At an IAS Part 19 of the Supreme Court of the State of New York, held in and for the County of New York, at 60 Centre Street New York, New York, on the 16 day of May, 2023.

P R E S E N T: HON. LISA A. SOKOLOFF, J.S.C.

MAGDALENA APONTE,

Plaintiff,

-against-

THE CITY OF NEW YORK and
NEW YORK CITY TRANSIT AUTHORITY,

Defendants.

DECISION & ORDER

Index No. 150383/2010

OSC #005

The following papers were read on this motion by defendants The City of New York and New York City Transit Authority for leave to reargue and renew, pursuant to CPLR §2221(d) and §2221(e), this Court's Decision and Order, dated May 1, 2019, striking defendants answer:

Notice of Motion (defendants)/Affirmation in Support/Exhibit A;

Affirmation in Opposition (plaintiff)/Exhibits A-H;

Affirmation in Reply (defendants);[1]

Plaintiff Magdalena Aponte commenced this action with the filing of a Summons and Complaint on October 20, 2010. Defendants served an Answer on January 31, 2011.

Plaintiff seeks to recover damages for injuries allegedly sustained on November 29, 2009, at the Canal Street Subway Station on the middle landing of the staircase #PL-41 after a trip and fall on a defectively secured drain cover. This Court granted plaintiff's motion to strike defendants' answer, pursuant to CPLR §3126, ruling that plaintiff was prejudiced by defendants'

[1] Oral arguments were held on April 20, 2023.

willful and contumacious conduct in failing to comply with multiple compliance conference orders and in the spoliation of evidence that was necessary for the prosecution of the action. Despite a litigation hold, defendants failed to ensure that the logs of station supervisors were preserved. Not only did the destruction of those logs prevent the plaintiff's from accessing the information contained in those records but also prevented the defendants from identifying and producing three of the assigned station supervisors from around the time of the incident.

Defendants now move to reargue and renew, pursuant to CPLR §2221(d) and §2221(e), this Court's Decision and Order, dated May 1, 2019, which struck defendants' answer for failure to produce responses to discovery demands and Orders of the Court. "Motions for reargument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some reason mistakenly arrived at its earlier decision" (*Loland v. City of New York*, 212 A.D.2d 674 (2d Dept 1995)). "Pursuant to CPLR 2221(e)(2) and (3), a motion to renew 'shall be based upon new facts not offered on the prior motion that would change the prior determination ... and ... shall contain reasonable justification for the failure to present such facts on the prior motion'" (*Nassau Cnty. v. Metro. Transp. Auth.*, 99 A.D.3d 617 (1st Dept 2012)).

Here, defendants failed to both provide the Court with new facts and to identify those that were overlooked. They suggest that their failure to oppose the motion below was the court's fault. Nothing could be further from the truth. The court did have a policy of requiring parties to mediate discovery disputes prior to moving for relief. In this matter, the court gave plaintiff permission to move to strike. The motion was adjourned (5) five times for a month a piece at defendants' request, presumably to permit the submission of papers, yet none were submitted prior to oral argument. The Court required the defendant to purchase the transcript of oral

argument below for the court to consider its options before coming to a decision, a last clear chance at which defendants failed to request time to submit opposition.

Defendants argue records were produced following plaintiff's discovery demands, and that despite the inadvertent destruction of documents that could have provided potential additional witnesses by defendants, a lesser punishment was warranted, specifically spoilation sanctions. Plaintiff contends that it must make a prima facie case [that it cannot do without the missing documents and witnesses] and has been prejudiced by defendants' actions.

The Court stands by its decision in that "even though defendants have exchanged documents establishing two notations of a displaced drain cover on the platform prior to plaintiff's fall, it is impossible to determine the universe of entries that would show whether it is the same drain cover, the number of times that problem was noted by the station supervisors and reported, or what type of inspection, repair, or other correction, if any was attempted" (NYSCEF Doc. 120, p 4). The Court also noted three supervisors that defendants failed to produce who maintained their own logs, which may have contained additional findings regarding the subject defective drain cover. The record supported a finding that defendants conduct was willful and contumacious, and that plaintiff has been prejudiced as a result. This type of disobedience of a series of court orders is "precisely the type of ..contumacious conduct warranting the striking of an answer (*Pigott v JC Happy Garden Corp.*, 2023 WL 3183740 (1 Dept 2023)).

Defendants contend that "[a]s a result of this Court's striking of defendants' answer …, defendants are deemed to have admitted all traversable allegations in the complaint, i.e., those relating to liability—causation as well as negligence. Accordingly, at the trial on damages, defendants may not introduce evidence tending to show that the injuries alleged in the complaint were not caused by defendant's" conduct (*Gray v. Jaeger*, 49 A.D.3d 287 (1st Dept 2008); see

Rokina Opt. Co. v Camera King, 63 N.Y.2d 728 (1984)). This concerns them as they believe one of plaintiff's alleged injuries was not proximately caused by the accident in question. However, "When an answer is stricken and a default entered, the defendant 'admits all traversable allegations in the complaint, including the basic allegation of liability, but does not admit the plaintiff's conclusion as to damages [Id.].' Consequently, unless the damages are for a sum certain or a sum which can be made certain by computation, the defendant is entitled to a proceeding to establish plaintiff's real damages" (*Curiale v. Ardra Ins. Co.*, 88 N.Y.2d 268 (1996); see *Rokina Opt. Co.,* 63 N.Y.2d 728). As is often the case, "causation issues are relevant to both liability and damages" (*Oakes v Patel*, 20 NY3d 633,647 (2013). Thus, even with their answer stricken, defendants shall refrain from offering evidence at trial regarding causation but shall be permitted to challenge the extent of plaintiff's damages.

* * *

Upon view of the foregoing, it is hereby

ORDERED that defendants motion to reargue and renew this Court's Decision and Order, dated May 1, 2019, is **DENIED**.

The foregoing constitutes the Decision and Order of this Court.

Dated: May 16, 2023 ENTER:

HON. LISA A. SOKOLOFF, J.S.C.