

Abreu v City of New York
2025 NY Slip Op 35570(U)
February 25, 2025
Supreme Court, Queens County
Docket Number: Index No. 712907/2021
Judge: Chereé A. Buggs
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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**
Justice

IAS PART 30

Index No.: 712907/2021



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NAIROBY ABREU, as Administratrix of the
Estate of GRADY V. ROMERO DUARTE,
Deceased,

Plaintiff,

Motion

Date: February 10, 2025

Motion Cal. No.: 2

Motion Sequence No.: 3

-against-

THE CITY OF NEW YORK, THE NEW YORK
CITY FIRE DEPARTMENT, THE NEW YORK
CITY DEPARTMENT TRANSPORTATION,
NEW YORK CITY FIRE COMMISSIONER
DANIEL NIGRO, NEW YORK CITY
DEPARTMENT OF TRANSPORTATION
COMMISSIONER POLLY TRACHTENBURG
or HENRY GUTMAN, JOHN J. DASILVA and
KATIE M. DASILVA,

Defendants.

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The following efile papers numbered EF 115-152 and 154-156 submitted and considered on this motion by plaintiffs, NAIROBY ABREU, as Administratrix of the Estate of GRADY V. ROMERO DUARTE, deceased (hereinafter collectively referred to as "Plaintiff") seeking an order pursuant to CPLR §§3124 and 3126 striking the defendants answers for failure to comply with the Order dated April 24, 2024 and willfully and intentionally failing to disclose the discovery sought in several of the plaintiff's discovery demands; or in the alternative, compelling all defendants to provide the documents sought in Plaintiff's discovery demands within twenty (20) days with failure to do so resulting in preclusion from offering any testimony on the issue of liability together with such other and further relief as this Court deems just and proper

Papers
Numbered

Notice of Motion-Affidavits-Exhibits.....	EF 115-132
Affirmation in Opposition-Affidavits-Exhibits.....	EF 133- 150
Reply Affirmation-Affidavits-Exhibits.....	EF 151-152
Affirmation in Opposition-Affidavits-Exhibits.....	EF 154-155
Reply Affirmation-Affidavits-Exhibits.....	EF 156

This matter involves a car accident between defendant JOHN J. DASILVA (“DaSilva”) and Plaintiff’s decedent on June 30, 2020 at approximately 12:24 AM, the car operated by DaSilva, who was under the influence of alcohol, hit Plaintiff’s decedent’s car causing injuries and Plaintiff’s decedent’s death. At the time, DaSilva was employed as a firefighter for the FDNY.

Plaintiff claims THE CITY OF NEW YORK s/h/a, THE CITY OF NEW YORK, THE NEW YORK CITY FIRE DEPARTMENT, THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION, COMMISSIONER DANIEL NIGRO, COMMISSIONER POLLY TROTTEBERG s/h/a POLLY TRACHTENBURG and COMMISSIONER HENRY GUTMATN (collectively referred to as the “City”) failed to provide discovery specifically a response to Plaintiff’s demand for a “Copy of portions of the ‘Mutual On/Mutual Off’ Log Book indicating any shift changes made or requested involving the time period 6/28/20 through 7/4/20 for DaSilva’s personal shifts and a copy of any documents showing Mr. DaSilva’s original schedule for the week of 6/28/20 through 7/4/20.”

According to Plaintiff, the City has failed to establish that DaSilva did not become “blindingly intoxicated in the course of his employment at the firehouse, which would potentially invoke liability against the City under respondeat superior.”

Despite allegations that the City failed to respond, it appears that the City’s response--albeit untimely--objected to production of evidence responsive to both demands on grounds that they are “overbroad and seek[s] information that is irrelevant and not reasonably calculated to lead to the discovery of admissible information.” It is undisputed that DaSilva testified that shift exchanges would be recorded in the Mutual On/Mutual Off logbook at the firehouse.

In support of the demand, Plaintiff points to the payroll chart provided by the City which purportedly indicates that DaSilva was paid for 24 hours on June 29th, despite also indicating that he clocked out at 6 PM, and that he was paid for 15 hours on June 30th. Plaintiff contends that this chart contradicts DaSilva’s testimony that he ended work at 6 PM on June 29th and did not work on June 30th, necessitating a review of the Mutual On/Mutual Off logbook to determine if he took on someone else’s shift following the completion of his own shift on June 29th.

In opposition, the City contends that the evidence indicates that the Plaintiff’s shift ended at 6:00 PM on June 29th and that he did not work on June 30th. According to the City, the payroll chart that Plaintiff points to indicates that he worked a 9-hour shift on June 29th from 9:00 AM to 6:00 PM and got paid 15 hours for “Mutual Off” on June 30th because he was being paid for a previously switched shift. In addition to the payroll chart, the City points to the shift records, DaSilva’s testimony, firefighter Velasquez’s testimony, Lieutenant O’Connell’s testimony, and the company journal which all indicate that DaSilva was off duty at 6:00 PM on June 29th.

In Reply, Plaintiff contends that DaSilva's previous perjury calls into question the veracity of the payroll records.

The main point of contention between DaSilva and Plaintiff is the relevance of DaSilva's medical records following the accident. Plaintiff contends that DaSilva's representation that he cannot recall where he was drinking and the fact that he disputes liability supports a finding that the medical records are relevant to this litigation. Plaintiff argues that the medical records may contain information pertinent to the same. The Plaintiff acknowledges that DaSilva may need to redact portions of the record that relate to diagnoses and treatment but Plaintiff insists that the records are relevant.

DISCUSSION

Pursuant to CPLR 3124 titled "Failure to disclose; motion to compel disclosure", the following is stated:

"If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response. "

CPLR § 3126 titled "Penalties for refusal to comply with order or to disclose" states the following:

"If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:

1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or
3. an order striking out pleadings or parts thereof, or staying

further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.”

This Court finds that the evidence submitted in support and opposition to this motion establishes that DaSilva worked from 18:00 on June 28th to 18:00 on June 29th, which explains why he would have been paid for 24 hours on June 29th as reflected by the payroll chart. The evidence submitted also supports a finding that DaSilva was paid for a Mutual Off on June 30th, despite not working. The evidence within the record is not inconsistent as to when DaSilva ended work on the 29th. The Mutual Off and original schedule records demanded by the Plaintiff are irrelevant.

Throughout his deposition, DaSilva claimed that he could not recall where he was drinking on the night of June 29th, and repeatedly represented that if the deposition was closer in proximity to the subject accident, he would be more apt to provide the missing information. In light of the same, the medical records are relevant to the extent that they were created in close temporal proximity to the subject accident and potentially contain information that speaks to where DaSilva was prior to the accident and issues of liability. While the medical record is only intended to be used to the extent that they speak to the above issues this Court will not direct redaction of the medical records as the diagnoses and treatment contained therein may speak to the veracity of DaSilva’s statements contained within that record. Therefore it is,

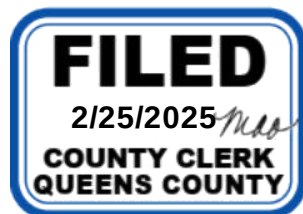
ORDERED, that the branches of the motion seeking to strike the answers and preclude the defendants are denied without prejudice; and it is further

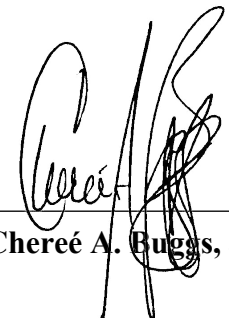
ORDERED, that the portion of the motion seeking to compel discovery is granted to the extent that DaSilva is directed to provide the authorizations for his no-fault benefits file, cell phone records for the dates specified, and credit card accounts for the dates specified by March 31, 2025; and it is further

ORDERED, that DaSilva is directed to provide an authorization for the hospital DaSilva treated at immediately following the accident within sixty (60) days of the date of this order.

The foregoing constitutes the decision and order of this Court.

Date: February 25, 2025




Hon. Chereé A. Buggs, JSC