

**Reyes v New York City Tr. Auth.**

2016 NY Slip Op 31673(U)

September 6, 2016

Supreme Court, New York County

Docket Number: 153721/2012

Judge: Michael D. Stallman

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 21**

-----X  
RAUL REYES,

Plaintiff,

- against -

**Index No.  
153721/2012**

NEW YORK CITY TRANSIT AUTHORITY,

Defendant.

-----X  
NEW YORK CITY TRANSIT AUTHORITY,

**Decision and Order  
Motion Seq. No. 004**

Third-Party Plaintiff,

- against -

CITY OF NEW YORK,

Third-Party Defendant.

-----X

**HON. MICHAEL D. STALLMAN, J.:**

In this action arising out of an alleged slip and fall in a subway station, plaintiff now moves for an order striking defendant's answer and compelling defendant to produce all outstanding discovery and to appear for a deposition. Defendant New York City Transit Authority (NYCTA) opposes the motion; third-party defendant City of New York takes no position regarding plaintiff's motion to the extent that the motion seeks relief solely against the NYCTA.

This is plaintiff's fourth motion to strike defendant's answer. The Court takes note that plaintiff has made a fifth motion to strike defendant's answer, which has been adjourned to the status conference on November 3, 2016 at 9:30 a.m. The discovery dispute at issue on this motion involves the adequacy of the NYCTA's three responses to plaintiff's discovery demand dated June 19, 2015, which implicates the thoroughness of searches conducted for the documents demanded.

### **BACKGROUND**

On December 13, 2011, plaintiff allegedly slipped and fell on water at the bottom portion of stairway ML2A at the Canal Street subway station in Manhattan. Defendant New York City Transit Authority (NYCTA) impleaded the City of New York. The NYCTA asserts that the leak attributable to street level condition at the intersection of Lafayette and Canal Streets, and that it purportedly made a complaint to the City's Department of Transportation on November 8, 2011, twenty-five days before plaintiff's alleged slip and fall.

According to plaintiff's counsel, there were several reports of leaks occurring from the walls of stairway ML2A, as well as the passageway of the ML2 stairway, and occurring in rooms above the location of the incident: the Electrical Distribution Room (EDR) and the Employee Facilities Room (EFR), i.e., the employee bathrooms. (See McCasland Affirm., Ex A [Demand dated

June 19, 2015].) Plaintiff's counsel maintains that Station Supervisor George Punnoose made multiple reports of water leaks in the EDR, EFR, and ML2A stairway.

By letter dated June 19, 2015, plaintiff's counsel demanded any service call tickets from reports of water leaks made by Station Supervisor Punnoose, and all documents relating to five specific service call tickets. Generally speaking, the service call ticket contains, among other things, a description of the complaint; remarks, if any; the status of the service call ticket; and a date "completed." (See Chang Opp. Affirm., Ex A.)

By a letter dated August 24, 2015, the NYCTA responded to plaintiff's demand. (McCasland Affirm. Ex C.) With respect to the demands for any service call tickets arising out of the Punnoose's reports, the NYCTA responded, "Defendant is still conducting an investigation as to whether the trouble call was encompassed into a previous service call or a new service call was made." (*Id.*) With respect to demands for all documents relating to specific service call tickets, the NYCTA simply gave copies of the specific service tickets and stated, "Defendant is continuing its search for other documents." (*Id.*)

By a so-ordered stipulation dated September 10, 2015, defendant agreed "to provide all documents relating to Service Call ticket 513939 or an

affidavit from the transit authority record searcher that the documents provided to plaintiff are the only documents in existence to this Service Call Ticket.” (McCasland Affirm., Ex D.)

By a letter dated November 23, 2015 (after this motion was served), defendant supplemented its prior August 24, 2015 response and included an affidavit from Vincent Moschello. (Chang Opp. Affirm., Ex A.) With respect to plaintiff’s demand for documents relating to Service Call ticket 513939, Moschello listed the documents that he found for that service call ticket. (*Id.* [Moschello Aff.] ¶ 7.) Moschello did not stat that these were the only documents in existence.

With respect to the demands for any service call tickets arising out of the Supervisor Punnoose's reports, Moschello stated, “new Service Call Tickets were not generated, because are encompassed with previous Service Call Tickets. (*Id.*) Moschello did not identify those previous Service Call Tickets; neither did he explain how he arrived at his conclusion.

With respect to documents related to other four specific service call tickets, the NYCTA produced a “Station Environment Service Call and Production Form” for Service Call Ticket 5132748, and said that there was no such document for Service Call Tickets 5133283 and 54879494. The

NYCTA did not respond at all for documents related to Service Call Ticket 5134084.

Lastly, the NYCTA provided a “Station Environment Service Call and Production Form” for Service Call Ticket 5132962, and said there was no such document for Service Call Ticket 5134619. These two service call tickets were not in plaintiff’s original demand.

By letter dated February 3, 2016, the NYCTA further supplemented its response for the third time. (McCasland Supplemental Affirm., Ex B.<sup>1</sup>) Even though the NYCTA had previously stated in its prior November 23, 2015 response that there was no “Station Environment Service Call and Production Form” for Service Call Ticket 5133283, it produced such a document in its February 3, 2016 response. The NYCTA also produced a “Station Environment Service Call and Production Form” for Service Call Ticket 5134084, whereas it was previously silent as to this service call ticket.

## DISCUSSION

“[I]t is well settled that the drastic remedy of striking a party’s pleading pursuant to CPLR 3126 for failure to comply with a discovery order is appropriate only where the moving party conclusively demonstrates that the non-disclosure was willful, contumacious or due to bad faith. Willful and contumacious

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<sup>1</sup> The Court requested the parties to submit supplemental papers to include the February 3, 2016 response; the parties agreed to the briefing schedule by a so-ordered stipulation dated March 10, 2016.

behavior can be inferred by a failure to comply with court orders, in the absence of adequate excuses.”

(*Henderson-Jones v City of New York*, 87 AD3d 498, 504 [1st Dept 2011]

[internal citation and quotation marks omitted].)

Plaintiff’s counsel aptly summarizes plaintiff’s predicament: “plaintiff is left wondering whether the piecemeal information trickling in from defendant is the entirety of the existing records or whether more will be produced at a later date.” (McCasland Suppl. Affirm.)

The NYCTA’s counsel states that he had relied upon information from the record searcher, Vincent Moschello, in forming the NYCTA’s November 23, 2015 response, and that he asked Moschello to search again for additional documents, which revealed the additional documents in the NYCTA’s February 3, 2016 response. (Chang Suppl. Affirm. ¶¶ 9-10.)

“Belated but substantial compliance with a discovery order undermines the position that the delay was a product of willful or contumacious conduct.” (*Cambry v Lincoln Gardens*, 50 AD3d 1081, 1082 (2d Dept 2008); see also *Gradaille v City of New York*, 52 AD3d 279, 284 [1st Dept 2008].) “[M]ere lack of diligence in furnishing some of the requested materials may not be grounds for striking a pleading.” (*De Socio v 136 E. 56th St. Owners, Inc.*, 74 AD3d 606, 608 [1st Dept 2010]); accord *Greer v Garito*, 27 AD3d 617, 618 [2d Dept 2006].) Because the record

demonstrates lack of diligence with only some, but not all, of plaintiff's discovery demands, the branch of plaintiff's motion seeking to strike defendant's answer is denied.

The branch of plaintiff's motion to compel presents a thorny, practical problem. For some service call tickets, the NYCTA produced a "Service Call and Production Form"; for other service call tickets, the NYCTA either represented that it did not find any or initially said nothing at all. The "Service Call and Production Form" is reasonably calculated to lead to admissible evidence as corroborating the existence of the reported leaks and as to whether those leaks were recurring conditions. This document appears to identify which individuals responded to the service call ticket, and the work performed. It appears that plaintiff is looking for documents that might indicate the source of the leaks reported.

The fact that the NYCTA produced a "Service Call and Production Form" for Service Call Ticket 5133283 in February 2016 when it initially stated that there was no such document found in November 2015 casts doubt as to the thoroughness of prior searches for documents for all of the service call tickets.

Therefore, the NYCTA is directed to perform a new search for all documents related to Service Call Tickets 51939, 5132718, and 5133283,



5487494, and 5134084, and an affidavit of the results of the search within 60 days. The person conducting the search must provide an affidavit setting forth the kind of documents that would be routinely generated during the time after a Service Call Ticket is created until that Service Call Ticket is closed; where such documents were likely to be kept; whether a search had been conducted in every location where such records were likely to be found; what efforts, if any, were made to preserve the subject records; and whether such records were routinely destroyed. (*See Jackson v City of New York*, 185 AD2d 768, 770 [1st Dept 1992].)

Plaintiff is granted a further deposition of the NYCTA as to any documents produced from this new search that were not previously disclosed to plaintiff.

As discussed above, plaintiff demanded service call tickets for leaks reported by Station Supervisors Goode and Punnoose. The record searcher responded that a service call ticket was not generated because they were “encompassed into a previously generated service call ticket” but did not specify which service call tickets encompassed those trouble. Therefore, within 60 days, the NYCTA is directed to provide an affidavit(s) from Vincent Moschello—and/or any other person with knowledge—to identify, by the service call ticket number, the service call tickets which purportedly

encompassed the trouble calls made on October 18, 2011 and November 20, 2011 by Supervisor Goode, and on November 11, 2011 and December 1, 2011 by Supervisor Punnoose. If the affiant(s) is unable to specify the specific service call ticket number under which a trouble call was purportedly encompassed, then the affiant(s) must state how he or she arrived at that conclusion and furnish copies of any records ~~he~~ reviewed to arrive at that conclusion.

Finally, plaintiff requests that any order to compel should also include a conditional sanction in the event that the NYCTA fails to comply with this Court's order, and that the sanction should be that its answer be stricken.

The Court disagrees. A discovery penalty should be "appropriately tailored to achieve a fair result." (*Krin v Lenox Hill Hosp.*, 88 AD3d 597 [1st Dept 2011] [citation and quotation marks omitted].) It should be "appropriately tailored to restore balance to the matter." (*Baldwin v Gerard Ave., LLC*, 58 AD3d 484, 484-485 [1st Dept 2009].)

Here, striking the answer would be disproportionate to the failure to conduct the new search. The specific service call tickets indicate when the complaints were closed, and the status of the service call tickets. Plaintiff is seeking documents relating to the service call tickets to determine what repairs were done and who made the repairs to close the service tickets.

The documents relating to the service tickets might corroborate that repairs were made, or might undermine what is reflected in the service call ticket—that is, that a service call ticket should not have been closed because no work or further work was needed.

Thus, if the NYCTA fails to comply, the appropriate, tailored sanction is that plaintiff will be entitled to a missing documents charge at trial.

### **CONCLUSION**

Accordingly, it is hereby

Upon the foregoing papers, it is ordered that plaintiff's motion is granted to the extent that defendant is directed to perform a new search for all documents related to Service Call Tickets 513939, 5132748, and 5133283, 5487494, and 5134084, and to provide an affidavit of the results of the search within 60 days; and it is further

ORDERED that the person conducting the search must provide an affidavit setting forth the kind of documents that would be routinely generated during the time after a Service Call Ticket is created until that Service Call Ticket is closed; where such documents were likely to be kept; whether a search had been conducted in every location where such records were likely to be found; what efforts, if any, were made to preserve the subject records; and whether such records were routinely destroyed; and it is further

ORDERED that, within 60 days, the NYCTA is directed to provide an affidavit(s) from Vincent Moschello—and/or any other person with knowledge—to identify, by the service call ticket number, the service call tickets which purportedly encompassed the trouble calls made on October 18, 2011 and November 20, 2011 by Supervisor Goode, and on November 11, 2011 and December 1, 2011 by Supervisor Punnoose. If the affiant(s) is unable to specify the specific service call ticket number under which a trouble call was purportedly encompassed, then the affiant(s) must state how he or she arrived at that conclusion and furnish copies of any records he reviewed to arrive at that conclusion; and it is further

ORDERED that if the NYCTA does not comply with the directives of this order, then plaintiff is entitled to a missing documents charge at trial; and it is further

ORDERED that plaintiff is granted a further deposition of defendant as to any documents produced from this search that were not previously disclosed to plaintiff.

Dated: September 6, 2016  
New York, New York

ENTER:

  
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J.S.C.

MICHAEL D. STALLMAN  
J.S.