

<b>Bini v City of New York</b>
2022 NY Slip Op 30945(U)
March 23, 2022
Supreme Court, New York County
Docket Number: Index No. 153581/2020
Judge: Judy H. Kim
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. JUDY H. KIM **PART** **05RCP**

*Justice*

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THIAGO BINI

Plaintiff,

- v -

THE CITY OF NEW YORK,

Defendant.

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**INDEX NO.** 153581/2020

**MOTION DATE** 01/25/2022

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31, 32, 33, 34

were read on this motion to STRIKE PLEADINGS.

Upon the foregoing documents, plaintiff’s motion, pursuant to CPLR §§3124 and 3126, to strike defendant’s answer or compel certain discovery responses, is granted to the limited extent set forth below.

Plaintiff Thiago Bini commenced this action seeking damages for injuries allegedly sustained when a police dog bit him while he was in the Critical Response Command K9 parking lot at 5 Central Road, Randall’s Island, New York on February 17, 2020 (NYSCEF Doc. No. 3 [Complaint at ¶8]). Plaintiff served “Combined Demands For Discovery and Inspection” (the “Combined Demands”) on defendant the City of New York (the “City”) on June 24, 2020. The Combined Demands included a “Demand for Verified Bill of Particulars as to Affirmative Defenses,” demanding that defendant

1. Identify the acts and omissions constituting any alleged culpable conduct and/or comparative negligence of the plaintiff.
2. Identify the acts and omissions constituting any alleged express assumption of the risk.

3. Identify the acts and omissions constituting any alleged implied assumption of the risk.
4. Identify the discretionary acts and omissions that defendant claims were in the performance of a governmental function.
5. Identify the discretionary acts and omissions that defendant claims were in the exercise of professional judgment.
6. Identify the acts and omissions that defendant claims were justified as being reasonably necessary in the exercise of professional judgment.
7. Specify by code, section, sub-section or other descriptive number, the specific statutes, ordinance, rules and regulations alleged to provide any qualified privilege.
8. State the basis for any claim that plaintiff failed to state a cause of action.
9. Identify any statute, code, rule or other codification pursuant to which defendants claim to be immune from suit

(NYSCEF Doc. No. 6 [Plaintiff's Combined Demands]).

The City subsequently served plaintiff with a "Response to Plaintiff's Combined Demands for Discovery and Inspection," dated December 15, 2021, responding as follows:

1. Identify the acts and omissions constituting any alleged culpable conduct and/or comparative negligence of the plaintiff.

The City relies on the allegations set forth in plaintiff's verified bill of particulars as to the date, time and location of plaintiff's alleged incidents, conduct, acts and/or omissions; said incidents, conduct, acts and/or omissions having occurred on or before the date and time alleged. Plaintiff's culpable conduct, acts and/or omissions in whole or in part contributed to the occurrence of said alleged incident. Plaintiff's culpable conduct was, in whole or in part, responsible for any and/or all alleged injuries which plaintiff sustained during said alleged incident. Plaintiff's culpable conduct, acts and/or omissions included but were not limited to the following: failing to take reasonable care under the circumstances; failing to take reasonable precautions for her own care that a reasonable person would have taken under similar circumstances; failing to take due care which is expected of every reasonable person to protect themselves from injury; failing to avoid whatever alleged situation existed; failing to see what was to be seen; failing to proceed at a reasonable rate of travel under the conditions; failing to wear proper and/or adequate footwear necessitated by the weather conditions at the time of the accident; failing to take

an alternate route and thus avoid any condition as alleged; failing to proceed in a safe and reasonable manner; and/or failing to proceed in a safe and reasonable manner for the conditions then and there prevailing.

2. Identify the acts and omissions constituting any alleged express assumption of the risk.

See the City's response to number 1, above.

3. Identify the acts and omissions constituting any alleged implied assumption of the risk.

See the City's response to number 1, above.

4. Identify the discretionary acts and omissions that defendant claims were in the performance of a governmental function.

Objection. The City objects to this demand as outside the scope of a bill of particulars. Notwithstanding this objection, the City asserts that, among other actions by the City, how the k-9 is trained, handled, and actions by the handlers are discretionary acts.

5. Identify the discretionary acts and omissions that defendant claims were in the exercise of professional judgment.

Objection. Please see the City's response to 4 above.

6. Identify the acts and omissions that defendant claims were justified as being reasonably necessary in the exercise of professional judgment.

Any act or omission by any City employee, related to this incident was justified as being reasonably necessary in the exercise of professional judgment.

7. Specify by code, section, sub-section or other descriptive number, the specific statutes, ordinance, rules and regulations alleged to provide any qualified privilege.

Valdez v. City of New York, 18 N.Y.3d 69 (2011); see also McGinness v. City of New York, 113 A.D.3d 566 (1st Dep't 2014); Freeman v. City of New York, 111 A.D.3d 780 (2d Dep't 2013); Rozell, 98 A.D.3d 960.

8. State the basis for any claim that plaintiff failed to state a cause of action.

Plaintiff's injuries were not the result of the City's alleged negligence, and therefore, failed to state a cause of action as to the City in which relief can be granted.

9. Identify any statute, code, rule or other codification pursuant to which defendants claim to be immune from suit.

Valdez v. City of New York, 18 N.Y.3d 69 (2011); see also McGinness v. City of New York, 113 A.D.3d 566 (1st Dep't 2014); Freeman v. City of New York, 111 A.D.3d 780 (2d Dep't 2013); Rozell, 98 A.D.3d 960.

(NYSCEF Doc. No. 27).

Plaintiff contends that the above response is inadequate and now moves for an order (1) pursuant to CPLR §3126(3), striking defendant's answer; or, alternatively (2) pursuant to CPLR §3124, compelling defendant's production of a supplemental Bill of Particulars as to its affirmative defenses<sup>1</sup>.

### DISCUSSION

Plaintiff's motion to strike defendant's answer based on its failure to produce demanded discovery is denied. Plaintiff's Good Faith Affirmation does not specify the efforts plaintiff's counsel took to resolve the parties' discovery disputes but attests that counsel was granted leave to file the instant motion based on defendant's "lack of production following multiple prior orders" (NYSECEF Doc. No. 16 [Good Faith Affirmation]). This is insufficient to "evinced a diligent effort by the plaintiff to resolve the discovery dispute," which is a necessary predicate for the relief sought (Roye v Gelberg, 172 AD3d 1260, 1263 [2d Dept 2019] [internal citations omitted]). Even setting this aside, the Court does not, on the record before it, find that defendants' delay has been willful and contumacious such that the "imposition of punitive sanctions" sought by plaintiff are appropriate (See Masotto v City of New York, 38 Misc 3d 1226(A) [Sup Ct, Kings County 2013] [internal citations omitted]; see also Administrative Order 71, §2 ["In no event will participants in civil litigation be penalized if discovery compliance is delayed for reasons relating to the

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<sup>1</sup> Plaintiff's motion originally involved other disputed discovery, but all other issues have been resolved per stipulation of the parties (NYSCEF Doc. No. 35 [So-Ordered Stipulation]).

coronavirus public health emergency”]), particularly in light of the fact that almost all of the discovery issues raised in the instant motion have been subsequently resolved by the parties (See NYSCEF Doc. No. 35 [So-Ordered Stipulation]).

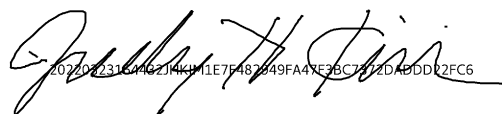
As to that branch of plaintiff’s motion, which seeks to compel the City to serve a supplemental Bill of Particulars responding to plaintiff’s Demand for Verified Bill of Particulars as to Affirmative Defenses, it is granted in part. The Court agrees that the City’s responses to demands one, two, and three in the Demand for Verified Bill of Particulars as to Affirmative Defenses are both generic and vague (See e.g., Bergman v Gen. Motors Corp., 74 AD2d 886 [2d Dept 1980]). Accordingly, plaintiff’s motion is granted to the extent that the City is directed to serve a supplemental Bill of Particulars with more particularized responses to demands numbered 1, 2, and 3 of plaintiff’s Demand for Verified Bill of Particulars as to Affirmative Defenses within thirty days of the date of this decision and order.

Accordingly, it is

**ORDERED** that plaintiff’s motion is granted to the extent that the City is directed to serve a supplemental Bill of Particulars with more particularized responses to demands numbered 1, 2, and 3 of plaintiff’s Demand for Verified Bill of Particulars as to Affirmative Defenses within thirty days of the date of this decision and order; and it is further

**ORDERED** that the Clerk of the Court is directed to set this matter down for a conference in the DCM Part on the next available date after April 11, 2022.

This constitutes the decision and order of the Court.



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JUDY H. KIM, J.S.C.

3/23/2022  
DATE

CHECK ONE:

CASE DISPOSED  
GRANTED

DENIED

NON-FINAL DISPOSITION  
GRANTED IN PART

OTHER