

<b>Han v New York City Tr. Auth.</b>
2017 NY Slip Op 31586(U)
July 25, 2017
Supreme Court, New York County
Docket Number: 152872/2013
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED, J.S.C.
Justice

PART 2

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ASHLEY HAN, AS ADMINISTRATRIX OF THE ESTATE OF KI SUCK HAN, SE RIM HAN, INDIVIDUALLY, AND ASHLEY HAN, INDIVIDUALLY,

INDEX NO. 152872/2013

Plaintiffs,

MOTION DATE

- v -

MOTION SEQ. NO. 002

NEW YORK CITY TRANSIT AUTHORITY,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90

were read on this application to/for Strike Answer

Upon the foregoing documents, it is ordered that the motion is decided as follows.

This wrongful death action arises from an incident on December 3, 2012 in which plaintiff's decedent, Ki Suck Han, was fatally injured when he was pushed onto train tracks and struck by a train at the subway station operated by the defendant New York City Transit Authority ("NYCTA") located at 49th Street and Seventh Avenue. Plaintiffs Ashley Han, as Administratrix of the Estate of Ki Suck Han ("the decedent"), Se Rim Han, and Ashley Han individually (collectively "plaintiffs")

moves, pursuant to CPLR 3124 and 3126, to strike the NYCTA's answer. The motion is decided as set forth below.

**FACTUAL AND PROCEDURAL BACKGROUND:**

On December 3, 2012, an individual pushed the decedent onto the subway tracks at the NYCTA subway station located at 49<sup>th</sup> Street and 7<sup>th</sup> Avenue. NYSCEF Doc. 57.<sup>1</sup> Although the decedent attempted to pull himself up onto the platform, he was struck by a train and passed away as the result of his injuries. *Kremins Aff.* In Supp., at par. 3; Doc. 57, at par. 20.

On January 4, 2013, plaintiffs Ashley Han, as Administratrix of the Estate of Ki Suck Han, Se Rim Han, and Ashley Han individually filed a notice of claim against the City of New York, the Metropolitan Transportation Authority, the NYCTA, and Terrence Legree, the operator of the train which struck decedent. Doc. 57, at par. 18; Doc. 18.<sup>2</sup> After a 50-h hearing was held, plaintiffs commenced the instant action on March 29, 2013 by filing a summons and complaint naming the

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<sup>1</sup> Unless otherwise noted, all references to documents are to the NYSCEF documents filed in this matter.

<sup>2</sup> Ashley Han, the daughter of the decedent, and Se Rim Han, the wife of the decedent, assert claims for loss of consortium. Doc. 1, at pars. 34-35, 40-41.

NYCTA as defendant. Doc. 57. The NYCTA joined issue by service of its verified answer on or about April 18, 2013. Doc. 58.

On June 7, 2013, a preliminary conference was held before this Court (Stallman, J.), at which the NYCTA was directed to appear for deposition on August 7, 2013. Doc. 59.

On October 2, 2014, Justice Stallman so-ordered a stipulation directing the train operator and conductor to appear for depositions on behalf of the NYCTA on December 17 and 18, 2014, respectively. Doc. 60.

Pursuant to a so-ordered stipulation dated January 22, 2015, Justice Stallman ordered the train operator and conductor to appear for depositions on April 30 and May 7, 2015, respectively. Doc. 61.

On May 12, 2015, Justice Stallman so-ordered a stipulation providing, inter alia, that plaintiffs reserved their right to “serve [a] motion seeking to strike/preclude [the NYCTA] from non-compliance of previous discovery orders.” Doc. 62.

At a compliance conference conducted on July 23, 2015, Justice Stallman asked counsel for the NYCTA why the train operator, Terrence Legree, had not been produced for deposition. Kremins Aff. In Supp., at par. 11. Counsel for the NYCTA represented to Justice Stallman that Legree was on sick leave and was thus unable to be deposed. Id. Justice Stallman then ordered the NYCTA to “provide an affidavit as to the employment status of [Legree within] 30 days.” Doc. 63.

At a compliance conference on October 20, 2015, Justice Stallman directed counsel for the NYCTA to telephone Legree to ascertain whether, despite the fact that he was out on sick leave, he was capable of answering questions at a deposition. Kremins Aff. In Supp., at par. 12. Legree responded in the affirmative and Justice Stallman so-ordered a stipulation directing him to appear for his deposition on December 1, 2015. Doc. 64.

On November 30, 2015, Michael Armienti of Armienti, DeBellis, Guglielmo & Rhoden, incoming counsel for the NYCTA, telephoned plaintiffs’ counsel to request an adjournment of Legree’s deposition, which was scheduled for the next day. Kremins Aff., at par. 13. Armienti represented that he had medical tests scheduled for December 1, 2015 which could not be rescheduled and he requested

that the deposition instead be conducted on December 21, 2015. Id.<sup>3</sup> Plaintiffs' counsel agreed to the adjournment of Legree's deposition until December 21, 2015.

On December 15, 2015, Armienti's firm filed a notice of appearance for the NYCTA. Doc. 14. The same day, the NYCTA filed a proposed order to show cause (Doc. 16) seeking to stay the depositions of the train operator, Legree, as well as that of the conductor, asserting that it would be prejudiced by producing them for depositions while the criminal prosecution of the individual who pushed the decedent onto the tracks was still pending. The NYCTA argued that it would be prejudiced if Legree were to testify because the District Attorney ("DA") and/or New York City Police Department ("NYPD") could be in possession of documents prepared by Legree which might contradict his deposition testimony. Kremins Aff in Supp., at par. 15. In support of the order to show cause, Legree submitted an affidavit in which he represented that, although he believed he spoke to investigators at the scene of the incident, he did not recall what he said and wished to delay his deposition until he could review any statements he gave. Doc. 26.

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<sup>3</sup> At oral argument, plaintiffs' counsel represented that Armienti also sought an adjournment of the deposition in order to have time to review the file.

At a compliance conference on December 17, 2015, Justice Stallman, after considering the argument made by counsel for the NYCTA, adjourned Legree's deposition and stated that the deposition would be rescheduled by a stipulation or court order. *Id.*, at par. 16.

On February 4, 2016, Justice Stallman signed the order to show cause submitted by the NYCTA on December 15, 2015. Doc. 33. By signing the order to show cause, Justice Stallman stayed the depositions of Legree and the train conductor pending the outcome of that application. *Id.* At a conference held before Justice Stallman that day, counsel for the NYCTA advised the Court that the criminal case relating to the decedent's death had been adjourned for disposition until March 3, 2016. *Kremins Aff. In Supp.*, at par. 17; Doc. 65.

By order dated April 22, 2016, Justice Stallman denied the NYCTA's motion to stay Legree's deposition. Doc. 66. In so holding, Justice Stallman stated, *inter alia*, that:

[I]t is hard to believe that NYCTA did not retain copies of documents it turned over to the police or the DA. Movant's [sic] have not demonstrated that the NYCTA does not have such copies. NYCTA, apparently did not pursue the NYPD's administrative appeal decision denying movant's FOIL and did not pursue its subpoena to the NYPD. Neither, [sic] does it appear that efforts were made to negotiate the obtaining of NYCTA documents from the DA. Be that as it may, the

lack of such document disclosure need not prevent other discovery proceedings, such as the expeditious scheduling of depositions of NYCTA employees such as the train crew. Accordingly, counsel shall appear in IAS Part 21 on Thursday May 19, 2016 at 10:00 a.m. for a discovery conference for inter alia the scheduling of depositions and remaining disclosure.”

Doc. 66.

On May 19, 2016, counsel for the NYCTA advised Justice Stallman that the NYCTA had terminated Legree. Kremins Aff. In Supp., at par. 18. On June 23, 2016, this Court directed the NYCTA to provide an affidavit explaining the circumstances of Legree’s termination and simultaneously ordered that the Legree’s personnel file be submitted to him for in camera inspection. Doc. 43.

By order dated July 25, 2016, Justice Stallman directed the NYCTA to provide plaintiffs with all of Legree’s personnel records, without redaction, within 25 days. Doc. 67. The NYCTA thereafter provided plaintiffs with the documents. Kremins Aff. In Supp., at par. 20. Included in the documents was a letter by the NYCTA to Legree dated April 25, 2016 which reflected that Legree had been terminated pursuant to Civil Service Law section 73 as of April 22, 2016 due to his inability to perform his job duties for one year. Doc. 68.

Legree now resides in Pennsylvania and refuses to appear for a deposition in this matter in New York or Pennsylvania. Ex. N to Kremis Aff. In Supp.; Kremins Aff. In Supp., at par. 22. Although Justice Stallman and the undersigned offered to issue an open commission so that Legree's deposition could be conducted in Pennsylvania, plaintiffs declined to pursue this opportunity.

On September 21, 2016, plaintiffs filed the instant order to show cause, pursuant to CPLR 3124 and 3126, seeking to strike the NYCTA's answer on the ground that its willful violations of multiple court orders prejudiced their ability to prosecute this action. The NYCTA opposes the motion.

### **CONTENTIONS OF THE PARTIES:**

In support of their application, plaintiffs contend that the NYCTA's willful and contumacious failure to comply with multiple court orders warrants the striking of their answer pursuant to CPLR 3126. Alternatively, they assert that the NYCTA should be precluded from introducing evidence regarding liability in this matter.

Plaintiffs maintain that the willfulness of the NYCTA's conduct can be inferred from its repeated refusal to comply with court orders. They urge that,

although the NYCTA used Legree's inability to work as an excuse for his failure to appear for a deposition, Justice Stallman confirmed with Legree that he was in fact able to testify at a deposition while he was still an employee of the NYCTA.

Additionally, plaintiffs claim that the NYCTA acted as it did because it knew that, since Legree was out on medical disability since April 22, 2015, he would be terminated pursuant to Civil Service Law section 73 if he did not return to his position within one year. That one year period expired, and Legree was terminated, on April 22, 2016, the day Justice Stallman denied the NYCTA's motion for a stay. Doc. 68.

In opposition, the NYCTA argues that it did not obstruct the deposition of Legree in any way. This, it asserts, is illustrated by the fact that Justice Stallman stayed the case to allow the NYPD to provide records to the NYCTA. Further, it insists that it did not terminate Legree in an attempt to avoid producing him for deposition; rather, he was terminated for failing to return to work within one year. The NYCTA further asserts that it should not face sanctions pursuant to CPLR 3126 since plaintiffs did not pursue the open commission offered by Justice Stallman, which would have at least given them the opportunity to depose Legree in Pennsylvania.

## LEGAL CONCLUSIONS:

CPLR 3126 provides that if a party "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed . . . , the court may make such orders with regard to the failure or refusals as are just." Such an order may include the entry of a default judgment against the non-complying party (*see* CPLR 3126 [3]). It is within the trial court's discretion to determine the nature and degree of the penalty (*see Kihl v Pfeffer*, 94 NY2d 118, 122, 722 NE2d 55, 700 NYS2d 87 [1999]), and the sanction will remain undisturbed unless there has been a clear abuse of discretion (*see Those Certain Underwriters at Lloyds, London v Occidental Gems, Inc.*, 11 NY3d 843, 845 (2008)). The sanction should be "commensurate with the particular disobedience it is designed to punish, and go no further than that" (Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3126:8, at 462).

*Merrill Lynch, Pierce, Fenner & Smith, Inc. v Global Strat Inc.*, 22 NY3d 877, 880 (2013).

Justice Stallman ordered the NYCTA to produce Legree for deposition by orders dated June 7, 2013 (Doc. 59), October 2, 2014 (Doc. 60), and January 22, 2015 (Doc. 61). At a compliance conference on July 23, 2015, Justice Stallman asked counsel for the NYCTA why Legree had not yet appeared for his deposition and was told that the latter was out on sick leave. At a compliance conference on October 20, 2015, Justice Stallman again asked the NYCTA why Legree had not

appeared for deposition and directed counsel for the NYCTA to contact Legree to ascertain whether, although he could not work, he was able to answer questions at a deposition. Legree advised this Court that he was able to testify at a deposition, a fact which the NYCTA evidently had not bothered to explore during the period of more than two years which had elapsed since the initial order directing him to appear was issued on June 7, 2013. When Justice Stallman learned that Legree was able to testify, he directed him to appear for deposition by December 1, 2015. Doc. 64. At that juncture, the NYCTA's obstructionist tactics, which thus far had consisted of ignoring three court orders directing Legree to appear for deposition, assumed a more suspicious character.

On November 30, 2015, Michael Armienti, incoming counsel for the NYCTA, who would file a notice of appearance on December 15, 2015, asked plaintiffs to adjourn Legree's December 1, 2015 deposition until December 21, 2015 on the ground that he (Armienti) was ill. Plaintiffs' counsel agreed to the adjournment. However, in lieu of proceeding with the deposition on December 21, 2015, Armienti moved, on the day on which he filed an appearance, to stay the deposition because Legree could not recall whether he gave a statement to the NYPD following the incident and, if he did, what the content of the statement was. Thus, Armienti, citing a personal illness, took advantage of the courtesy and understanding

of plaintiffs' counsel to engineer yet a further delay of Legree's deposition in order to seek a strategic advantage.

By order dated April 22, 2016, Justice Stallman denied the NYCTA's motion for a stay and directed Legree to appear for a deposition by May 19, 2016. Doc. 66. Although the NYCTA knew on or before April 22, 2016 that Legree was to be terminated that day pursuant to Civil Service Law section 73 due to his failure to work for one full year, it did not advise Justice Stallman until the compliance conference on May 19, 2016 that the NYCTA could no longer produce Legree for deposition because he was no longer in its employ.

Based on the foregoing facts, this Court, in its discretion, determines that the NYCTA's delaying tactics and pattern of noncompliance with discovery orders gives rise to an inference of willful and contumacious conduct which warrants the imposition of sanctions herein pursuant to CPLR 3126. *Jackson v Open Communications Omnimedia, LLC*, 147 AD3d 709 (1<sup>st</sup> Dept 2017). This finding is based on the fact that the NYCTA ignored court orders, failed to investigate whether Legree was able to appear for a deposition despite the fact that he was out on sick leave, and used motion practice to further delay the production of Legree for deposition. The facts strongly suggest that the NYCTA sought to delay the

production of Legree for deposition until after he was terminated so that it could argue that it no longer had control over him as a deposition witness. Having found that discovery sanctions against the NYCTA are warranted pursuant to CPLR 3126, it is incumbent upon this Court to exercise its “broad discretion in fashioning [a remedy] that [is] precisely tailored to the discovery abuse at issue (citation omitted).” *Crooke v Bonofacio*, 147 AD3d 510, 511 (1<sup>st</sup> Dept 2017).

While the NYCTA’s conduct was willful and contumacious, this Court does not find that it warrants the striking of the answer for several reasons. Perhaps most importantly, it is undisputed that, although this Court offered them a commission to pursue Legree’s deposition in Pennsylvania, they declined to avail themselves of this opportunity.

Additionally, plaintiffs did not move to compel Legree’s deposition or to strike the answer until more than three years had elapsed after the first order, issued June 7, 2013 (Doc. 59), was issued directing him to appear for deposition. Additionally, plaintiffs did not move to strike the answer for over one year after April 30, 2015, the date on which Legree was directed to appear for deposition by the third compliance conference order issued January 22, 2015. Doc. 61.

Further, although Armienti's motives in moving to stay Legree's deposition appeared to be calculated to delay the latter's deposition, at least some delay resulted from Justice Stallman's decision to entertain the NYCTA's order to show cause seeking a stay of Legree's deposition which, although filed December 15, 2015, was not signed until February 4, 2016 and not decided until April 22, 2016. Docs. 16, 33, 42.

After considering the foregoing facts, this Court determines that plaintiffs' motion is granted to the extent that Legree is precluded from testifying at trial due to his failure to appear for a deposition, as well as the willful and contumacious conduct of the NYCTA impeding Legree from being deposed. See *Mehta v Chugh*, 99 AD3d 439 (1<sup>st</sup> Dept 2012) (plaintiff precluded from testifying at trial where she failed to appear for her deposition or respond to interrogatories); *Gonzalez v National Car Rental*, 178 AD2d 116 (1<sup>st</sup> Dept 1991) (defendant ordered to appear for deposition within 60 days or be precluded from testifying at trial, despite fact he disappeared or made himself unavailable). The NYCTA is also precluded from introducing at trial any statements made by Legree in connection with the alleged incident. Additionally, plaintiffs are entitled to an adverse inference instruction against the NYCTA at trial based on Legree's repeated failure to appear for deposition and the NYCTA's actions in preventing the deposition from proceeding.


See *Schilling v Quiros*, 23 AD3d 243 (1<sup>st</sup> Dept 2005) (adverse inference charge warranted where defendant willfully failed to provide court-ordered discovery).

Therefore, in light of the foregoing it is hereby:

ORDERED that the motion by plaintiffs Ashley Han, as Administratrix of the Estate of Ki Suck Han, Se Rim Han, Individually, and Ashley Han, Individually is granted to the extent of: a) precluding Terrence Legree from testifying at the trial of this matter based on his failure to appear for a deposition; b) precluding the NYCTA from introducing at trial any statements made by Legree in connection with the incident alleged in this matter; and c) directing that an adverse inference charge against the NYCTA be given to the jury at the trial of this matter based on the failure by Terrence Legree to appear for a deposition; and it is further

ORDERED that this constitutes the decision and order of the court.

7/25/2017  
DATE

  
HON. KATHRYN E. FREED, J.S.C.  
HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	DO NOT POST	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	