

Rafee v New York City Tr. Auth.

2023 NY Slip Op 33007(U)

August 28, 2023

Supreme Court, New York County

Docket Number: Index No. 452225/2014

Judge: Denise M. Dominguez

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DENISE M DOMINGUEZ PART 21

Justice

-----X

INDEX NO. 452225/2014

FERAS S. RAFEE,

MOTION SEQ. NO. 002

Plaintiff,

- v -

DECISION + ORDER ON MOTION

NEW YORK CITY TRANSIT AUTHORITY,

Defendant.

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NEW YORK CITY TRANSIT AUTHORITY

Third-Party
Index No. 595725/2015

Plaintiff,

-against-

CITY OF NEW YORK

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124

were read on this motion to/for DISCOVERY

Upon the foregoing documents, the Plaintiff's motion to prohibit the Defendant NEW YORK CITY TRANSIT AUTHORITY from "opposing plaintiff(s) claim or supporting defendant's defenses, or alternatively to strike the Defendant's answer, or alternatively to compel the Defendant to provide outstanding discovery and appear for deposition is denied without prejudice in part and granted in part.

Although the complaint is not entirely clear, this action apparently arises out of an August 6, 2013 incident in which it is alleged that the Plaintiff, FERAS S. RAFEE, was apparently caused to fall on a staircase at the Broadway and Canal Street subway station. (NYSCEF Doc. 1).

As the Plaintiff has not demonstrated that the Defendant's failure to provide a response to the October 18, 2021 notice to produce "was willful, contumacious or in bad faith, that branch of

the Plaintiff's motion to strike the Defendants' answer, or alternatively to preclude the Defendant, is denied without prejudice. (*Scher v. Paramount Pictures Corp.*, 102 A.D.3d 471, 958 N.Y.S.2d 122 [1st Dept 2013]; see *Pezhman v. Dep't of Educ. of City of New York*, 95 A.D.3d 625, 944 N.Y.S.2d 128 [1st Dept 2012]). Upon a review of the record, it is clear that despite the Defendant has previously exchanged substantial discovery and appeared for deposition. Thus, there is no evidence that the Defendant has refused to participate in discovery or acted in bad faith.

Upon a review of the record, it is also clear that the alleged outstanding discovery, at least in part, was previously sought in Motion Seq. 1. The Plaintiff's prior motion (Motion Seq. 1) was denied by Judge Machel Sweeting as the Plaintiff did not abide by then Part 62 rules. (NYSCEF Doc. 69). Further, following the denial of that motion, the parties worked with Part 62 via two separate conferences on October 28, 2021 and December 9, 2021 to resolve outstanding discovery proposing a stipulation to address discovery that the Plaintiff seeks in the within motion. That stipulation addressed outstanding discovery items, would have included an affidavit concerning the Defendant's search for various records and would have accounted for a further deposition witness. The stipulation had the input and approval of Part 62. (NYSCEF Doc. 121, 122, 123). However, it appears that the Plaintiff would not agree and did not sign the stipulation approved by Part 62.

As outstanding discovery items were previously consented to by the Defendant and already approved by the Court, this Court sees no need to diverge from the prior determination. Accordingly, that branch of the Plaintiff's motion which seeks to compel outstanding discovery is granted to the extent of the following items, previously consented to by the Defendant, are to be provided by September 30, 2023 if not already exchanged:

- 1) As to items numerated in Plaintiff's Letter to the Court dated October 14, 2021 (NYSCEF Doc 74):
 - a. Items 1, 2, 4, and 5: Defendant NYCTA to provide, via email, prior responses of maintenance and repair records, which includes the Service Call Reports (a/k/a Trouble Call Reports), Production Reports, Defendant to provide an affidavit from the record searcher that the records provided are complete, true, and accurate copy of the maintenance and repair records;
 - b. Item 3: Defendant NYCTA to provide manual or guidelines as to how priority letters are assigned to service calls;
 - c. Item 6: Defendant NYCTA to allow plaintiff to inspect, at a mutually agreeable time, the station supervisor logs for the station supervisors assigned to the subject station;

- d. Item 7: Defendant to search for payroll production forms from RC shops, and if any, to be provided;
- e. Item 8: Plaintiff withdraws demand.

2) Except for the duplicative numerated items, Defendant NYCTA to respond to Plaintiff's Letter dated April 27, 2021 (efiled duplicate as NYSCEF Doc 75 and 76).

3) Deposition to be held by October 31, 2023 of a plumbing supervisor (Louis Ward, James Smith, or Shaji George) that can testify as to the service call numbers listed in Plaintiff's Letter dated April 27, 2021, and if no longer employed, by September 22, 2023, Defendant to provide last known address.

Additionally, as the Court previously directed: "Counsel for Transit already has represented to the court that there is no separate electronic file for the case – that, instead, the information is retrieved from a general database and then sent to the handling attorney. The record keeper's affidavit shall explain this process". Thus, as no additional language related to ESI was previously directed by the Court, same will not be included now.

Finally, the parties are also directed to submit a joint proposed Status Conference Order as per Part 21 rules on or by September 30, 2023 setting forth the dates for the completion of any remaining outstanding discovery with all discovery to be completed by November 30, 2023.

Accordingly, it is

ORDERED that the Plaintiff's motion to strike the Defendant's answer, or alternatively, to preclude the Defendant from presenting evidence at the time of trial is denied; and it is further

ORDERED that the Plaintiff's motion to compel the Defendant to provide outstanding discovery is granted to the extent set forth above; and it is further

ORDERED that the parties are to submit a joint proposed status conference order on consent as per Part 21 rules on or by September 30, 2023 with all discovery to be completed by November 30, 2023; and it is further

ORDERED that the Plaintiff shall file the note of issue by November 30, 2023; and it is further

ORDERED that no adjournments of the above are permitted absent Court approval; and it is further

ORDERED that, within 15 days from the entry of this order, movant shall serve a copy of this order with notice of entry on all parties and upon the Clerk of the General Clerk's Office, who is hereby directed to strike the case from the trial calendar and make all required notations thereof in the records of the court; and it is further

ORDERED that such upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website)].

Any requested relief not expressly addressed herein has nonetheless been considered by the Court and is hereby expressly denied.

8/28/2023
DATE

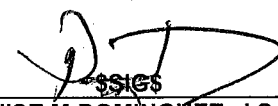
CHECK ONE:

- CASE DISPOSED
- GRANTED DENIED
- SETTLE ORDER
- INCLUDES TRANSFER/REASSIGN

APPLICATION:

CHECK IF APPROPRIATE:

- NON-FINAL DISPOSITION
- GRANTED IN PART OTHER
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT REFERENCE


HON. DENISE M. DOMINGUEZ J.S.C.