SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

MARILYN FRIEDMAN,

Plaintiff,

- against -

MTA LONG ISLAND RAILROAD and METROPOLITAN TRANSPORTATION AUTHORITY,

Defendants.

Index No.: 3512/2009

Motion Date: O6/28/12

Motion No.: 48

Motion Seq.: 3

- x

The following papers numbered 1 to 8 were read on this motion by defendants, MTA LONG ISLAND RAILROAD and METROPOLITAN TRANSPORTATION AUTHORITY, for an order pursuant to CPLR 2304 and 3103 quashing three judicial subpoenas duces tecum dated November 7, 2011:

	Papers Numbered
Notice of Motion-Affirmation-Exhibits	1 - 6
Affirmation in Opposition	7 - 8

This is an action for damages for personal injuries sustained by the plaintiff on October 17, 2008, at the Long Island Railroad train station in Inwood, New York, when she allegedly slipped into a gap between the train and the platform while attempting to exit the train.

The action was commenced by the filing of a summons and verified complaint on February 13, 2009. Issue was joined by service of defendant's verified answer on March 10, 2009. On July 28, 2009, the plaintiff served a bill of particulars alleging that as a result of the accident she sustained a fractured right leg which required an open reduction and internal fixation surgery with extensive hardware.

The plaintiff filed a note of issue on October 29, 2010, certifying that discovery was complete. The matter was marked off the trial calendar and the note of issue vacated on December 5, 2011. By order dated April 13, 2012, this Court granted the plaintiff's motion to restore the matter to the trial calendar and directed plaintiff to file a new note of issue. The new note of issue was filed on May 4, 2012 and the matter restored to the trial calendar. The matter next appears for trial in the Trial Scheduling Part on October 15, 2012.

On November 7, 2011, Justice Weinstein signed three subpoenas directing the MTA Long Island Railroad to produce certain documents including, inter alia, pre-incident and post-incident records relating to all surveys of the gap between the platform and the passenger railcars at Inwood Station; pre-incident and post-incident records relating to rail passenger car #7318 including design, installation, maintenance, modification, alteration, service and repair records; pre-incident and post-incident records relating to rail passenger car #7318 including all records indicating whether said car currently has a door threshold extension plate attached, when was the extension plate installed and/or additional plans to install a threshold plate in the future; records, documents and information relative to all improvements that are planned to further reduce the vertical and horizontal gap problems at all LIRR stations generally, and at the Inwood Station in particular.

Defendant's counsel, N. Jeffrey Brown, Esq., states in his affirmation in support of the motion to quash, that the subpoenas were first served on June 8, 2012. He states that the material requested could have been previously obtained during discovery. Counsel claims that by service of the subpoenas plaintiff is attempting to obtain pre-trial discovery subsequent to the filing of a note of issue and subsequent to certification that discovery was complete. Counsel states that a subpoena duces tecum cannot be used at trial as a substitute for pre-trial discovery (citing Soho Generation v Tri-City Ins. Brokers, 236 AD2d 276 [1st Dept. 1997]). Further, citing Pena v. New York City Tr. Auth., 48 AD3d 309 [1st Dept. 2998) counsel asserts that post-note of issue discovery is improper without a showing of unusual or unanticipated circumstances.

Moreover, counsel contends that many of the documents requested which were created after the incident in question, and as such, are not material or relevant to the facts in issue at trial. Counsel claims that the post-incident records are irrelevant to the conditions at the time of the alleged incident.

In addition, counsel contends that the subpoenas were served directly on the MTA and not on counsel and that counsel did not learn of the subpoenas until June 8, 2012 pursuant to a letter from plaintiff's counsel.

In opposition, plaintiff contends that the subpoenas were signed and served in November 2011, and that the defendants waited over eight months to move to quash. Counsel states that the information is material as it was learned during discovery that the LIRR began a plan in 2008 to institute a gap mitigation program including affixing running boards along the platform edges and installing threshold plate extenders on the train cars to reduce the gap. Counsel states that the subpoenas were narrowly drawn to address the gap issues, gap mitigation studies and gap reduction measurements. Counsel claims that said information is material and necessary to the trial of this action to prove notice and to prove that a dangerous condition existed at the time of the plaintiff's accident.

Upon review and consideration of the defendant's motion and plaintiff's affirmation in opposition thereto, this Court finds that the subpoenas were issued and served in November 2011 prior to the filing of the second note of issue in May 2012. Therefore, the subpoenas were timely as they were served prior to the matter being restored to the trial calendar. In any event, the defendants waited eight months until the eve of trial to move to quash. Lastly, as this matter has been adjourned for trial until October 2012, there is still sufficient time, prior to commencement of trial, for the defendants to supply the plaintiff with those materials requested in the subpoenas which this court finds to be material and necessary to the prosecution of this case.

Therefore after reviewing the defendants' motion to quash, the plaintiff's affirmation in opposition and the subpoenas involved in this matter, this Court finds as follows:

The defendant's motion to quash the three subpoenas signed by Justice Weinstein on November 7, 2012 is granted in part and denied in part. The defendants are directed to supply the plaintiff's with certified copies of the following documents to the extent they are in the defendants' possession and to the extent that they have not previously been provided to the plaintiff. Said documents shall be provided within 30 days of the date of this order:

All survey reports reflecting the size of the gap at the subject station platform, architectural drawings, as-built drawings, designs and sketches for the construction, excavation and demolition project at the east-bound platform of the Inwood Station of the Long Island Railroad for the period of two years prior to the date of the incident.

Copies of the Project Plan Book for two years prior to the date of the incident; Gap mitigation plan and all quarterly reports prepared by the LIRR special sub committee and hazard analysis consultant regarding gap incidents for two years prior to the date of the incident.

Copies of all pre-incident records relating to all LIRR surveys of the horizontal and vertical gap between the platform and the passenger railcars at Inwood Station, southwest bound platform (accident platform) for a period of two years prior to the incident only.

Copies of all pre-incident records relating to rail passenger car #7318 including design, installation, maintenance, modification, alteration, service and repair records for the period of two years prior to the incident.

Copies of all records documents and information detailing when the LIRR first identified a platform-railcar horizontal and vertical gap problem at the Inwood Station.

Copies of all video surveillance footage of the incident and/or plaintiff at the incident scene.

Copies of all records, documents, and incident reports in connection with all other platform to railcar horizontal and vertical gap incidents at Inwood Station for the period of two years prior to the incident.

Copies of all photographs of the subject platform and gap.

Copies of all records, documents and information detailing the LIRR gap standard generally and its gap standard for Inwood Station in particular for the period of two years prior to the incident.

Copies of all records detailing whether rail passenger car #7318 had a load leveling system to align the door threshold with the platform level installed on the date of the incident.

Copies of all records detailing whether the car's load leveling system was operational on the date of the incident.

Copies of all studies conducted, commissioned or received by the LIRR relative to dangers of horizontal and vertical gaps between train and platform for the period of two years prior to the incident.

This court finds that post-incident discovery is not required for plaintiff to establish her claims (see Goode v. City of New York, 15 AD3d 440 [2d Dept. 2005]; Sosa v City of New York, 281 AD2d 469[2d Dept. 2001]; Angerome v City of New York, 237 AD2d 551 [2d Dept. 1997]).

So ordered.

Dated: July 16, 2012
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.