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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN PART 21
Justice

PATRICIA TELFORD,

Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., NICO ASPHALT PAVING, INC. and TROCOM CONSTRUCTION CORP.,

Defendants.

INDEX NO. 113994/08
MOTION DATE 3/29/12
MOTION SEQ. NO. 001

The following papers, numbered 1 to 6 were read on this motion to strike

Notice of Motion— Affirmation — Exhibits A-K	No(s). 1; 2
Affirmation In Opposition; Affirmation In Opposition — Exhibits A-C	No(s). 3; 4
Replying Affirmation — Exhibits	No(s). 5; 6

Upon the foregoing papers, it is ordered that plaintiff's motion to strike the answers of defendants City of New York and New York City Transit Authority, or in the alternative, for an order to compel, is partially granted as follows:

1) Within 90 days, the City must produce Walter Bruno for a deposition, if currently employed by the City. If Walter Bruno is no longer employed by the City, then the City must produce an inspector from the HIQA unit of the Department of Transportation. The purpose of the deposition is to ascertain the existence of any documents that an inspector would be required to complete in connection with an inspection, including the inspections indicated on the CASH printouts marked as Exhibit #4; to determine whether any of those documents would contain information that would not be reflected on the CASH printouts; to determine whether those documents would be kept in the ordinary course of business after the inspection, and the procedures for maintaining these documents (i.e., the location whether they are likely to be kept or a document retention policy).

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

(Continued . . .)

2) Within 90 days, the New York City Transit Authority shall produce the documents demanded in items 1, 6, 9, and 10 and items 4 and 5 (as limited by NYCTA) of plaintiff's supplemental notice for supplemental discovery and inspection dated December 23, 2010;

3) Upon 10 business days' notice, the New York City Transit Authority shall make available for inspection and copying the originals of the documents annexed as Exhibit J to the moving papers;

and the motion is otherwise denied.

In this action, plaintiff alleges that, on July 30, 2007, at approximately 7:20 a.m., she was a passenger on the M66 bus, which had stopped past its designated bus stop, in the middle of East 67th Street in Manhattan. After exiting the bus, plaintiff allegedly tripped and fell while crossing East 67th Street (near the northwest corner of East 67th Street and Lexington Avenue) due to a roadway defect.

According to NYCTA, the accident was unreported, and that plaintiff did not get the bus number. Plaintiff claims that she regularly took the M66 bus, and that the M66 bus driver on the date of her accident was not the usual bus driver.

Plaintiff moves for an order striking the answers of defendants City of New York and NYCTA, due to their alleged failure to provide discovery demanded in two supplemental notices for discovery and inspection dated October 2, 2009 and June 2, 2010 served upon the City, and a supplemental notice for discovery and inspection dated December 23, 2010 served upon NYCTA. Alternatively, plaintiff seeks an order compelling defendants to provide responsive documents.

Generally speaking, the first supplemental notice for discovery and inspection served upon the City sought documents pertaining to the repair, maintenance, inspection, and construction of the roadway where plaintiff allegedly fell, for the two year period subsequent to the accident. (Schachner Affirm., Ex D.) In its response, the City objected generally to all the demands

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as not material and necessary, and objected specifically to each demand as overly broad and unduly burdensome. (*Id.*, Ex E.) Plaintiff argues that the post-accident repair records are discoverable for the purpose of establishing that a particular condition was dangerous, citing *Lestingi v City of New York* (209 AD2d 384 [2d Dept 1994].)

The City's objections to plaintiff's first supplemental notice for discovery and inspection are sustained. Under limited circumstances, evidence of post-accident repair is discoverable to show that a particular condition was dangerous. (*See e.g. Albino v New York City Hous. Auth.*, 52 AD3d 321 [1st Dept 2008][repairs of hot water system]; *Longo v Armor Elevator, Co., Inc.*, 278 AD2d 127 [1st Dept 2000][elevator repair]; *Lestingi v City of New York*, 209 AD2d 384 [2d Dept 1994] [traffic signal repairs]; , *Kaplan v Elny*, 209 AD2d 248 [1st Dept 1994] [elevator repair].) However, those cases are distinguishable because in those cases the origin of the allegedly dangerous condition might be in the nature of a mechanical defect, which might only come to light after the device, machine, or apparatus is repaired post-accident. In addition, some of the categories of discovery sought, such as inspection reports and inspection records, could not be construed as being limited only to repair records.

The second supplemental notice for discovery and inspection served upon the City sought

> "all records regarding Highway Inspection and Quality Assurance inspection records carried out by the HIQA unit of the Department of Transportation, regarding the roadway at the place of occurrence at/near East 67th Street and Lexington Avenue and as noted in Exhibit #4 marked at the deposition of Abraham Lopez on April 21, 2010 for two (2) years prior to the date of the accident to wit, July 30, 2005 to July 29, 2007."

(Schachner Affirm., Ex F.) Exhibit #4 appears to be a series of printouts from the "CASH Central Access System of HIQA," which contain various data fields, such as "Permit Number," "Work Start Date" "Work End Date", "Inspection Date" "Inspection Type", and "Inspection Result." (*see Id.*)

To the extent that the City argues that plaintiff's demand did not identify the HIQA records with reasonable particularity because the request called

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for "all records," this argument is unpersuasive. (*Mendelowitz v Xerox Corp.*, 169 AD2d 300, 305 [1st Dept 1991].) Plaintiff referred to the deposition of Abraham Lopez and purportedly annexed the CASH printouts marked as Exhibit # 4. Indeed, the City itself claims that the HIQA records called for at Lopez's deposition were inspection records associated with a HIQA inspection where Walter Bruno, an inspector, issued a Corrective Action Request (CAR) for permit number M012007155113. The CASH printout for that permit number apparently indicates a "Work Start Date: 6/9/2007," and "Work End Date: 9/9/07" with "Remarks" "temp trench overdue for final." (Schachner Affirm., Ex F.)

The City's contention that all HIQA inspection records were previously provided in the City's preliminary conference response appears to be a misunderstanding of the demand. Plaintiff's counsel was already provided with the CASH printouts. It appears that, at Lopez's deposition, plaintiff's counsel believed that the information on the CASH printouts was taken from another document that Bruno himself filled out, which plaintiff's counsel referred to as the "actual inspection report." (*See id.*) From the excerpt of Lopez's deposition, Lopez did not testify that Bruno's had made any written inspection report, or that HIQA would have maintained such a document. Lopez testified, "I don't know what their procedures are." (*Id.*)

Under these circumstances, the Court agrees with the City that Bruno should appear for a deposition before it is compelled to comply with plaintiff's document demand.

> "Lacking knowledge of the existence of specific documents, etc., proper procedure requires that the party seeking discovery and inspection pursuant to CPLR 3120 initially make use of the deposition and related procedures provided by the CPLR to ascertain the existence of such documents in order that they may be designated with specificity in a CPLR 3120 notice."

(*Fascaldi v Fascaldi* 209 A.D.2d 578, 579 [2d Dept 1994].) Bruno should appear for a deposition to answer questions about, among other things, what forms or documents he would fill out when an inspector performs the inspections indicated on the CASH printouts, whether any of those documents would contain information that would not be reflected on the CASH printouts, and whether those documents are kept after the inspection.

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Therefore, plaintiff has not demonstrated that the City's failure to produce the HIQA records demanded was wilful or contumacious, so as to warrant the drastic remedy of striking the City's answer.

Turning to NYCTA, plainitff served a supplemental notice for discovery and inspection dated December 23, 2010, which requested 13 categories of documents. (Schachner Affirm., Ex H.) For four of those categories (items, 1, 6, 9, and 10), NYCTA stated that it would conduct a search; for two others (items 4 and 5), NYCTA narrowed the discovery request to a shorter time frame and stated that it would also search for those documents. NYCTA objected to all the other document demands.

NYCTA properly narrowed the time period in items 4 and 5 to the time period of 7:15 a.m. to 7:45 a.m on July 30, 2007 (5 minutes before and 25 minutes after the time of plaintiff's alleged accident). Items 4 and 5 sought records regarding "time point checking," i.e., notations about whether a particular bus had not reached a checkpoint by a certain time. (*See* Schachner Affirm., Ex H [Rossiter EBT], at 25.) Plaintiff testified at her statutory hearing that the bus that dropped her off at East 67th Street and Lexington Avenue remained for "what seemed like five minutes." (Mulvenna Opp. Affirm., Ex B, at 26.) To the extent that plaintiff believes that the M66 bus she was on would have missed a time checkpoint, the records for the period of 7:15 a.m. to 7:45 a.m. might lead to admissible evidence of the bus number of the M66 bus in which plaintiff was a passenger. Given plaintiff's own statutory hearing testimony, the time point checking records that plaintiff requested–from 7:00 a.m. - 9:00 a.m– was overly broad.

NYCTA admits that it did not produce the documents that it agreed to produce, but claims that it attempted to provide the outstanding discovery. (Mulvenna Opp. Affirm. ¶ 10.) Therefore, NYCTA is directed to provide the discovery demanded in items 1, 6, 9, and 10, and items 4 and 5 (as limited), within 90 days. Striking NYCTA's answer is not warranted because plaintiff has not demonstrated that NYCTA had a pattern of non-compliance with prior court orders.

NYCTA apparently provided plaintiff with the names of five bus operators on the M66 route, whose westbound buses were in the vicinity of York Avenue & East 67th Street on the date of plaintiff's alleged accident, between 7:00 a.m.

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and 7:30 a.m. (*See* Mulvenna Opp. Affirm., Ex C.) Plaintiff also received physical descriptions of three of the bus operators. (*Id.*)

The Court agrees with NYCTA that the discovery demands for records for the week of July 23, 2010 to July 27, 2010 (items 2, 11, 12, and 13) are irrelevant. Plaintiff argues that the records from the week before plaintiff's alleged accident would be used as a comparison with the names of the drivers on the date of plaintiff's accident. However, the Court disagrees that the discovery sought would be reasonably calculated to lead to admissible evidence as to the identity of the bus operator on the date and time of plaintiff's accident. Assuming that the driver of the M66 bus that plaintiff boarded was not the bus operator plaintiff saw on previous occasions when she boarded the bus, it does not follow that this bus operator would not have been assigned to the M66 bus route in the week before plaintiff's accident.

Item 3, which demanded any/all complaints regarding the bus stop located at East 67th Street and Lexington Avenue for a two month period prior to the date of plaintiff's accident, was palpably improper on its face. As NYCTA indicated, "[t]he duty to keep public sidewalks and roadways, including those adjacent to bus stops, in a reasonably safe condition and to repair any defects falls upon the municipality." (*Cioe v Petrocelli Elec. Co., Inc.*, 33 AD3d 377, 378 [1st Dept 2006][emphasis supplied]; *accord Cabrera v City of New York*, 45 AD3d 455 [1st Dept 2007].) Although it is possible that bus passengers might complain to NYCTA about roadway conditions around the bus stop, it would be unduly burdensome for NYCTA to conduct a search for complaints about conditions for which it had no duty to repair.

NYCTA's objection to item 7 as overly broad and unduly burdensome is sustained. Item 7 sought duplicate copies and/or transcripts of all audio records made from the M66 bus to the command center for the time span of 7:00 a.m. to 7:30 a.m. on July 30, 2007. However, plaintiff does not dispute that her accident was not reported to the bus driver. Plaintiff does not explain in her motion papers why the audio recordings of such communications from all the M66 bus operators during this time frame would be reasonably calculated to lead to any admissible evidence as to the identity of the bus operator, or bear on the issue of the whether the bus operator provided plaintiff with a safe place from which to alight from the bus.

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In response to item 8, which sought legible copies of certain documents which contain handwriting (*see* Schachner Affirm., Ex J.), NYCTA responded that these were only copies in its possession. To the extent that NYCTA is stating that it cannot reproduce more legible copies from the original documents, then NYCTA must make the original documents available for inspection and copying upon 10 business days' notice.

Copies to counsel.

Dated: 6/19/12
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