

Brumfield v City of New York

2023 NY Slip Op 30019(U)

January 4, 2023

Supreme Court, New York County

Docket Number: Index No. 159710/2020

Judge: Judy H. Kim

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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. JUDY H. KIM PART 05RCP

Justice

-----X

RAY BRUMFIELD,

Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF PARKS AND RECREATION,

Defendants.

-----X

INDEX NO. 159710/2020
MOTION DATE 09/21/2022
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37 were read on this motion to STRIKE PLEADINGS/COMPEL/AMEND.

On November 11, 2020, plaintiff commenced this negligence action against defendants the City of New York and New York City Department of Parks and Recreation (collectively, the "City") alleging that on February 23, 2020, plaintiff's bicycle struck a defective condition upon the Greenway Bike Path near Exit 15 and Exit 16 at the Henry Hudson Parkway, New York, New York, which defective condition the City negligently failed to repair (NYSCEF Doc. No. 1 [Complaint at ¶¶55-56]).

On or about October 7, 2021, Plaintiff served Combined Demands and Demand for a Verified Bill of Particulars (NYSCEF Doc. No. 15). The City responded to these demands on or about September 22, 2022 (NYSCEF Doc. No. 25).

Prior to the City's response, plaintiff filed the instant motion seeking an order: (1) striking the City's answer for failure to respond to plaintiff's discovery demands or precluding the City from offering such evidence at trial or, alternatively, compelling the City to comply with these

discovery demands; (2) granting plaintiff leave to amend the summons and complaint to add “John Doe 1-10” and “ABC Corporations 1-10” as defendants; (3) for leave to amend the caption to substitute the additional defendants plaintiff expects to identify through discovery and for an extension of time to effect service on any such identified defendants; and (4) extending plaintiff’s time to file the Note of Issue.

The City opposes that branch of plaintiff’s motion seeking to strike the City’s answer or compel discovery, noting that it responded to plaintiff’s discovery demands on or about September 22, 2022, and cross-moves, requesting a preliminary conference. For the reasons set forth below, plaintiff’s motion is granted in part and otherwise denied.

DISCUSSION

That branch of plaintiff’s motion to strike the City’s Answer or compel responses to plaintiff’s discovery demands is denied. CPLR §3124 provides that “[i]f a person fails to respond or comply with any request, notice, interrogatory, demand, question or order under this article . . . the party seeking disclosure may move to compel compliance or a response” (CPLR §3124). CPLR §3126, in turn, authorizes the court to sanction a party who “refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed” (CPLR §3126). However, “[t]he striking of a party’s pleading . . . is appropriate 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] quoting McGilvery v New York City Tr. Auth., 213 AD2d 322, 324 [1st Dept 1995]). Plaintiff has not established his entitlement to the drastic remedy sought here.

As a threshold matter, plaintiff’s counsel’s efforts to procure discovery that are set forth in his good faith affirmation—a single good faith letter dated July 27, 2022 and a reference to “several

good faith attempts to obtain discovery without success”—does not evince the “diligent effort by plaintiff to resolve the discovery dispute,” a necessary predicate for the relief sought (Roye v Gelberg, 172 AD3d 1260, 1263 [2nd Dept 2019]; see also Lorocco v 375 Park Ave., L.P., 2010 NY Slip Op 32980[U], *5-6 [Sup Ct, NY County 2010]). The Court further notes that plaintiff did not request a discovery conference with the Differentiated Case Management Part or otherwise obtain approval from this Court prior to making the instant motion, in contravention of its Part Rules.

Even leaving the foregoing aside, the Court does not find, on the record before it, that the City engaged in willful or contumacious conduct such that the “imposition of punitive sanctions” is appropriate (See Masotto v City of New York, 38 Misc 3d 1226(A) [Sup Ct, Kings County 2013]) particularly in light of the fact that the City has responded to plaintiff’s demands (Pascarelli v City of New York, 16 AD3d 472, 473 [2nd Dept 2005]; Simpson v Sinha, 246 AD2d 361, 361-362 [1st Dept 1998]). Accordingly, that branch of plaintiff’s motion pursuant to CPLR §§3124 and 3126 is denied.

That branch of plaintiff’s motion seeking leave to amend the summons and complaint to add “John Doe 1-10” and “ABC Corporations” is granted without opposition. “Leave to amend pleadings under CPLR §3025(b) should be freely given and denied only if there is prejudice or surprise resulting directly from the delay or if the proposed amendment is palpably improper or insufficient as a matter of law” (McGhee v Odell, 96 AD3d 449, 450 [1st Dept 2012] [internal citations and quotations omitted]). The proposed amendment is neither palpably improper or insufficient and defendants do not suggest any prejudice, or indeed, oppose amendment.

However, to the extent that plaintiff also seeks leave, pursuant to CPLR §1024, to amend his complaint at some future date to substitute any subsequently discovered defendants for John

Does 1-10 and ABC Corporations 1-10, this branch of his motion is denied without prejudice at this time. The Court observes that any such substitution effected prior to the expiration of the statute of limitations does not require leave of the Court¹ (See Kirsch v Lincoln Ctr. For the Performing Arts., 2018 NY Slip Op 30533[U], *3 [Sup Ct, NY County 2018] citing Woodburn Ct. Assoc. I v Wingate Mgt. Co., Inc., 243 AD2d 1043, 1044 [3d Dept 1997]). It would be premature, at this juncture, for the Court to determine that plaintiff has satisfied the requirements of CPLR §1024 for effecting such a substitution after the expiration of the statute of limitations (See e.g., Goldberg v Boatmax://, Inc., 41 AD3d 255, 256 [1st Dept 2007] [CPLR §1024 did not permit substitution where plaintiff did not demonstrate that he conducted a diligent inquiry into the actual identities of the intended defendants before the expiration of the statutory period and the complaint's allegations did not fairly apprise intended defendant of plaintiff's intent to sue him]).

That branch of Plaintiff's motion seeking additional time to effect service of the Supplemental Summons and Amended Verified Complaint on the additional proposed defendants John Doe and ABC Corporation - is also denied without prejudice. The Court declines to preemptively extend the period of time under CPLR §306-b(a) (See e.g., Redmond v Jamaica Hosp. Med. Ctr., 29 AD3d 768, 770 [2d Dept 2006]). This decision is without prejudice to plaintiff to seek an extension of the time to serve any subsequently identified defendants upon good cause shown or in the interest of justice pursuant to CPLR §2004 and CPLR §306-b.

Finally, that branch of plaintiff's motion seeking an extension to file the Note of Issue is granted to the extent that the parties are directed to select a Note of Issue date at the preliminary conference.

¹ While plaintiff asserts that the statute of limitations will expire on February 23, 2023, plaintiff has failed to account for the tolling period pursuant to Executive Order 202.8, as extended by subsequent executive orders (Executive Order [A. Cuomo] No. 202.8 [9 NYCRR 8.202.8] et seq.).

Accordingly, it is

ORDERED that plaintiff’s motion to strike the City’s answer or preclude the City from offering certain evidence at trial is denied; and it is further

ORDERED that plaintiff’s motion to compel the City to produce discovery demanded is denied; and it is further

ORDERED that plaintiff’s motion for leave to amend the complaint and add “John Doe 1-10” and “ABC Corporations 1-10” as defendants in this action is granted; and it is further

ORDERED that the amended complaint shall bear the following caption:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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RAY S. BRUMFIELD,

Plaintiff,

Index No. 159710/2020

-against-

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT
OF PARKS AND RECREATION, “JOHN DOE” (1-10), name
fictitious as real name unknown and “ABC CORPORATION” (1-
10), name fictitious as real name unknown,

Defendants.
-----X

and it is further

ORDERED that the branch of plaintiff’s motion seeking leave to amend the caption to include any additional defendants subsequently identified through discovery is denied without prejudice; and it is further

ORDERED that the branch of plaintiff’s motion seeking an extension of time to serve the amended summons and complaint on any additional defendants subsequently identified through discovery is denied without prejudice; and it is further

ORDERED that plaintiff's Supplemental Summons and Amended Verified Complaint in the proposed form annexed as Exhibit G to plaintiff's moving papers (NYSCEF Doc. No. 19) shall be deemed served upon all parties who have previously appeared in the action upon plaintiff's service of a copy of this decision and order with notice of entry on those parties; and it is further

ORDERED that plaintiff's Supplemental Summons and Amended Verified Complaint in the proposed form annexed as Exhibit G to plaintiff's moving papers (NYSCEF Doc. No. 19) shall be deemed filed with the Clerk of the Court upon plaintiff's service of a copy of this decision and order with notice of entry upon the Clerk of the Court (60 Centre St., Room 141B), and the Clerk of the General Clerk's Office (60 Centre St., Rm. 119); and it is further

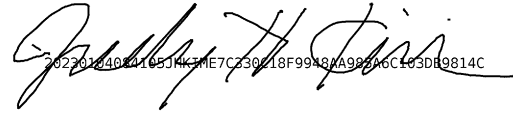
ORDERED that within twenty days of the date of this decision and order, plaintiff shall serve a copy of this decision and order with notice of its entry upon the Clerk of the Court (60 Centre St., Room 141B), and the Clerk of the General Clerk's Office (60 Centre St., Rm. 119) who are directed to mark their records to reflect the amended caption; and it is further

ORDERED that such service on the Clerk of the Court and Clerk of the General Clerk's Office shall comply with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on this court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that plaintiff's motion for an extension to serve the note of issue is granted to the extent set forth above; and it is further

ORDERED that the City of New York's cross-motion is granted to the extent that the Clerk of the Court is directed to schedule this matter for a preliminary conference in the Differentiated Case Management Part on the next available date.

This constitutes the decision and order of the Court.



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1/4/2023
DATE

HON. JUDY H. KIM, 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: