

**Smalls v New York City Tr. Auth.**

2026 NY Slip Op 31843(U)

April 28, 2026

Supreme Court, New York County

Docket Number: Index No. 155216/2021

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

DENNIS SMALLS,
Plaintiff,

- v -

NEW YORK CITY TRANSIT AUTHORITY,
METROPOLITAN TRANSPORTATION AUTHORITY and
JOHN DOE AND/OR JANE DOE,

Defendants.

-----X

INDEX NO. 155216/2021

MOTION DATE 09/17/2025

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 002) 43-55, 58-59, 64-67

were read on this motion to/for STRIKE PLEADINGS

Upon the foregoing documents, it is hereby ORDERED that plaintiff's motion for discovery sanctions, pursuant to CPLR 3126, or alternatively, to compel defendants "to conduct depositions and comply with further Court Ordered discovery by a date certain" (notice of motion [NYSCEF Doc. No. 43] at 1) is GRANTED TO THE EXTENT that the parties are directed to complete the parties' depositions on or before October 15, 2026, and to come to the upcoming status conference on this Thursday, April 30, 2026 at 11:30 a.m. with dates on which counsel and the relevant party witnesses will be available for deposition, and the motion is otherwise denied.

In this action, plaintiff alleges that, on May 3, 2020, he was standing on the 1 Train subway platform at Times Square, when he fell onto the train tracks and was subsequently struck by a train.

On this motion, plaintiff moves for various discovery sanctions as against defendants, including striking the answer, on the grounds that (1) defendants purportedly never responded to plaintiff's June 6, 2024 demand (affirmation in support of motion [NYSCEF Doc. No. 44] ¶ 9; see also exhibit D in support of motion [NYSCEF Doc. No. 50], 6/6/24 demand); and (2) "all depositions remain outstanding, due to Defendants' failure to comply with Court Ordered discovery directives" (affirmation in support of motion ¶ 11). Despite numerous stipulations to adjourn this motion, defendants have never submitted opposition papers.

DISCUSSION

"[I]t is well settled that the drastic remedy of striking a party's pleading pursuant to CPLR 3126 for failure to comply with a discovery order is

appropriate only where the moving party conclusively demonstrates that the non-disclosure was willful, contumacious or due to bad faith. Willful and contumacious behavior can be inferred by a failure to comply with court orders, in the absence of adequate excuses” (*Henderson-Jones v City of New York*, 87 AD3d 498, 504 [1st Dept 2011] [internal citation and quotation marks omitted]).

### I. The June 6, 2024 Demand

With regard to plaintiff’s assertion that defendants never responded to the June 6, 2024 demand, the court notes that, at the time this motion was e-filed, the then-most-recent so-ordered status conference stipulation of March 20, 2025, expressly stated that defendants were to “further respond to the demand dated 6/6/24, and if they have no documents then provide an affidavit explaining” (exhibit D in support of motion [NYSCEF Doc. No. 50], 3/20/25 SC Order). Thus, the fuller picture would appear to be that defendants had provided some type of response—not annexed as an exhibit hereto—to the June 6, 2026 demand, and, at the March 20, 205 conference, it was agreed and ordered that defendants would “further respond” to that demand.

Several months later, in the so-ordered status conference stipulation of July 31, 2025, defendants were further directed to comply with the March 20, 2025 status conference order which had previously directed defendants to “further respond to the demand dated 6/6/24” (7/31/25 SC Order [NYSCEF Doc. No. 61] at 2); and on August 26, 2025, defendants apparently e-filed such response (defendants’ responses to July 31, 2025 order, dated August 22, 2025 [NYSCEF Doc. No. 62]).

Thereafter, on December 17, 2025, plaintiff’s counsel e-filed a deficiency letter regarding defendants’ August 22, 2025 responses (NYSCEF Doc. No. 71). On the very next day, the parties appeared for a status conference wherein it was agreed, and so-ordered, in relevant part:

“Deft to provide responses to court-ordered discovery as set forth in order of 3/20/25 re event recorder by providing affidavit per Jackson v City of NY, 185 AD2d 768 (1st Dept 1992) w/in 30 days.

Affidavits to be provided as to the searches made, if deft claims the discovery does not exist” (SC Order of December 18, 2025 [NYSCEF Doc. No. 72]).

Thus, in the court’s view, the branch of this motion as to defendant providing responses to plaintiff’s June 6, 2024 demand has been rendered academic by the subsequent discovery orders, defendant’s further response, dated August 22, 2026, deficiency letter dated December 17, 2025, and the December 18, 2025 status conference order addressing plaintiff’s concerns in the previous day’s deficiency letter.

This determination is, of course, without prejudice to plaintiff seeking any appropriate relief in the event that defendants have not complied with the December 18, 2025 status conference order.

## II. The Party Depositions

In regard to the depositions going forward, plaintiff writes:

“To date, Defendants have failed to comply with the Court’s directives. They have repeatedly failed to respond to Plaintiff’s Notice of Discovery and Inspection dated June 6, 2024 despite multiple Court Orders spanning over the course of years directing them to do so. As a result, no depositions have been held and discovery remains in a complete standstill due to the willful and contumacious behavior of the Defendants” (affirmation in support of motion ¶ 14).

Plaintiff appears to argue that depositions could not proceed because defendants had not responded to plaintiff’s June 6, 2024 demand.

Plaintiff has not yet appeared for a deposition. Defendants cannot be compelled to proceed with their deposition before plaintiff, because defendants preserved the priority of depositions when they served a notice of deposition contemporaneously with their answer (see plaintiff’s Exhibit B [NYSCEF Doc. No. 48]; see *Anderson v Lubin*, --- AD3d—2026 NY Slip Op 02440 [1st Dept, Apr. 23, 2026]). Thus, the question presented is why defendants’ alleged failure to respond to plaintiff’s discovery demand dated June 6, 2024 should be considered the cause for the delay in depositions.

Plaintiff does not explain what specific discovery from defendants was needed in order for plaintiff to appear for his own deposition. Moreover, as discussed above, it does not appear completely accurate to say that defendants never responded to the June 6, 2024 demand.

Although defendants did not oppose plaintiff’s motion, plaintiff therefore has not met his burden of demonstrating that defendants’ failure to proceed with depositions was “willful, contumacious or in bad faith” (*Hicks v Unitrin Advantage Ins. Co.*, 246 AD3d 1489, 1491 [4th Dept 2026]). The branch of plaintiff’s motion for sanctions against defendants is therefore denied.

Given that the court is aware of no reason why the party depositions cannot proceed, the court directs that the parties’ depositions to be completed on or before October 15, 2026, and to come to the upcoming status conference on this **Thursday, April 30, 2026 at 11:30 a.m.** with dates on which counsel and the relevant party

witnesses will be available for deposition.

All other requested relief is denied.

ENTER:



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4/28/2026

DATE

RICHARD TSAI, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE