

Kirton, Denise, & Eversley, Jr. v City of New York

2019 NY Slip Op 33895(U)

June 11, 2019

Supreme Court, New York County

Docket Number: 104534/2009

Judge: Julio Rodriguez, III

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. JULIO RODRIGUEZ, III PART IAS MOTION 62EFM
Justice

KIRTON, DENISE, and EVERSLEY, JUNIOR	RECEIVED JUN 13 2019 COUNTY CLERK'S OFFICE NYS SUPREME COURT - CIVIL	INDEX NO. <u>104534/2009</u>
Plaintiffs,		MOTION DATE <u>05/02/2019</u>
- V -		MOTION SEQ. NO. <u>003</u>
CITY OF NEW YORK, ADULT SERVICE CORP., RISBECK, and WELSBACH ELECTRIC CORP.,		DECISION AND ORDER
Defendants.		

-----X

The following papers, numbered 1 - 6, were read on this application to/for STRIKE/PRECLUDE

Notice of Motion/ Petition/ OSC - Affidavits - Exhibits	No(s) <u>1, 2</u>
Answering Affidavits - Exhibits	No(s) <u>3, 4, 5</u>
Replying	No(s) <u>6</u>

FILED
 JUN 13 2019
 COUNTY CLERK'S OFFICE
 NEW YORK

Plaintiff commenced this action seeking to recover for damages allegedly sustained as a result of an accident at the intersection of Walker and Centre Streets, New York, New York, on June 29, 2008. Plaintiff Junior Eversley now moves and plaintiff Denise Kirton now cross-moves this court for an order 1) striking the answer of defendant City of New York, 2) precluding defendant City of New York from testifying at trial, and 3) extending the time in which to file a Note of Issue. Defendant City of New York ("City") opposes the motion.

In support of their motion and cross-motion, plaintiffs argue that the striking of defendant City's answer or preclusion are warranted in this matter because, plaintiffs state, defendant City has failed to produce a witness for ordered depositions scheduled for April 22, 2016, September 14, 2016, January 17, 2017, January 11, 2018, April 6, 2018, November 21, 2018, and March 22, 2019, as well as failed to respond to plaintiff's notice for discovery and inspection dated August 20, 2018.

In opposition, defendant City states that it has responded to plaintiff's notice for discovery and inspection dated August 20, 2018, upon defendant City's receipt of said notice as an attachment to the instant motion; before this motion, defendant City's counsel notes, defendant City was not in receipt of the notice. Defendant City, in opposition, also sets forth the circumstances surrounding the numerous orders which set a date for a City deposition, including 1) that one of the witnesses demanded by plaintiffs no longer works for the City Department of Transportation (and accordingly a last known address was provided) and 2) that a witness with knowledge of traffic signal maintenance and inspection was produced for a deposition, but the deposition, having commenced, ultimately did not conclude because the witness was made

uncomfortable by plaintiff's counsel, as indicated by counsel for defendant City on the record at that time.

In reply, plaintiff disputes defendant City's contention that it received the notice for discovery and inspection dated August 20, 2018, upon submission of this motion, and reiterates his main arguments.

"A party seeking to depose additional witnesses must make a detailed showing of the necessity for taking such depositions" (*Colicchio v City of New York*, 181 AD2d 528, 529 [1st Dept 1992] citing *Ayala v City of New York*, 169 AD2d 530 [1st Dept 1991]; see *Carlucci v City of New York*, 89 AD3d 489 [1st Dept 2011]; *Ewadi v City of New York*, 66 AD3d 583 [1st Dept 2009]).

"A court may strike an answer only when the moving party establishes 'a clear showing that the failure to comply is willful, contumacious or in bad faith'" (*Lee v 13th Street Entertainment LLC*, 161 AD3d 631, 632 [1st Dept 2018] citing *Palmenta v Columbia Univ.*, 266 AD2d 90, 91 [1st Dept 1999]). Ultimately, "the nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter of discretion with the court" (*Palmenta* at 91).

With respect to plaintiff's notice for discovery and inspection dated August 20, 2018, this court finds that defendant City resolved the issue by providing a response. In reply, plaintiff does not raise any issues with the substance of defendant City's response to said notice. Rather, plaintiff stresses that proper service was made on August 21, 2018. That may be so, but counsel for defendant City correctly notes that the subsequent compliance conference orders, dated August 30, 2018, and January 3, 2019, make no mention of an outstanding response to this notice. Based on defendant City's response to the notice for discovery and inspection dated August 20, 2018, and the lack of objection to the substance of said response, this issue is now deemed moot.

As to depositions, defendant City has thus far produced three witnesses in this matter: Mr. Omar Codling on March 12, 2015; Mr. Remon Abdalla on January 17, 2017; and Mr. Lann Chin on April 6, 2018. It is clear from the papers that plaintiff seeks to depose a witness responsible for inspection and repair of traffic signals in the area around the intersection of Walker and Centre Streets on June 29, 2008, and the period immediately preceding that date; it is equally clear that plaintiff has not been satisfied by the particular knowledge of the three produced witnesses. It remains, however, that Mr. Lann Chin, who was deposed on April 6, 2018, is responsible for traffic signal inspection (City aff. in opp., Exhibit H, at 21) for the borough of Manhattan (*id.*) and has been assigned to the borough of Manhattan for 30 years (*id.* at 24). As a result of these facts, combined with plaintiff's failure to "make a detailed showing of the necessity for taking [additional witnesses'] depositions" (*Colicchio*, 181 AD2d at 529), this court finds that a deposition of an additional witness is not merited.

Mr. Chin's deposition, nevertheless, did not conclude and must be concluded. This court finds that inspector Chin must be produced to complete his deposition.

Moreover, defendant City has produced the name and last known address of an employee that, defendant City maintains, also had such responsibility (*see* City aff. in opp., Exhibit F [“Additional Notes: Last Known Address for Ronald Ogno...”]) for the relevant time period. However, the records produced do not provide any context whatsoever as to that employee’s title, responsibilities, or connection to the area or traffic signal at issue. To that end, defendant City is required to provide an affidavit describing Mr. Ogno’s job title and connection to traffic signal inspection in Manhattan during the period immediately preceding and up to June 29, 2008.

Finally, in light of the contents of the deposition transcript of Mr. Chin’s uncompleted deposition held April 6, 2018, this court emphatically reminds all parties that “[a] lawyer’s duty to refrain from uncivil and abusive behavior is not diminished because the site of the proceeding is a deposition room, or law office, rather than a courtroom” (*Corsini v U-Haul Intern., Inc.*, 212 AD2d 288, 291 [1st Dept 1995]).

Upon the foregoing, it is ORDERED that defendant City of New York shall serve a copy of this order with notice of entry upon all parties and the General Clerk’s Office within 15 days; and it is further

ORDERED that defendant City of New York shall produce Mr. Lann Chin for a continued deposition within 45 days of service of this order with notice of entry, at a date and time to be agreed upon between the parties; and it is further

ORDERED that plaintiff shall serve all parties, including defendant City of New York, a list of available dates for Mr. Lann Chin’s continued deposition within 10 days of receipt of service of this order with notice of entry; and it is further

ORDERED that if plaintiff fails to serve all parties, including defendant City of New York, with a list of available dates within 10 days of receipt of service of this order with notice of entry, the continued deposition of Mr. Lann Chin will be deemed waived absent good cause shown; and it is further

ORDERED that defendant City of New York shall exchange with all parties an affidavit describing Ronald Ogno’s job title, responsibilities, and connection to the area or traffic signal at issue within 30 days of service of this order with notice of entry; and it is further

ORDERED that the Note of Issue deadline for this matter is extended to August 16, 2019; and it is further

ORDERED that plaintiff’s motion is denied to the extent that it seeks to strike defendant City of New York’s answer and denied to the extent that it seeks preclusion of evidence or witnesses produced by defendant City of New York at time of trial.

Any argument or requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected. This constitutes the decision and order of the court.

June 11, 2019



HON. JULIO RODRIGUEZ III, JSC

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE

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