MICHAEL D. STALLMAN