

Charles v New York City Tr. Auth.

2023 NY Slip Op 32069(U)

June 22, 2023

Supreme Court, New York County

Docket Number: Index No. 156358/2021

Judge: Denise M. Dominguez

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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. DENISE M DOMINGUEZ PART 21

Justice

INDEX NO. 156358/2021
MOTION SEQ. NO. 002

KERRY CHARLES,

Plaintiff,

- v -

THE NEW YORK CITY TRANSIT AUTHORITY, THE METROPOLITAN TRANSPORTATION AUTHORITY

Defendants.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 46, 47, 48, 49, 50, 54 were read on this motion to/for STRIKE PLEADINGS

Upon the foregoing documents, Plaintiff's motion is denied in part and granted in part.

This personal injury matter arises out of a February 4, 2021 incident in which the Plaintiff alleges to have slipped on snow and ice on the steps of one of the staircases located at the 34th Street Herald Square subway station.

Plaintiff commenced this action by the filing of the complaint on July 6, 2021 (NYSCEF Doc. #1). Defendants THE NEW YORK CITY TRANSIT AUTHORITY and METROPOLITAN TRANSPORTATION AUTHORITY ("TRANSIT") joined issue by the filing of their answer on August 13, 2021 (NYSCEF Doc. #5). A Preliminary Conference Order was entered into on October 18, 2021 (NYSCEF Doc. #12) and the parties most recently entered into a Status Conference Order, dated March 21, 2023 (NYSCEF Doc. #42).

Plaintiff now moves by notice of motion, pursuant to CPLR §3126 to strike TRANSIT's answer for failure to abide by an order of this Court, or alternatively for conditional language striking TRANSIT's answer unless a "complete response to plaintiff's demands is provided, and appears for depositions."

Here, the most recent discovery Order of March 21, 2023 (NYSCEF Doc. #42) directs TRANSIT to respond to the Plaintiff's post-deposition demands, dated February 21, 2023 and to provide the results of its notice of claim search within 45 days (by May 5, 2023). Plaintiff also

reserved the right to a further deposition of TRANSIT. No other specific discovery from TRANSIT is contemplated by the Order.

It is unclear to this Court from the within motion exactly what discovery Plaintiff is claiming is outstanding. However, it appears that the Plaintiff is asserting that TRANSIT's answer should be stricken due to their failure to respond to the February 21, 2023 post-deposition demands as set forth in the March 21, 2023 Status Conference Order.

Both the Plaintiff's supporting documents (NYSCEF Doc. #50) and TRANSIT's affirmation in opposition and supporting exhibits (NYSCEF Doc. #51) show TRANSIT was requesting a copy of the deposition transcript of their witness from Plaintiff as the time by which they had to respond to the Plaintiff's post-deposition demands approached. Despite that, a response was provided by TRANSIT on May 5, 2023, the time by which TRANSIT had to respond pursuant to the March 21, 2023 Order (NYSCEF Doc. #52). It is also clear that TRANSIT did not refuse to respond to either this Court's Order or the demand, and a supplemental response to the demand was provided thereafter (NYSCEF Doc. #53). Therefore, upon review, that branch of the Plaintiff's motion which seeks to strike TRANSIT's answer is denied as the Plaintiff has not established that TRANSIT has refused to abide by an Order of this Court, nor is there evidence that TRANSIT's delay in fully complying with the March 21, 2023 Order "was willful, contumacious or in bad faith". (*Scher v. Paramount Pictures Corp.*, 102 A.D.3d 471, 958 N.Y.S.2d 122 [1st Dept 2013]; *see Pezhman v. Dep't of Educ. of City of New York*, 95 A.D.3d 625, 944 N.Y.S.2d 128 [1st Dept 2012]).

Moreover, as both an initial response to the demands, and a supplemental response to the demands has been served, that branch of the motion which seeks conditional language unless a response is provided by date certain is likewise denied. Additionally, that branch of the motion which appears to request conditional language striking the Defendant's answer for the failure to appear for a deposition is also denied as there is nothing submitted in support of the motion to support such relief as it is clear that the TRANSIT produced a knowledgeable deposition witness on December 22, 2022 (NYSCEF Doc. #49).

Plaintiff's motion claims that the initial deposition witness was unsatisfactory because the witness was prevented from testifying about various photographs. However, upon review of the testimony, that does not appear to be the case. The witness made clear at the deposition that his position as Construction Maintenance Team allowed him to interpret TRANSIT records, but, that

he could not testify as to photographs that he did not provide. Notably, the transcript in question does not appear to contain any reference regarding the date, source or other identification of the photographs that were presented to the witness, and the photographs in question have not been submitted in support of this motion. Without more, this Court has no basis by which to direct that the Construction Maintenance Team witness provide testimony regarding a photo he clearly did not take, especially where the source of the photo has not been identified or even provided to this Court.

However, that branch of the motion which seeks a further deposition of a TRANSIT witness who can offer testimony concerning the photographs is granted to the extent that the Plaintiff is directed to identify the specific photographs of the subject staircase for which testimony is sought and provide TRANSIT with copies of same, along with the dates which the photographs were taken by July 28, 2023. Within 30 days of receiving the photographs and information from the Plaintiff, TRANSIT is directed to identify and schedule the deposition of an appropriate witness, such as a manager, supervisor or other individual who was familiar with the subject staircase at the time of the accident, and at the time the photographs were taken, for the limited deposition of discussing the photographs identified by Plaintiff. That deposition shall be held by October 1, 2023. If no such individual remains in the control of TRANSIT, within 30 days of receiving the photographs and information from Plaintiff, TRANSIT is directed to provide an affidavit as to why such individual cannot be produced for a deposition.

Plaintiff also seeks a further deposition of a TRANSIT witness to offer testimony as to the recently provided response to Plaintiff's post-deposition discovery demands. That branch of the motion is also granted to the extent that TRANSIT is directed to identify an appropriate witness to offer deposition testimony limited to the recently exchanged discovery annexed to their May 5, 2023 and/or June 14, 2023 response (NYSCEF Doc. #52, 53). The deposition of this witness shall also be held by October 1, 2023.

Finally, this Court would note that the Plaintiff's Affirmation of Good Faith does not attest to a time and date when the parties met in person, had a telephone conference or attempted to meet and confer to discuss the outstanding post-deposition discovery response as required in 22 NYCRR 202.7[c] and Part 21 rules. Reliance on written and/or email correspondence is insufficient as the Court has made clear that it expects the parties to work together to resolve discovery before seeking the intervention of the Court. Additionally, there is no indication in the motion that parties made

any effort to resolve any outstanding discovery by entering into the scheduled Status Conference Order on May 19, 2023, as directed in the March 21, 2023 Order. To date, no further Status Conference Order has been submitted by the parties and the Plaintiff did not file the Note of Issue by June 1, 2023. Therefore, the parties are directed to enter into a Status Conference Order as per Part 21 Rules on, or by, July 28, 2023, at which time a new Note of Issue date will be provided by the Court.

Accordingly, it is hereby

ORDERED that the Plaintiff's motion to strike TRANSIT's answer is denied; and it is further

ORDERED that the Plaintiff's motion for conditional language striking TRANSIT's answer is denied; and it is further

ORDERED that the Plaintiff's motion seeking a further deposition of TRANSIT regarding photographs of the subject staircase is granted to the extent that the Plaintiff is directed to provide TRANSIT with copies of the photographs at issue, along with the dates which the photographs were taken, by July 28, 2023; and it is further

ORDERED that within 30 days of receiving the photographs and information from Plaintiff, TRANSIT is to identify and schedule the deposition of an appropriate witness to be held by October 1, 2023, if TRANSIT cannot identify an appropriate witness to offer deposition testimony concerning the Plaintiff's photographs, TRANSIT shall provide an affidavit as to why such a witness is not available; and it is further

ORDERED that the Plaintiff's motion seeking a further deposition of TRANSIT regarding recently exchanged documents is granted to the extent that TRANSIT is directed to produce a witness to offer deposition testimony limited to TRANSIT's recent June 14, 2023 exchange; and it is further

ORDERED that the parties are directed to submit a joint proposed Status Conference Order as per Part 21 Rules on, or by, July 28, 2023 setting forth the dates for the completion of aforementioned limited depositions, as well as all outstanding discovery; and it is further

ORDERED that a new note of issue date will be provided by the Court following the submission of the parties' Status Conference Order.

Any requested relief not expressly addressed herein has nonetheless been considered by the Court and is hereby expressly denied.

6/22/2023

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE


HON. DENISE M. DOMINGUEZ
J.S.C.