Berger v New York City Tr. Auth.
2024 NY Slip Op 32691(U)
August 2, 2024
Supreme Court, New York County
Docket Number: Index No. 157005/2018
Judge: Richard Tsai

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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ELIZABETH BERGER,

Plaintiff,

- v -

NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSIT AUTHORITY and NEW YORK CITY TRANSIT AUTHORITY,

Defendants.

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INDEX NO. 157005/2018

MOTION DATE 11/09/2023

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 003) 6, 91, 96-114, 128 were read on this motion to COMPEL DISCOVERY.

Upon the foregoing documents, it is **ORDERED** that plaintiff's motion to compel defendants to provide all documents fully responsive to plaintiff's Third Notice for Discovery and Inspection dated January 12, 2022 is **GRANTED IN PART TO THE EXTENT** that defendants are directed to produce the following within 45 days:

1. All Customer Unusual Occurrence Reports, G2/Correspondence Sheets, and all Train Trouble Control Request for Assistance Reports related to any incident in which a Transit Authority subway train car door closed on a passenger as they were entering or exiting the subway train car, anywhere in the New York City Transit Authority subway, for the period from January 13, 2013 to January 13, 2018; and

2. Unredacted notices of claim filed by anyone claiming injury to an incident in which a Transit Authority subway train car door closed on a passenger as they were entering or exiting the subway train car, anywhere in the New York City Transit Authority subway, for the period from January 13, 2013 to January 13, 2018; and it is further

ORDERED that the remainder of plaintiff's motion is otherwise denied; and it is further

ORDERED that the parties are directed to appear for a status conference on **October 10, 2024 at 3 p.m.** in IAS Part 21, 80 Centre Street Room 280, New York, New York.

In this action, plaintiff alleges that, on January 13, 2018 she was a passenger on a #2 train on the northbound express track at 42nd Street, and the subway car doors closed upon her as she went to exit the train, within 2-3 seconds after they had opened, without any warning, and the doors did not "reopen, recycle, or retract" automatically when plaintiff was allegedly pinned between the door panels (*see* affirmation of plaintiff's counsel in support of motion ¶¶ 3-8 [NYSCEF Doc. No. 98]). Plaintiff alleges negligence of the conductor, who allegedly did not make any announcements about the closing doors, and allegedly closed the train doors prematurely (*id.* ¶ 10). Additionally, in a prior motion for summary judgment, plaintiff's expert stated that a door closing accident occurs because, among other things, a defect or failure to maintain the door closing/object sensing mechanism, or "the door recycle mechanism, which is set and maintained by the TA, was set for zero recycling" (*see* aff of Nicholas Bellizi ¶ 12 [NYSCEF Doc. No. 91]).

By a Third Notice for Discovery and Inspection dated January 12, 2022, plaintiff sought discovery of three categories of documents (*see* plaintiff's Exhibit 1 in support of motion [NYSCEF Doc. No. 99]). Defendants responded to Items 1 and 2 of the demand, but objected to item 3 of the demand.

Plaintiff now moves to compel defendants to provide all documents fully responsive to plaintiff's Third Notice for Discovery and Inspection dated January 12, 2022. Defendants oppose the motion.

On May 24 and August 2, 2024, this court held oral argument on plaintiff's motion, which was not on the record.

Defendants did not properly respond to Items #1 and #2 of plaintiff's demand. Defendants apparently generated a report of incidents of train doors which struck a passenger anywhere in the subway system, which yielded only three incidents, instead of producing any reports taken in the ordinary course of business of a train door closing incident.[1] Defendants produced the same report in response to item #2, which sought instead unredacted notices of claim of train door closing incidents for a period of 5 years prior to plaintiff's incident.

For item #2, plaintiff is entitled to unredacted notices of claim filed by anyone claiming injury to an incident in which a Transit Authority subway train car door closed on a passenger as they were entering or exiting the subway train car, anywhere in the New York City Transit Authority subway, for at least the 2-year period before plaintiff's incident (*Lau v New York City Tr. Auth.*, 201 AD3d 470, 471 [1st Dept 2022]).

Defendants argue that a five-year period would be overly broad, noting that in *Lau*, the Appellate Division, First Department affirmed the decision of the court below to

[1] According to plaintiff's counsel, a FOIL request from plaintiff's counsel revealed more incidents of train doors closing upon passengers than the three incidents disclosed in defendants' discovery response. At oral argument, plaintiff's counsel agreed to promptly email to defendants' counsel the FOIL response that they received, to aid defendants' search of the reports directed in this decision and order.

narrow the ten year period of records sought to a two-year period. However, because defendants did not raise any objections to item #2 in its response, the objection was not preserved.

As to item #1, at oral argument, this court narrowed the scope of plaintiff's demand for reports to three kinds of reports which defendant New York City Transit Authority keeps in the ordinary course of business that might be generated when a door closing incident occurs, regardless of whether a notice of claim is later filed. These are (1) Customer Unusual Occurrence Reports; (2) G2/Correspondence Sheets (which are written statements by a conductor or train operator about the incident); and (3) Train Trouble Control Requests for Assistance Reports (when a request for assistance is radioed in). The kinds of reports are reasonably calculated to lead to admissible evidence to prove, by circumstantial evidence, that the door recycling mechanism of subway car doors was set to zero, as plaintiff asserts.

Citing *Lau*, defendants nevertheless argue that plaintiff should not be entitled to the reports sought in item #1, insofar as the court below had narrowed the records to be produced only to notices of claim, and only for a 2 year period prior to the incident. However, because defendants did not raise any objections to item #1 in its response, defendants' objections were not preserved.

Lastly, defendants' objections to item #3 are sustained as overly broad.

Plaintiff's working theory is either that defendants deliberately set the door recycling mechanism to zero, that mechanical failure of the particular train car door occurred, or operator negligence. As defendants did not assert any defense of qualified immunity (*see* NYSCEF Doc. No. 6, answer), discovery as to what studies, if any, were undertaken concerning an alleged decision to set the door recycling mechanism to zero, would be irrelevant and not reasonably calculated to lead to admissible evidence as to the issues in this action.

The court reminds defendants' counsel that, Uniform Rules of Supreme Court [22 NYCRR] § 202.20-c now requires that a discovery response contain

> "(c) at the conclusion of thereof, the affidavit of the responding party stating: (i) whether the production of documents in its possession, custody or control and that are responsive to the individual requests is complete; or (ii) that there are no documents in its possession, custody or control that are responsive to any individual requests."

The branch of plaintiff's motion for a conditional order striking defendants' answer is denied. Plaintiff did not establish any willful noncompliance with any prior court orders directing defendants to provide the discovery sought in plaintiff's Third Notice for Discovery and Inspection dated January 12, 2022 to warrant the drastic remedy of

striking defendants' answer (*see generally Henderson-Jones v City of New York*, 87 AD3d 498, 504 [1st Dept 2011]).

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8/2/2024
DATE

RICHARD TSAI, 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