

Havison v Port Auth. of N.Y. & N.J.
2021 NY Slip Op 30475(U)
February 16, 2021
Supreme Court, New York County
Docket Number: 158983/2015
Judge: Shawn T. Kelly
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 57

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CHRISTOPHER HAVISON and MICHELLE
HAVISON,

DECISION AND ORDER

Index No. 158983/2015

Plaintiff,

- against -

PORT AUTHORITY OF NEW YORK & NEW JERSEY; PORT
AUTHORITY TRANS HUDSON CORPORATION; SIEMENS
INDUSTRY, INC.; ALDRIDGE ELECTRIC, INC.; CH2M
HILL NEW YORK, INC.; TUV RHEINLAND MOBILITY,
INC; D/A BUILDINGS, LLC,

Defendants.

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SHAWN T. KELLY, J.:

In this personal injury action arising out of a September 23, 2014 construction-related accident, plaintiffs Christopher Havison (Havison) and Michelle Havison (together, plaintiffs) move, pursuant to CPLR 3126, for an order striking the answers of defendants Port Authority of New York & New Jersey, Port Authority Trans Hudson Corporation (PA Trans Hudson) (together, Port Authority), Siemens Industry, Inc. (Siemens), Aldridge Electric, Inc. (Aldridge), and D/A Builders, LLC (D/A) (collectively, defendants), or in the alternative, for an order deeming their liability established for their refusal to comply with court-ordered discovery. No relief is sought against defendants CH2M Hill New York, Inc. (CH2M) and TUV Rheinland Mobility, Inc.

Since this action was commenced the parties have been engaged in protracted discovery disputes concerning post-accident material which plaintiffs claim they had requested initially in their combined demands dated November 7, 2016 (NY St Cts Elec Filing [NYSCEF] Doc No. 166, Paul T. Hofmann [Hofmann] affirmation, exhibit 1 at 22-23). At a compliance conference on March 9, 2017, defendants were directed to respond to those demands (NYSCEF Doc No. 167, Hofmann affirmation, exhibit 2 at 2). Plaintiffs repeated their request for “[a]ny post-accident

analysis of failures, risks, etc. associated with the subject incident, including any analysis contained in the Project Consultant's and Project Manager's inspection and/or safety reports" in a supplemental demand dated July 16, 2018 (NYSCEF Doc No. 170, Hofmann affirmation, exhibit 5 at 4). Defendants objected, claiming that plaintiffs sought evidence of post-incident remedial measures, and that responsive documents, specifically a root cause analysis prepared by Havison's employer, nonparty Daidone Electric, Inc., had already been produced (NYSCEF Doc No. 165, Hofmann affirmation, ¶ 12). Plaintiffs allege they learned that "defendants were withholding critical, relevant documents" when defendants' depositions were held (*id.*). Plaintiffs subsequently served defendants with a discovery demand dated August 5, 2019 for additional documents. Notably, item nos. 6 and 7 in the August 5, 2019 demand sought the following:

- "6. Randy Walker's analysis of the errors, omissions and root causes of the Havison incident, as testified by Mr. Chin that he was directed to do;
7. Any safety meeting notes for the safety meeting following the Daidone Aldridge Root Cause analysis document prepared regarding Havison's injury, in which it states a discussion of the incident would take place at the next safety meeting"¹

(NYSCEF Doc No. 172, Hofmann affirmation, exhibit 7 at 10). Pursuant to an order dated December 20, 2019, the court (Reed, J.) directed defendants to furnish plaintiffs with documents responsive to item nos. 6 and 7 (NYSCEF Doc No. 173, Hofmann affirmation, exhibit 8 at 3).

Defendants moved to reargue the December 20, 2019 order on the ground that evidence of post-accident remedial measures is not discoverable or admissible in an action for negligence (NYSCEF Doc No. 174, Hofmann affirmation, exhibit 9 at 3-4). On July 28, 2020, the court (Reed, J.) denied the motion and directed defendants to produce documents responsive to item nos. 6 and 7 for an *in camera* review and to send redacted versions to plaintiffs' counsel within 15 days

¹ Randy Walker (Walker) is an Aldridge safety supervisor (NYSCEF Doc No. 165, Hofmann affirmation at 8 n 3). Robert Chin (Chin) is a D/A supervisor (*id.*, ¶ 12).

after entry of the order (*id.* at 6-7). Plaintiffs maintain that defendants have not complied with the July 28, 2020 order, and now move for an order striking their answers or deeming their liability established. At the very least, plaintiffs request an order under CPLR 3124 directing defendants to provide responses to their outstanding discovery demands.

Defendants, in opposition, argue that the motion should be denied in its entirety. They contend that plaintiffs have already received responsive documents in a 2,600-page FOIL response from the Port Authority in February 2016 and from defendants' discovery exchanges in March 2017 (NYSCEF Doc No. 178, Mary E. Adams [Adams] affirmation, ¶ 9). Defendants submit there are no other documents responsive to those two categories of documents, as indicated in their written response to the July 28, 2020 order filed November 6, 2020² (NYSCEF Doc No. 179, Adams affirmation, exhibit A). They submit that their witnesses have all testified that no additional post-accident reports exist (*id.*, ¶ 16). Lastly, defendants argue that their continued objections to plaintiffs' requests for post-accident documents were made in good faith.

In reply, plaintiffs maintain that defendants have not demonstrated good faith compliance with the prior court orders because defendants have not exchanged a formal response to the August 5, 2019 demand. To the extent defendants claim responsive documents are already in their possession, plaintiffs argue that counsel's statement should be ignored as hearsay, since none of the documents were authenticated by a witness with personal knowledge. Plaintiffs also argue that the report bearing Walker's name has never been identified as the complete root cause investigation or analysis because Havison did not recognize that document at his deposition. They surmise that "there likely is a separate, thorough root cause analysis, with investigation support

² As defendants contend that the requested documents have already been produced, presumably in unredacted form, it appears that there is no need for the court to conduct an *in camera* review.

and documentation different from the accident report that has been reviewed in this litigation” (NYSCEF Doc No. 184, Hofmann reply affirmation, ¶ 12).

Where a party refuses to obey an order for disclosure, CPLR 3126 permits the court to strike the offending party’s pleadings, stay the proceedings until the order is complied with, or render a judgment by default against the disobedient party (*see CDR Creances S.A.S. v Cohen*, 23 NY3d 307, 317 [2014]). A party’s pleading may be stricken “for failure to comply with a discovery order ... only where the moving party conclusively demonstrates that the non-disclosure was willful, contumacious or due to bad faith” (*Henderson-Jones v City of New York*, 87 AD3d 498, 504 [1st Dept 2011] [internal quotation marks and citation omitted]). Wilful and contumacious conduct or bad faith may be inferred where there is a pattern of repeated noncompliance with court orders (*see Cooper v Metropolitan Transp. Auth.*, 186 AD3d 1150, 1150 [1st Dept 2020]). As “a litigant cannot ignore court orders with impunity” (*Kihl v Pfeffer*, 94 NY2d 118, 123 [1999]), a party’s repeated noncompliance that is “dilatatory, evasive, obstructive and ultimately contumacious” warrants the striking of that party’s pleadings (*Arts4All, Ltd. v Hancock*, 54 AD3d 286, 286 [1st Dept 2008], *affd* 12 NY3d 846 [2009], *rearg denied* 13 NY3d 762 [2009], *cert denied* 559 US 905 [2010], quoting *Henry Rosenfeld, Inc. v Bower & Gardner*, 161 AD2d 374, 375 [1st Dept 1990]).

The court finds that defendants have offered no excuse for their belated response to the July 28, 2020 order, which, as plaintiffs correctly point out, is the third court order directing defendants to furnish plaintiffs with documentary discovery regarding post-accident reports. Defendants’ reliance on the deposition testimony of their witnesses for the proposition that there are no additional documents responsive to item nos. 6 and 7, above, is unavailing. A review of the excerpts identified in defendants’ opposition demonstrates that none of the witnesses conclusively

stated that no post-accident “root cause” analyses exist. For instance, in response to whether he had seen any accident or incident reports for the subject accident, David H. Jones, Jr. (Jones), an employee for PA Trans Hudson replied, “No” (NYSCEF Doc No. 180, Adams affirmation, exhibit B at 7 and 70-71). When asked whether he was aware if CH2M had prepared any reports, Jones responded, “Not to my knowledge” (*id.* at 127). Jones, though, also testified that he was never asked to sign off on any reports prepared by CH2M (*id.*). David Costello, a Siemens employee, testified that he had no knowledge of Havison’s accident and had no recollection of investigating it (NYSCEF Doc No. 181, Adams affirmation, exhibit C at 6 and 43). James Splendoria, an Aldridge employee, testified that Walker served as Aldridge’s site safety manager, and confirmed that Walker’s root cause analysis was the only formal report Aldridge had prepared (NYSCEF Doc No. 182, Adams affirmation, exhibit D at 51). Chin, a project manager for Daidone, stated that he was personally unaware if a job hazard analysis was ever performed, but added that “[o]ne should have been done” (NYSCEF Doc No. 183, Adams affirmation, exhibit E at 60).

Nevertheless, “any sanction levied by a court must be proportionate to the conduct at issue” (*Young v City of New York*, 104 AD3d 452, 454 [1st Dept 2013]). At the outset, plaintiffs have not disputed the contention that Walker’s root cause analysis, or a document bearing his name, had been exchanged previously. That said, it is unclear from the testimony that no other documents within defendants’ possession are responsive to item nos. 6 and 7. Likewise, it is unclear from defendants’ belated response to the July 28, 2020 order what documents actually comprise “Randy Walker’s root cause analysis” (NYSCEF Doc No. 179 at 3). Defendants did not annex a copy of the analysis to their response nor is it clear which defendant, apart from Aldridge, would have created such a report. Consequently, defendants shall supplement their written response to the July 28, 2020 order to include a complete unredacted copy of Walker’s analysis. In addition,

defendants shall produce any additional documents within their possession that are responsive to item nos. 6 and 7 identified in plaintiffs' discovery demand dated August 5, 2019. In the event no other documents, apart from those already exchanged, can be located, then defendants shall produce an affidavit(s) from a witness(es) attesting to "where the subject records were likely to be kept, what efforts, if any, were made to preserve them, whether such records were routinely destroyed, [and] whether a search [was] conducted in every location where the records were likely to be found" (Henderson-Jones, 87 AD3d at 505, quoting *Jackson v City of New York*, 185 AD2d 768, 770 [1st Dept 1992]). The affiant(s) shall also attest to the result of the search(es). Defendants shall comply with the aforesaid order within 30 days after service of this order with written notice of entry. Defendants' failure to comply within this time frame shall result in an order striking their answers.

Accordingly, is

ORDERED that the motion brought by plaintiffs Christopher Havison and Michelle Havison for an order striking the answer of defendants Port Authority of New York & New Jersey, Port Authority Trans Hudson Corporation, Siemens Industry, Inc., Aldridge Electric, Inc. and D/A Builders, LLC or deeming their liability established is granted to the extent that said defendants' answers shall be conditionally stricken unless they, within 30 days after the date of this order with written notice of entry:

- (1) supplement their written response to the July 28, 2020 order to include a complete unredacted copy of the root cause analysis prepared by or bearing Randy Walker's name;
- (2) produce any additional records within their possession that are responsive to item nos. 6 and 7 identified in plaintiffs' discovery demand dated August 5, 2019. If no additional records can be located, then defendants shall produce an affidavit(s) from a witness(es)

with knowledge attesting to where the records responsive to item nos. 6 and 7 were likely to be kept, what efforts, if any, were made to preserve them, whether such records were routinely destroyed, and whether a search had been conducted in every location where the records were likely to be found. The affiant(s) shall also describe the results of the search(es).

Dated: February 16, 2021

ENTER:



**HON. SHAWN T. KELLY,
J.S.C.**