Gonzalez v New York City Transit
2012 NY Slip Op 31002(U)
April 17, 2012
Sup Ct, New York County
Docket Number: 105199/10
Judge: Michael D. Stallman
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SCANNED ON 4/17/2012

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN PART 21
Justice

Index Number : 105199/2010
GONZALEZ, DEMETRIO
vs.
NEW YORK CITY TRANSIT
SEQUENCE NUMBER : 002
STRIKE ANSWER

INDEX NO. 105199/10
MOTION DATE 1/19/12
MOTION SEQ. NO. 002

FILED
APR 17 2012
NEW YORK
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 4 were read on this motion to strike answer

Amended Notice of Motion— Affirmation — Exhibits A-H | No(s). 1-2

Answering Affirmation — Exhibits A-B | No(s). 3

Replying Affirmation — Exhibits | No(s). 4

Upon the foregoing papers, it is ordered that plaintiff's motion to strike the answer of defendant New York City Transit Authority is denied; and it is further

ORDERED that, by May 31, 2012, defendant New York City Transit Authority shall provide copies of cleaning records for the Dyckman station from December 1, 2009 to March 1, 2010, and from December 1, 2008 to March 1, 2009.

In this action, plaintiff alleges that, on February 8, 2010, he slipped and fell due to a defective condition on a stairway leading to the A train at the subway station at Dyckman Street and Broadway in Manhattan. According to the verified bill of particulars, the stairway is designated as O2A. (Fader Affirm., Ex A [Bill of Particulars] ¶ 4.) The bill of particulars also alleges that defendant New York City Transit Authority (NYCTA) "failed to remove debris, including salt, sand and/or ice removal agents from the stairs despite the lack of snow and/or ice, in a reasonable period of time." (*Id.* ¶ 6.)

Plaintiff served a notice for discovery and inspection dated May 21, 2010 upon NYCTA, which demanded, among other things:

> **"2. Exact duplicate copies of all records, documents, logs and/or writings concerning the placement of any snow and/or ice removal substances or products on the stairs of the subject subway station for two (2) weeks prior to and including February 8, 2010.**

(Continued . . .)

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

> 3. Exact duplicate copies of all records, documents, logs and/or writings concerning cleaning and cleaning schedules; particularly with regard to the stairways within the subject subway station, for six months prior to the accident date inclusive of the accident date."

(Fader Affirm., Ex C.) By letter dated February 16, 2011, NYCTA responded,

> "2. Snow Removal Records: None, as subject stairway is not owned or maintained by the New York City Transit Authority. Please also note that defendant does not maintain snow removal records for underground stations.
> 3. Cleaning Schedules: None, as subject stairway is not owned or maintained by the New York City Transit Authority."

(Fader Affirm., Ex D.) By so-ordered stipulations dated June 30, 2011 and October 27, 2011, NYCTA agreed to serve a "supplemental response to plaintiff's notice for discovery and inspection dated May 21, 2010." (Fader Affirm., Exs F, G.)

Plaintiff now moves to strike NYCTA's answer on the ground that NYCTA failed to comply with two prior so-ordered stipulations directing service of a supplemental response to plaintiff's notice for discovery and inspection. According to plaintiff, an investigation revealed that defendant 4761 Broadway Associates LLC is the successor-in-interest to the owner of stairway O2A, not NYCTA. However, plaintiff claims that the investigation also revealed that NYCTA performed maintenance and/or repair of stairway O2A.

NYCTA opposes plaintiff's motion, and submits a copy of the cleaning schedule of the Dyckman Street subway station for the date of the accident, to show that NYCTA "has nothing to hide; the schedules do not include staircases which the AUTHORITY does not own." (Shufer Opp. Affirm. ¶ 6.) NYCTA also submits copies of "time control logs (daily personnel sign-in sheets)" for two weeks prior to and including the date of the accident (Shufer Opp. Affirm, Ex B.) NYCTA asserts that the search for these logs was delayed due to personnel changes.

> "The drastic remedy of striking an answer is inappropriate, absent a clear

(Continued . . .)

showing that defendant's failure to comply with discovery demands was willful or contumacious." (*Daimlerchrysler Ins. Co. v Seck*, 82 AD3d 581, 582 [1st Dept 2011].) A pattern of noncompliance with court orders and discovery demands and failure to offer a reasonable excuse for the noncompliance may give rise to an inference of wilful and contumacious conduct. (*See e.g. Henderson v Manhattan and Bronx Surface Tr. Operating Auth.*, 74 AD3d 654 [1st Dept 2010]; *Fish & Richardson, P.C. v Schindler*, 75 AD3d 219 [1st Dept 2010]; *Bryant v New York City Hous. Auth.*, 69 AD3d 488 [1st Dept 2010]; *Figiel v Met Food*, 48 AD3d 330 [1st Dept 2008].) However, "[b]elated but substantial compliance with a discovery order undermines the position that the delay was a product of willful or contumacious conduct." (*Cambry v Lincoln Gardens*, 50 AD3d 1081, 1082 [2d Dept 2008]; *see also Gradaille v City of New York*, 52 AD3d 279, 284 [1st Dept 2008].)

Here, NYCTA agreed to supplement its response in two prior so-ordered stipulations, but it is not clear that NYCTA agreed that its supplemental response would include either snow removal records or cleaning records for stairway O2A. NYCTA's prior letter dated February 16, 2011 stated that it did not keep snow removal records for underground stations.

As plaintiff points out, NYCTA did not serve any supplemental response within the deadlines of prior so-ordered stipulations. However, NYCTA belatedly provided additional discovery on this motion, which therefore undermines the inference of willfulness. (*Cambry*, 50 AD3d 1081, *supra*.) Given the wording of the stipulations, and the records that NYCTA produced, striking NYCTA's answer is not warranted.

As plaintiff points out, accidents allegedly involving stairway O2A at the Dyckman subway station were the subject of prior litigation against NYCTA, *Sanchez v New York City Tr. Auth.*, Index No. 107304/2006 and *Windley v City of New York*, Index No. 100182/2005. In *Windley*, 4761 Broadway Associates LLC contended that it never maintained, operated, controlled or repaired the subject staircase, and that maintenance and repair records

(Continued . . .)

obtained during discovery in *Sanchez* purportedly indicated that NYCTA performed maintenance and repair on stairway O2A.[1] Those records that were provided were apparently produced in response to a demand for maintenance and repair records for the Dyckman station.

That NYCTA might have performed maintenance and repair of stairway O2A notwithstanding that it did not own it raises the possibility that it also cleaned and performed snow and ice removal of that stairway. However, to the extent that plaintiff contends that the existence of records of maintenance and repair of stairway O2A proves that NYCTA willfully failed to disclose cleaning records, this argument is unpersuasive. Structural maintenance and repair is not synonymous with cleaning and snow and ice removal.

It is not clear from NYCTA's response whether it looked for cleaning records for stairway O2A and found none, or whether NYCTA had not looked for cleaning records for stairway O2A because it believed none would exist. As plaintiff points out, it is possible that, even if NYCTA does not own stairway O2A, it might nevertheless have a legal duty to keep it reasonably safe, or NYCTA might have voluntarily assumed a duty to clean, maintain, or repair stairway O2A.

NYCTA cleaning records for the Dyckman station exist. Because the cleaning records might contain an entry for stairway O2A, disclosure of the cleaning records might lead to admissible evidence as to whether NYCTA cleaned or performed snow and ice removal of stairway O2A. Because plaintiff is asserting that he slipped and fell due to materials placed on the stairway intended to remove snow and ice, the cleaning records of the Dyckman station for the winter months are the appropriate starting point for production of these records.

(Continued . . .)

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[1] In *Windley*, 4761 Broadway Associates LLC's motion for summary judgment dismissing the complaint and cross claims as against it was granted on default by decision and order dated May 20, 2011. However, NYCTA's motion to vacate that prior decision and order has been granted. (*Windley v City of New York*, Index No. 100182/2005, Sup Ct, NY County, April 10, 2012, Stallman, J.)

Therefore, on or before the next compliance conference on May 31, 2012, NYCTA shall provide copies of cleaning records for the Dyckman station from December 1, 2009 to March 1, 2010, and from December 1, 2008 to March 1, 2009. NYCTA is being directed to produce post-accident cleaning records because there is a question as to NYCTA's maintenance or control of stairway O2A.

Copies to counsel.

Dated: 4/10/12
New York, New York

_____, J.S.C.
HON. MICHAEL D. STALLMAN

1. Check one: ..... ☐ CASE DISPOSED ■ NON-FINAL DISPOSITION
2. Check if appropriate:..... MOTION IS: ■ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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