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| Hardie v MTA Bus Co. |
| 2016 NY Slip Op 31831(U) |
| June 15, 2016 |
| Supreme Court, Queens County |
| Docket Number: 700450/14 |
| Judge: Janice A. Taylor |
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

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GOLIATH HARDIE,

Plaintiff(s),

- and -

MTA BUS COMPANY and JOHN DOE,

Defendant(s).
-----x

Index No.:700450/14
Motion Date: 2/17/16
Motion Cal. No.: 63
Motion Seq. No: 4

FILED
JUN 22 2016
COUNTY CLERK
QUEENS COUNTY

The following papers numbered 1 - 8 read on this motion by plaintiff for an order striking the defendant MTA Bus Company answer or, in the alternative, compelling this defendant to respond to outstanding discovery demands.

| | <u>Papers</u> <u>Numbered</u> |
|---|----------------------------------|
| Notice of Motion-Affirmation-Exhibits-Service..... | 1 - 4 |
| Notice of Cross-Motion-Affirmation-Exhibits-Service.. | 5 - 8 |

Upon the foregoing papers, and following a conference held before this court on June 14, 2016, it is **ORDERED** that the motion and cross-motion are considered together and decided as follows:

This is an action for personal injuries allegedly sustained by the plaintiff on January 21, 2013 while he was a passenger on a bus running on the Q69 route on 21st Street at or near its intersection with 30th Avenue in the County of Queens, City and State of New York. Specifically, plaintiff asserts that he was injured upon entering the bus when the entrance steps to the bus suddenly lifted. This action was commenced on January 20, 2014 by the electronic filing of a summons and complaint. Defendant MTA Bus Company ("MTA") joined issue by electronic service of an answer dated February 3, 2014. On July 29, 2015, defendant MTA produced Willington Vidal as its witness for deposition. During the deposition, it was established that, although Mr. Vidal is a bus driver who routinely drives the Q69 bus, he was not the driver inv

Plaintiff filed his Note of Issue on August 3, 2015. On the

same day, plaintiff served a Demand for the Production of Documents on defendant MTA. A review of the filed Note of Issue reveals that plaintiff annexed an affirmation of outstanding discovery to the Note of Issue. In this affirmation, plaintiff's counsel noted that the aforementioned discovery demand had been served and that discovery remained outstanding.

On or about September 28, 2015, defendant MTA served a response to the August 3, 2015 discovery demand. In its response, defendant MTA objects to the demands as untimely, improper, vague, overbroad and unduly burdensome. However, defendant MTA did provide responses to several of the demands by stating that it was unclear what document plaintiff was requesting.

Plaintiff now moves, pursuant to CPLR §3126, for an order striking the defendant MTA's answer or, in the alternative, compelling this defendant to respond to the August 3, 2015 demand. It is well-settled that the drastic remedy of striking a pleading or dismissing the complaint pursuant to CPLR §3126 for failure to comply with disclosure should be granted only where the conduct of the resisting party is shown to be willful, contumacious, or in bad faith. Only where a party disobeys a court order by his/her conduct and, thus, frustrates disclosure, is dismissal within the discretion of the trial court (see, *Greer v. Garito*, 27 AD3d 617 [2d Dept. 2006]; *Ave. C Constr. V. Gassner*, 306 AD2d 506 [2d Dept. 2003]; *Cronic v. Perry*, 269 A.D.2d 351 [2d Dept. 2001]). Defendant MTA now cross-moves for a protective order regarding the August 3, 2015 discovery demand. Pursuant to CPLR §3103, a court may issue "a protective order denying, limiting, conditioning or regulating the use of any disclosure device" (CPLR §3103[a]).

By order dated May 4, 2016, the parties were directed to appear for a discovery conference. On June 14, 2016, counsel for both parties appeared for a discovery conference. After completion of the discovery conference, this court hereby rules as follows:

As previously stated, plaintiff filed his Note of Issue on August 3, 2015 despite the fact that discovery was not complete. A review of the file maintained by the Queens County Clerk reveals that, in a Compliance Conference Order dated March 11, 2015, the Honorable Martin E. Ritholtz, J.S.C. directed plaintiff to file his Note of Issue on or before August 14, 2015 or risk dismissal of this action. However, as it is apparent that discovery is ongoing in this action, the filed Note must be vacated.

In his Demand for the Production of Documents, plaintiff seeks the following:

1. Name, address and telephone number of the bus dispatcher who was working at the Queens depot from which the Q69 bus leaves on January 21, 2013.

This court finds that this demand is overbroad and must be limited. Defendant MTA is directed to provide the name of any bus dispatchers working on January 21, 2013 from 2:00 p.m. to 4:00 p.m. at the Queens depot from which the Q69 bus leaves. If any of these bus dispatchers are no longer employed by defendant MTA, the defendant will provide the dispatcher's name and last known address.

2. Pick Run Report for all buses operating out of the Queens depot on January 21, 2013.

This court finds that this demand is overbroad and must be limited. Additionally, in its response, defendant MTA asserts that it does not know what a Pick Run report is. However, in his deposition, Willington Vidal, the defendant's witness and employee, specifically mentioned a document called a "Pick Run Report". Thus, it is clear that defendant MTA has the ability to ascertain the location of this document. Defendant MTA is directed to provide any document known as a Pick Run report for any Q69 buses operating from 2:00 p.m. to 4:00 p.m. If defendant MTA is unable to locate such a document, it is directed to submit an affidavit stating efforts put forth to locate the documents.

3. GPS records showing the locations, times and plate number of all Q69 buses for the time period from 2:00 p.m. to 4:00 p.m. on January 21, 2013.

In its response to the discovery demand, defendant MTA stated that it was not sure what a "GPS record" was. However, in his deposition Willington Vidal, stated that he believed that the MTA had "GPS" records for the subject buses. This court takes judicial notice that the acronym "GPS" stands for Global Positioning System. If defendant MTA is unable to locate such a document, it is directed to submit an affidavit stating efforts put forth to locate the documents.

4. Safety Manual, guide and all other instructional documentation, rules, codes and information, which govern the use of Neeler Switch on MTA buses and safety operation of MTA buses.

In its response to the discovery demand, defendant MTA stated that this demand is vague, overbroad, burdensome and irrelevant. While this court agrees that the demand is overbroad in that it has no time limitation, it hereby rules that the demand is neither vague nor irrelevant. Moreover, as the defendant MTA has not asserted that it has taken any efforts to ascertain the comply with the subject demand, the defendant has failed to demonstrate that the request is overly burdensome. Consequently, defendant MTA is hereby directed to provide any safety manuals, guides and all instructional documentation, rules and information given to bus drivers, in effect on the date of plaintiff's accident, which

govern the use of Neeler Switches on MTA buses and the safety operation of such switches. While defendant MTA states that it is unsure of what a "Neeler Switch" is, such a devise was cited in the deposition of Wellington Vidal, its employee. Thus, it is clear that the defendant has the ability to ascertain this information.

5. OVCR Card for all buses that ran the Q69 route on January 21, 2013.

In its response to the above discovery demand, defendant MTA again states that this demand is vague, overbroad, burdensome and irrelevant. Additionally, the defendant states this is unaware what an OVCR card is. In his deposition, Wellington Vidal, defendant MTA's employee, states that an OVCR card is a card filled out by bus drivers when they seek to report a maintenance problem with a bus. According to Mr. Vidal, the OVCR card is submitted to the foreman on duty. Thus, it is clear that defendant MTA has the ability to investigate the nature, content and location of these documents. Defendant MTA is directed to provide any document known as a OVCR card submitted from September 21, 2012 to March 21, 2013 for any Q69 buses that operated on the Q69 route on January 21, 2013. If defendant MTA is unable to locate such a document, it is directed to submit an affidavit stating efforts put forth to locate the documents. Accordingly, it is,

ORDERED, that the Note of Issue filed on August 3, 2015 is hereby vacated. The parties are directed to continue discovery in this action. Plaintiff is further directed to file a new Note of Issue on or before November 30, 2016. It is further,

ORDERED, plaintiff is directed to serve a copy of this order with notice of entry upon defendant MTA within thirty (30) days from the date herein. It is further,

ORDERED, that the defendant MTA is directed to supplement its response to the above-referenced discovery demand, as limited by this court within thirty(30) days of the date of this order with notice of entry.

Dated: June 15, 2016



JANICE A. TAYLOR, J.S.C.

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