

**Disbrow v Metropolitan Tr. Auth.**

2020 NY Slip Op 34424(U)

September 8, 2020

Supreme Court, New York County

Docket Number: 158791/2018

Judge: Suzanne J. Adams

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: HON. SUZANNE J. ADAMS PART IAS MOTION 21

Justice

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DEBORAH DISBROW,

Plaintiff,

- v -

METROPOLITAN TRANSIT AUTHORITY, MIDTOWN TDR  
VENTURES LLC, MIDTOWN TRACKAGE VENTURES LLC

Defendant.

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INDEX NO. 158791/2018  
MOTION DATE N/A  
MOTION SEQ. NO. 002

DECISION + ORDER ON  
MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 31, 32, 33, 34, 35, 36, 38, 39, 40, 41, 42

were read on this motion to/for STRIKE PLEADINGS

Upon the foregoing documents, and a video conference having been held with the court on August 10, 2020, it is ordered that plaintiff's motion is granted to the extent that defendant Metropolitan Transportation Authority ("MTA") is to appear for a remote video conference deposition, and defendants' cross-motion is granted to the extent that plaintiff shall appear for an independent medical examination. The remainders of the motion and cross-motion are denied.

This personal injury action arises out of plaintiff's alleged slip and fall down a staircase at Grand Central Terminal on September 12, 2017. The most recent discovery order in this matter, dated February 13, 2020, required, *inter alia*, defendants' deposition to be held March 10, 2020. A witness on behalf of defendant Midtown Trackage Ventures LLC was deposed remotely via video conference on March 26, 2020, per adjournment. Thereafter, plaintiff demanded the deposition of a further witness from MTA. Defendants have advised that MTA will produce a witness for an in-person deposition conducted in a safe manner, but do not consent to a deposition

via remote video conference. Plaintiff now moves pursuant to CPLR § 3126 to strike defendants' answer. Defendants oppose the motion and cross-move for a protective order from compelled attendance at a remote deposition and for completion of certain outstanding discovery.

CPLR 3113(d) provides that the parties “*may* stipulate that a deposition be taken by telephone or other remote electronic means and that a party *may* participate electronically” [emphasis added]. While under normal circumstances a party could not be compelled to appear for a deposition via a remote video conference, it is unnecessary to note that the courts, the State of New York, and indeed the entire world is not operating under normal circumstances, but rather are in the midst of a global pandemic and must rapidly adapt to what these circumstances demand. The CPLR evolved to reflect the common use of telefacsimile (*i.e.*, the fax machine), e-mail and e-discovery, and undoubtedly will at some point reflect the use of remote video conferencing, but delaying discovery while awaiting such changes, or a vaccine for COVID-19 and a return to pre-pandemic practices, does not meet the current needs of litigants before the court, nor does it serve the interests of justice.

CPLR § 3103(a) allows the court to regulate “any disclosure device” so as to “prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.” Pursuant to that provision, it has been held that “[t]he decision to allow a party or witness to testify via video conference link is left to at trial court’s discretion [citations omitted].” *American Bank Note Corp. v. Daniele*, 81 A.D.3d 500, 501 (1<sup>st</sup> Dep’t 2011). In the instant matter, it is reasonable in the interests of justice to compel a deposition via remote video conference where there is no dispute that the parties possess the capability of holding such virtual depositions, and where the only alternative is to postpone discovery indefinitely. Indeed, courts in this state and around the country have already begun to compel such virtual depositions in light of the conditions

imposed by the global pandemic and the absence of specific guidance in the CPLR. See *Johnson v. Time Warner Cable New York City LLC*, 2020 WL 2769117, 2020 N.Y. Slip Op. 31592(U) (Sup. Ct., N.Y. Cty. May 28, 2020) (“The legal profession and its clients are currently coming to grips with the ‘new normal’ brought about by the COVID-19 pandemic.”); *Fields v. MTA Bus Company, et al.*, 2020 WL 4760424 (Sup. Ct., Westchester Cty. August 17, 2020) (noting that majority of recent cases addressing COVID-19 issues have denied insistence upon in-person depositions).

Accordingly, it is hereby

ORDERED that plaintiff’s motion is granted to the extent that MTA shall produce a witness for a deposition to be conducted via remote teleconference on or before October 15, 2020, and the remainder of plaintiff’s motion is denied; and it is further

ORDERED that defendants’ cross-motion is granted to the extent that defendants shall re-notice a physical examination of plaintiff and such examination shall be held on or before November 1, 2020, and the remainder of defendants’ cross-motion is denied; and it is further

ORDERED that plaintiff shall file the Note of Issue by December 15, 2020.

This constitutes the decision and order of the court.

9/8/2020  
DATE

  
SUZANNE J. ADAMS, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: