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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JAFFE BARBARA JAFFE J.S.C. PART 5

Justice

HILLARY ELLNER

-v-

City of NY CALH43

INDEX NO. 117294/08

MOTION DATE

MOTION SEQ. NO. 002

The following papers, numbered 1 to ____, were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits | No(s). 1, 2

Answering Affidavits — Exhibits | No(s). 3

Replying Affidavits | No(s). 4

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED
MAR 13 2012
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 3/12/12
MAR 12 2012

BJ
BARBARA JAFFE, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☒ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

----------x

HILLARY ELLNER,

Index No. 112294/08

Motion Date: 11/29/11
Motion Seq. No.: 002

Plaintiff,

-against-

DECISION AND ORDER

THE CITY OF NEW YORK,

Defendant.

----------x

BARBARA JAFFE, JSC:

For plaintiff:
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For defendant:
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By notice of motion dated August 16, 2011, plaintiff moves pursuant to CPLR 3126(3) for an order striking defendant City's answer for failure to obey court orders or, in the alternative, pursuant to CPLR 3126(1) for an order resolving certain issues in her favor. City opposes and, by notice of cross motion dated September 8, 2011, moves pursuant to CPLR 2221for an order granting it leave to renew its prior motion for summary judgment, which I denied by decision and order dated October 4, 2010.

I. PERTINENT BACKGROUND

As set forth in the October 2010 decision, on June 23, 2007, plaintiff was riding her bicycle on the Manhattan Greenway path/roadway adjacent to the west side of the Henry Hudson Parkway at approximately 200th Street when she was allegedly propelled off of the bicycle and

onto the path due to a defect on the path/roadway. (Affirmation of Andrew Lucas, ACC, dated Sept. 8, 2012 [Lucas Aff.], Exh. A).

On November 8, 2007, plaintiff testified at a 50-h hearing, as pertinent here, that on the day of her accident, she was riding her bicycle on the Greenway bicycle path along the Hudson River, that her accident occurred at the entrance of a bridge overpass near 200th Street which, to her knowledge, is part of the path, and that her bicycle wheel went into a hole in the path, causing her to fall over the handlebars and onto the ground. (*Id.*, Exh. B).

On or about September 24, 2007, plaintiff served her notice of claim on City, and on or about September 5, 2008, her summons and complaint. (*Id.*, Exhs. A, C). On or about January 16, 2009, City served its answer. (*Id.*, Exh. D).

In support of its prior motion, City submitted the transcript of an examination before trial (EBT) held on May 6, 2010 of Clinton Johnson, an employee of City's Department of Parks and Recreation (Parks), who testified that he did not believe that the bridge overpass on which plaintiff fell is within Parks's auspices, that it was his understanding that the area that Parks maintains is south of the expansion joint at the entrance of the bridge overpass, that he does not know who or what entity is responsible for maintaining the overpass, and that to his knowledge, Parks would not and does not inspect it. (*Id.*, Exh. F). Johnson's EBT transcript was neither signed nor notarized, although it was certified.

City also submitted the affidavit of Sherry Johnson-O'Neal, an employee of City's Department of Transportation (DOT), in which she states that she searched for "any documents regarding ownership, repair, maintenance and control" of the bridge overpass for two years prior to and including the date of plaintiff's accident, that her search included inspection reports,

contracts, insurance certificates, records of identified problems, and complaints, and that no relevant documentation was found. (*Id.*, Exh. I). Johnson-O'Neal also states that the overpass is owned by the Triborough Bridge and Tunnel Authority (TBTA), not City, and that DOT maintains no records for the overpass and performed no work on it during the search period. (*Id.*).

In denying City's motion, I held that:

> As Johnson's EBT transcript is neither signed nor notarized, it is inadmissible. (*See Rosa v City of New York*, Sup Ct, New York County, May 3, 2010, Jaffe, J., index No. 113359/2005). Even if considered, Johnson's opinion or statement that Parks does not own or maintain the bridge overpass is not probative absent any evidence as to the basis of his opinion or statement. For the same reason, Johnson-O'Neal's statement that TBTA owns the overpass is not probative.
>
> Moreover, that no records relating to the location were found among the records maintained by DOT does not prove, as a matter of law, that City does not own or maintain the overpass absent testimony or evidence that DOT would have exclusive custody of such records. (*See Faulk v City of New York,* 16 Misc 3d 1108[A], 2007 NY Slip Op 51346[U] [statements as to City's lack of activity is insufficient unless person asserting it shows "sufficient knowledge to say that the fact would have necessarily been reflected in the search."]).
>
> City has thus failed to prove, *prima facie*, that it did not own or maintain the bridge overpass on which plaintiff fell. Given this result, plaintiff's arguments need not be considered.

II. PLAINTIFF'S MOTION

A. Contentions

Plaintiff contends that despite two compliance conference orders directing City to produce a witness for an EBT with knowledge as to which entity is responsible for maintaining the bridge overpass, City has willfully and contumaciously failed to do so. (Affirmation of Jaime Lawrence, Esq., dated Aug. 16, 2011, Exhs. D, E).

City asserts that it unsuccessfully attempted to schedule the EBT with plaintiff's counsel on numerous occasions and that it was ready, willing and able to produce a witness. City also argues that the motion is moot as the witness it intended to produce, Leopold Bennett, has submitted an affidavit as to his knowledge of the bridge overpass. (Lucas Aff., Exhs. 4, 6).

In reply, plaintiff denies that City's counsel attempted to schedule the EBT. (Reply Affirmation, dated Oct. 26, 2011).

B. Analysis

Absent any evidence that City willfully and contumaciously failed to abide by the two discovery orders, plaintiff's motion to strike is granted only to the extent of directing City to produce a witness with knowledge of the maintenance of the bridge overpass for an EBT.

III. CITY'S MOTION

A. Contentions

City submits four new affidavits concerning its lack of ownership, maintenance or repair of the bridge overpass, and asserts that it did not previously submit them as it believed that they were unnecessary given its submission of Johnson's EBT transcript and DOT search results. (Lucas Aff., Exhs. 3, 4, 5; Affirmation of Andrew Lucas, ACC, dated Sept. 30, 2011, Exh. 1).

Plaintiff argues that City has not justified sufficiently its failure to offer the affidavits on its prior motion and observes that the facts set forth therein are not new but were already in City's possession and that City chose not to present them earlier. (Affirmation of Jaime Lawrence, Esq., dated Oct. 20, 2011).

B. Analysis

A motion for leave to renew "shall be based upon new facts not offered on the prior

motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination, and shall contain reasonable justification for the failure to present such facts on the prior motion." (CPLR 2221[e][2], [3]). The determination as to whether the failure to present facts on a prior motion was sufficiently justified is discretionary. (*Mejia v Nanni*, 307 AD2d 870 [1st Dept 2003]).

"Renewal is granted sparingly . . .; it is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation . . ." (*Henry v Peguero*, 72 AD3d 600 [1st Dept 2010], *lv denied* 15 NY3d 820). In *Henry*, the defendant moved for summary judgment, and the plaintiff opposed the motion by submitting a physician's affidavit. The trial court granted the motion, finding that the affidavit was insufficient, but upon renewal, it denied the motion based on the plaintiff's submission of an addendum to the affidavit, which addressed the insufficiency found by the court. The First Department held that the court should not have granted renewal based on the addendum, as the information set forth therein was not based on any new facts but rather information already known to the physician which could have been included in the original affidavit, and as the plaintiff failed to offer an excuse for not having done so earlier. (*Id.* at 602-603).

Absent any dispute that City could have obtained the new affidavits earlier, but failed to do so as part of a strategic decision as to what evidence to submit on the prior motion, it has not demonstrated either that the affidavits contain new facts which could not have been offered on its previous motion or a reasonable excuse for not having submitted them earlier. (*See 225 Fifth Ave. Retail LLC v 225 5th, LLC*, 937 NYS2d 852, 2012 NY Slip Op 00899 [1st Dept 2012] [motion to renew properly denied as new fact offered could have been obtained before original

motion was made]; *Whalen v New York City Dept. of Envtl. Protection*, 89 AD3d 416 [1st Dept 2011] ["City failed to show that it exercised due diligence in investigating the facts relevant to its liability or that it had a reasonable excuse for failing to present these facts, which it discovered in publicly available documents concerning its own property, on the prior motion"]; *Cillo v Schioppo*, 250 AD2d 416 [1st Dept 1998] [where plaintiff on original motion submitted unsworn letter from physician, motion to renew properly denied where plaintiff submitted updated, sworn affidavit from same physician containing new conclusion absent reasonable excuse why conclusion was not submitted on original motion]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion to strike is granted only to the extent of directing City to produce a witness with knowledge of the maintenance of the bridge overpass for an EBT within 45 days of service on it of a copy of this order; and it is further

ORDERED, that defendant City of New York's cross motion for leave to renew is denied.

FILED
MAR 13 2012
COUNTY CLERK'S OFFICE
NEW YORK

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: March 12, 2012
New York, New York

MAR 12 2012