

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

2024 NY Slip Op 32140(U)

June 20, 2024

Supreme Court, New York County

Docket Number: Index No. 450856/2019

Judge: Richard Tsai

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

**PRESENT: HON. RICHARD TSAI** PART **21**

*Justice*

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KIPPORA SCOTT

Plaintiff,

- v -

NEW YORK CITY TRANSIT AUTHORITY AND CITY OF  
NEW YORK,

Defendants.

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INDEX NO. 450856/2019  
MOTION DATE 06/13/2024  
MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 24-50  
were read on this motion to STRIKE ANSWER

Upon the foregoing documents, it is **ORDERED** that plaintiff's motion to strike the answer of defendant New York City Transit Authority (NYCTA), or in the alternative, for preclusion, is **GRANTED IN PART TO THE EXTENT** that, within 45 days, the NYCTA is directed to produce any video footage of the incident, and any video footage of the M8 staircase for the entire two hours prior to the incident (i.e., from 4:25 am to 6:25 a.m. on March 28, 2019), that was preserved by the NYCTA's FOIL Department; if no such footage is within the NYCTA's possession, custody, or control, then the NYCTA must provide an affidavit from someone in the FOIL Department with personal knowledge detailing the search, as indicated in the decision below.

In this action, plaintiff alleges that, on March 28, 2019, at around 6:25 a.m., she slipped and fell on stairs of the subway station at Canal Street along the A, C, and E line (see plaintiff's Exhibit C, bill of particulars ¶¶ 4-5 [NYSCEF Doc. No. 30]). Plaintiff testified at her statutory hearing that she slipped and fell due to "trash and debris" on the staircase (defendant's Exhibit 2 in opposition, tr at 34, lines 7-10 [NYSCEF Doc. No. 49]). It is undisputed that the incident was not reported to the NYCTA (*id.* at 40, lines 20-25; at 41, lines 4-6).

By a letter dated April 5, 2018, plaintiff's counsel directed the NYCTA to maintain "all recordings for both the interior and exterior of this location for the entire day of March 26, 2018. Please find enclosed photos of the exterior of the subway entrance, the subject steps and the camera" (plaintiff's Exhibit P in support of motion [NYSCEF Doc. No. 43]). One photograph depicts a subway entrance at Canal Street and Thompson Street, and another photograph depicts a staircase with an "M" designation (*see id.*).

By a "Notice for Discovery & Inspection (1)" dated June 3, 2019, plaintiff sought, among other things, "All video/surveillance for the subject stairway for the 24 hour

preceding plaintiff's accident" and "all video/surveillance that captures Plaintiff's accident" (plaintiff's Exhibit G in support of motion [NYSCEF Doc. No. 34]). By a "Notice for Discovery & Inspection (2)" dated June 3, 2019, plaintiff sought "All photographs videotapes, motion pictures and the like taken of the Plaintiff" (*id.*). By Combined Demands dated June 3, 2019, plaintiff sought, among other things, "videotapes or other visual reproduction of the plaintiff" (*id.*).

Plaintiff now moves for an order striking defendant's answer, due to the NYCTA's failure to produce the discovery sought, in violation of a preliminary conference dated December 19, 2019 and a compliance conference order dated October 27, 2021. NYCTA opposes the motion.

As a threshold matter, the NYCTA argues that plaintiff's discovery motion should be denied because plaintiff's counsel did not engage in good faith efforts to resolve the discovery dispute before seeking court intervention. The court agrees that plaintiff's counsel did not make good faith efforts before bringing the motion, but this does not mandate denial of plaintiff's motion. 22 NYCRR 202.20-f (c) states,

"The failure of counsel to comply with this rule may result in the denial of a discovery motion, without prejudice to renewal once the provisions of this rule have been complied with, or in such motion being held in abeyance until the informal resolution procedures of the court are conducted."

Here, the court scheduled a discovery conference for the parties to attempt a resolution of discovery issues, and as a result of the conference, plaintiff's counsel withdrew the motion as to all discovery demands except for the demands which sought discovery of any video footage of the incident. Therefore, this court exercises its discretion to entertain the remaining aspects of plaintiff's motion which the parties were unable to resolve.

Turning to the merits, plaintiff's demand for any video footage of the incident is reasonably calculated to lead to admissible evidence on the issue of whether the NYCTA had actual or constructive notice of the alleged trash and debris (which is a transient condition) on the staircase upon which plaintiff allegedly slipped and fell.

In opposition, NYCTA submitted an affidavit from Lyubomyr Boychuk, a Superintendent in the EMD/RSS division for the North Shop, whose area of responsibility are the boroughs of Manhattan and Bronx (*see* defendant's Exhibit 3 in opposition, Boychuk affirmation ¶ 3 [NYSCEF Doc. No. 50]). According to Boychuk, the camera mentioned in the preservation letter from plaintiff was a CCTV camera, which was not connected to any recording equipment at the time (*id.* ¶ 8-9). According to the station plan annexed to Boychuk's affidavit, the staircase at the corner of Canal & Thompson Streets with an M designation appears to be stairway M8.

It is undisputed that the preservation letter of plaintiff's counsel was sent prior to commencement of any lawsuit against the NYCTA. According to defendant's counsel,

such pre-litigation preservation letters are routed to the NYCTA's FOIL Department. Because any evidence to be preserved would have been collected by the NYCTA's FOIL Department, defendant's counsel argues that plaintiff should therefore serve a FOIL request, and then bring an Article 78 petition to compel the NYCTA to comply or respond to the FOIL request. At the discovery conference, plaintiff's counsel claimed that the FOIL Department stated that the video footage, if any, would not be turned over without a judicial subpoena.

Because the NYCTA is a party, and it is undisputed that the FOIL Department is not a separate corporate entity from the NYCTA, plaintiff was not required to subpoena the video footage from the NYCTA's FOIL Department, but rather plaintiff could properly serve a notice for the video footage (see CPLR 3120 [1]). "Against a party, discovery under 3120 can be by mere notice. . . . Discovery from a nonparty must be obtained through a subpoena duces tecum" (Patrick M. Connors, *Prac Commentaries*, McKinney's Cons Laws of NY, CPLR C3120:12).

Although the NYCTA belatedly responded to some of the plaintiff's demands, the NYCTA's responses did not include any response as to whether such footage was within its custody, possession or control (see plaintiff's Exhibits K and N [NYSCEF Doc. Nos. 38 and 42]), despite two prior court orders that required the NYCTA to respond to plaintiff's discovery demands (see plaintiff's Exhibits I and L [NYSCEF Doc. Nos. 36 and 39]). The fact that the camera mentioned in plaintiff's preservation letter was a CCTV camera does not end the inquiry, as plaintiff's discovery demands were not limited to only the CCTV camera.

However, the court exercises its discretion not to strike the NYCTA's answer. It is unclear whether any footage of the incident exists at all. Thus, the court cannot conclude that such footage was spoliated. Additionally, the drastic sanction of striking the answer is not narrowly tailored to the NYCTA's failure to respond to plaintiff's discovery demands concerning the video footage.

Thus, in the exercise of discretion, the court grant the NYCTA another opportunity to search and produce any video footage of the incident, and all video footage of the M8 staircase for the entire two hours prior to the incident, that is in custody, possession, or control of the NYCTA, as preserved by the NYCTA's FOIL Department.<sup>1</sup>

If any such footage is not in the custody, possession or control of the NYCTA, then the NYCTA is directed to provide an affidavit from someone with personal knowledge in the FOIL Department as to where the subject footage was likely to be kept, what efforts, if any, were made to preserve the footage, whether such footage was routinely destroyed, or whether a search had been conducted in every location where

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<sup>1</sup> Plaintiff's counsel did not object to limiting the search of the video footage to the NYCTA's FOIL Department, based on representation of defendant's counsel that any pre-action requests to preserve evidence would be handled by the FOIL Department.

such footage was likely to be stored (see *Jackson v City of New York*, 185 AD2d 768, 770 [1st Dept 1992]).

6/20/2024  
DATE

  
RICHARD TSAI, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input 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 type="checkbox"/>	REFERENCE