

Pascual v New York City Tr. Auth.

2025 NY Slip Op 30643(U)

February 25, 2025

Supreme Court, New York County

Docket Number: Index No. 160106/2022

Judge: Richard Tsai

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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. RICHARD TSAI PART 21

Justice

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MARGARITA PASCUAL, Plaintiff,

- v -

NEW YORK CITY TRANSIT AUTHORITY, CITY OF NEW YORK, 145 VERMILYEA ASSOCIATES, LLC, 145 VERMILYEA ASSOCIATES, L.P., 145 VERMILYEA CORP., SDG MANAGEMENT CORP., SERVICIOS EXPRESS LA NACIONAL, LTD., XYZ CORP. and OPTICA INTERNATIONAL, INC., Defendants.

INDEX NO. 160106/2022
MOTION DATE 10/30/2024
MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document numbers (Motion 003) 87-112 were read on this motion to/for STRIKE PLEADINGS.

In this action, plaintiff Margarita Pascual alleges that, on December 7, 2021 at approximately 1:57 PM, she tripped and fell on a sidewalk grating abutting 571-573 West 207th Street, New York, New York, "which grates were intended to aid in air flow/exhaust from subterranean [New York City Transit Authority] NYCTA facilities at and around the Location" (plaintiff's exhibit C in support of cross motion [NYSCEF Doc. No. 100], plaintiff's bill of particulars as to New York City Transit Authority ¶¶ 4-5, 10).

On this motion, defendant New York City Transit Authority (NYCTA) seeks a protective order from this court vacating plaintiff's notice to admit, dated October 25, 2024 (NYSCEF Doc. Nos. 80-84, notice to admit with exhibits A-D), which seeks admissions as to fourteen items concerning the subject sidewalk grate. Plaintiff opposed NYCTA's motion and cross-moved for an order "deeming admitted each fact alleged in plaintiff's notice to admit dated October 25, 2024" (plaintiff's notice of cross motion [NYSCEF Doc. No. 95]). NYCTA opposed plaintiff's cross motion.

BACKGROUND

On October 25, 2024, plaintiff e-filed a notice to admit dated October 25, 2024, containing 14 items (see NYCTA's exhibit A in support of motion [NYSCEF Doc. No. 98]). On October 28, 2024, NYCTA's counsel e-filed a response to the notice to admit, which objected to all the items (see NYCTA's exhibit D in support of motion [NYSCEF Doc. No. 93]).

On October 30, 2024, NYCTA e-filed a motion for a protective order. On November 1, 2024, plaintiff e-filed a cross-motion to deem admitted each fact alleged in plaintiff's notice to admit dated October 25, 2024.

Oral argument was held on February 24, 2025 on the stenographic record (Lisa Casey, court reporter). At oral argument, NYCTA's counsel agreed to admit to item numbers 1 through 9. In addition, plaintiff's counsel agreed to withdraw item numbers 12 and 13 in their entirety. Plaintiff's and NYCTA's counsel agreed to resolve their dispute as to item number 14 with the understanding that plaintiff would resubmit item number 14 with the language changed from "On and including December 7, 2021, said metal grates were used by NYCTA in the course of its operation of the New York City **transit** system" to "On and including December 7, 2021, said metal grates were used by NYCTA in the course of its operation of the New York City **subway** system."

Thus, the motion has been submitted for the court to determine whether to vacate item numbers 10 and 11 of the notice to admit, which read as follows:

"10. Said metal grates were installed by NYCTA.

11. Said metal grates were installed for the benefit of NYCTA."

DISCUSSION

"A notice to admit is designed to elicit admissions on matters which the requesting party 'reasonably believes there can be no substantial dispute' (CPLR 3123 [a]). A notice to admit may not be utilized to request admission of material issues or ultimate or conclusory facts, or facts within the unique knowledge of other parties. Rather, it is only properly used to eliminate from trial matters which are easily provable and about which there can be no controversy. Further, because a notice to admit is not intended as simply another means for achieving discovery, it may not be used to obtain information in lieu of other disclosure devices" (*Fetahu v New Jersey Tr. Corp.*, 167 AD3d 514, 515 [1st Dept 2018] [internal quotation marks, citations, and emendation omitted]).

A priori, one might think that ownership or control of a grate is a material issue in a case involving a trip and fall over a grate, as the issue of whether a defendant owes a duty to the plaintiff would be an element of plaintiff's cause of action. An owner of the grate would owe a nondelegable duty under 34 RCNY 2-07(b) to monitor the condition of the sidewalk grate and the area of the sidewalk extending 12 inches outward from the perimeter of the grating (*Fajardo v City of New York*, 197 AD3d 456, 459 [2d Dept 2021]; see also *Garrett v City of New York*, 222 AD3d 554, 556 [1st Dept 2023]). Meanwhile, the defendants who are not owners of the grate would owe no duty to the plaintiff (see *Storper v Kobe Club*, 76 AD3d 426, 427 [1st Dept 2010]).

Also, item 10 also raises the concern of whether it actually amounts to an interrogatory, not a request to admit (*see Taylor v Blair*, 116 AD2d 204, 207 [1st Dept 1986]).

Nevertheless, the court agrees with plaintiff that, under *Hernandez v City of New York* (95 AD3d 793, 794 [1st Dept 2012]), this court is constrained to rule that item 10 was not an improper request to admit.

In *Hernandez*, the plaintiff served a notice to admit upon the New York City Transit Authority regarding its ownership, control, and duty to maintain the metal grating upon which plaintiff allegedly fell. The New York City Transit Authority did not respond to the notice to admit until 2½ years later, objecting to the requests as improper. Supreme Court denied the plaintiff's motion for an order deeming the facts in her notice to admit as having been admitted by defendant, and the plaintiff. On appeal, the New York City Transit Authority argued, among other things, "the question of who owned or managed the grating touched on issues central to liability. As a result, it was not a proper subject for a notice to admit" (brief for defendant-respondent in *Hernandez v City of New York*, 95 AD3d 793, available at 2012 WL 13024162, at *16).

The Appellate Division, First Department ruled,

"Contrary to defendant's contention, the notice to admit, which addressed matters regarding the ownership, control and duty to maintain the metal grating upon which plaintiff allegedly fell, did not demand answers to material issues of fact. Indeed, defendant's answer did not unequivocally deny the allegation that it 'had charge' of the metal grating and a duty to maintain it" (*Hernandez*, 95 AD3d at 794).

Here, like *Hernandez*, NYCTA did not unequivocally deny the allegation that in paragraph 27 of the complaint that "TA owned and installed said sidewalk grates" (see NYSCEF No. 1). Rather, NYCTA's answer stated, "Denies that it has the knowledge or information sufficient to form a belief as to the allegation(s) contained in paragraph(s) 1, 3, and 7-71 of the Verified Complaint" (see NYSCEF Doc. No. 15). Additionally, item 10 demands an admission as to whether NYCTA installed the grate, which is similar to the notice to admit in *Hernandez* requesting an admission as to the NYCTA's ownership, control, or duty to maintain the grate.

Thus, NYCTA's objection to item 10 of the notice to admit is overruled. However, the analysis does not end there.

NYCTA moved for a protective order on October 30, 2024, just five days after plaintiff served it with the notice to admit. Thus, pursuant to CPLR 3103 (b), NYCTA's motion "suspend[ed] disclosure of the particular matter in dispute." Thus, NYCTA still

has 15 days left to admit or deny item 10 of the notice to admit. Thus, plaintiff's cross motion to deem item 10 of the notice to admit is denied.¹

However, item number 11 appears to request an admission to a legal conclusion, in that it demands an admission that the grates were installed "for the benefit of NYCTA" (see *Gomez v Long Is. R.R.*, 201 AD2d 455, 456 [2d Dept 1994] [notice to admit as to the plaintiff's immigration status and whether the plaintiff was trespassing improperly called for legal conclusions]). At oral argument, plaintiff's counsel explained that item number 11 was meant to cover a situation where the subject grate was installed by a third party at NYCTA's direction (i.e., NYCTA had hired a contractor to install the grate). However, item 11 was not worded to elicit only factual admissions. Therefore, NYCTA's objection to item 11 is sustained.

CONCLUSION

Upon the foregoing documents, it is hereby **ORDERED** that the motion by defendant New York City Transit Authority (NYCTA) for a protective order vacating plaintiff's notice to admit, dated October 25, 2024 (NYSCEF Doc. Nos. 80-84, notice to admit with exhibits A-D), is **GRANTED TO THE EXTENT** that the item number 11 is vacated; and it is further

ORDERED that, within fifteen (15) days of being served with a copy of this decision and order, NYCTA shall respond to item number 10 of plaintiff's October 25, 2024 notice to admit, and the motion is otherwise denied; and it is further

ORDERED that plaintiff's cross motion to deem "each fact alleged" in the October 25, 2024 notice to admit to be "admitted" is **GRANTED TO THE EXTENT** that item numbers 1 through 9 are deemed admitted, and plaintiff's motion is otherwise denied; and it is further

ORDERED that the parties are directed to appear in person for a status conference in IAS Part 21, 80 Centre Street Room 280 on **6/12/25 at 10:30 a.m.**

This constitutes the decision and order of the court.



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<u>2/25/2025</u>							
DATE						RICHARD TSAI, J.S.C.	
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED		<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
Seq. No. 003 Motion	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
Seq. No. 003 Cross Motion	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	<input checked="" type="checkbox"/>	GRANTED IN PART	<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

¹ The court notes that lower courts have ruled that an attorney's response to a notice to admit will not satisfy the requirements of CPLR 3123 (a), which requires a "sworn statement of a party" (see *Nationstar Mortgage LLC v. Phillips*, 2024 WL 3319997, at *3 [Sup Ct., Dutchess County 2024]; *Elrac, Inc. v. McDonald*, 186 Misc.2d 830 [Sup Ct., Nassau County 2001]).