Gravely v City of New York
2018 NY Slip Op 31119(U)
March 26, 2018
Supreme Court, Queens County
Docket Number: 643/15
Judge: Ernest F. Hart

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **ERNEST F. HART** IAS PART 6
Justice

JUSTICE ERNEST F. HART

Effie M. Gravely, as the Administratrix of the Estate of Crystal S. Gravely, deceased, Effie M. Gravely, individually, and Mervin T. Leader, as Administrator of the Estate of Jada M. Butts, deceased,

Plaintiff(s),

-against-

The City of New York,

Defendant(s).

Index No.: 643/15

Motion Date:
October 18, 2017
January 24, 2018

Mot. Seq. No.: 3, 4 & 5

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

Dena Lewis-Feurtado, Administrator of the Estate of Jaleel N. Feurtado,

Plaintiff(s),

-against-

The City of New York, New York City Economic Development Corporation,

Defendant(s).

Index No.: 697/15

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

Vilma Elliott, as Administrator of the Estate of Darius Fletcher, deceased, and Vilma Elliott, individually,

Plaintiff(s),

-against-

The City of New York, Myrtle H. Stuckey and Andrew Jordon Gramm,

Defendant(s).

Index No.: 3311/15

The following papers numbered 1 to 53 read on this motion by defendant, The City of New York (City) (Seq. 4), seeking, among other things, summary judgment, pursuant to CPLR 3212; and these motions by plaintiff, Mervin T. Leader, as Administrator of the Estate of Jada M. Butts, deceased (Leader), seeking the striking of the City's answer for failure to comply with discovery (Seq. 3), and a separate motion seeking to strike the City's answer for spoliation, pursuant to CPLR 3124 and 3126 (Seq. 5); along with cross motions for this same relief interposed by plaintiffs, Gravely, and Vilma Elliott, individually, and as Administrator of the Estate of Darius Fletcher, deceased (from a separate, jointly-connected, action bearing Index Number 3311/2015).

	Papers Numbered
Notices of Motion and Cross Motion - Affirmations - Exhibits	1-21
Answering Affidavits - Exhibits	22-41, 52-53
Reply Affidavits - Exhibits	42-51

Upon the foregoing papers, it is ordered that the City's motion; plaintiff, Leader's motion; and plaintiffs, Gravely's and Elliott's cross motions, are determined as follows:

On April 4, 2014, Andrew Gramm was operating a motor vehicle owned by his grandmother, Myrtle H. Stuckey, in which Crystal S. Gravely, Jada M. Butts, Jaleel N. Feurtado, and Darius Fletcher were passengers, westbound on 19th Avenue, west of 37th Street, Astoria, Queens. 19th Avenue became a "dead end" street approximately 491 feet west of 37th Street. Traveling at an excessive rate of speed, Mr. Gramm lost control of the vehicle and skidded beyond the terminus of 19th Avenue, across an expanse of land, and into Steinway Creek. All four passengers died. Leader and Effie M. Gravely, individually, and as Administrator of the Estate of Crystal S. Gravely, commenced separate wrongful death actions against the City, New York City Department of Highways, and New York City Department of Transportation (hereafter combined

under City), which actions were consolidated by order of this court, dated July 29, 2015. Vilma Elliott, individually, and as Administrator of the Estate of Darius Fletcher, commenced an action against the City, Stuckey and Gramm, under Index Number 3311/2015, and Dena Lewis-Feurtado, as Administrator of the Estate of Jaleel N. Feurtado, commenced an action against the City and New York City Economic Development Corporation, bearing Index Number 697/2015. The Elliott and Lewis-Feurtado actions were judicially joined for trial with the instant consolidated action, under the decision and order of July 29, 2015.

Said consolidated plaintiffs' complaints alleged that the City was negligent with regard to, among other things, signage and warning devices, barriers, lighting, design and construction of a "traffic safety plan," and "failing to undertake a reasonable study of the roadway." The City answered, and impleaded Stuckey and Gramm in both cases. Said third-party actions were dismissed by court order, dated May 20, 2016. Defendant, City, moved for summary judgment dismissing the complaints in the consolidated action, alleging it had no "prior written notice of any condition with regard to the roadway and its appurtenances;" no notice of a dangerous condition at the accident site; and "there is no evidence that the City's alleged actions or inaction was a proximate cause of ... the accident." Plaintiffs oppose.

"[T]he proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *see Schmitt v Medford Kidney Center,* 121 AD3d 1088 [2014]; *Zapata v Buitriago*, 107 AD3d 977 [2013]). On defendants' motion for summary judgment, the evidence should be liberally construed in a light most favorable to the non-moving plaintiff (*see Boulos v Lerner-Harrington*, 124 AD3d 709 [2015]; *Farrell v Herzog*, 123 AD3d 655 [2014]). Credibility issues regarding the circumstances of the subject incident require resolution by the trier of fact (*see Bravo v Vargas*, 113 AD3d 579 [2014]; *Martin v Cartledge*, 102 AD3d 841 [2013]), and the denial of summary judgment.

The Court's function on a motion for summary judgment is "to determine whether material factual issues exist, not to resolve such issues" (*Lopez v Beltre*, 59 AD3d 683, 685 [2009]; *Santiago v Joyce*, 127 AD3d 954 [2015]). As summary judgment is to be considered the procedural equivalent of a trial, "it must clearly appear that no material and triable issue of fact is presented .... This drastic remedy should not be granted where there is any doubt as to the existence of such issues ... or where the issue is 'arguable' [citations omitted] (*Sillman v. Twentieth Century-Fox Film Corp*., 3 NY2d 395, 404 [1957]; *see also, Rotuba Extruders v.Ceppos*, 46 NY2d 223 [1978]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Stukas v. Streiter*, 83 AD3d 18 [2011]; *Dykeman v. Heht*, 52 AD3d 767 [2008]. Summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Collado v Jiacono*,, 126 AD3d 927 [2014]), citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2002]). The burden is on the party moving for summary judgment to demonstrate the absence of a material issue of fact. Failure to make such showing requires denial

of the motion, regardless of the sufficiency of the opposing papers (*see Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 [1988]; *Winegrad v. New York Med. Ctr.*, 64 NY2d 851 [1985]).

The City, the owner of the public roadway of 19th Avenue, and its appurtenances, contends that plaintiffs' complaints should be dismissed against it because it did not receive prior written notice of the alleged defect, pursuant to NYC Administrative Code § 7-201 (c) (2), a condition precedent to commencing an action against the City.

"Where, as here, a municipality has enacted a prior written notice law, it may not be subjected to liability for injuries caused by a dangerous condition which comes within the ambit of the law unless it has received prior written notice of the alleged defect or dangerous condition, or an exception to the prior written notice requirement applies" (*Trela v City of Long Beach*, 157 AD3d 747, 749 [2d Dept 2018], quoting *Palka v Village of Ossining*, 120 AD3d 641, 641 [2d Dept 2014]). One of the two recognized exceptions to the rule is "that the municipality affirmatively created the defect through an act of negligence," and such exception is limited to work by the municipality that immediately results in the existence of a dangerous condition (*Yarborough v City of New York*, 10 NY3d 726, 728 [2008]; *see Pylarinos v Town of Huntington*, 156 AD3d 922 [2d Dept 2017]; *Doherty v Town of Lewisboro*, 154 AD3d 737 [2d Dept 2017]; *Piazza v Volpe*, 153 AD3d 563 [2d Dept 2017]). In order to establish its prima facie entitlement to judgment as a matter of law, the City must demonstrate it did not have prior written notice of the alleged dangerous condition complained of, and that it did not create such dangerous condition (*see Loghry v Village of Scarsdale*, 149 AD3d 714 [2d Dept 2017]; *Beiner v Village of Scarsdale*, 149 AD3d 679 [2d Dept 2017]).

Although the City demonstrated, prima facie, that it did not receive prior written notice of the alleged dangerous condition located at the terminus of 19th Avenue, and plaintiffs have failed to rebut such lack of written notice, the City has failed to substantiate that it did not create said dangerous condition. Its submissions, lacking evidence relating back to the time of the construction of the roadway, the plans for same, and its maintenance of the roadway and appurtenances since, "failed to eliminate triable issues of fact as to whether its work on the (roadway area) immediately left it in a condition that was dangerous" to vehicles thereat (*Trela v City of Long Beach*, 157 AD3d 747, 750). As the City has failed to meet its prima facie burden in the first instance, the burden of proof does not shift to plaintiffs, the City is not entitled to summary judgment, and its motion is denied, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Rokach v Taback*, 148 AD3d 1195 [2d Dept 2017]; *Pineda v Elias*, 125 AD3d 738 [2d Dept 2015]).

Plaintiff, Leader, moved (Seq. 5), and plaintiffs, Gravely and Elliott, cross-moved, to dismiss the City's answer on the basis of alleged spoliation of evidence, notably as-built drawings, construction, and maintenance records of the roadway of 19th Avenue at or near its terminus, pursuant to CPLR 3124 and 3126. Although Gravely and Elliott's cross motions are improperly brought, as they seek affirmative relief from a nonmoving party, such technicality may be disregarded where, as here, there is no prejudice, and opposing parties had ample time to, and

were, heard on the merits (*see* CPLR §§ 2215, 2001; *Daramboukas v Samlidis*, 84 AD3d 719 [2d Dept 2011]; *Sheehan v Marshall*, 9 AD3d 403 [2d Dept 2004]).

"Under the common-law doctrine of spoliation, a party may be sanctioned where it negligently loses or intentionally destroys key evidence" (*Gaoming You v Rahmouni*, 147 AD3d 729, 730 [2d Dept 2017]; *see Peters v Hernandez*, 142 AD3d 980 [2d Dept 2016]; *Morales v City of New York*, 130 AD3d 792 [2d Dept 2015]). The party requesting the sanctions for spoliation has the burden of showing that the party having control over the evidence, and possessing an obligation to preserve such evidence at that time, either intentionally, "with a culpable state of mind," or negligently, disposed of such critical evidence, which fatally compromised plaintiff's ability to prove his or her claim or defense (*Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 547 [2015]; *see Goodwin v Guardian Life Ins. Co. of Am.*, 156 AD3d 765 [2d Dept 2017]; *Eksarko v Associated Supermarket*, 155 AD3d 826 [2d Dept 2017]). Moving plaintiffs contend that the city was put on notice that such evidence should be preserved by the fact that four deaths occurred at that time and location, and that the Department of Transportation investigated the scene shortly after the occurrence. While sanctions may be imposed "even if 'the evidence was destroyed before the spoliator became a party, provided the spoliator was on notice that the evidence might be needed for future litigation'" (*Smith v Cunningham*, 154 AD3d 681, 682 [2d Dept 2017]; quoting *Biniachvili v Yeshivat Shaare Torah, Inc.*, 120 AD3d 605, 606 [2d Dept 2014]), movants have failed to demonstrate entitlement to such relief herein.

The cases presented in support of this motion by plaintiffs all refer to either "destroyed" or "lost" material evidence. Plaintiffs' standard, the matter of *DiDomenico v C & S Aeromatik Supplies, Inc.*, 252 AD2d 41 [2d Dept 1998), is factually inapposite to the case at bar. In that case, defendant destroyed physical evidence of the package which caused the plaintiff's injury, and refused to respond to orders for discovery, delaying the exchange of records until they had been destroyed in the regular course of business. In this matter, the City has responded to discovery requests, producing numerous records, including, in June 2015, a "[c]ompact disk with aerial photographs of 19th Avenue from Steinway Street to Steinway Creek, Astoria, Queens, New York," dated April 2012, which depict the condition of the subject dead-end at that time. The City has failed, only, to locate any as-built drawings for the area. While plaintiffs contend that the requested as-built drawings for the accident location were "destroyed" by the City, plaintiffs have failed to proffer evidence either that such documents were, in fact, in existence at the time the City had an obligation to preserve them for the instant litigation, or that such records were actually "destroyed" by the City. Plaintiffs have failed to proffer any statutory requirement that the City either create, or retain such records for a certain period of time, and have failed to show wilfulness or the requisite malicious intent on the part of the City, in failing to locate such records.

The City's numerous responses to such demands for discovery stated that, after thorough searches of the various City departments, "no records were found", or that "the search results were negative." Contrary to plaintiffs' preferred interpretation of such responses, the necessary elements of entitlement to sanctions for spoliation of evidence are not manifested by such proof (*see Saeed v City of New York*, 156 AD3d 735 [2d Dept 2017]; *Golan v North Shore-Long Is.*

Jewish Health Sys., Inc., 147 AD3d 103 [2d Dept 2017]). Additionally, especially in light of the 2012 aerial photographs of the subject area exchanged by the City, plaintiffs have failed to show that such unavailable evidence, in the form of the as-built plans, would "deprive plaintiff of the ability to prove (his) claim" (*Rokach v Taback*, 148 AD3d 1195, 1196 [2d Dept 2017]). or leave plaintiffs "prejudicially bereft of appropriate means to confront a claim with incisive evidence" (*Klein v Ford Motor Co.*, 303 AD2d 376, 377 [2d Dept 2003], quoting *Kirkland v New York City Hous. Auth.*, 236 AD2d 170, 174 [1st Dept 2007]; *see Neve v City of New York*, 117 AD3d 1006 [2d Dept 2014]). Consequently, the motion and cross motions, seeking sanctions against the City for spoliation of evidence, are denied.

Consolidated plaintiff, Leader, also moved (Seq. 3) to strike the City's answer, and preclude the City from offering evidence at trial, for its failure to comply with discovery, pursuant to CPLR 3126 . Plaintiff, Elliott,cross-moved for the same relief, and, while said cross motion was improperly pleaded, such impropriety will, again, be overlooked as no prejudice exists, since the opposing parties were fully heard on the merits (*see* CPLR §§ 2215, 2001; *Daramboukas v Samlidis*, 84 AD3d 719; *Sheehan v Marshall*, 9 AD3d 403).

"Resolution of discovery disputes and the nature and degree of the penalty to be imposed pursuant to CPLR 3126 are matters within the sound discretion of the motion court" (*Hasan v 18-24 Luquer St. Realty, LLC*, 144 AD3d 631, 632 [2d Dept 2016], quoting *Richards v RP Stellar Riverton, LLC*, 136 AD3d 1011, 1011 [2d Dept 2016]). Striking a pleading or prohibiting the introduction of evidence, pursuant to CPLR 3126, for failure to comply with disclosure is a drastic remedy, and is only appropriate where there is a clear showing that the failure to comply was willful, contumacious or in bad faith (*see Teitelbaum v Maimonides Medical Center*, 144 AD3d 1013 [2d Dept 2016]; *Cioffi v S.M. Foods Inc.*, 142 AD3d 520 [2d Dept 2016]; *Arpino v F.J.F. & Sons Elec. Co., Inc.,* 102 AD3d 2091 [2d Dept 2012]). It may be inferred that a party's conduct is willful and contumacious when said party repeatedly fails to comply with court orders compelling disclosure without providing a reasonable excuse for said party's noncompliance over an extended period of time (*see Candela v Kantor*, 154 AD3d 733 [2d Dept 2017]; *Desiderio v GEICO Gen. Ins. Co.*, 153 AD3d 1322 [2d Dept 2017]; *Pesce v Fernandez*, 144 AD3d 653 [2d Dept 2016]).

In the case at bar, moving plaintiffs' submissions, lacking the existence of specific names or job titles which would demonstrate the existence of a City employee who would have superior knowledge of the discovery requested, are unpersuasive in demonstrating the City's bad faith or willfulness in failing to comply with the demands and court orders/stipulations for depositions herein (*see Jones v LeFrance Leasing Ltd. Partnership*, 110 AD3d 1032 [2013]; *Northfield Inc. Co. v. Model Towing and Recovery*, 63 AD3d 808 [2009]). Hence, the City's alleged failure to fully comply do not yet support an inference that such failure was willful, contumacious or in bad faith (*see Teitelbaum v Maimonides Medical Center*, 144 AD3d 1013 [2d Dept 2016]; *Cioffi v S.M. Foods Inc.*, 142 AD3d 520; *Arpino v F.J.F. & Sons Elec. Co., Inc.,* 102 AD3d 201), and do not warrant the extreme sanction of striking said defendants' answer with regard to depositions. As

such, the branches of plaintiffs' motion and cross motion, seeking the striking the City's answer, and compelling further depositions, for failure to comply with deposition demands, are denied.

However, "[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity" (*Kihl v Pfeffer*, 94 NY2d 118, 123 [1999]). When a party fails to comply with court orders and/or stipulations for evidence, for an extended period of time, without a reasonable excuse, thereby frustrating the disclosure scheme set forth in the CPLR, it is well within the broad discretion of the trial court to strike a pleading (*see Zletz v Wetanson*, 67 NY2d 711 [1986]; *Ozeri v Ozeri*, 135 AD3d 838 [2016]; *Lazar, Sanders, Thaler & Associates, LLP*, 131 AD3d 1133 [2015]).

In the case at bar, the City defendants' responses to plaintiffs' demands for discovery and inspection are, possibly, incomplete. As such, upon the court's own motion, pursuant to CPLR 3124, the City shall perform searches of the following requested New York City databases, with regard to the roadway of 19th Avenue from 37th Street westbound to its terminus at the dead-end at Steinway Creek, including the area beyond the roadway of 19th Avenue, up to and including the body of water of Steinway Creek: MOSAIC; GANG SHEETS; HIQA; CASH; DASH; ANALYTICS; FITS; TERM; CCU; BCTS; SIEBEL; HUMINGBIRD; STATUS; and IPHONE, and provide copies of any and all found documents within such databases, whether previously exchanged or not, within twenty (20) days of being served with a copy of this decision with notice of entry.

If no such documents are contained in any individual, stated database, or any such database listed above does not exist, or any such documents listed in a database are not possessed by the City defendants, the City is to supply an affidavit to that effect, as a party cannot be "compelled to produce records, documents, or information that were not in [its] possession, or did not exist" (*Gottfried v Maizel*, 68 AD3d 1060, 1061 [2d Dept 2009]; *see Freely v Donnenfeld*, 150 AD3d 695 [2d Dept 2017]). Such affidavit shall include a statement as to the efforts made to search for, and secure, such information. Should defendants fail to comply with this order, defendants shall be precluded from offering any evidence at trial that would have been contained in the responses to such ordered discovery.

The parties' remaining contentions either are without merit, or need not be addressed in light of the foregoing determinations.

Accordingly, the City's motion (Seq. 4) seeking summary judgment dismissing the complaints, is denied; the motion by plaintiff, Leader (Seq. 5), and cross motion by plaintiff, Gravely, both seeking the striking of the City's answer based on spoliation of evidence, are denied;

and plaintiff, Leader's motion (Seq. 3), and cross motion by plaintiff, Elliott, both to strike the City's answer for failure to comply with discovery, are denied, however, on the court's own motion, discovery is ordered as above-stated.

Dated: March 26, 2018

J.S.C.