

Berenbaum v City of New York

2026 NY Slip Op 30034(U)

January 7, 2026

Supreme Court, New York County

Docket Number: Index No. 153628/2024

Judge: Carol Sharpe

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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. CAROL SHARPE PART 52M

Justice

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INDEX NO. 153628/2024

DAVID BERENBAUM,

MOTION DATE 08/22/2025

Plaintiff,

MOTION SEQ. NO. 001

- v -

THE CITY OF NEW YORK, CITY OF NEW YORK
DEPARTMENT OF PARKS AND RECREATION, CENTRAL
PARK CONSERVANCY, NEW YORK CITY DEPARTMENT
OF TRANSPORTATION

DECISION + ORDER ON
MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12,
13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28

were read on this motion to/for STRIKE PLEADINGS.

Upon the foregoing documents, plaintiff's motion to strike the answers of defendants The City
of New York, City of New York Department of Parks and Recreation, Central Park Conservancy, and
New York City Department of Transportation (collectively "The City") is denied.

Plaintiff David Berenbaum commenced this personal injury action against the defendants by
filing a summons and complaint on April 17, 2024 (NYSCEF Doc. #1). Plaintiff alleges that on May
9, 2023, he sustained injuries when he hit a pothole and fell while riding his bicycle on the roadway
located under the West Drive overpass on 86th Street, in Central Park, in New York County. Issue
was joined by the filing of The City's answer on May 15, 2024 (NYSCEF Doc. #2).

Plaintiff seeks an Order striking The City's answer pursuant to CPLR §3126, on the grounds
that The City has willfully and contumaciously failed to provide court ordered discovery; precluding
The City from offering evidence and/or testimony at trial on liability; or in the alternative, compelling
The City to provide the outstanding discovery, pursuant to CPLR 3124, within 40 days under a
conditional order of preclusion; and to extend plaintiff's time to file a note of issue to February 27,

2026. The City filed written opposition. Plaintiff failed to appear for oral arguments on October 29, 2025, and again on November 12, 2025.

In support of the motion, plaintiff submitted, among other things, an Affirmation of Good Faith (NYSCEF Doc. #8) and discovery demands (NYSCEF Doc. #14), arguing that the extended delay will cause evidence to be lost, witness memories to be forgotten, unanticipated changed circumstances, and independent intervening acts to transpire such as death and illness which will unfairly prejudice plaintiff's litigation strategy.

The City opposes the motion on the ground that it responded to plaintiff's discovery demands (NYSCEF Doc. #19); that EBTs are scheduled according to the customary Case Scheduling Order ("CSO"), which will be agreed upon at the discovery conference to be held in the Differentiated Case Management Part ("DCM"); that plaintiff failed to comply with 22 NYCRR § 202.20-f; and the Affirmation of Good Faith does not comply with 22 NYCRR § 202.7(a) and (c).

CPLR §3126 provides in pertinent parts that where a party "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 issue an order deeming the issue resolved in the moving party's favor, precluding the disobedient party from producing evidence, or striking the pleading. "The law is settled that an action should, if at all possible, be resolved on the merits and that the drastic remedy of striking a party's pleading pursuant to CPLR 3126 for failure to comply with a discovery order or request is appropriate only where the moving party conclusively demonstrates that the nondisclosure was willful, contumacious or due to bad faith [internal citation omitted] (*Remuneration Planning & Servs. Corp. v Berg & Brown, Inc.*, 151 AD2d 268, 269, 542 NYS2d 182 [1st Dept 1989]; *Youwanes v Steinbrech*, 193 AD3d 492, 493, 146 NYS3d 253 [1st Dept 2021] ["Even if the proffered excuse is less than compelling, there is a strong preference in our law that matters be decided on their merits."]). Striking the answer can be denied where the party discloses the records it possesses and submits an

affidavit explaining its search for the missing records (*see Patterson v Beth Abraham Nursing Home*, 214 AD3d 437, 437, 183 NYS3d 306 [1st Dept 2023]).

While CPLR 3124 permits a party to file a motion to compel compliance or response where “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,” 22 NYCRR § 202.7(a) provides that “no motion shall be filed with the court unless there have been served and filed with the motion papers (1) a notice of motion, and (2) with respect to a motion relating to disclosure or to a bill of particulars, an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion.” 22 NYCRR § 202.7(c) further provides that “[t]he affirmation of the good faith effort to resolve the issues raised by the motion shall indicate the time, place and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held.” 22 NYCRR § 202.20-f (a) and (b) set forth the requirements before a motion can be brought, that is, to resolve disputes through informal procedures, and where the parties are unable to resolve the discovery dispute after consultation by an in-person or telephonic conference, the motion shall include, among other things, “an affidavit or affirmation from counsel attesting to counsel having conducted an in-person or telephonic conference, setting forth the date and time of such conference, persons participating, and the length of time of the conference.”

Here, this Court does not find that striking the answers is the appropriate remedy and The City established that it responded to plaintiff’s discovery demands. Furthermore, in his affirmation, plaintiff’s counsel failed to indicate the time, place, and nature of the attempt(s), and failed to appear for oral arguments on two occasions. Accordingly, it is

ORDERED, that plaintiff’s motion is denied in its entirety; it is further

ORDERED, that the movant is to contact SFC-CITY-DCM@nycourts.gov to follow up on the scheduling of a CSO conference in the DCM Part; it is


ORDERED, that the plaintiff, within twenty (20) days of the date of this Order and file proof of service within (10) days from effectuating said service, shall serve this Order with Notice of Entry on all parties and on the Clerk of the General Clerk’s Office; and it is further

ORDERED, that service of this Order upon the Clerk of the General Clerk’s Office shall be made in hard-copy format if this action is a hard-copy matter or, if it is an e-file case, shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-filing” page on the court’s website).

This constitutes the Decision and Order of the Court.

ENTER:

1/7/2026
DATE


HON. CAROL SHARPE, J.S.C.
HON. CAROL SHARPE
J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: