

Kille v New York City Tr. Auth.

2025 NY Slip Op 34838(U)

December 15, 2025

Supreme Court, New York County

Docket Number: Index No. 155861/2018

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

-----X

SUSAN D. KILLE and THOMAS W. SAWYER,
Plaintiffs,

INDEX NO. 155861/2018

MOTION DATE 12/11/25

MOTION SEQ. NO. 002-005

- v -

NEW YORK CITY TRANSIT AUTHORITY,
METROPOLITAN TRANSPORTATION AUTHORITY, CITY
OF NEW YORK, PORT AUTHORITY OF NEW YORK AND
NEW JERSEY and PORT AUTHORITY TRANS-HUDSON
CORPORATION (PATH),

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document numbers (Motion 002) 135-149, 156-166, 178, 181-189, 199-200

were read on this motion to/for DISCOVERY.

The following e-filed documents, listed by NYSCEF document numbers (Motion 003) 150-155, 167-177, 179, 190-198, 201-202

were read on this motion to/for DISCOVERY.

The following e-filed documents, listed by NYSCEF document numbers (Motion 004) 204-209, 235-237

were read on this motion to/for DISCOVERY.

The following e-filed documents, listed by NYSCEF document numbers (Motion 005) 210-234

were read on this motion to/for DISCOVERY.

Upon the foregoing documents, it is hereby **ORDERED** that plaintiffs' discovery motions (Seq. Nos. 002-005) are **RESOLVED** pursuant to the so-ordered stipulation of December 11, 2025 (NYSCEF Doc. No. 238) with the exception of the branch of plaintiffs' discovery motion against defendant City of New York (Seq. No. 002) seeking certain discovery concerning a potential employee of defendant City of New York (the City) named Shane Zhang which was reserved for decision by this Court (status conference order of December 11, 2025 (NYSCEF Doc. No. 238); and it is further

ORDERED that the above-mentioned branch of plaintiffs' motion (Seq. No. 002) is **GRANTED TO THE EXTENT** that within thirty (60) days, the City shall provide documents that are responsive to plaintiffs' counsel's letter of August 19, 2025 (exhibit 5 in support of Motion Seq. No. 002 [NYSCEF Doc. No. 141]), or, if there are no responsive documents, an affirmation of search by a person with knowledge, stating, at

the very least, “where the subject records were likely to be kept, what efforts, if any, were made to preserve them, whether such records were routinely destroyed, [and] whether a search had been conducted in every location where the records were likely to be found” (*Jackson v City of New York*, 185 AD2d 768, 770 [1st Dept 1992]).

BACKGROUND

In this action, plaintiff Susan Kille alleges that, on November 5, 2017 at about 3:30 p.m., she slipped and fell on a sidewalk grating, depicted in the below photograph, in front of 635 West Sixth Avenue in Manhattan:



(exhibit A in opposition to Motion Seq. No. 002 [NYSCEF Doc. No. 182], notice of claim ¶ 3; exhibit B in opposition to Motion Seq. No. 002 [NYSCEF Doc. No. 183], complaint ¶¶ 7, 14; exhibit 1 in support of Motion Seq. No. 002 [NYSCEF Doc. No. 157], photograph of alleged accident site]). Plaintiffs Susan D. Kille and Thomas W. Sawyer assert a cause of action sounding in negligence, upon theory that the subject grate was “defectively designed and / or defectively manufactured so as to create an extreme slip hazard,” as well as on the theory that “there was a failure by the respondents to respond to numerous prior complaints about this dangerous condition as it is observable that pedestrians frequently slip on this dangerous and slippery surface” (notice of claim ¶ 3).

There is no dispute that underneath subject grating there are subway lines operated by defendant New York City Transit Authority (NYCTA) as well as the Port

Authority Trans-Hudson line operated by defendant Port Authority Trans-Hudson Corporation (PATH).

Following joinder of issue, plaintiffs served notices to admit on defendants NYCTA, Metropolitan Transportation Authority (MTA), the City, the Port Authority of New York and New Jersey (Port Authority), and PATH, concerning, among other things, issues of ownership and maintenance of the subject grating (plaintiffs' notice to admit [NYSCEF Doc. No. 9]). The City denied ownership (City's response to plaintiffs' notice to admit [NYSCEF Doc. No. 10], responses to items 1 and 2). Defendants NYCTA and MTA (collectively, Transit Defendants) denied owning the subject grating but admitted that "[a]t all times material to this action" the subject grating was "maintained" by NYCTA (NYCTA's response to plaintiffs' notice to admit [NYSCEF Doc. No. 12], response to item 4).

Notably plaintiffs' notice to admit did not seek an admission from defendants Port Authority and PATH (collectively, PA Defendants) concerning ownership of the subject grating. Thus, subsequently, Transit Defendants served a notice, on PA Defendants, to admit that they owned the subject "metal gratings", and PA Defendants objected to this item, asserting that it sought an "admission of matters of fact that are not clear-cut and which constitute an actual dispute of the lawsuit; is being used in lieu of the proper disclosure devices for obtaining information; and that the photographs do not provide sufficient context to when and where the photographs were taken" (*compare* Transit's notice to admit on Port Authority [NYSCEF Doc. No. 15], item 1, *with* Port Authority's response to Transit's Notice to admit [NYSCEF Doc. No. 17], response to item 1).

Thus, with ownership of the subject grating contested between defendants, plaintiffs argue that "[d]ocument-wise, the crown jewel of discoverable evidence in the matter at bar is believed to be the initial permit application for installation of the subject sidewalk grating" as plaintiffs believe that "the permit application with related documents will identify the owner of the sidewalk grating" (affirmation in support of Motion Seq. No. 002 [NYSCEF Doc. No. 136] ¶ 7). Plaintiffs further contend that such permitting documents "would address the design and engineering considerations, if any, that contributed to the final 'as built' design alleged by plaintiffs to be defective" (*id.*).

To this end, plaintiffs' counsel has requested that the City produce the following:

"Re: Engineering Package for Vault Application and Maintenance Agreement for Vault, Including Sidewalk Grate. For the space under the street and sidewalk in front of 635 6th Avenue, AKA Avenue of the Americas, on the west side of Sixth Avenue, AKA Avenue of the Americas, Manhattan, New York, N.Y. Block and Lot No. 795-37 M" (exhibit 5 in support of Motion Seq. No. 002 [NYSCEF Doc. No. 141], plaintiffs' follow-up discovery request letter of August 19, 2025 at 1).

In his letter requesting this document discovery, plaintiffs' counsel stated that he believed that the above documents being sought "should be filed with the NYC Department of Transportation Bureau of Permit Management and Construction Control Plan Examination Unit, 55 Water Street, New York, NY" and that he believed "the current examiner for this vault unit is Shane Zhang" (*id.* at 1-2). Plaintiffs' counsel further noted that "the subject vault is a ventilation shaft in use by the NYCTA/MTA and/or PATH, Port Authority of New York and New Jersey" (*id.*).¹

According to counsel for the City, the City responded to this demand "as irrelevant and beyond the scope of the CSO" (affirmation in opposition to Seq. No. 002 [NYSCEF Doc. No. 181] ¶ 9 [referencing the City's letter of September 29, 2025 [NYSCEF Doc. No. 134]). Counsel for the City contends that, pursuant to the Case Scheduling Order (CSO) in this matter, they provided a document search for "two (2) years prior to and including the date of accident" which "has consistently been held" to be "sufficient to establish a prima facie case" (*id.*; see also exhibit D in opposition to Motion Seq. No. 002 [NYSCEF Doc. No. 185], CSO).

The court finds that the demand in plaintiffs' counsel's letter of August 19, 2025 is "appropriately tailored and reasonably calculated to yield relevant information" (*Forman v Henkin*, 30 NY3d 656, 664 [2018]). Indeed, in this court's experience, there are few, if any discovery demands, that provide the other party information about the location where the responsive documents are likely to be kept and the potential employee of the responding party that might be able to help the party locate the responsive documents.

While the City claims that plaintiffs demand irrelevant information, information related to the installation of the subject grating is material and necessary (*Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406 [1968]). As plaintiffs are alleging that the subject grating was negligently designed, plaintiffs will need to establish that the subject grating "violated building safety standards applicable at the time it was built" (*Hoteling v City of New York*, 55 AD3d 396, 397 [1st Dept 2008], *affd*, 12 NY3d 862 [2009]; see also *Merino v New York City Tr. Auth.*, 218 AD2d 451, 457 [1st Dept 1996] ["The law is settled that a party is under no legal duty to upgrade a structure, which was originally built in compliance with the law, by reason of subsequent changes in specifications"], *affd*, 89 NY2d 824 [1996]). Plaintiffs cannot meet this burden unless they know *when* subject grating was installed.

Although the City contends that its search for records two years prior to the accident should be sufficient, the City has not provided any basis to show that the subject grating was installed in the two years before the subject accident—and thus documents relating to its installation would be covered the current two-year search.

¹ During a status conference on December 11, 2025, plaintiffs' counsel stated that he learned about the likely location of these records and the identity of Shane Zhang through a Freedom of Information Law (FOIL) request performed by plaintiff Thomas W. Sawyer, who, as the spouse of Kille, asserts a claim for loss of services.

In addition, documents responsive to plaintiffs' counsel's letter of August 19, 2025 may potentially shed light on who the owner of the subject grating is.

For all of these reasons, the City must respond to plaintiffs' counsel's letter of August 19, 2025 by providing responsive documents, or, if there are no responsive documents, an affirmation of search by a person with knowledge, stating, at the very least, "where the subject records were likely to be kept, what efforts, if any, were made to preserve them, whether such records were routinely destroyed, [and] whether a search had been conducted in every location where the records were likely to be found" (*Jackson v City of New York*, 185 AD2d 768, 770 [1st Dept 1992]).

The parties are reminded of the upcoming status conference in this matter scheduled for **Thursday, February 26, 2026 at 9:30 a.m.** in courtroom 280 at 80 Centre Street, New York, NY.

ENTER:



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