

<b>Pedraza v New York City Tr. Auth.</b>
2022 NY Slip Op 33645(U)
October 24, 2022
Supreme Court, New York County
Docket Number: Index No. 159366/2013
Judge: Frank P. Nervo
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. FRANK P. NERVO PART 04**

*Justice*

-----X

JOSE LUIS MELENDEZ PEDRAZA,  
  
Plaintiff,

- v -

NEW YORK CITY TRANSIT AUTHORITY,  
METROPOLITAN TRANSPORTATION AUTHORITY,  
ANGEL RIVERA

Defendant.

-----X

**INDEX NO.** 159366/2013

**MOTION DATE** 08/01/2022,  
09/07/2022

**MOTION SEQ. NO.** 010 011

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 010) 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 376, 377, 378, 379

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

The following e-filed documents, listed by NYSCEF document number (Motion 011) 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405

were read on this motion to/for DISCOVERY.

These motions appeared on the Court’s calendar on October 21, 2022. On October 21, 2022, counsel, off-the-record, advised that they were relying on their paper submissions. Plaintiff having not moved for a commission to take the testimony of Mr. Cabrera, who resides out of state, and plaintiff not having otherwise subpoenaed Mr. Cabrera, the Court issues the following decision and order.

MOTION SEQUENCE 010 –CONFIDENTIALITY ORDER

Defendants seek to predicate the disclosure of documents related to their speed policy upon plaintiff's counsel executing a confidentiality agreement, inter alia, prohibiting the disclosure of these documents in other matters. While defendants assert generalized claims of terrorism and public safety threats should such documents be disclosed, they do not specify how the disclosure of same would pose such threats. Notwithstanding, and given the gravity of defendants' assertions, if supported, the Court refers the motion to a discovery referee of the parties own choosing to hear and report on the issues raised therein.

Consistent with the general principle that the producing party must bear the initial costs associated with producing information and documents requested as part of discovery (*US Bank Nat. Ass'n v. GreenPoint Mortgage Funding, Inc.*, 94 AD3d 58 [1st Dept 2012] [Acosta, J.]; see also *Zubulake v. UBS Warburg, LLC*, 217 FRD 309 [SDNY 2003]), and upon review of the seven factors outlined in *Zublake* and *US Bank Nat. Ass'n*, the Court directs that defendants shall bear the costs associated with the discovery referee appointed herein. Plaintiff's request for speed policy documents is narrowly tailored; the documents are not readily available by any source other than defendants; the

costs associated with a discovery referee reviewing same for threats to public safety is insignificant in comparison with the personal injury damages sought; the defendants are best able to bear the total cost of production; the defendants are in the best position to control the costs of such discovery referee and in bearing such costs are best incentivized to narrow the issues before the discovery referee; the importance of the documents at issue is paramount to the defendants' qualified immunity defense; the defendants cannot establish their qualified immunity defense absent these documents and plaintiff cannot refute this defense without disclosure of same (*id.*)

MOTION SEQUENCE 011 – EXTENSION OF DISCOVERY DEADLINES

Defendants further seek to extend the deadline to produce a witness for deposition with knowledge related to the speed policy underlying their claim of qualified immunity. As relevant here, defendants advised they intended to call an expert employee, Mr. Cabrera, to testify regarding the speed policy. However, after plaintiff served three notices advising that plaintiff intended to depose Mr. Cabrera, and after the deposition was adjourned, Mr. Cabrera abruptly retired and defendants advised they could no longer produce him for deposition. Defendants' qualified immunity defense, the subject of the appeal ultimately reversing judgment and remanding this matter to this Court for

retrial, is predicated upon, in large part, Mr. Cabrera's affidavit. In remanding this matter for retrial, the Appellate Division, First Department relied upon affidavits of three of defendants' experts, Mr. Cabrera, Mr. Lunden, and Mr. Korach. The apparent unavailability of defendant's expert witness, Mr. Cabrera, for retrial when the Appellate Division, First Department's remand granting that very same retrial relies, in large part, upon Mr. Cabrera's affidavit and anticipated testimony, raises serious due process concerns should defendants be unable to locate an equivalent expert witness with equivalent testimony.

As such, defendants must be provided sufficient time to locate an equivalent expert witness with knowledge of the Speed Policy Committee, knowledge of proposed changes to operating speeds reviewed by that committee, the 1989 and 1994 conclusions of that committee finding a 30 mph entry speed appropriate, and finding that the Spring Street station's curve is not unique and at least 50 other stations have sharper curves, as the Appellate Division, First Department expressly relied on these factors, as averred by Mr. Cabrera, in reaching its determination that a retrial was required. The equivalent replacement expert must be sufficiently familiar with all of the

documentary evidence related to the speed policy underlying defendants' claim of qualified immunity.

Accordingly, it is

ORDERED that motion sequence 010 is referred to a discovery referee of the parties choosing, to hear and report on the issues raised in motion sequence 010, including but not limited to the necessity of predicated disclosure upon a confidentiality order and, if necessary, the terms of such confidentiality order, and the parties shall select such referee within 20 days; and it is further

ORDERED that counsel shall advise the Court, via a letter to judge with courtesy copy to chambers, of their selection of a discovery referee within 20 days; and it is further

ORDERED that should the parties fail to timely select a discovery referee, or fail to timely advise the court of the selection of same as above, the Court will appoint a referee of its own choosing, and any objection to such referee shall be deemed waived; and it is further

ORDERED that defendants shall bear the costs of the discovery referee; and it is further

ORDERED that the powers of the discovery referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that the discovery referee shall set the date(s) for any appearance before the discovery referee or any further briefing; and it is further

ORDERED that the parties shall file memoranda or other documents directed to the discovery referee by filing same with NYSCEF with courtesy copy to the discovery referee, if any, as directed by the discovery referee; and it is further

ORDERED that any motion to confirm or disaffirm the Report of the discovery referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

ORDERED that motion sequence 011 is granted to the extent of providing defendants with 90 days to locate an equivalent expert given Mr. Cabrera's apparent unavailability; and it is further

ORDERED that defendants shall advise plaintiff upon locating an equivalent expert, and serve all appropriate notices and reports related to same, within 120 days; and it is further

ORDERED that plaintiff shall serve notice of the deposition of the newly identified equivalent expert at least 20 days prior to deposition date; and it is further

ORDERED that as the deposition of the newly identified equivalent expert may require the use of documents at issue in motion sequence 010 as referred to a discovery referee, the deposition of the newly identified equivalent expert shall be completed within 60 days of the Court's decision and order confirming or disaffirming or modifying the referee's report, and such deposition may occur either in-person or via electronic means; and it is further

ORDERED that post deposition demands shall be served within 20 days of completion of the deposition giving rise to such demand; responses thereto shall be served within 20 days of receipt of demand; and it is further

ORDERED that the failure to timely serve post-deposition demands shall constitute waiver of same; failure to timely respond to timely served demands shall result in sanctions, including but not limited to the striking of pleadings, in the Court's discretion; and it is further

ORDERED that the parties are reminded of the Uniform Rules, including those related to depositions and responses to demands; and it is further

ORDERED that should defendants be unable to locate an equivalent expert, they shall notify plaintiff of same within 90 days; and all appropriate motions related to the inability to locate an equivalent replacement expert shall be made returnable no later than March 10, 2023; and it is further

ORDERED that the deadlines imposed herein shall not be extended, adjourned, or otherwise modified by the parties. Extension, adjournment, or modification of this order shall be by order to show cause filed as soon as practicable.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

10/24/2022  
DATE

  
HON. FRANK P. NERVO

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	J.S.C.	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input checked="" type="checkbox"/>	REFERENCE