

Gillespie v City of Yonkers
2025 NY Slip Op 35240(U)
November 7, 2025
Supreme Court, Westchester County
Docket Number: Index No. 57337/2023
Judge: Walter Rivera
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER – I.A.S. PART

-----X
LISA BRACEY GILLESPIE,

Plaintiff,

-against-

CITY OF YONKERS,

Defendant,
-----X

Index No. 57337/2023

DECISION AND ORDER

Motion Sequence Nos. 6 & 7

Rivera, J.

On November 19, 2021, plaintiff, Lisa Bracey Gillespie, was walking in the intersection of Saw Mill River Road and Dearborne Street in the City of Yonkers, New York, when she tripped and fell sustaining personal injuries. The area where she fell was a cracked roadway adjacent to an uneven sidewalk. Plaintiff was treated at St. John’s Hospital for her injuries.

Plaintiff filed the within motion seeking to strike the defendant’s answer and for other relief based on defendant’s purported failure to comply with multiple discovery orders issued by the Court. Defendant filed a cross motion seeking to dismiss plaintiff’s complaint for failing to timely commence this action. For the reasons detailed below, plaintiff’s motion and defendant’s cross motion are both denied.

The following documents filed to the New York State Court Electronic Filing System (NYSCEF) were read and considered by the Court:

PAPERS

NYSCEF Doc. No.

Motion Seq. No. 6

Plaintiff’s notice of motion, affirmation in good faith, memorandum of law in support and exhibits 167-172

Defendant’s affirmation in opposition to plaintiff’s motion and in support of defendant’s cross motion to dismiss and exhibits 178-183

Plaintiff’s reply affirmation, memorandum of law and exhibits 184-188

Motion Seq. No. 7

Defendant’s notice of cross motion, affirmation in support of cross motion and exhibits 173-183

Plaintiff's memorandum of law in reply, affirmation in opposition to defendant's cross motion and exhibits	189-196
Defendant's affirmation in reply and exhibits	197-198

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff commenced the instant action by filing a summons and complaint with several exhibits (NYSCEF Doc. Nos. 1-6), and an amended complaint with exhibits (NYSCEF Doc. Nos. 14-20). Defendant interposed an answer (NYSCEF Doc. No. 27), and a Notice of Rejection of the Amended Complaint (NYSCEF Doc. No. 29). Pursuant to the Referee Report and Order of Court Attorney Referee David Evan Markus, which was So-Ordered on April 27, 2023, plaintiff's first amended complaint was deemed filed and served, and the answer of defendant City of Yonkers was deemed to answer plaintiff's first amended complaint (NYSCEF Doc. No. 37). Among other affirmative defenses, the answer contains an affirmative defense that the action is barred by the statute of limitations.

This case has been zealously litigated since its inception. There were five prior motions, which were resolved via one withdrawal (Motion Seq. No. 1, NYSCEF Doc. No. 37); decisions on three motions (Motion Seq. No. 2 & 3, NYSCEF Doc. Nos. 70-75; Motion Seq. No. 4, NYSCEF Doc. No. 92¹), and one motion was resolved at a compliance conference and the subsequent issuance of a compliance conference order (Motion Seq. 5, NYSCEF Doc. No. 121).

Additionally, the lack of compliance with discovery requests by both sides resulted in numerous compliance conference orders (NYSCEF Doc. Nos. 91, 96, 110, 121, 125 and 136). At the most recent compliance conference held on October 23, 2025, plaintiff's counsel failed to appear or otherwise seek an adjournment prior to the conference.²

Plaintiff filed the within motion seeking the following relief: a) pursuant to CPLR 3124 and 3126, striking defendant's answer for its alleged violation of the Court's Orders of February 11, 2025 and April 14, 2025, and an alleged material misrepresentation contained in its February 28, 2024 letter to the court (NYSCEF Doc. No. 142); b) pursuant to CPLR 3124 and 3126, prohibiting defendant from introducing any evidence upon the trial of this matter for its failure to provide good faith responses to plaintiff's discovery demands and specific responses to various outstanding discovery

¹ This decision was erroneously marked "Motion Sequence # 3". Motion Seq. No. 4 was a motion to reargue and renew the decision issued on Motion Seq. 3, and the subject decision resolved said motion.

² Plaintiff's counsel is reminded that the failure to appear at a Court conference may result in dismissal of the action (see 22 NYCRR 202.27 [b]).

demands; c) for monetary sanctions pursuant to NYCRR 130-2.1 for the defendant's failure to produce previously ordered discovery; d) compelling the defendant to immediately comply with the court's February 11, 2025 order which: "ORDERED, that no later than March 7, 2025, defendant shall produce to plaintiff copies of records showing, without limitation, paving, patching, asphaltting, cementing, tarring, treating of Dearbourne Street and Saw Mill River Road in the City of Yonkers for the period 2017 through November 19, 2021"; and e) compelling the defendant to immediately provide all records concerning the work performed by the City in March of 2018 at the intersection of Saw Mill River Road and Dearborne Street referenced in service request No. 101000856304 (NYSCEF Doc. No. 167).

Defendant filed a cross motion pursuant to CPLR 3211 (a) (7) and 3212 to dismiss the plaintiff's complaint in its entirety on the grounds that this action is time barred pursuant to General Municipal Law §50-i (1) (c) and CPLR 217-a (NYSCEF Doc. No. 173).

ANALYSIS

Initially, this Court notes that the affirmation of good faith of Alyssa Gillespie, Esq., dated June 2, 2025, filed in support of plaintiff's motion, fails to comport with the recently amended statutory language of CPLR 2106 (NYSCEF Doc. No. 168). Additionally, this Court notes that the affirmation of Cesar Zuniga, Esq., dated July 24, 2025, submitted in support of defendant's cross motion to dismiss and in opposition to plaintiff's motion, fails to comport with CPLR 2106 (NYSCEF Doc. Nos. 178 & 183).

Moreover, Ms. Gillespie's affirmation in opposition to defendant's cross motion to dismiss, dated July 26, 2025, fails to comport with CPLR 2106 (NYSCEF Doc. No. 184).

CPLR 2106, as amended effective as of January 1, 2024, provides as follows:

The statement of any person wherever made, subscribed and affirmed by that person to be true under the penalties of perjury, may be used in an action in New York in lieu of and with the same force and effect as an affidavit. Such affirmation shall be in substantially the following form:

I affirm this ___ day of _____, _____, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.

The affirmations of plaintiff's counsel are only "affirmed to be true" and those of defendant's counsel are only made "under the penalties of perjury." Such affirmations were sufficient under the older CPLR 2106, but effective January 1, 2024, they are no longer legally sufficient to comport with

this rule, as amended. The Advisory Committee Notes to CPLR 2106 state, “[w]hile attorneys always have a professional duty to state the truth in papers, the affirmation under the proposed rule gives attorneys adequate warning of the possibility of prosecution for perjury for a false statement.” (*see Zhou v Cent. Radiology, PC*, 84 Misc.3d 410, 419 [Sup Ct, Queens County 2024].)

Additionally, since the amended rule includes the word “shall” within its directive, the language set forth thereafter is mandatory and not merely a suggestion. (*see Diego Beekman Mut. Hous. Assn. Hous. Dev. Fund Corp. v Hammond*, 81 Misc 3d 1244(A) [Civ Ct, Bronx County 2024].) The failure to include the required language as set forth in CPLR 2106 cannot be said to be harmless and renders the affirmation inadmissible and of no probative value (*see Zhou* at 419; *R.F. v L.K.*, 82 Misc.3d 1221(A) [Sup Ct, Westchester County 2024]).

In *Kallo v Kane St. Synagogue*, 241AD3d 522 [2nd Dept 2025], the Second Department found that a defective affirmation that was missing the required language of CPLR 2106 may be corrected with the submission of a reply affirmation containing the requisite language.

Here, all the affirmations submitted by counsel in connection with the plaintiff’s motion and defendant’s cross motion are not in substantial compliance with CPLR 2106, as amended, since they fail to acknowledge the import and seriousness of the statements made in the affirmation and the consequences of making false statements, as required by the statute. (*see Zhou* at 419; *see generally Matter of Grandsard v Hutchinson*, 227 AD3d 491 [1st Dept 2024]; *Great Lakes Ins. SE v American S.S. Owners Mut. Protection & Indem. Assn. Inc.*, 228 AD3d 429 [1st Dept 2024]; *Fifth Partners LLC v Foley*, 227 AD3d 543 [1st Dept 2024]). Furthermore, the reply affirmations submitted by counsel for both parties (NYSCEF Doc. Nos. 184 & 197) failed to correct the defects in the affirmations (*see Kallo, supra*).

Accordingly, the affirmations submitted by counsel for both parties fail to comply with the mandates of CPLR 2106, and, thus, they are inadmissible and lack probative value. Consequently, the plaintiff’s motion seeking to dismiss the defendant’s answer and other relief is denied.³ The defendant’s cross motion seeking to dismiss all of plaintiff’s claims in their entirety on the grounds that this action is time barred is also denied, without prejudice.⁴

All other arguments raised on these motions and evidence submitted by the parties in connection thereto have been considered by this court notwithstanding the specific absence of reference thereto.

³ Counsel are referred to the requirements set forth in this Court’s Part Rules prior to filing any further motion related to a discovery dispute.

⁴ The Court notes that a motion to dismiss based on a statute of limitations defense is governed by CPLR 3211 (a) (5). The instant cross motion filed by defendant was made pursuant to CPLR 3211 (a) (7) and CPLR 3212.

CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion seeking the following relief: a) pursuant to CPLR 3124 and 3126, striking defendant's answer for its alleged violation of the Court's Orders of February 11, 2025 and April 14, 2025, and an alleged material misrepresentation contained in its February 28, 2024 letter to the court (NYSCEF Doc. No. 142); b) pursuant to CPLR 3124 and 3126, prohibiting defendant from introducing any evidence upon the trial of this matter for its failure to provide good faith responses to plaintiff's discovery demands and specific responses to various outstanding discovery demands; c) for monetary sanctions pursuant to NYCRR 130-2.1 for the defendant's failure to produce previously ordered discovery; d) compelling the defendant to immediately comply with the court's February 11, 2025 order which: "ORDERED, that no later than March 7, 2025, defendant shall produce to plaintiff copies of records showing, without limitation, paving, patching, asphaltting, cementing, tarring, treating of Dearborne Street and Saw Mill River Road in the City of Yonkers for the period 2017 through November 19, 2021"; and e) compelling the defendant to immediately provide all records concerning the work performed by the City in March of 2018 at the intersection of Saw Mill River Road and Dearborne Street referenced in service request No. 101000856304, is hereby DENIED; and it is further

ORDERED, that defendant's cross motion to dismiss the complaint pursuant to CPLR 3211(a)(7) and CPLR 3212 on the grounds that the action is time barred pursuant to General Municipal Law § 50-i (1) (c) and CPLR 217-a is hereby DENIED, without prejudice.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
November 7, 2025

ENTER:



HON. WALTER RIVERA, J.S.C.