SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 10

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SYMONETTE NELSON NUGENT **Index №.155991/2012**

Plaintiff

-against-

THE CITY OF NEW YORK, THE NEW YORK DEPARTMENT OF TRANSPORTAION, *et al.*

Defendant

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The following papers numbered 1 to 4 were read on this motion for (Seq. No. **003**) for **SANCTIONS** (*see* CPLR §2219 [a]):

HON. GEORGE J. SILVER:

In this personal injury case, plaintiff SYMONETTE NELSON NUGENT ("plaintiff") moves, pursuant to CPLR §3126 for an order striking the answer of defendant THE CITY OF NEW YORK, THE NEW YORK DEPARTMENT OF TRANSPORTATION, and THE NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION (collectively, the "City"), for the City's late disclosure of discovery. In the alternative, plaintiff seeks an order sanctioning the City for its willful, contumacious, and wrongful abuse of the discovery process. Separately, defendant CON EDISON, INC. ("Con Ed") cross-moves for an order dismissing this action against Con Ed and awarding Con Ed costs and reasonable attorney's fees on the grounds that plaintiff has knowingly continued to pursue a frivolous claim against Con Ed. In response, plaintiff seeks to impose sanctions against Con Ed for its own previous late disclosure of discovery.

BACKGROUND AND ARGUMENTS

On February 29, 2012, plaintiff was walking northbound on the west side of First Avenue and 21st Street in Manhattan. At the time, plaintiff was pushing an infant in a stroller. After proceeding a few steps, plaintiff stopped for the pedestrian crosswalk sign on the south side of 21st Street, waiting to go north. When she was given the indication to move forward, the wheel of the stroller got caught in a hole where the curb meets the street. Plaintiff fell, and as a result of her fall sustained injuries, and underwent various surgical procedures.

Throughout this litigation, plaintiff's counsel has requested the disclosure of all pertinent information regarding the hole that resulted in her fall. Through plaintiff's efforts, which included taking depositions of City employees, making motions and requesting numerous affidavits and affirmations of City employees, plaintiff pieced together what plaintiff perceived to be the full disclosure of discovery from the City necessary to build plaintiff's case.

On June 17, 2019, a date that was considered a "final" trial date, the City exchanged records for the first time that it previously had indicated did not exist. Included in the City's disclosure was a work order from January 12, 2012 that was never previously exchanged, and search results "for records related to a trip and fall on East 21st Street between 1st avenue and 2nd avenue including the intersection of East 21st Street and 1st avenue." While plaintiff was otherwise ready to proceed with trial, a short adjournment was requested to make the instant application.

In support of the instant application, plaintiff contends that the City violated numerous court orders and thwarted discovery at every turn. To be sure, plaintiff submits that the City attempted to benefit from its discovery failures by moving for summary judgment, and delayed this case based on its own improper conduct, and perpetrated a fraud upon the court by representing on multiple occasions that it had complied with discovery, before subsequently providing plaintiff with additional documentation on the scheduled trial date.

Plaintiff argues that the revelation of documents on the day of trial, which were in the exclusive control of the City and seven years overdue, is an abhorrent abuse of the discovery process.

Separately, Con Ed argues that plaintiff's case against it is frivolous, as there is no evidence to support plaintiff's claim that Con Ed performed work at the site of the accident or caused the purported defect plaintiff claims to have tripped over. To be sure, Con Ed submits that it had nothing to do with the condition of the site where plaintiff claims she fell, thus rendering the case against it illusory. Consequently, Con Ed seeks dismissal of plaintiff's claims as against it as well as sanctions for plaintiff's purported frivolous conduct.

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" (*McGilvery v. New York City Tr. Auth.*, 213 AD.2d 322, 324 [1st Dept 1995]). Willful and contumacious behavior can be inferred by a failure to comply with court orders, in the absence of adequate excuses (*see Johnson v. City of New York*, 188 AD2d 302 [1st Dept 1992). However, the Appellate Division, First Department, has held that "[a]ctions should, wherever possible, be resolved on the merits, and, therefore, litigants who have not replied expeditiously to notices of discovery and inspection should be afforded reasonable latitude before imposition of the harshest available penalty, the striking of pleadings" (*Bassett v. Bando Sangsa Co., Ltd.*, 103 AD2d 728 [1st Dept 1984]).

In the instant action, plaintiff's motion for an order striking the City's answer is denied as plaintiff has not demonstrated that the City's failure to comply with discovery was willful and contumacious. While plaintiff made numerous requests to the City for records for the location of plaintiff's accident, the City's delay in producing the documents at issue does not amount to willful and contumacious behavior. To be sure, the court is disturbed by, but ultimately satisfied with, the City's explanation of deficient search protocols that impeded an earlier revelation of the documents at issue. Moreover, plaintiff has yet to specifically identify a document from the recent

disclosure as evidence of liability against the City on either the theory of prior written notice or immediate cause. While plaintiff may have been prejudiced by the City's late disclosure, the Appellate Division, First Department, has held that the striking of a pleading is a drastic remedy, one which will be imposed when the party is shown to have flagrantly evaded court-ordered discovery (*see Henderson-Jones v. City of New York*, 87 AD3d 498 [1st Dept 2011]). "Moreover, even where the proffered excuse is less than compelling there is a strong preference in our law that matters be decided on their merits" (*Catarine v. Beth Israel Med. Ctr.*, 290 AD2d 213, 215 [1st Dept 2002]; *see also* CPLR §3126; *Iskowitz v. Forkosh Constr. Co.*, 269 AD2d 131, 133 [1st Dept 2000]["In light of this State's policy preference for deciding actions on their merits, such a drastic sanction should only be imposed when the party's conduct is willful, contumacious or in bad faith"]). "The moving party bears the initial burden of coming forward with a sufficient showing of willfulness" (*Read v. Dickson*, 150 AD2d 543, 544 [2d Dept 1989]).

However, "repeated and persistent" failure to comply with successive disclosure orders without providing adequate explanation establishes willfulness and contumaciousness (*see Rodriguez v United Bronx Parents, Inc.*, 70 AD3d 492, 492 [1st Dept 2010]; *Arts4All, Ltd. v Hancock*, 54 AD3d 286, 286-288 [1st Dept 2008]). For example, disobeying three successive court orders directing defendants to appear for depositions without a reasonable excuse has been held contumacious conduct that warrants striking a pleading (*Reidel v Ryder TRS, Inc.*, 13 AD3d 170, 171 [1st Dept 2004]). Furthermore, in *Asim v City of New York*, 117 AD3d 655 (1st Dept 2014), defendant Metropolitan Transit Authority ("MTA") failed to acknowledge ownership of its own vehicle that caused plaintiff's injuries or to disclose the name of the driver until the court ruled that MTA owned the vehicle, and MTA only disclosed an incident report after plaintiff moved for discovery sanctions. MTA's late disclosure of the report and the driver's identity was deemed willful and contumacious behavior that warranted striking its answer (*id.*). In addition, courts are justified in striking the pleadings when the nonmoving party is on notice that it risks having its pleadings dismissed for disclosure abuse (*see Oasis Sportswear, Inc. v Rego*, 95 AD3d 592, 592 [1st Dept 2012]; *Arts4All, Ltd.*, 54 AD3d at 289, *supra*).

Here, the record does not support the inference that the City flagrantly failed to disclose all discovery. Rather, the record before the court demonstrates the City's failure to produce "full and complete" discovery responses, which falls within the ambit of a disclosure violation, but does not exceed the "repeated and persistent" threshold for willful and contumacious conduct to be inferred. Moreover, as already indicated, plaintiff has failed to show that the disclosure at issue is so material to this case that its discovery at this late juncture in the litigation substantively impacts the manner in which this matter will be tried. As such, plaintiff's application to strike the City's answer is denied.

Separately, the court recognizes that it reserves the right to award to any party costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees resulting from frivolous conduct (22 NYCRR §130-1.1). The court may also impose financial sanctions upon an attorney who engages in frivolous conduct (22 NYCRR §130-1.1). Conduct may be deemed frivolous if it is "undertaken primarily to delay or prolong the resolution of the litigation" (22 NYCRR §130-1.1[c][2]).

Here, it is axiomatic that the City's conduct has delayed this litigation. However, on this record, it does not follow that the City's late disclosure was intended to produce that outcome. Rather, the City has averred that it did not view the content of the recent disclosure as substantially impacting the litigation, and plaintiff has not provided persuasive proof that it has. Nevertheless, the court is troubled by the City's unexcused failure to provide the records at issue. To be sure, the City has known for several years, through various demands exchanged, that plaintiff has been seeking documents such as those recently produced. Late disclosure under such a circumstance may constitute frivolous conduct (*Hughes v Farrey*, 48 AD3d 385, 385 [1st Dept 2008]; *see also Davis v City of New York*, 205 AD2d 442, 442 [1st Dept 1994][imposing sanction for inexcusable delay in providing discovery in violation of court orders]). Nevertheless, while the City's particular conduct has delayed the resolution of the litigation, the interruption occasioned by the late disclosure does not, in and of itself, support an inference that the conduct was "undertaken primarily" for that purpose (*see Brocklebank v City of Lockport*, 198 AD2d 906, 906 [4th Dept 1993]). While defense counsel's failure to produce the documents at issue may have prolonged the resolution of the litigation, plaintiff has not offered any evidence that defense counsel's absence was undertaken primarily to prolong the resolution of the litigation. Furthermore, plaintiff's assertion that had plaintiff received records in a timely manner then plaintiff could have proven the City negligently caused a condition in the road, is without merit as this argument is complete speculation. Plaintiff has provided no evidence that any potential repairs by the City of the subject area were defective or negligently performed. While plaintiff did not have access to certain records, plaintiff did have access to photographs of the location where plaintiff fell and no evidence exists from these photographs that the City's actions, if any, were done improperly.

Moreover, although the City disregarded the directives of this court in an inexcusable manner, it cannot be automatically inferred that defense counsel's decision not to disclosure the records at issue at an earlier juncture was part of an effort to prolong litigation. Imposing a sanction on defense counsel here would not serve the ends of justice as it would fail to target or address the cause of the City's intransigence.

Likewise, the court finds no merit to Con Ed's cross-motion. On December 7, 2017, Con Ed, moved for summary judgment on liability, claiming that it did not cause, create, or contribute to the defective condition that caused plaintiff to trip. In its reply affirmation in connection with that motion, Con Ed unearthed several 2009 documents, which had not previously been exchanged, and which revealed work done in the vicinity of the area where the accident occurred by way of a search performed by Jennifer Grimm, a specialist in the legal service department. Con Ed argued that the document demonstrated that while work was done near the area of the accident, it was 119 (one hundred and nineteen) feet away from the subject defect. The court rejected this argument, and denied Con Ed's motion for summary judgment on April 8, 2019. Notably, in denying summary judgment, the court held that "[a]fter consideration of the arguments advanced and the documents submitted, including the Big Apple map and the photographs of the accident location which plaintiff marked at her deposition, it is clear that issues of fact remain as to whether work performed by the City and/or Con Edison caused or created the defect causing plaintiff's fall." Con Ed did not file a notice of appeal or move to reargue or renew the court's findings.

Since this court has already considered, and rejected, Con Ed's argument that the action against it is frivolous in light of the documents it unearthed in 2009, among other items, it is manifestly true that this court cannot sanction plaintiff for continuing to pursue plaintiff's claims as against Con Ed. To be sure, this court has found that issues of fact remain regarding Con Ed's liability. As those issues will ultimately be resolved at trial by a jury, the court sees no need to sanction plaintiff for exercising plaintiff's self-evident right to pursue plaintiff's claims to their ultimate resolution at trial. As Con Ed's application for dismissal and sanctions against plaintiff amounts to nothing more than an attempt to perform an "end-around" and revive its prior failed motion to dismiss the case, the court's denies the application in its entirety.

The court has considered plaintiff's request for preclusion under *Jackson v. City of New York*, 185 AD2d 768 [1st Dept 1992], and finds it to be inappropriate based on this record. In *Jackson*, the Appellate Division, First Department, held that "blatantly ignoring court orders, should not "inure" to the City's "benefit," and accordingly held that the issue of notice "should be resolved in favor of the plaintiff and defendant is precluded from raising any issue with respect thereto." While the City's conduct throughout this litigation has raised legitimate concerns that the City has a proclivity to find pertinent and necessary records after the City has stated that it has exhausted its search for those records and found nothing, barring the City from defending this case on the issue of notice would only serve to further frustrate the goal of having this litigation resolved on its merits.

Lastly, for reasons similar to those espoused with respect to plaintiff's application for sanctions as against the City, plaintiff's application for sanctions against Con Ed is without merit.

In accordance with the foregoing, it is therefore

ORDERED that plaintiff's motion pursuant to CPLR §3126 to strike the answer of the City is denied; and it is further

ORDERED that plaintiff's motion for sanctions against the City, is denied; and it is further

ORDERED that Con Ed's cross-motion for dismissal of this case and sanctions against plaintiff, is denied; and it is further

ORDERED that plaintiff's application for sanctions against Con Ed, is denied; and it is further

ORDERED that the parties are directed to appear for a conference before the court on September 10th at 9:30 AM at the courthouse located at 111 Centre Street, Room 1227, New York, NY (Part 10).

This constitutes the decision and order of the court.

Dated: August 13, 2019

GEORGE J. SILVER
J.S.C.