

Smith v Metropolitan Transp. Auth.

2012 NY Slip Op 32324(U)

September 6, 2012

Supreme Court, New York County

Docket Number: 101887/11

Judge: Michael D. Stallman

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SCANNED ON 9/10/2012
[* 1]

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 21

Index Number : 101887/2011
SMITH, DENISE
vs.
METROPOLITAN TRANSPORTATION
SEQUENCE NUMBER : 002
STRIKE ANSWER

INDEX NO. 101887/11
MOTION DATE 6/28/12
MOTION SEQ. NO. 002

The following papers, numbered 1 to 11 were read on this motion for sanctions and leave to amend

Notice of Motion— Affirmation — Exhibits A-O—Affirmation of Service No(s). 1-3
Affirmation in Opposition — Exhibits A-C—Affirmation of Service; No(s). 4-5; 6-7
Affirmation in Opposition — Exhibits A-D—Affirmation of Service; _____
Reply Affirmation — Affirmation of Service; Reply Affirmation — Affirmation of No(s). 8-9; 10-11
Service _____

Upon the foregoing papers, it is ordered that the branch of plaintiff's motion for leave to amend the complaint is granted without opposition; and it is further

ORDERED that the third amended complaint in the form annexed as Exhibit M to the moving papers shall be deemed served upon the current parties upon service of a copy of this order with notice of entry;

ORDERED that the supplemental summons and third amended verified complaint shall be served in accordance with CPLR 311 or Business Corporation Law §§ 306 or 307 (whichever may be applicable) on Vincent Rusciano Construction Co., Inc., KDJ Builders, Inc., and MRC II Contracting, Inc., along with a copy of this order, within 10 days of service of a copy of this order with notice of entry and is further

ORDERED that the caption is hereby amended as follows:

SEP 10 2012
NEW YORK
COUNTY CLERK'S OFFICE

(Continued. . . .)

DENISE SMITH,

Plaintiff,

- v -

METROPOLITAN TRANSPORTATION
 AUTHORITY, NEW YORK CITY TRANSIT
 AUTHORITY, 288 ST. NICK, LLC, ABECO
 MANAGEMENT L.L.C., J DIAMOND LEATHER
 CORP., KDJ BUILDERS, INC., VINCENT
 RUSCIANO CONSTRUCTION CO., INC., and
 MRC II CONTRACTING, INC.,

FILED
 SEP 10 2012
 NEW YORK
 COUNTY CLERK'S OFFICE
 Defendants.

Plaintiff must serve a copy of this order on the Trial Support Office (60 Centre Street, Room 119) and the County Clerk, who are directed to mark their records to reflect this amendment; and it is further

ORDERED that the branch of plaintiff's motion for discovery sanctions against defendants is granted only to the extent that, within 60 days, Abe Betesh shall appear for a further deposition, and the remainder of the motion is otherwise denied.

In this action, the complaint alleges that, on September 13, 2010, plaintiff tripped and fell on a cracked, uneven section of sidewalk that was in severe disrepair and at a different elevation from the surrounding area. Plaintiff was allegedly walking on the sidewalk just south of 125th Street in Manhattan at the southeast corner of the intersection, adjacent to premises located at 288 St. Nicholas Avenue and to the subway entrance to the 125th Street subway station for the A, B, C, and D lines.

In a request for production of documents dated May 18, 2011, plaintiff further defined the accident location as

"the east side of St. Nicholas Avenue between 124th and 125th Streets in Manhattan, adjacent to a subway entrance and a subway

(Continued. . . .)

grate. The location is further shown in 2 photographs annexed to plaintiff's Notice to Admit with the bottom one marked at plaintiff's 50-h hearing and showing with specificity where plaintiff alleges to have tripped and fallen."

(Dinnocenzo Affirm., Ex E; see *also* Antanesian Affirm., Ex C [photographs]; Shufer Affirm., Ex D [photographs].)

Plaintiff seeks sanctions against defendants for failing to disclose and produce photographs from another lawsuit, *Hood v 288 St. Nick, LLC*, Index No. 112489/2007, where 288 St. Nick, LLC is a defendant and the New York City Transit Authority (NYCTA) is a third-party defendant. Plaintiff also contends that NYCTA should have disclosed Pete Lombardo as a witness in this action, based on Lombardo's deposition testimony in *Hood*.

Plaintiff argues that the disclosures were required pursuant to the preliminary conference order dated May 12, 2011, and pursuant to discovery demands dated May 18, 2011. (Dinnocenzo Affirm., Exs A, E.) Specifically, plaintiff contends that the complaint, photographs, and deposition transcripts in *Hood* were responsive to demands calling for "All violations, notices, reports and memoranda showing a defective condition of the sidewalk at the accident location" and for "Accident reports, notices, and complaints for other accidents where a person alleged to have fallen at or near the accident location during the past 5 years." (Dinnocenzo Affirm, Ex E.)

As a threshold matter, the failure of plaintiff to include an affirmation of good faith "is excusable because any effort to resolve the present dispute non-judicially would have been 'futile.'" (*Baulieu v Ardsley Assocs. L.P.*, 84 AD3d 666, 666 [1st Dept 2011], quoting *Carrasquillo v Netsloh Realty Corp.*, 279 AD2d 334, 334-335 [1st Dept 2001].)

"[T]he drastic sanction of striking an answer is inappropriate absent a clear showing that the defendant's failure to comply with disclosure obligations was willful, contumacious or the result of bad faith." (*Gradaille v City of New York*, 52 AD3d 279, 283 [1st Dept 2008].) Here, plaintiff has not demonstrated that either NYCTA or 288 St. Nick, LLC wilfully or contumaciously failed to comply with the preliminary conference order and discovery demands, that the responses were made in bad faith, or that defendants wilfully supplied false

(Continued. . . .)

and fraudulent discovery responses. (*Garnett v Hudson Rent A Car*, 258 AD2d 559 [2d Dept 1999].) It is undisputed that Hood did not fall in the same location as plaintiff in this action. At her deposition, Hood marked the location of her fall on a photograph, which indicates an area near the top of stairway entrance to the subway station. (Shufer Affirm., Ex A at 27; Shufer Affirm., Ex B.) Moreover, counsel for 288 St. Nick, LLC is not the same counsel as in *Hood*. The attorney representing NYCTA in this case apparently was not present at Lombardo's deposition in *Hood*. (See Dinnocenzo Affirm., Ex D [Lombardo EBT, at 45].)

It would not reasonable to construe plaintiff's documentary demands dated May 18, 2011 as calling for, with reasonable particularity, the discovery exchanged in *Hood*. (See CPLR 3120 [2].) It bears repeating that Hood did not fall in the same area as plaintiff in this action. The demand calling for complaints for other accidents "near the accident location" is vague. Even if the documents were in defendants' custody, possession, or control, it would have been unduly burdensome for 288 St. Nick, LLC and NYCTA to have reviewed the discovery exchanged in every prior litigation to determine whether photographs in prior litigation might have shown a defective condition of the sidewalk at the accident location here, or whether the deposition testimony taken prior to plaintiff's accident might be viewed as testimony of a notice witness.

Plaintiff has not demonstrated that Abe Betesh's response at his deposition was in bad faith. At his deposition, Betesh was asked, "Did you ever take any photographs of the sidewalk shown in Exhibit 3, any part thereof?" Betesh answered, "No." When asked, "Do you know if anyone did take photographs of it?", Betesh answered, "I don't know anyone that they did." (Dinnocenzo Affirm., Ex I, at 50.)

Plaintiff argues that Betesh gave false and misleading testimony because, during his deposition in *Hood* in 2010, Betesh was shown photographs. (See Dinnocenzo Affirm., Ex H.) However, Betesh's answer at his deposition here was not clear, in that Betesh might have understood the question as whether he knew the person who took photographs of the sidewalk, and not whether he had seen any photographs of the sidewalk, or whether he knew if photographs

(Continued. . . .)

of the sidewalk were taken previously. Moreover, plaintiff's counsel candidly admits that he does not have any of the photographs that were identified and shown to Betesh at his deposition in *Hood*. Therefore, plaintiff's counsel is speculating as to what Betesh had seen in the photographs.

Therefore, the branch of plaintiff's motion seeking to strike defendants' answers is denied.

The branch of plaintiff's motion seeking a further deposition of Abe Betesh, the costs of which are to be borne by defendant 288 St. Nick, LLC, is granted only to the extent of directing a further deposition of Betesh within 60 days. Plaintiff is entitled to a further deposition of Abe Betesh to inquire about a lease agreement between 288 St. Nick LLC and J Diamond Leather Corp., because the lease agreement was produced after Betesh's deposition was taken.

Plaintiff asserts that the costs of that deposition should be borne solely by 288 St. Nick, LLC, because the lease agreement should have been disclosed pursuant to a prior document demand calling for "Contracts, agreements, and other statements showing who was responsible for maintaining and repairing the accident location." (Dinnocenzo Affirm., Ex E.) 288 St. Nick, LLC responded that it "[wa]s not in possession of such documents." (*Id.*, Ex F.) The lease agreement states, in pertinent part: "Owner shall maintain and repair the public portions of the building, both exterior and interior, inclusive of roof, structural repairs (both interior and exterior), repair and replacement of sidewalks and curbs. . ." (Dinnocenzo Affirm., Ex J.)

The Court is not persuaded that 288 St. Nick, LLC's response to plaintiff's document demand was made in bad faith. The lease agreement itself does not create a legal duty to repair the abutting sidewalk that did not already exist under Administrative Code § 7-210.

The branch of plaintiff's motion to compel 288 St. Nick, LLC to respond "without objection" to items 1-5 of its demands dated April 4, 2012 is denied. Plaintiff essentially seeks an advisory opinion from the Court that those demands are proper and that there exists no possible basis for an objection. 288 St. Nick, LLC has responded to the demands, with some objections.

(Continued. . .)

(Antanesian Opp. Affirm., Ex B.) Plaintiff may ask for a ruling on those objections at the next status conference on September 20, 2012.

The branch of plaintiff's motion for leave to amend the complaint to add three defendants is granted without opposition. Plaintiff's counsel asserts that, based on Department of Transportation permits and other documents, the parties to be added may have negligently performed sidewalk repair in the location where plaintiff allegedly tripped and fell, by applying patchwork that may have ultimately caused/created the alleged defect.

The Court notes that the proposed amended complaint annexed as Exhibit M to the moving papers is denominated as the Third Amended Verified Complaint, which is verified by counsel. However, the proposed amended complaint indicates that "At all relevant times, Plaintiff was a resident of the State of New York, County of New York," and that plaintiff testified at her deposition on April 13, 2009 that her address was in New York County. Because counsel's office is located in the same county as plaintiff, verification by counsel is not permitted. (CPLR 3020 [d] [3].) Accordingly, the Third Amended Verified Complaint is treated as an unverified pleading.

Finally, the Court also reminds plaintiff's counsel that Rule 14 (a) of the Rules of the Justices of the Supreme Court of New York County requires exhibits to motion papers to be tabbed. (See New York State Supreme Court, New York County-Civil Branch, <http://www.courts.state.ny.us/supctmanh/UNIFRLrev-8-15-12.pdf> accessed September 5, 2012 May 29, 2012.) Sheets of paper between exhibits are not considered tabs. In the future, the Court may reject any papers with exhibits that are not tabbed.

Copies to counsel:

Dated: 9/6/12
New York, New York

FILED
SEP 10 2012
NEW YORK COUNTY CLERK'S OFFICE
HON. MICHAEL D. STALLMAN, J.S.C.

- 1. Check one:
- 2. Check if appropriate:..... MOTION IS:
- 3. Check if appropriate:.....

- CASE DISPOSED NON-FINAL DISPOSITION
- GRANTED DENIED GRANTED IN PART OTHER
- SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE