

**Morang v New York City Tr. Auth.**

2023 NY Slip Op 32255(U)

July 3, 2023

Supreme Court, New York County

Docket Number: Index No. 157780/2012

Judge: Adam Silvera

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ADAM SILVERA Justice

PART

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INDEX NO. 157780/2012

MICHELLE MORANG

MOTION DATE 01/31/2023

Plaintiff,

MOTION SEQ. NO. 005

- v -

THE NEW YORK CITY TRANSIT AUTHORITY,

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 168 were read on this motion to/for DISCOVERY

Upon the foregoing documents, and after oral arguments, it is ordered that plaintiff's motion for discovery is granted for the reasons set forth below.

Here, plaintiff seeks, inter alia, to compel defendant New York City Transit Authority to provide outstanding discovery, to preclude defendant should it fail to respond to such discovery, and to compel a site inspection by plaintiff's expert. In opposition, defendant argues that during the course of discovery, it has satisfied its discovery obligations, and that a site inspection is not necessary as it is unlikely that any video of the accident was captured. Plaintiff replies.

CPLR §3101(a)(4) states that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by: (4) any other person, upon notice stating the circumstances or reasons such disclosure is sought or required." The Court of Appeals has held that:

"[t]he words 'material and necessary' as used in section 3103 must be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and

prolixity. Section CPLR 3101(a)(4) imposes no requirement that the subpoenaing party demonstrate that it cannot obtain the requested disclosure from any other source. Thus, so long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the nonparty.” *Matter of Kapon v Koch*, 23 NY3d 32, 38 (2014)(internal citations and quotations omitted).

Here, plaintiff has met its initial burden in establishing that the requested information is material and necessary. The Court notes that the instant accident happened when plaintiff was exiting the E train at 42<sup>nd</sup> Street and fell allegedly due to the clearance between the train and the platform. In opposition, defendant argues that each gap is unique due to, *inter alia*, station design, location, and train equipment. Defendant further argues that the size of the gap did not exceed the Transit Authority’s specifications. Thus, defendant argues that plaintiff’s demands are unduly burdensome and irrelevant. In reply, plaintiff argues that the information regarding the potentially dangerous condition is clearly relevant herein.

At this juncture, during discovery, material and relevant information is discoverable. Whether such discovery is ultimately admissible at trial is a separate standard to be addressed at the time of trial. “[T]he rules governing disclosure differ from those concerning admissibility, and questions of admissibility are to be reserved for the trial court”. *Suzuki Performance of Huntington, Ltd. v Utica Mut. Ins. Co.*, 121 AD2d 520 (2<sup>nd</sup> Dep’t 1986). As plaintiff has met her initial threshold burden of demonstrating that the discovery demanded was calculated to yield material and necessary information, and is relevant herein, plaintiff’s motion is granted as specified below. Failure to produce such documents will result in the preclusion of defendant from denying at trial that the lists of gap accidents obtained from defendant through FOIL are not substantially similar to the gap which caused plaintiff’s fall.

Plaintiff further seeks to preclude defendant from asserting the defense of qualified immunity. Plaintiff argues that prior defense counsel agreed not to assert the defense of qualified

immunity, and that defendant's bill of particulars for affirmative defenses does not include such defense nor is it pled in their answer. In opposition, defendant argues that any agreement by counsel is not binding as it was not memorialized in writing. Defendant further argues that defendant raised and preserved the defense of qualified immunity in response to plaintiff's demand for a bill of particulars. In reply, plaintiff argues that defendants' opposition papers were untimely. Plaintiff further argues that prior defense counsel represented in open court via a Teams' meeting with Honorable Suzanne Adams that it would not assert the defense of qualified immunity. It is undisputed that prior counsel made such an agreement during a court conference with Judge Adams. According to plaintiff, qualified immunity must be pled but was not pled in the answer.

Here, the Appellate Division, First Department, has held that "[q]ualified immunity is...an issue of law which the court should decide at the earliest possible stage of the litigation." *Liu v New York City Police Dep't*, 216 AD2d 67, 69 (1<sup>st</sup> Dep't 1995). The instant action was commenced over ten and a half (10½) years ago. Plaintiff correctly argues that defendant should be precluded in this instance as this action has been litigated for over 10½ years and the defense of qualified immunity was never pled. Thus, plaintiff's motion is granted and defendant is precluded from asserting the defense of qualified immunity.

With regards to plaintiff's request for a site inspection, plaintiff argues that by order dated February 20, 2020, defendant Transit Authority was to provide a supplemental affidavit, within 30 days, stating whether there was any recording equipment which could have recorded the site of the accident, but that no such affidavit was provided.

In opposition, defendant Transit Authority argues that Public Officer Law §87(2)(i) permits denial of access to areas if access would jeopardize the agency's ability "to guarantee the

security of its information technology assets, such assets encompassing both electronic information systems and infrastructures.” According to defendant Transit Authority, it has a security interest in keeping its CCTV capabilities and camera locations “from broad disclosures to prevent its use by nefarious actors.” Defendant’s Memorandum of Law in Opposition to Plaintiff’s Motion to Compel/Preclude, p. 8. In support of its opposition, defendant Transit Authority proffers, *inter alia*, the affidavit of Mr. Lyubomyr Boychuk regarding camera angles and capabilities at the station platform at issue herein. Plaintiff replies.

Here, defendant Transit Authority does not dispute that it failed to provide an affidavit as ordered by Judge Adams in February of 2020. Moreover, the affidavit of Mr. Boychuk, proffered herein, is insufficient to establish that there were no cameras capable of capturing the instant accident. Plaintiff correctly argues that Mr. Boychuk’s affidavit fails to even allege that the list of cameras referred to was an exhaustive list. Moreover, Mr. Boychuk’s affidavit specifically states that there is one camera that is capable of capturing the location of the accident. The Appellate Division, First Department, has held that “[p]laintiff[ was] entitled to inspect the tapes to determine for themselves whether the area of the accident was depicted. [Plaintiff] should not be compelled to accept defendant’s self-serving statement concerning the contents of the destroyed tapes”. *Gogos v Modell’s Sporting Goods, Inc.*, 87 AD3d 248, 251 (1<sup>st</sup> Dep’t 2011). As such, plaintiff’s motion is granted and defendant Transit Authority will arrange with plaintiff’s counsel for a site inspection to take place within 90 days.

Accordingly, it is

ORDERED that plaintiff’s motion to compel is granted; and it is further

ORDERED that, within 30 days, plaintiff to serve defendant with a supplemental discovery demand detailing all the outstanding documentary discovery; and it is further

ORDERED that defendant shall respond to plaintiff's supplemental discovery demand within 45 days thereafter; and it is further

ORDERED that defendant shall arrange with plaintiff's counsel for a site inspection to take place within 90 days; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this decision/order upon all parties with notice of entry.

This constitutes the Decision/Order of the Court.

7/3/2023  
DATE

  
ADAM SILVERA, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES  
TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE