SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: PART C-2

----------X HON. THOMAS P. ALIOTTA, J.S.C.

ROBERT MARAIO,

Plaintiff,

- against -

THE CITY OF NEW YORK, THE BROOKLYN UNION GAS COMPANY d/b/a NATIONAL GRID NY, NATIONAL GRID ENERGY SERVICES LLC, NATIONAL GRID ELECTRIC SERVICES LLC, NATIONAL GRID ENERGY MANAGEMENT, LLC, THE HALLEN CONSTRUCTION CO., INC., LORI K. PERROTTA, NIKITA TRETYAKOV a/k/a NIKILZ TRETYAKOV, LORISA TRETYAKOV, and NEW YORK PAVING INC.,

Defendants.

----------X

DECISION & ORDER
Index No.: 150119/2018
Motion Sequence #001 & #002

Recitation of the following papers numbered "1" through "8" as required by CPLR 2219(a) were marked fully submitted on the 20th day of November, 2020.

Papers Numbered

Plaintiff's Notice of Motion & Affirmation to Strike the Answer of Defendant City of New York pursuant to CPLR §3126, with Exhibits (**MS_001** dated March 6, 2020; NYSCEF 95-101).....1, 2

Defendant's Affirmation in Opposition, with Exhibits (**MS_001** dated August 26, 2020; NYSCEF 130-138).....3

Plaintiff's Reply Affirmation, with Exhibit (**MS_001** dated November 3, 2020; NYSCEF 139-140).....4

Notice of Motion & Affirmation by Defendant, City of New York, for a Protective Order pursuant to CPLR §3101(a), with Exhibits (**MS_002** dated March 9, 2020; NYSCEF 102-111).....5, 6

Plaintiff's Affirmation in Opposition (**MS_002** dated August 5, 2020; NYSCEF 113-115).....7

Defendant, City of New York's, Reply Affirmation (**MS_002** dated November 19, 2020; NYSCEF 141-144).....8

Upon the foregoing papers, plaintiff's motion (Seq. No. 001) to strike the answer of defendant The City of New York pursuant to CPLR §3126 is denied; the motion (Seq. No. 002) of defendant The City of New York for a protective order pursuant to CPLR §3101(a) is granted in accordance herewith.

BACKGROUND

This action arises out of a motor vehicle accident on October 31, 2016, at or near the intersection of Nelson Avenue and Hillcrest Street in Staten Island, New York. Plaintiff Robert Maraio was a passenger in a motor vehicle operated and owned by defendants, Nikilz Tretyakov and Lorisa Tretyakov, respectively. Said vehicle collided with another vehicle owned and operated by defendant, Lori Perrotta. It is alleged that construction work was in progress in the vicinity of the intersection in question causing a narrowing of the roadway. There were no flagmen present to direct traffic and no warning was given to the motorists regarding the construction work and/or the dangerous condition of the roadway at the intersection. As a result of the accident, Mr. Maraio allegedly sustained serious and permanent injuries, including head trauma, fractured and shattered pelvis, lacerated spleen, a punctured lung, torn and lacerated urethra, and other fractures which required multiple surgical procedures.

Plaintiff commenced this action on January 18, 2018 to recover damages for personal injuries. The parties appeared for a Preliminary Conference on July 17, 2018. Plaintiff served a First Supplemental Notice for Discovery and Inspection on November 12, 2018. Among other discovery items, the plaintiff demanded the production of all motor vehicle reports for accidents that took place on Nelson Avenue between Hylan Boulevard and Amboy Road for the period of January 1, 2011, through November 1, 2016. The City served a Response dated January 14, 2019, and a Supplemental Response dated September 20, 2019.

The most recent compliance conference in this matter was held on January 23, 2020. The Court issued a Compliance Conference Order wherein plaintiff was directed to serve a motion seeking "accident reports for accidents that took place on Nelson Avenue between Hylan Boulevard and Amboy Road for the period of 2011-2016"; the City was directed to serve a "motion seeking a protective order as to plaintiff's First Supplemental Notice for Discovery and Inspection dated 11/12/18".

Rather than adhere to the Court's direction in the Compliance Conference Order dated January 23, 2020, plaintiff moves for an order striking the City's answer pursuant to CPLR §3126 for failing to respond to his First Supplemental Notice for Discovery and Inspection dated November 12, 2018, and for willfully failing to comply with prior Compliance Conference Orders dated January 17, 2019, March 21, 2019, May 7, 2019, June 18, 2019, July 30, 2019, and November 21, 2019. In those Orders, the City was directed, *inter alia*, to respond to plaintiff's First Supplemental Notice for Discovery and Inspection and any "outstanding demands" and/or prior court orders.

Plaintiff maintains the City failed to provide the records sought for the period from January 1, 2011, through November 1, 2016. Instead, the City limited its search to the two years prior to the date of the accident. Plaintiff further contends the records produced by the City relate to an "arbitrary" geographic location on Nelson Avenue that was "narrower" than the requested geographic distance between Hylan Boulevard and Amboy Road.

According to plaintiff, the claims he asserts in the complaint require a "longer and more extensive search" to be conducted by the City for records and documents that would uncover the accident history for the subject roadway and, therefore, the potential negligence of the City for failing to implement the necessary traffic safety and traffic calming measures to correct an

alleged known dangerous condition. Furthermore, plaintiff argues his demand for records pertaining to a broader stretch of Nelson Avenue, *i.e.*, between Hylan Boulevard and Amboy Road, rather than the specific intersection where the accident occurred, is equally important to an investigation of the City's potential negligence in failing to implement traffic calming measures at the location in question.

It is worth mentioning the scope of plaintiff's demands for records allegedly encompass the roadway distance of Nelson Avenue approximately .7 miles in length, which plaintiff contends is not unreasonable in view of his claim that the dangerous roadway condition was caused by the lack of traffic safety and traffic calming measures.

In opposition to the motion, the City maintains that a two-year search for records was conducted pertaining to a broader geographic area than the subject intersection that included the roadway segments surrounding the intersection up to the various cross streets. The City points out that its search results were successful in yielding a 2015 pre-accident traffic control study of the Nelson Avenue roadway (which found that a traffic light was not warranted at the subject intersection); 7 accident reports for the search area; 3 responsive roadway complaints concerning the search area; work orders for traffic signage in the search area; field inspections related to the 2015 traffic control study; responsive roadway manuals for traffic controls; and a traffic operations manual of standard operating procedures. The City also points out that on December 5, 2019, the individual who performed the search, Alison Boles, was produced for deposition and described in "painstaking details the voluminous nature of the search and the documents produced."

In view of the foregoing, defendant alleges it has fully complied with the Compliance Conference Orders by way of the foregoing search results, which have been disclosed in the

City's Response dated January 14, 2019 to plaintiff's First Supplemental Notice for Discovery and Inspection, and the City's Supplemental Response dated September 20, 2019.

In any event, defendant points out that 42 separate demands for documents pertaining to a period of more than five years prior to the accident are overly broad and lack relevance. It is further alleged that plaintiff's First Supplemental Notice for Discovery and Inspection encompasses an overly broad geographic area that includes 13 random intersections that are irrelevant to the intersection in question. The City maintains that plaintiff's voluminous demands are nothing more than a fishing expedition that is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of relevant evidence.

In view of the foregoing, the municipal defendant seeks a protective order pursuant to CPLR §3101(a) against plaintiff's discovery demands pertaining to the documents sought for the period from January 1, 2011 through November 1, 2016, within the geographic span of Nelson Avenue between Hylan Boulevard and Amboy Road, Staten Island, New York, to the extent such materials have not previously been provided.

DISCUSSION

CPLR §3101(a) requires "full disclosure of all matters material and necessary in the prosecution or defense of an action." The principle of full disclosure, however, does not give a party the right to uncontrolled and unfettered disclosure (*see McAlwee v Westchester Health Assoc., PLLC*, 163 AD3d 547, 548 [2d Dept 2018]; *JPMorgan Chase, National Association v Levenson*, 149 AD3d 1053, 1054 [2d Dept 2017]). While discovery is intended to be broad, it is not unlimited. "Unlimited disclosure...is not required and the rules provide that the court may issue a protective order denying, limiting, conditioning or regulating the use of any disclosure device to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other

prejudice to any person or the courts" (*Accent Collections, Inc. v Cappelli Enters., Inc.*, 84 AD3d 1283, 1283 [2d Dept 2011]; CPLR §3103[a]). Thus, to prevent abuse or prejudice to the parties, the Court is vested with broad discretion to issue an appropriate protective order pursuant to CPLR §3103(a), vacating improper demands that seek irrelevant information, are overbroad and unduly burdensome (*see Feger v Warwick Animal Shelter*, 59 AD3d 68, 70 [2d Dept 2008]; *Scalone v Phelps Mem. Hosp. Ctr.*, 184 AD2d 65, 70 [2d Dept 1992]).

In the matter at bar, it is incumbent on the plaintiff, as the party seeking disclosure, "to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims, and bare unsubstantiated allegations of relevancy are insufficient to establish the factual predicate regarding relevancy" (*Wadolowski v Cohen*, 99 AD3d 793, 794 [2d Dept 2012]). Plaintiff failed to meet this burden.

His unsubstantiated and bare allegations of the need and relevancy of roadway records pertaining to (1) the five-year period prior to the accident and (2) the .7 mile span of Nelson Avenue are legally insufficient. The proposition that the demanded search for records would most likely reveal discoverable information that will be crucial to plaintiff's case is based on conjecture and pure speculation. In particular, plaintiff surmises that the results will "uncover potential negligence" on the part of the City for its failure to maintain a safe roadway through the implementation of traffic safety and calming measures on a roadway where speeding was allegedly common. The foregoing unsupported contentions are of no avail.

It is worth mentioning defendant produced a 2015 pre-accident traffic control study of Nelson Avenue which included accident report information, field inspections, and fieldwork orders based on the study pertinent to the area in question. The production of accident reports for

other unrelated intersections on Nelson Avenue would have no probative value especially in light of the 2015 traffic control study which the City maintains formed the basis of the decision to maintain the stop sign at the subject intersection. Plaintiff has not challenged the 2015 study or requested a deposition of a traffic control witness concerning the study, the accident reports, the field inspections, and traffic signage work orders that have been produced.

In the matter at bar, plaintiff's bare assertion to the effect that the demanded discovery is "material and necessary" and defendants would not be unduly prejudiced or burdened is legally insufficient "to establish the factual predicate regarding relevancy" (*see Wadolowski v Cohen*, 99 AD3d at 794-795). The demands at issue in plaintiff's First Supplemental Notice for Discovery and Inspection are palpably improper in that they seek irrelevant information, are overbroad and burdensome (*see JPMorgan Chase Bank, N.A. v Levenson*, 149 AD3d at 1057; *Pesce v Fernandez*, 144 AD3d 653, 654 [2d Dept 2016]).

The City has made the requisite showing pursuant to CPLR §3103(a) to warrant the issuance of a protective order denying the demanded discovery.

In view of the foregoing, plaintiff's motion for an order striking the City's answer pursuant to CPLR §3126 for failing to respond to his First Supplemental Notice for Discovery and Inspection dated November 12, 2018, and for willfully failing to comply with prior Compliance Conference Orders is denied as moot.

Accordingly, it is

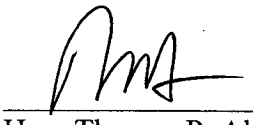
ORDERED, plaintiff's motion to strike the answer of defendant The City of New York pursuant to CPLR §3126 is denied; and it is further

ORDERED, the motion of defendant The City of New York for a protective order pursuant to CPLR §3101(a) is granted; and it is further

ORDERED, the Clerk shall mark his records accordingly.

This constitutes the decision and order of the Court.

E N T E R,



Hon. Thomas P. Aliotta, J.S.C.

Dated: December 9, 2020