Walston v City of New York
2020 NY Slip Op 32985(U)
September 10, 2020
Supreme Court, New York County
Docket Number: 158602/2019
Judge: Kathryn E. Freed

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2EFM

Justice

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INDEX NO. 158602/2019

ANDRE WALSTON,

Plaintiff,

MOTION SEQ. NO. 001

- v -

THE CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY, and MTA CAPITAL CONSTRUCTION COMPANY,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21

were read on this motion to/for ORDER OF PROTECTION.

In this personal injury/Labor Law action commenced by plaintiff Andre Walston, defendants The City of New York ("the City"), New York City Transit Authority ("the TA"), Metropolitan Transportation Authority ("the MTA"), and MTA Capital Construction ("the MTACC") (collectively "defendants") move, pursuant to CPLR 3103, for a protective order striking plaintiff's notice to admit dated November 25, 2019. Plaintiff opposes the motion. After consideration of the parties' contentions, and after a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff Andre Walston, an employee of Judlau Contracting Inc. ("Judlau"), was allegedly injured at a construction site on November 30, 2018 when a pile of materials fell on

him. At the time, plaintiff was working on the rehabilitation of the F and M subway lines at 23rd Street and 6th Avenue in Manhattan. He thereafter commenced the captioned action against defendants by filing a summons and complaint on September 4, 2019. Doc. 1. In his complaint, plaintiff alleged negligence and violations of Labor Law sections 200, 240(1) and 241(6) by defendants, which allegedly owned, operated, controlled, and managed the site and/or hired Judlau to perform certain work there. Doc. 1.

On or about November 25, 2019, plaintiff served defendants with a notice to admit reading as follows:

1. Admit or deny, that pursuant to the Order of Honorable Lyle E. Frank, dated May 1, 2019, which granted Plaintiff's Order to Show Cause to serve a late Notice of Claim, the plaintiff was deemed to have duly complied with §50(e) of the General Municipal Law and Public Authorities Law §§1276(2) and 2980, and served upon the Comptroller of the City of New York, the MTA Capital Construction Company, Metropolitan Transportation Authority and the New York City Transit Authority, a Notice of Claim, in writing, sworn to by said plaintiff setting forth therein the matters required by 50(e) of the General Municipal Law and Public Authorities Law §§1276(2) and 2980.

2. Admit or deny that on the 4th day of September, 2019, Andre Walston was duly examined under oath pursuant to the General Municipal Law §50-h by a representative of the defendant City of New York.

3. Admit or deny that at least thirty (30) days have elapsed since the service of the Notice of Claim was deemed timely served by the Court, and that adjustment and payment thereof has been neglected and/or refused for thirty (30) days after service of said notice, and this action is commenced within one (1) year and ninety (90) days, plus applicable tolls, after said cause of action accrued.

4. Admit or deny that on November 30, 2018, the City of New York, owned the lands and premises located at the 23rd Street, F & M line subway rehabilitation project, located at 23rd Street and Sixth Avenue, New York, NY.

5. Admit or deny that at some time prior to November 30, 2018 the City of New York, entered into a long term lease with New York City Transit Authority for the lands and premises consisting of the New York City Transit system, including the 23rd Street, F & M subway lines, located at 23rd Street and Sixth Avenue, New York, NY.

6. Admit or deny that on November 30, 2018, the New York City Transit Authority, operated the lands and premises consisting of the New York City Transit system, including the including [sic] the 23rd Street, F & M subway lines, located at 23rd Street and Sixth Avenue, New York, NY.

7. Admit or deny that on November 30, 2018, Judlau Contracting Inc. was the general contractor in connection with the construction and rehabilitation project located at the 23rd Street, F & M line subway rehabilitation project, located at 23rd Street and Sixth Avenue, New York, NY.

8. Admit or deny that on November 30, 2018 the MTA Capital Construction Company, was the construction manager in connection with the construction and rehabilitation project located at the 23rd Street, F & M line subway rehabilitation project, located at 23rd Street and Sixth Avenue, New York, NY.

In lieu of responding to the notice to admit, defendants filed the instant motion seeking a protective order. In support of their motion, they argue that the notice to admit is improper because it seeks admissions of matters in dispute and ultimate facts. They further assert that plaintiff improperly seeks to use the notice to admit as a substitute for other discovery devices.

In opposition, plaintiff argues that the motion must be denied since he is not seeking information about matters in dispute or ultimate matters of fact. He further asserts that the fact that certain issues could be explored at a deposition does not enable defendants to avoid responding to the notice to admit.

In reply, defendants maintain, inter alia, that a dispute exists regarding who owns the location where plaintiff was injured since plaintiff testified at his 50-h hearing that the accident occurred "outside the subject [subway] station and at or near the street." Doc. 21 at 2.

LEGAL CONCLUSIONS:

> "A notice to admit is designed to elicit admissions on matters which the requesting party 'reasonably believes there can be no substantial dispute' (CPLR 3123 [a])" (*National Union Fire Ins. Co. of Pittsburgh, Pa. v Allen*, 232 AD2d 80, 85 [1st Dept 1997]). "[A] notice to admit may not be utilized to request admission of material issues or ultimate or conclusory facts," or "facts within the unique knowledge of other parties" (*Taylor v Blair*, 116 AD2d 204, 206 [1st Dept 1986]). Rather, it is "only properly used to eliminate from trial matters which are easily provable and about which there can be no controversy" (*Samsung Am. v Yugoslav-Korean Consulting & Trading Co.*, 199 AD2d 48, 49 [1st Dept 1993]). Further, because a notice to admit "is not intended as simply another means for achieving discovery," it may not be used to obtain information in lieu of other disclosure devices (*see Hodes v City of New York*, 165 AD2d 168, 170 [1st Dept 1991]).

Fetahu v New Jersey Tr. Corp., 167 AD3d 514, 515 (1st Dept 2018).

Although a "notice to admit can be used to probe a party's understanding of his own duties under law . . . it is inappropriate as a vehicle for asking a party to interpret the law or someone else's compliance therewith." *Villa v NY City Hous. Auth.*, 107 AD2d 619, 620 (1st Dept 1985). Further, the decision whether to issue a protective order against a notice to admit lies within the discretion of the court. *See Hawthorne Group, LLC v RRE Ventures,* 7 AD3d 320, 324 (1st Dept 2004).

CPLR 3103 (a) provides, inter alia, that "[t]he court may at any time on its own initiative, or on motion of any party or of any person from whom or about whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts."

Items 1 and 3 of the notice to admit seek defendants' interpretation of the law and/or Justice Frank's order and are thus improper. *See Villa v NY City Hous. Auth.*, 107 AD2d at 620.

Item 2 simply asks defendants to admit that plaintiff testified at a 50-h hearing. Since plaintiff knows that he appeared for the hearing, and could establish that he did so with the transcript of the proceeding, it is unclear why this question is necessary. Thus, defendants are not required to respond to the same. See CPLR 3103(a).

In drafting Item 4, which addresses the ownership of the premises where the incident occurred, plaintiff's counsel relied on the transcript of the oral argument of plaintiff's motion to extend his time to file a notice of claim, at which counsel for the TA, the MTA and the MTACC represented that "there is a long-term lease between the City of New York and the [TA] with regards to ownership and usage of all the train stations in the City" and that, "[a]lthough the City technically is the owner, the lease provides for the MTA, the transit authority, to be responsible for the subway stations, etcetera." Doc. 19 at 3-4. Based on the transcript, Item 4 asks the City to admit or deny that it owned "the lands and premises located at the 23rd Street, F & M line subway rehabilitation project, located at 23rd Street and Sixth Avenue, New York, NY." Although ownership is a proper subject of a notice to admit (*see, e.g., Villa v New York City Hous. Auth.*, *supra*), the phrase "lands and premises . . . located at 23rd Street and Sixth Avenue", to which defendants surprisingly did not object, is vague and overbroad. If the purpose of a notice to admit is to obtain factual admissions about which the demanding party reasonably believes there can be no substantial dispute (CPLR 3123 [a]; *National Union Fire Ins. Co. of Pittsburgh, Pa. v Allen*, 232 AD2d at 85), then Item 4 is clearly improper, since there is no way to respond to it without speculation about the precise location to which it refers. Thus, defendants are not required to respond to the same.

Plaintiff argues that defendants must respond to Item 5 because there is no dispute that the City leased the subject subway station to the TA. However, as noted in the previous paragraph, at oral argument of plaintiff's motion, defendants' attorney refers to the TA and the MTA interchangeably. Doc. 19 at 3-4. Since the identity of the owner is unclear even to defendants' own attorney, this Item is not appropriate for a notice to admit. Additionally, although not raised, plaintiff again uses the phrase "lands and premises", which is vague and overbroad and thus inappropriate.

Item 6 asks defendants to admit or deny whether the TA "operated the lands and premises consisting of the New York City Transit system." Aside from repeating the vague language discussed above, this Item is improper since it calls for a legal conclusion. *See Luthmann v Gulino*, 131 AD3d 636, 637 (2d Dept 2015), *lv denied* 25 NY3d 914 (2015).

Items 7 and 8 are proper. However, "while a few proper requests may be interspersed in the [n]otice to [a]dmit . . . it is not [this Court's] obligation to prune [the notice to admit]." *Kimmel v Paul, Weiss, Rifkind, Wharton & Garrison*, 214 AD2 453, 453-454 (1st Dept 1995) (citations omitted).

Finally, as noted above, a notice to admit should not be used in lieu of a discovery device. *See Hodes v City of New York*, 165 AD2d 168, 170 (1st Dept 1991). Since the depositions of the plaintiffs and defendants are currently scheduled for September 23 and 30, 2020, respectively (Doc. 28), plaintiff will have an ample opportunity to explore all of the issues raised by the notice to admit in the immediate future.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by defendants for a protective order is granted; and it is further

ORDERED that the parties shall participate in a previously scheduled telephonic compliance conference on November 5, 2020 at 11 am, unless the parties, prior to that day, the provide the court with a discovery stipulation by emailing it to jjudd@nycourts.gov to be so-ordered, leaving blank spaces for the compliance conference date and note of issue filing deadline; and it is further

ORDERED that if the parties cannot so stipulate, then they are to provide the court with a dial-in number and access code or must have all parties on the line and then patch the court in at (646) 386-5655; and it is further

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

9/10/2020
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
	X	GRANTED	DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE