Trebista v Rosas
2021 NY Slip Op 33007(U)
December 3, 2021
Supreme Court, Richmond County
Docket Number: Index No. 150304/2013
Judge: Thomas P. Aliotta
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: PART C-2

----------X HON. THOMAS P. ALIOTTA

VIOLETA TREBISTA,

Plaintiff,

DECISION & ORDER

-against-

Index #150304/2013

CARMEN ROSAS, THE CITY OF NEW YORK and THE NEW YORK CITY FIRE DEPARTMENT,

Motion No. 003

Defendants.

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Recitation as required pursuant to CPLR 2219(a) of the papers numbered "1" through "4" were marked fully submitted on the 15th day of September 2021

	Papers Numbered
Plaintiff's Notice of Motion (1) pursuant to CPLR §3042(d) and CPLR §3126(3) to Strike Defendants' Answer; (2) pursuant to CPLR §3042(c) and §3126(2) for an Order of Preclusion; and (3) pursuant to CPLR §3124 compelling Defendants to Respond to the Notice to Produce dated August 7, 2020 (dated May 7, 2021)	1
Plaintiff's Affirmation in Support of Motion (dated May 7, 2021)	2
Defendants' Affirmation in Opposition (dated September 8, 2021)	3
Plaintiff's Affirmation in Reply (dated September 14, 2021)	4

Upon the foregoing papers, plaintiff's motion (Seq. No. 003), *inter alia*, for an order pursuant to CPLR §3124 compelling defendants Carmen Rosas, The City of New York and The New York City Fire Department (hereinafter, collectively, the "City") to respond to plaintiff's Notice to Produce dated August 7, 2020 is decided as follows:

Plaintiff Violeta Trebista commenced this action on May 23, 2013 to recover damages for personal injuries sustained on December 30, 2012 arising from a motor vehicle accident in the northbound lanes of Hylan Boulevard at or near its intersection with Seaview Avenue in Staten Island, New York. According to plaintiff's Notice of Claim (NYSCEF 83), it is alleged that plaintiff's vehicle was struck by a New York City Fire Department ambulance operated by its employee, defendant Carmen Rosas. Ms. Trebista alleges the accident occurred when the driver of the ambulance "attempted a right turn onto Seaview Avenue from the middle lane as it also traveled north on Hylan Boulevard."

Presently before the Court is plaintiff's motion for an order (1) pursuant to CPLR § 3126(3) and CPLR § 3042(d) for an order striking defendants' answer for its failure to comply with a Notice to Produce dated August 7, 2020; (2) pursuant to CPLR § 3126(2) and CPLR § 3042(c) to preclude defendants from presenting evidence in support of their claims at trial, or in the alternative; (3) pursuant to CPLR § 3124 compelling defendants to respond to the Notice to Produce dated August 7, 2020.

A compliance conference was conducted on March 23, 2021. At that time, plaintiff's counsel advised the Court that despite good faith efforts to address the City's objections to plaintiff's Notice to Produce dated August 7, 2020, the parties were unable to reach an amicable resolution. Thus, the Court granted plaintiff permission to serve a motion to resolve the issues.

It is noted from the outset that the parties have annexed to their respective papers two different versions of the Notice to Produce at issue. Plaintiff's version (NYSCEF 73) contains eight (8) demands for documents and information, while defendants' version (NYSCEF 83) contains nine (9). Therefore, the Court will address the Notice to Produce annexed to the City's opposition to the motion, which lists the following demands:

Demand 1: Any and all surveillance videos of the accident.
Response: The City objects based on laches and further asserts the City is not in possession of any video of the incident.

Demand 2: A complete unredacted copy of the Chief Officer's Apparatus Accident Investigation Report.
Response: The City objects to this demand based on laches and the item requested calls for post incident remedial measures and is privileged material.

Demand 3: A complete copy of the master record of crash scene field inspections.
Response: The City objects based on the doctrine of laches and it is unknown if such records exist or ever existed.

Demand 4: Defendants' response, or courtesy copies of the response to the Demand for Verified Bill of Particulars as to Affirmative Defenses previously served by plaintiff's former counsel.
Response: The Verified Bill of Particulars as to affirmative defenses to be provided under separate cover.

Demand 5: A true copy of defendant, Carmen Rosas' deposition transcript from April 25, 2018, executed by Carmen Rosas.
Response: The City objects based on previous discussion with plaintiff's present counsel in that it is unclear what the status is between prior and present counsel. The City does not wish involvement in any disputes. As such plaintiff's counsel should obtain said documents from plaintiff's prior counsel.

Demand 6: The employment status or last known address of Gary Wegener, Unit/Group L109 14, Battalion 21, Division 08.
Response: The City objects to this demand based on laches.

Demand 7: Any and all written reports, studies, surveys, documents and information identifying the existing traffic control devices, including but not limited to any and all traffic signs, traffic signals, traffic road lines, and safety studies existing at the time of the incident (December 30, 2012) relevant to the north east bound side of Hylan Boulevard from the stretch of road between Buel Avenue and Seaview Avenue;
Response: The City objects to this demand based on laches and that said request is vague, irrelevant, palpably improper, over-burdensome and unlikely to lead to admissible evidence.

Demand 8: Copies of all documents or written materials that defendants will rely on in support of its affirmative defense of limited governmental immunity.
Response: The City objects as this demand is vague and palpably improper.

Demand 9: Courtesy copies of any and all discovery and discovery responses previously exchanged with plaintiff's former counsel.
Response: The City objects based on previous discussion with plaintiffs present counsel in that it is unclear what the status is between prior and present counsel. The City does not wish involvement in any disputes. As such plaintiff's counsel should obtain said documents from plaintiff's prior counsel.

Plaintiff maintains such evidence is customarily provided in motor vehicle accidents resulting in FDNY investigations. It is said to be material and necessary to prove the City's violation of New York State's Vehicle and Traffic laws was a proximate cause of her injuries. Furthermore, plaintiff maintains the City improperly redacted the results of a fact-finding investigation as set forth in the New York City Fire Department's "Chief Officer's Apparatus Accident Investigative Report" which the City produced in its response to the Preliminary Conference Order. In particular, the report is redacted as to material conclusions of fact, i.e., causes of the accident; determination of preventability; violations of departmental rules and regulations; and recommended corrective/disciplinary action. It is alleged that since the document is certified as a report prepared in the ordinary course of business, it is considered mandatory discovery under CPLR § 3101(g) and should be produced in unredacted form.

Plaintiff claims that defendants' willful and contumacious refusal to provide material discovery necessary to the prosecution of this action, including courtesy copies of prior responses, has caused unwarranted delays and substantial prejudice. As such, she argues that an order, inter alia, compelling the City to provide the outstanding discovery is warranted.

In opposition, the City has reiterated its objections to the Notice to Produce and, further, the City argues that although the accident occurred over 8 years ago, the records and information sought in these items were never requested prior to plaintiff's service of the Notice to Produce. Thus, defendants contend that performing a search at this stage of the proceedings after such a lengthy time period would be futile. The City has also set forth more specific objections within their opposition, as follows:

Demand 1: Even if one existed [surveillance videos], plaintiff failed to request that such evidence be preserved following the accident.

Demand 2: Further, the redactions in the Chief Officer's Investigative Report are proper as the information pertains to post-accident remedial measures which are not discoverable.

Demand 7: The records relating to highway design defects or signal, signage and/or roadway defects are irrelevant absent the assertion of such allegations in the notice of claim.

However, the City has now consented to the following relief:

Demands 4, 6 and 8: The City has agreed to comply by providing a copy of the verified bill of particulars to the affirmative defenses; the employment status or last known address of Gary Wegener, Unit/Group L109 14, Battalion 21, Division 08; and other documents previously exchanged with plaintiff's prior counsel upon the Court's issuance of an order to that effect.

With respect to that branch of plaintiff's motion which seeks an order pursuant to CPLR § 3126, the City argues that such request is misguided. The City contends it is well recognized that the statute can be applied only when a party has willfully refused to obey a Court order requiring disclosure. The Court has not issued any such orders in this action directing the City to provide the documents sought in the Notice to Produce. Thus, the City argues that

plaintiff is not entitled to relief pursuant to CPLR § 3126 absent its noncompliance with a Court order.

DISCUSSION

"It is a fundamental principle in civil litigation that '[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof'" (*Slapo v. Winthrop Univ. Hosp.,* 186 AD3d 1281, 1282 [2d Dept 2020] citing *Allen v. Crowell-Collie Publ. Co.,* 21 NY2d 403, 405-407 [1968]; CPLR 3101[a]). The statute shall be liberally construed "to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" (*Allen v. Crowell-Collie Publ. Co.,* 21 NY2d at 406; *see Vargas v. A. Lee,* 170 AD3d 1073, 1075 [2d Dept 2019]). However, the principle of full disclosure "does not give a party the right to uncontrolled and unfettered disclosure" (*Pascual v. Rustic Woods Homeowners Assn.,* 149 AD3d 757, 758 [2d Dept 2019]; *see McAlwee v. Westchester Health Assoc., PLLC*, 163 AD3d 547, 548 [2d Dept 2018]; *JPMorgan Chase, National Association v. Levenson,* 149 AD3d 1053, 1054 [2d Dept 2017]).

In the motion before the Court, plaintiff has the burden to "demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims, and unsubstantial bare allegations of relevancy are insufficient to establish the factual predicate regarding relevancy" (*101Co, LLC v. Sand Land Corporation,* 189 AD3d 942, [2d Dept 2020], citing *Crazytown Furniture v. Brooklyn Union Gas Co.,* 150 AD2d 420 421 [2d Dept 1989]; *see Wadolowski v. Cohen,* 99 AD3d 793, 794 [2d Dept 2012]).

The objections to demands numbered "1", "7" and "8" are sustained. First, a review of defendants' response to the preliminary conference order (NYSCEF 72)[1] indicates that defendants did not provide a response to directive 6(g) regarding surveillance videos. Prior to the service of the Notice to Produce dated August 7, 2020, plaintiff neither served an additional demand, nor requested permission to serve a motion to compel a response to 6(g).[2] Also, plaintiff has not articulated a basis that surveillance videos, from "any and all" sources, may be in existence despite the City's verified response that it is not in possession of surveillance videos. Therefore, even though the language "any and all" contained in Demand "1" is not overly broad per se, the language is overbroad, nonspecific and without a factual foundation (see *Breslauer v. Dan,* 150 AD2d 324, 325 [2d Dept. 1989] and *101Co, LLC v. Sand Land Corporation, supra*). The nonspecific nature of the demand renders it palpably improper (see *Kiernan v. Booth Memorial Medical Center*, 175 AD3d 1396, 1397-1398 [2d Dept 2019] and *Asprou v. Hellenic Orthodox Community of Astoria*, 185 AD3d 638, 640 [2d Dept 2020]).

Second, the notice of claim is devoid of allegations that the roadway design or traffic control devices were the basis for liability. Thus, the information demanded in #7 will not lead to discovery of admissible evidence as to the stated theory of negligence, i.e., the failure to operate the lights and sirens at the time of the accident while attempting a right turn from the middle lane (NYSCEF83). Plaintiff is bound by the theories of negligence alleged in the notice

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[1] The Court reviewed the e-file docket in NYSCEF as the Preliminary Conference Order was not annexed to the motion.

[2] Plaintiff annexed as an Exhibit to this motion a copy of the affirmation in opposition to a prior motion served by the City of New York seeking discovery (NYSCEF 75). The affirmation requested, *inter alia,* compelling a response to the Notice to Produce dated 8/7/2020. This request was denied without prejudice as this prayer for relief was not in proper form, i.e. a cross-motion. Within the affirmation in opposition, reference was also made to a post-deposition demand for discovery dated 2/24/2020 served by plaintiff. However, a copy of the demand was not annexed to said affirmation or the current motion. Therefore, the Court's holding herein is based upon the record before it.

of claim and cannot exceed its scope within the litigation (see *Levy v. Incorporated Village of East Hampton,* 193 AD3d 714 [2d Dept. 2021], *citing Burton v. Village of Greenport,* 162 AD3d 968, 969 [2d Dept. 2018], and *Clare-Hollo v. Finger Lakes Ambulance EMS, Inc.,* 99 AD3d 1199, 1200-1201 [4th Dept. 2012]).

Third, the demand for copies of "any and all" documents or written materials that the municipal defendants will rely on in support of its affirmative defense of limited governmental immunity, is also overly broad and burdensome (see *Asprou v. Hellenic Orthodox Community of Astoria* and *Kiernan v. Booth Memorial Medical Center, supra.*), as well as palpably improper in that it fails to specify with "reasonable particularity" the documents demanded (see *Breslauer v. Dan, supra.*).

Finally, with respect to plaintiff's request for an unredacted copy of the Chief Officer's Investigation Apparatus Accident Report (Demand 2) and the master record of the crash scene field inspections (Demand 3), defendants shall produce the unredacted records to the Court for an *in camera* inspection and determination as to relevancy.

Based upon the foregoing, plaintiff's motion for an order to compel responses, as well as CPLR §3126 (3) and CPLR §3126(2) to strike the answer and/or preclude defendants from introducing evidence at trial is denied. It is noted that sanctions pursuant to CPLR §3126 are drastic remedies that are justified only when a party refuses to comply with a court order directing disclosure, or willfully and deliberately fails to disclose information which the Court finds ought to have been disclosed (see CPLR §3126; *Hoi Wah Lai,* 89 AD3d 990, 991 [2d Dept 2011]; *Thompson v. Dallas BBQ*, 84 AD3d 1221, 1221 [2d Dept 2011]). Here, plaintiff failed to make such a showing and, therefore, she is not entitled to an order imposing a sanction under CPLR §3126.

Accordingly, it is

ORDERED, the plaintiff's motion pursuant to CPLR § 3126(3) and CPLR § 3042(d) is denied; and it is further

ORDERED, that plaintiff shall serve a copy of this Order with Notice of Entry through NYSCEF upon defendants; and it is further

ORDERED, that plaintiff's motion for an order pursuant to CPLR §3124 is granted to the extent that defendants are directed to produce a complete unredacted copy of the Chief Officer's Apparatus Accident Investigation Report and master record of the crash scene to the Court for an *in camera* inspection within 60 days of electronic service through NYSCEF of this Order with Notice of Entry; and it is further

ORDERED, that plaintiff's motion for an order pursuant to CPLR §3124 is granted to the extent that defendants are directed to produce a response, or a courtesy copy of the response to the Demand for Verified Bill of Particulars as to Affirmative Defenses previously exchanged by plaintiff's former counsel; and it is further

ORDERED, that plaintiff's motion for an order pursuant to CPLR §3124 is granted to the extent that defendants are directed to produce courtesy copies of any and all discovery and discovery responses previously exchanged with plaintiff's former counsel; and it is further

ORDERED, that plaintiff's motion for an order pursuant to CPLR §3124 is granted to the extent that defendants are directed to provide the employment status or last known address of Gary Wegener, Unit/Group L109 14, Battalion 21, Division 08; and it is further

ORDERED, that plaintiff's motion is denied in all other respects.

This constitutes the decision and order of the Court.

Dated: December 3, 2021

ENTER:

HON. THOMAS P. ALIOTTA, J.S.C.