SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED JUSTICE OF SUPREME COURT PART 5

Justice

Index Number : 113867/2009
HOWE, CHRISTOPHER
vs
CITY OF NEW YORK
Sequence Number : 004
DEFAULT JUDGMENT CAL: # 44

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

FILED

JAN 28 2014

NEW YORK
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 1-21-14
JAN 21 2014

_____, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 5

----------X

CHRISTOPHER HOWE AND DOREEN HOWE,

Plaintiffs,

DECISION/ORDER
Index No. 113867/09
Seq. No. 004

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION, THE NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE NEW YORK CITY MUNICIPAL WATER BOARD, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., EMPIRE CITY SUBWAY COMPANY (LIMITED), VERIZON SERVICES CORP., VERIZON NEW YORK, INC., AND VERIZON COMMUNICATIONS INC.,

Defendants.

----------X

KATHRYN E. FREED, J.S.C.:

RECITATION, AS REQUIRED BY CPLR 2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THESE MOTIONS:

PAPERS	NUMBERED
Seq. No. 004	
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	1 (Exs. A-L),.2
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	.....
NOTICE OF CROSS-MOTION/ANSWERING AFFIDAVIT.....	...3 (Ex. A).....
REPLYING AFFIDAVITS.....	.....4.....
EXHIBITS.....	.....
OTHER.....	.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THESE MOTIONS IS AS FOLLOWS:

Plaintiffs Christopher Howe and Doreen Howe move, pursuant to CPLR 3126, to preclude defendants The City of New York, The New York City Department of Transportation, The New York City Department of Environmental Protection, and The New York City Municipal Water Board

(hereinafter collectively "the City") from introducing evidence at trial and striking their answer. The City opposes the plaintiffs' motion and cross-moves to dismiss the complaint pursuant to CPLR 3211 and to renew its motion for summary judgment seeking dismissal of the complaint pursuant to CPLR 3212. Plaintiffs oppose the cross-motion. For the reasons set forth below, **plaintiffs' motion and the City's cross-motion are denied**.

Factual and Procedural Background:

This action arises from an alleged trip and fall accident on January 28, 2009. Plaintiff Christopher Howe alleges that he was injured in a crosswalk at the intersection of Broadway and Bond Street in Manhattan when he fell on a defective manhole cover. Plaintiff Doreen Howe asserts a claim for loss of consortium.[1] This action, commenced on October 2, 2009, named as defendants The City of New York, The New York City Department of Transportation ("the DOT"), The New York City Department of Environmental Protection ("the DEP"), The New York City Municipal Water Board, Consolidated Edison Company of New York, Inc. ("Con Edison"), Empire City Subway Company (Limted) ("ECS"), and Verizon Services Corp., Verizon New York, Inc., and Verizon Communications Inc. (hereinafter collectively "Verizon").

The motions pending before this Court relate to the inability of any party, or nonparty, to definitively establish the identity of the entity which owned and/or controlled the manhole cover which allegedly caused plaintiff's accident.

On February 21, 2009, plaintiffs' counsel notified the DOT about a defective manhole at the intersection of Broadway and Bond Street. The DOT investigated the manhole, found that it was

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[1]"Plaintiff" shall hereinafter refer to Christopher Howe and "plaintiffs" shall refer to Christopher Howe and Doreen Howe.

"defective, missing or sunken", and referred the problem to the DEP. The DEP inspected the area and, in a report dated February 28, 2009, noted that "no such a condition" existed on Broadway between Bond and Great Jones Streets.

On April 6, 2011, a witness was deposed on behalf of the DEP. The witness testified that the DEP inspected the intersection of Broadway and Bond Street in March of 2008. However, it is evident from the inspection report marked at the deposition that the inspection was in response to a complaint regarding a sinkhole, which was not found at that location. The report did not refer to a defective manhole cover. At the deposition, plaintiffs' counsel attempted to question the DEP witness regarding possible post-accident repairs to the manholes at the intersection of Broadway and Bond Street and the City's attorney would not allow the witness to respond.

By order dated August 16, 2011, this Court (Jaffe, J.) directed, inter alia, that the Highways Inspection and Quality Assurance Unit of the DOT ("HIQA") "identify [the] subject manhole cover within 45 days." On October 3, 2011, the City sent plaintiffs' counsel a memorandum reflecting that HIQA inspected the intersection and determined that the manhole belonged to ECS.

The Court file reflects that, by so-ordered stipulation dated April 24, 2012, this Court (Jaffe, J.) noted that all discovery had been completed and directed that the note of issue was to be filed by June 25, 2012. The court file further reflects that the note of issue was filed on June 19, 2012 and was vacated by stipulation on July 6, 2012. Although plaintiffs' counsel states in his affirmation in support of the instant motion to strike that this case was certified for trial, he neither stated when the note of issue was filed nor attached the note of issue, which is in the court file, to his papers. Nor did counsel submit the stipulation withdrawing the note of issue to his motion and this document does not appear in the court file. In addition, counsel does not explain why the parties stipulated to vacate the note of issue.

According to the City's attorney, the City moved for summary judgment dismissing the complaint in or about October, 2012. In an affidavit dated May 4, 2012, Victor Green, a training coordinator for HIQA, averred that, on October 3, 2011, he inspected the manhole covers located at the subject intersection and determined that they were not owned, installed, or maintained by the City but were "Empire City Subway (Verizon) manhole covers." Although the City's attorney represents that Green's affidavit was submitted in support of the City's prior motion for summary judgment, the City does not annex its prior motion to the papers submitted in connection with the instant motion.

Oral argument of the City's prior motion for summary judgment, as well as motions for summary judgment by Con Edison, ECS, and Verizon, was conducted before this Court on April 30, 2013. During oral argument, counsel for ECS and Verizon asserted that the manhole was owned by the Metropolitan Transportation Authority (the "MTA"), against which no notice of claim had been filed and against which the time to commence suit has expired. At oral argument, plaintiffs' counsel opposed the City's motion by asserting that the City misled plaintiffs by asserting that the manhole was owned by ECS. Counsel maintained that there was case law holding that, if a defendant "provides information that's inaccurate, and identifies a person - - and as a result, issues of statute of limitations happened, they can be responsible for that action."

Following oral argument, this Court issued an Order granting motions for summary judgment dismissing the complaint and all cross-claims against defendants Con Edison, ECS and Verizon on the ground that they had established that they did not own the manhole. This Court denied the City's motion for summary judgment with leave to renew and granted plaintiffs permission to move, within 60 days, for discovery sanctions based on the fact that they relied to their detriment on the City's discovery response representing that the manhole in question was owned by ECS.

Plaintiffs thereafter brought the instant motion to strike the City's answer pursuant to CPLR 3126 and the City cross-moved to dismiss the complaint pursuant to CPLR 3211 and for summary judgment pursuant to CPLR 3212.

Positions of the Parties:

Plaintiffs maintain that the City's answer must be stricken because Green's false statement, i.e., that the manhole was owned by ECS, as well as the City's failure to comply with discovery demands and court orders, has prejudiced their ability to prosecute this action.

In asserting that the plaintiffs' motion to strike the answer must be denied, the City argues that the plaintiffs could not have detrimentally relied on Green's May 4, 2012 affidavit that ECS owned the manhole because ECS and Verizon established in their summary judgment motions that the manhole was owned by the MTA. The City further asserts that the plaintiffs' deadline for filing a notice of claim against the MTA expired on April 28, 2009 and that the time to move to file a late notice of claim expired on April 28, 2010. Thus, asserts the City, Green's affidavit could not have misled plaintiffs since it was executed nearly two years after the day on which plaintiffs lost their right to sue the correct party, the MTA.

The City further asserts that there is no evidence that it acted willfully or contumaciously. Instead, urges the City, Green was mistaken in representing in his affidavit that the manhole was owned by ECS. In addition, the City claims that the documents introduced at the DEP's deposition do not establish the City's ownership or control over the manhole in question.

Finally, the City asserts that it is entitled to summary judgment dismissing the complaint against it because Green established in his affidavit that the manhole was not owned by the City.

In an affirmation in opposition to the City's cross-motion and in further support of the

plaintiffs' motion to strike, plaintiffs assert that, because the City failed to provide any records proving that the manhole was owned by an entity other than the DEP, its claim that the manhole was owned by ECS is false. Plaintiffs further assert that the City's answer must be stricken because it refused to permit the DEP witness from testifying about subsequent remedial measures taken by the City with respect to the manhole and that the City "failed to provide any documents to prove that the manhole cover was not under the jurisdiction of the DEP."

Conclusions of Law:

A. The Motion To Strike The City's Answer

"A party moving to strike a pleading pursuant to CPLR 3126 is required to submit an affirmation that counsel for the moving party has made 'a good faith effort to resolve the issues raised by the motion' with the opposing party's counsel (Uniform Rules for Trial Cts [22 NYCRR] 202.7). To be deemed sufficient, the affirmation must state the nature of the efforts made by the moving party to reconcile with opposing counsel (22 NYCRR 202.7[c]; *see Mironer v City of New York*, 79 AD3d 1106, 1107-1108 [2d Dept 2010])." *241 Fifth Ave. Hotel, LLC v GSY Corp.*, 110 AD3d 470, 471 (1st Dept 2013). Here, plaintiffs' affirmation of good faith fails to substantively comply with the requirements of 22 NYCRR 202.7. *See 241 Fifth Ave., supra* at 472; *Chichilnisky v Trustees of Columbia Univ. in City of N.Y.*, 45 AD3d 393, 394 (1st Dept 2007). Although plaintiffs' counsel states, in conclusory fashion, that he made "a good faith attempt to obviate the need for the within motion", the affirmation of good faith and the attorney affirmation submitted by plaintiffs' counsel in support of the motion are devoid of any indication that he actually communicated with the City's attorney in an attempt to resolve the issues raised by the motion. *See 241 Fifth Ave., supra* at 472; *Molyneaux v City of New York*, 64 AD3d 406, 407 (1st Dept 2009).

There are no letters by plaintiffs' counsel to the City's attorney in the motion papers. Nor was there any motion by plaintiffs to compel discovery from the City. Thus, plaintiffs' motion to strike must be denied on procedural grounds.

Plaintiffs' motion must in any event be denied since there is no proof that the City's conduct was willful, contumacious, or in bad faith. *See Nat. Cas. Co. v Amer. Home Assur. Co.*, 102 AD3d 553, 554 (1st Dept 2013); *Armstrong v B.R. Fries & Assocs., Inc.*, 95 AD3d 697, 698 (1st Dept 2012). Although plaintiffs claim that Green intentionally misled them by stating in an affidavit that ECS, and not the City, owned the manhole, there is no substantiation for this speculative contention. Additionally, although plaintiffs claim that the City refused to allow the DEP to answer questions at its deposition regarding subsequent remedial repairs to the manhole, plaintiffs never moved to compel this testimony and cannot now attempt to strike a pleading based on the actions of counsel which they never challenged. Additionally, plaintiffs' contention that the City "failed to provide any documents to prove that the manhole cover was not under the jurisdiction of the DEP"is without merit since Green represented in his affidavit that the manhole was owned by ECS. Thus, there is no justification for the dismissal of the City's answer pursuant to CPLR 3126.

Even if the conduct of the City had been willful and contumacious, "the extreme penalty of dismissal should not be imposed in the absence of any prior notice to [the City] that such a sanction might be imminent." *Armstrong, supra*, at 698. Plaintiffs' papers are devoid of any indication that the City had been warned, prior to the filing of this motion, that it would be precluded from introducing testimony or evidence, or have its answer stricken, if it did not provide certain discovery.

The Court notes that, in asserting that the City's answer must be stricken, plaintiffs rely, inter alia, on *Baldwin v Gerard Ave., LLC*, 58 AD3d 484 (1st Dept 2009) and *DiDomenico v C&S Aeromatik Supplies, Inc.*, 252 AD2d 41 (2d Dept 1998). However, these cases, as well as the others

cited by plaintiffs, are inapposite herein insofar as they address sanctions for spoliation of evidence.

B. The City's Cross-Motion To Dismiss And To Renew Its Motion For Summary Judgment

The City seeks to dismiss the complaint pursuant to CPLR 3211. To the extent that the City seeks to dismiss the complaint pursuant to CPLR 3211(a), its motion must be denied since its moving papers fail to specify under which subdivision of the statute dismissal is sought. *See Zenaida Reyes-Arguelles, M.D. v Omni Indem. Co.*, 2013 N.Y. Misc. LEXIS 5828 (App Term 2d Dept 2013). In any event, this Court finds that the City's motion papers failed to establish that relief was appropriate under any of the subdivisions of CPLR 3211(a).

The City's motion to renew its prior motion for summary judgment dismissing the complaint pursuant to CPLR 3212 is also denied. The City's moving papers are insufficient because they fail to include a copy of its initial moving papers and any papers in opposition thereto. *See* CPLR 2214(c). Instead, the City states that "[i]n the interests of judicial economy, [it] refers to those exhibits annexed to [its] underlying motion for summary judgment, presently before this Court." CPLR 2214 (c) provides, in pertinent part, that "[t]he moving party shall furnish...all other papers not already in the possession of the court necessary to the consideration of the questions involved." The court does not retain motion papers after it decides a motion "and should not be compelled to retrieve the clerk's file in connection with its consideration of subsequent motions." *Sheedy v Pataki*, 236 AD2d 92, 97 (3d Dept 1997), *lv denied* 91 NY2d 805 (1998). The movant is responsible for assembling complete papers documenting the procedural history of the motion and provide a proper foundation for the relief requested (*See Fernald v Vinci*, 13 AD3d 333 [2d Dept 2003]) and a court may refuse to consider improperly submitted papers. *See Wells Fargo Home Mtge., Inc. v Mercer*, 35 AD3d 728 (2d Dept 2006). Here, this Court cannot determine what evidence was submitted in

support of the City's initial motion for summary judgment since the papers relating to that motion were not submitted in connection with the City's instant application to renew its motion for summary judgment. Thus, this court does not have all of the information necessary to render a decision regarding the relief sought.

Even if the City had provided this Court with the underlying motion papers, its motion would still be denied. This is because the City's motion to renew does not indicate that it is "based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" (CPLR 2221[e][2]) or that there is a "reasonable justification for the failure to present such facts on the prior motion." Further, the only documents submitted in support of the City's motion for summary judgment are an attorney's affirmation, which is of no probative value on a motion for summary judgment (*see Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]), and a transcript of the April 30, 2013 oral argument of the City's prior motion for summary judgment. Thus, the City failed to establish its right to summary judgment pursuant to CPLR 3212. *See Zuckerman, supra* at 563-564.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motion by plaintiffs Christopher Howe and Doreen Howe is denied; and it is further,

ORDERED that the cross-motion by defendants The City of New York, The New York City Department of Transportation, The New York City Department of Environmental Protection, and The New York City Water Board is denied; and it is further,

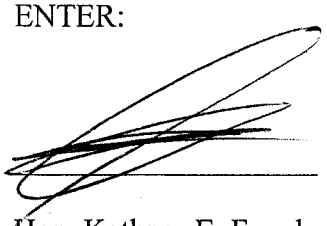
ORDERED that the parties are to appear for a discovery conference on February 18, 2014

at 2:30 p.m. at 80 Centre Street, Room 103; and it is further,

ORDERED that this constitutes the decision and order of the Court.

DATED: January 21, 2014

ENTER:



Hon. Kathryn E. Freed

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

JAN 21 2014

FILED

JAN 28 2014

NEW YORK
COUNTY CLERK'S OFFICE