

**Buttacavoli v Vouitsis**

2019 NY Slip Op 35203(U)

August 29, 2019

Supreme Court, Queens County

Docket Number: Index No. 706535/16

Judge: Kevin J. Kerrigan

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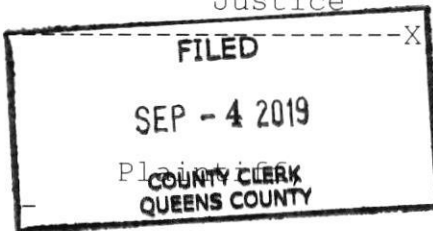
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10  
Justice

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Ronald Buttacavoli,



- against -

Index  
Number: 706535/16

Motion  
Date: 8/12/19

Eva Vouitsis, Achillas Vouitsis and  
The City of New York,

Motion Seq. Nos.: 2&3

Defendants.  
-----X

The following papers numbered 1 to 8 read on this motion by defendant, Eva Vouitsis, to compel discovery (motion seq. 2) and 1 to 8 to compel discovery and for sanctions (motion sequence 3).

	<u>Papers Numbered</u>
<u>Motion Sequence 2</u>	
Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition-Exhibits.....	5-6
Reply.....	7-8
<u>Motion Sequence 3</u>	
Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition-Exhibits.....	5-6
Reply.....	7-8

Upon the foregoing papers it is ordered that the motions are decided as follows:

Motions by Vouitsis for an order compelling the City to comply with her notice of discovery and inspection dated March 8, 2019 (motion seq. 2) and with her notice of discovery and inspection dated May 6, 2019 and for the imposition of sanctions against the City "for a pattern of discovery violations" (motion seq. 3) are consolidated for disposition and are denied.

Plaintiff allegedly sustained injuries as a result of tripping and falling on a raised sidewalk flag in front of Vouitsis' property at 168 Beach 118<sup>th</sup> Street in Queens County on October 23, 2015. Vouitsis does not allege as an affirmative defense in her answer that she is exempt from statutory liability under §7-210(b) of the New York City Administrative Code. Rather, it is her contention that, irrespective of §7-210, the City created the

raised sidewalk condition and thus remains liable under common law negligence and so, if Vouitsis is found liable under §7-210, she would be entitled to contribution from the City. It is her theory that the City created the defective condition of the sidewalk as a result of its clean-up operations in the aftermath of Hurricane Sandy.

Annexed to the moving papers is a copy of the non-party deposition transcript of one Damian Vouitsis, son of defendant Eva Vouitsis, dated March 12, 2019. This witness testified that he resides in Vouitsis' premises with his wife and has been for 18 years. He testified that Hurricane Sandy left beach sand evenly across the street, including the sidewalk four to five feet deep and that the City came in with front loaders and dump trucks to cart away the sand, which took approximately two weeks, working round the clock. He testified that the sidewalk in front of the property was "pristine" prior to Sandy, but after the City workers left, he observed one flag that was depressed with a small elevation differential of "less than an inch, maybe three quarters of an inch".

On March 8, 2019, Vouitsis' counsel served the City with a notice of discovery and inspection demanding the City to produce

"1. All contracts relating to the cleanup of the Rockaways following Super Storm Sandy that included work on Beach 118<sup>th</sup> Street.

"2. All inspection reports, daily summaries, progress reports, or similarly named documents, related to the cleanup of the Rockaways following Super Storm Sandy that included work on Beach 118<sup>th</sup> Street.

"3. All emails related to the cleanup of the Rockaways following Super Storm Sandy that included work on Beach 118<sup>th</sup> Street.

"4. All documents showing what City owned or leased equipment was used on a day to day basis during the cleanup of the Rockaways following Super Storm Sandy that included work on Beach 118<sup>th</sup> Street.

"5. All photographs for the period following Super Storm Sandy to October 23, 2015, which depict Beach 118<sup>th</sup> Street.

"6. All videos for the period following Super Storm Sandy to October 23, 2015, which depict Beach 118<sup>th</sup> Street."

Even were this demand proper, which it is not, as will be discussed shortly, the demand for all documents and materials in the City's possession concerning its Sandy cleanup of the Rockaways

is clearly overbroad and unduly burdensome. That the notice for discovery and inspection asks for documents relating to the Sandy cleanup that included Beach 118<sup>th</sup> Street hardly narrows the demand to any meaningful degree. Since Beach 118<sup>th</sup> Street is in the heart of the Rockaways, it is not likely that any of the demanded materials covering the entirety of the Rockaways would exclude it. Moreover, the demand is not limited to records of work in the area in front of Vouitsis' property, her side of the street or even her block, but seeks records inclusive of the entirety of Beach 118<sup>th</sup> Street, a considerable area that includes multiple blocks that are not remotely in proximity to Vouitsis' property.

On May 6, 2019, Vouitsis' counsel served the City with an additional notice of discovery and inspection demanding the City to produce

"1. The Notice of Claim, including any photographs, re: Claim # 2013PD007113 (claimant Vincent Fusco);

"2. All internal documents regarding said claim including the reports from other agencies referenced in the Comptroller's Claim Status Letter dated May 12, 2013."

Vincent Fusco, as counsel informs the Court, is a neighbor of Vouitsis and that he filed a notice of claim alleging damage to his sidewalk in front of his property at 174 Beach 118<sup>th</sup> Street from the City's heavy equipment. Plaintiff's counsel annexes to the moving papers a copy of the City's response to that notice of discovery and inspection which includes a copy of Fusco's notice of claim, correspondence from the Comptroller's office sent on various dates in 2013 informing that his claim was under investigation and that a decision will be made as soon as reports from the agencies involved in his claim are received, a letter dated January 24, 2014 asking for the dollar amount of the claim and copies of invoices, bills, canceled checks or estimates, a letter dated February 24, 2014 offering the sum of \$17,400 in full settlement of the claim and a release signed by the neighbor dated March 2, 2014. Thus, plaintiff's own exhibits demonstrate that the City complied with item #1 of the notice of discovery and inspection. Counsel only complains that the City has failed to provide the documentation demanded in item #2.

Counsel contends that whatever reports were received that led to the offer of settlement of the neighbor's claim are relevant and necessary to Vouitsis' defense. There is no showing that any report or investigation conducted in connection with the other property owner's claim would be relevant or necessary to Vouitsis' cross-claim against the City.

This Court notes that the neighbor filed his timely notice of

claim on March 13, 2013. The date of the incident set forth is December 15, 2012 and the manner in which the claim arose is described as follows: "Sanitation 'machinery' damaged cement while removing sand deposited by Sandy AND by them (they used my house as a collection area for the entire block: sidewalk, driveway and front entryway were all damaged." The damage claimed comprised 60 feet of sidewalk, 7' X 15' of his driveway and 10' X 12' of his front entryway. Therefore, although the claim alleges property damage resulting from the City's cleanup in the aftermath of Sandy, the nature and manner of creation of the damages claimed by the neighbor are dramatically different from those that Vouitsis speculates the City's cleanup in front of her property caused. She does not assert that the City made any special use of her property as a collection area for the deposit of debris from the entire block and thus that the City's cleanup operations were different in nature and extent from that performed in front of any other properties. Moreover, Vouitsis does not allege that the City caused anywhere near the amount of damage to the sidewalk in front of her property that the neighbor claimed it caused to his sidewalk and property as a result of the special use of his property as a collection area for the entire block.

Vouitsis' son testified merely that after the cleanup to remove the beach sand that took approximately two weeks, he noticed that a single sidewalk flag in front of his premises was slightly depressed from the abutting flag by less than one inch, "maybe three quarters of an inch" (which was the flag upon which plaintiff alleges that he stumbled). Indeed, he testified that he merely assumed that this minuscule elevation differential of one sidewalk flag was caused by the City's cleanup operations.

Thus, whatever report or reports were produced relative to the other property owner's claim alleging extensive damage to his sidewalk, driveway and entranceway caused by the City's operations which were of a dramatically different character and extent from its cleanup work performed on the rest of the block would be of no probative value in establishing Vouitsis' cross-claim against the City that amounts to pure speculation that the slight elevation differential of a single sidewalk flag alleged to have been noticed after the cleanup of the sand in front of his premises may have been caused by that cleanup. Additionally, any reports, if any, that may have been generated in evaluating another property owner's claim for purposes of settlement of that property owner's claim have not been shown to be necessary or helpful to establish that the City performed cleanup on the block, as it is the testimony of Vouitsis' son that he saw the City's Sanitation Department cleaning up the deposits of sand using dump trucks and front loaders, which constitutes admissible evidence of such allegation, in which case it would be the burden of the City to show evidence that it did not perform any such cleanup operation.

Counsel could have also sought the non-party deposition of that other property owner to establish the same. Moreover, as opposed to the other property owner's claim that the City caused extensive damage to his property by their use of the property as a dumping ground for Sandy debris and its subsequent removal of that debris, Vouitsis' son did not testify that he observed any damage being done to the sidewalk in front of his premises by the City and does not allege that he observed anything after the cleanup other than a "maybe" 3/4" elevation differential of a single sidewalk flag that he merely assumed was caused by the City. Assuming that the City were unable to rebut such eyewitness testimony that it performed cleanup using such equipment, it would still be the burden of Vouitsis to show evidence, through an expert, that the slight elevation differential of the sidewalk flag was created by the City's heavy equipment in the course of the cleanup, and not by the devastation of the hurricane itself that Vouitsis states, and which is not denied, deposited sand and debris up to five feet high, or that it arose naturally over the course of time through any other means.

But in any event, this Court considers plaintiff's discovery demands in the notices for discovery and inspection made at this stage of the action to be improper and are disallowed. Plaintiff did not seek such discovery at the preliminary conference of this matter held on July 11, 2018 and, consequently, the preliminary conference order issued on said date did not direct the City to provide any such discovery. Indeed, although counsel now complains, inter alia, that the City's discovery provided consisting of searches for permits, repair orders, violations, contracts and complaints for two years prior to the date of the accident is insufficient because Hurricane Sandy occurred more than two years prior to the date of the accident, such was the extent of the discovery settled upon and ordered, and no demand was made at that time for records concerning the settlement of the other property owner's claim. Furthermore, counsel did not seek the discovery now sought at the time of the compliance conference that was held on January 7, 2019 and, consequently, no such discovery was directed in the compliance conference order. Indeed, the compliance conference order directed the discovery set forth in said order based upon the finding that "disclosure previously ordered herein has not been completed, or that additional disclosure is warranted" (emphasis added). Consequently, it was ordered that plaintiff file a note of issue and certificate of readiness on or before September 13, 2019.

It is undisputed that all discovery ordered in the compliance conference order has been provided and completed. Therefore, the City has not violated any prior order of the Court so as to merit Vouitsis' instant motions. On the contrary, it is Vouitsis' counsel who has made unwarranted motions for discovery in contravention of

the compliance conference order in which it was deemed that no further discovery, other than that set forth therein which was undisputably complied with, was warranted. Not only did counsel demand of the City for the first time in March 2019 the frivolously overbroad and burdensome discovery set forth in that notice for discovery and inspection, but then served a second notice for discovery and inspection two months later in May 2019 seeking the notice of claim information concerning the other property owner's notice of claim. Counsel is apparently of the impression that he may ignore the prior order of the Court setting forth the remaining discovery to be provided and to simply continue to make new discovery demands on an ad hoc basis whenever he comes up with something else that he wishes to explore, and then to move to compel such discovery and to seek the imposition of sanctions for the failure of the City to provide all of the additional discovery demanded. No justification is offered by counsel for his continued multiple discovery demands made after the compliance conference for new and different discovery that was never asked for previously.

Finally, not only has counsel ignored the compliance conference order in making these additional discovery demands, but has ignored this Court's Part Rules which specifically prohibit any discovery motions to be made prior to a final status conference or the filing of the note of issue. Although counsel expresses his belief that he may ignore this directive because it is not in the CPLR, this Court is authorized to issue part rules governing motion practice before it that are not addressed in the CPLR. Requiring attorneys to avail themselves of a conference in the Compliance Conference Part within the window of opportunity for such conference prior to resorting to motion practice before this Court is a valid exercise of this Court's discretion in implementing part rules that promote the efficient progress of cases and management of its motion calendar and in assuring that attorneys do not seek to sidestep the Compliance Conference Part that was instituted specifically to handle discovery and to free the motion parts from dealing with discovery matters until the time of the filing of a note of issue. This Court should not have been compelled by counsel's cavalier disregard of court procedure to waste its time and resources to explain this basic principle of practice which attorneys are reasonably expected to know, and to address these baseless motions.

There is thus no basis for counsel's additional request for the imposition of sanctions upon the City. Indeed, this Court considers counsel's request for sanctions to be borderline frivolous and sanctionable itself.

Accordingly, the motions are denied. It is further ordered that all discovery in this case is complete and all further discovery is precluded, and no further discovery-related motions

shall be made. It is further ordered that plaintiff file a note of issue and certificate of readiness certifying that all discovery is complete and the case is ready for trial by September 13, 2019, the date directed in the compliance conference order.

Dated: August 29, 2019



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KEVIN J. KERRIGAN, J.S.C.

FILED  
SEP - 4 2019  
COUNTY CLERK  
QUEENS COUNTY