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

PRESENT: CYNTHIA S. KERN J.S.C. PART 52

Justice

Index Number : 110470/2009
STRONG, KEVIN
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 003
PRECLUDE

INDEX NO. 110470/09

MOTION DATE

MOTION SEQ. NO. 03

MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the annexed decision.

FILED

SEP 20 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 9/16/11

CK

CYNTHIA S. KERN J.S.C.

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 52

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KEVIN STRONG,

Plaintiff,

Index No. 110470/09

-against-

THE CITY OF NEW YORK, MATTHEW PEACOCK and GERALDO FALCON,

Defendants.

----------x

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits and Cross Motion.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff Kevin Strong commenced this action for personal injuries he allegedly sustained when a police car driven by defendant police officer Matthew Peacock mounted the sidewalk and struck plaintiff and other pedestrians. This action has been consolidated for trial only with an action brought by another injured pedestrian, Miguel Carasquillo. Plaintiff now moves to preclude defendant the City of New York (the "City") from offering particulars at trial in support of its affirmative defenses of culpable conduct, assumption of the risk and Vehicle and Traffic Law Sections 1103 and 1104 and seeks to compel certain other discovery. Defendant City cross-moves to consolidate the instant action with *De Fa Chen v The City of New York, Geraldo Falcon and Matthew Peacock*, Index No. 112685/10 (the "Chen Action"). For the reasons set

forth below, plaintiff's motion is granted in part and denied in part and the City's cross-motion is granted in part.

The relevant facts are as follows. On June 30, 2009, a police vehicle driven by defendant Peacock came into contact with a vehicle driven by defendant Falcon. The police vehicle then mounted the sidewalk and struck several pedestrians including plaintiff Kevin Strong, Miguel Carasquillo and De Fa Chen. Mr. Strong, Mr. Carasquillo and Mr. Chen each commenced separate actions. The Carasquillo and Strong actions have been ordered consolidated for trial.

This court turns first to plaintiff's discovery motion. First, plaintiff asserts that defendants failed to respond adequately to his demand in paragraphs 8, 9, 10 and 11 in his bill of particulars dated June 21, 2010 for details of his affirmative defenses. As an initial matter, defendant City has conceded that its affirmative defenses of culpable conduct and assumption of the risk are not at issue. Accordingly, the City is hereby precluded from offering any evidence as to these affirmative defenses. Furthermore, plaintiff's motion to compel a further response to his demand for details of the City's affirmative defense based on Vehicle and Traffic Law Sections 1103 and 1104 is denied. The City's response was adequate and plaintiff may seek additional details via deposition.

Plaintiff also seeks defendant Peacock's driving record, maintenance records for the vehicle driven by Peacock, the names and addresses of witnesses or parties to the emergency that Peacock was allegedly responding to at the time of the accident, video and audiotapes of the same, and (unredacted) written memoranda, records and reports of same. Plaintiff's motion is denied as to Peacock's driving record and maintenance records for the vehicle he was driving. In the absence of a claim for negligent hiring and/or retention and in the absence of a claim of a

vehicle defect, these items are not relevant. *See Karoon v New York City Transit Auth.*, 241 A.D.2d 323 (1st Dept 1997); *Neiger v City of New York*, 72 A.D.3d 663 (2nd Dept 2010). However, the City is ordered to produce, to the extent they exist, unredacted memoranda, records and reports regarding the emergency Peacock was allegedly responding to at the time of the accident, including unredacted department incident reports. Plaintiff is entitled to discovery to find out if defendants were truly responding to an emergency at the time of the accident. If such items cannot be found or do not exist, defendants are ordered to submit an affidavit describing the search undertaken for such items and the results. However, the City does not have to produce video and audiotapes of the same and the names and addresses of witnesses or parties to the same. The crux of the instant case is the accident which injured plaintiff, not the emergency defendants were responding to and, as such, a balance must be struck between providing plaintiff adequate discovery as to the nature of that emergency and the burden placed on defendants.

As to the remaining items, the City has either provided them or have stated that they do not exist. Specifically, the City has provided a tape of the 911 call regarding the incident, video footage of the incident, the departmental incident report, an MV-104 accident report, and the full name of Sergeant Rega. Plaintiff appears to dispute that the MV-104 accident report is the correct report but in the absence of clarifying information, it appears that this demand has been met. These items have been provided. To the extent that plaintiff believes the MV-104 accident report is not the correct report or is not the only report, his motion seeking same is denied without prejudice and with leave to renew.

In addition, the City states that as no fire department vehicle was involved in the subject accident, there is no FDNY accident report. Therefore this cannot be ordered to be produced.

The City also states that there is no "sprint report" of the alleged emergency and that any other radio run audio recording would have been destroyed. It submits the affidavit of Awilda DeJesus, who swears that she conducted a diligent search for such a sprint report and that she could not find one. Plaintiff alleges that the destruction of the radio run audio recording constitutes spoliation of evidence as it had already been requested before 180 days after the accident had passed. The City asserts that such radio recordings are deleted after 180 days. It is unclear what sanctions, if any, plaintiff seeks for this alleged spoliation of evidence but, as other evidence of the emergency defendant City was responding to is available, the appropriate sanction is to preclude the City from introducing testimony as to what was on the audio recording. *See Lebron v Rite Aid Corp.*, 9 Misc.3d 137(A) (1st Dept 2005) (appropriate sanction where absence of spoliated evidence not fatal to plaintiff's case is precluding defendant from offering testimony as to what missing videotape portrayed).

Accordingly, plaintiff's motion for sanctions and to compel discovery is granted in part and denied in part. The City is hereby ordered to produce to the extent they exist, unredacted memoranda, records and reports regarding the emergency Peacock was allegedly responding to at the time of the accident, including unredacted department incident reports within 30 days of the date of this order. If such items cannot be found or do not exist, the City is ordered to submit an affidavit describing the search undertaken for such items and the results. In addition, the City is precluded from introducing testimony as to what was on the radio run audio recording as well as precluded from offering any evidence regarding its affirmative defenses of culpable conduct or assumption of the risk.

The court now turns to the City's motion to consolidate the instant action and the Chen

action. Pursuant to CPLR 602(a), when actions involving a common question of law or fact are pending before the court, the court may, upon motion, order a joint trial and/or may order that the actions be consolidated. Where consolidation would save time and expense, even if the additional discovery causes some delay, it should be granted unless the parties opposing it demonstrate "prejudice of a substantial right." *Fisher 40th & 3rd Co. v Welsbach Elec. Corp.*, 266 A.D.2d 169 (1st Dept 1999); *see Moretti v 860 W. Tower*, 221 A.D.2d 191 (1st Dept 1995). Otherwise, "the policy preference for consolidation should prevail." Fisher, 266 A.D.2d 169; see Moretti, 221 A.D. 2d 191.

The City's motion for consolidation is granted to the extent that the instant action and the Chen action are consolidated for trial only. Pursuant to CPLR § 602(a), when actions involving a common question of law or fact are pending before a court, the court may, upon motion, order the actions to be tried jointly. Because the instant action and the Chen action have common questions of law and fact, they should be tried jointly. However, they shall not be consolidated for all purposes as discovery has been proceeding separately in both actions and the instant action and the Carasquillo action have also only been consolidated for trial . Accordingly, it is therefore

ORDERED that the motion of the City is granted to t he extent that the above-captioned action shall be jointly tried with DE FA CHEN v THE CITY OF NEW YORK, GERALDO FALCON and MATTHEW PEACOCK, Index No. 112685/10, pending in this court; and it is further

ORDERED that, within 30 days from entry of this order, counsel for the movant shall serve a copy of it with notice of entry upon the Clerk of the Trial Support Office (Room 158);

and it is further

ORDERED that upon payment of the appropriate calendar fees and the filing of notes of issue and statements of readiness in each of the above actions, the Clerk of the Trial Support Office shall place the aforesaid actions upon the trial calendar for a joint trial; and it is further

ORDERED that at said joint trial plaintiff DE FA CHEN in the action DE FA CHEN v THE CITY OF NEW YORK, GERALDO FALCON and MATTHEW PEACOCK, Index No. 112685/10 shall have the right to open and close before the jury.

Dated: 9/16/11

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C.

FILED

SEP 20 2011

NEW YORK
COUNTY CLERK'S OFFICE