

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

PRESENT: HAROLD BEELE
J.S.C.
Justice

PART 21

Index Number : 101942/2006
PACHECO, JUAN
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with
the attached memorandum and decision.
Parties are to meet for a
status conference on
March 5, 2010 @ 2:30 PM
at 111 Centre St. Room 949

Dated: 12/18/09

HAROLD BEELE
J.S.C.

HAROLD BEELE J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED
PAGES NUMBERED
DEC 22 2009
NEW YORK
COUNTY CLERK'S OFFICE

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

-----X
JUAN PACHECO,

Plaintiff,

-against-

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

Defendants

-----X
HAROLD B. BEELER, J.S.C.:

Index No. 101942/2006
SEQUENCE MS001
DECISION & ORDER

FILED

DEC 22 2009

NEW YORK
COUNTY CLERK'S OFFICE

Defendant City of New York ("City") moves for summary judgment dismissing the complaint against it. Plaintiff opposes the motion, and cross-moves to strike the answer of defendants City, New York Transit Authority and Metropolitan Transit Authority (the latter two, collectively, "Transit Authority"), or in the alternative, to compel outstanding discovery, and to impose sanctions on these defendants. Transit Authority opposes that portion of plaintiff's motion seeking sanctions against it; it does not oppose City's motion. City did not submit opposition to plaintiff's cross-motion.

Facts

Plaintiff was working as a security guard for non-party Allied Security. At the time of the alleged accident, Allied Security provided security for a building known as the "Rail Control Center," a newly constructed building at 354 West 54th Street. The building and outdoor parking lot are leased to Transit Authority by City.

On June 19, 2005, at approximately 11:15 p.m., plaintiff exited the building and proceeded to the outdoor parking lot. As he approached his car, he stepped into an unsecured sewer lid, which was allegedly left remaining after a security booth had been removed. He fell,

sustaining injury to both knees, and eventually had surgery on his right knee.

Plaintiff timely served a Notice of Claim, pursuant to General Municipal Law § 50-e, on Transit Authority and City on September 16, 2005, and served a Summons and Complaint on all parties on February 9, 2006.

On February 1, 2007, the parties met for a preliminary conference, where the parties scheduled depositions and agreed to production of documents. Since then, the parties have held six successive discovery conferences, from August 23, 2007 through May 28, 2009. Following each of these conferences, when the deadlines for production had passed, plaintiffs wrote to Transit Authority and City to remind them of outstanding discovery. City has produced none of the discovery ordered at these conferences.

On February 24, 2009, City filed this motion to dismiss. On March 31, 2009, Transit Authority wrote to plaintiff regarding previously ordered items, informing plaintiff that "MTA Capital Construction Division has advised the undersigned that the items listed cannot be located and/or no longer in existence."

On May 28, 2009, while City's motion was still pending, the parties met for another status conference. Transit Authority was ordered to produce a witness from the "CPM" department, with knowledge of the parking lot area and removal of the security booth thereat. City's motion to dismiss was adjourned. The parties stipulated that "nothing in this stipulation will act as a waiver or release of any previous discovery ordered" at prior conferences.

On June 22, 2009, plaintiff filed his cross-motion for sanctions against Transit Authority and City for their failure to produce the ordered discovery. In response, Transit Authority produced numerous items, including the 1953 agreement between City and Transit Authority, whereby City leased the property to Transit Authority. In an affirmation in opposition to plaintiff's cross-motion, Transit Authority stated that daily worksheets and trouble call tickets for

one month prior to accident, and daily reports for work done at the accident location on March 7, 2005 and June 3, 2005 have not been saved. Instead, these documents in a computer and the originals were destroyed. Transit Authority produced computer printouts of the work done, but these printouts do not provide details of the work performed.. Transit Authority conceded that it had not fully complied with discovery orders, including a stipulation dated January 8, 2009. It acknowledged that it had not provided contracts, diagrams, blueprints, and schematics of work done at the facility, including the name of the contractor who removed the security booth. According to Transit Authority, the work in question was completed four years ago, and the relevant information is now in storage. Transit Authority offered that it will search for the relevant documents, and produce an affidavit if they cannot be located.

Discussion

In support of the motion to dismiss, City argues that, as an out-of-possession landowner, it does not owe a duty to plaintiff. It leased the parking lot area to MTA, which in turn leased the area to New York City Transit Authority. The City has not covenanted to maintain or repair the leased premises, nor retained a right to re-enter.

In the June 24, 1995 agreement whereby City leased the 54th Street Bus Depot, located at 354 West 64th Street, Ninth Avenue and 54th Street, Block 1044 Lot 3, to MTA, MTA covenanted to:

- a) MTA agrees to indemnify the City and hold the City harmless against claims for damages by reason of bodily injury or death or property damages arising out of MTA's lease of the Depot to the extent that claims for such damages are not covered and paid by insurers or paid by third parties, excluding, however, any such damages which result from such acts, omissions or negligence of the City, its agents, employees or representatives.
- b) MTA agrees to assign this lease to NYCTA upon completion of the transit project contemplated for the Depot.

This lease incorporated by reference the terms of the Agreement of Lease between City and NYCTA, originally entered into on June 1, 1953. Under Section 2.1 of this Master Lease, "The City hereby authorizes the Authority to take jurisdiction, control, possession and supervision of such transit facilities, materials, supplies, and property..."

Section 6.8 of the Master Lease states:

The Authority covenants that, during the term of this Agreement, it shall be responsible for the payment of, discharge of, defense against any final disposition of, any and all claims, actions or judgments...in connection with the operation, management and control by the Authority of the Lease Property.

Thus, possession and control of the subject area, and liability arising from accidents in the area, lies with Transit Authority and not City, and the City's motion to dismiss is granted. The motion for sanctions against City has been mooted by this Court's dismissal of the claims against it.

However, because Transit Authority remains a party, it maintains its obligations to provide plaintiff with the necessary documents that have been court-ordered on numerous occasions over the past three years. Although some of these documents have been produced as a result of plaintiff's diligence in reminding Transit Authority of its obligations (and plaintiff has shown extraordinary patience, considering the obfuscation and delay), many items that may bear on defendants' ultimate liability have not been produced to plaintiff

Plaintiff argues that defendants' continuing disobedience of Court orders has delayed timely completion of discovery, and prejudiced plaintiff's case, warranting the striking of the answer. Transit Authority argues that plaintiff's motion should be denied as moot, because some discovery has been provided and Transit Authority is willing to provide what is available.

In *Figdor v. City of New York*, the First Department imposed upon trial courts an affirmative obligation to penalize parties who have frustrated litigation by repeatedly failing to

comply with discovery orders. 33 A.D.3d 560, 561, 823 N.Y.S. 385 (1st Dept 2006). In *Figdor*, the First Department affirmed a \$10,000 sanction against the City of New York, where the City failed to respond to discovery orders over a period of two years, noting that documents eventually “trickled in with the passage of each compliance conference.”

Transit Authority was ordered to produce documents as early as the preliminary conference, on February 1, 2007. Even prior to that, Transit Authority was aware that litigation regarding the subject area would arise. Plaintiff timely filed a notice of claim, indicating the precise location of his injury, on August 25, 2005. On February 9, 2006, he timely a Summons and Complaint, which also indicated the precise location.

Yet, although on notice of plaintiff’s injury, the precise location, and the pending cause of action nearly four years ago, and despite numerous discovery orders between now and then, Transit Authority now informs the court that relevant information is no longer available. Transit Authority avers that daily worksheets and call tickets for one month prior to the accident, and daily reports for work performed on March 7, 2005, and June 3, 2005, have been destroyed, and only computer printouts have been provided. These printouts do not contain any detail as to the work performed. Moreover, Transit Authority acknowledges that contracts, diagrams, blueprints, and schematics or work done at the facility, including the name of the contractor who removed the security booth, were at some point placed in storage. Transit Authority has not shown that it has conducted a meaningful search for these items. Although there is no evidence that Transit Authority intentionally or recklessly concealed relevant documents, it did not take proper steps to preserve documents necessary for this litigation. *See, e.g. Yechiel v. Glissen Chem. Co., Inc.*, 2005 WL 6219363, * 3 (Sup. Ct. Kings Co.), *affirmed*, 40 A.D.3d 988, 836 N.Y.S.2d 668 (2d Dept 2007) (permitting an adverse inference where physical evidence in defendant City’s possession was destroyed, where City knew that the evidence was critical to a

potential lawsuit, and there was no evidence of bad faith on the City's part).

Additionally, Transit Authority has not produced Anthony Armello, the engineer who came to the scene of the accident, for deposition as previously agreed. In response to plaintiff's cross-motion, Transit Authority insists that it has no objection to producing him.

Transit Authority has been given many chances to comply with these discovery orders, and the record indicates that plaintiff's counsel has consistently taken efforts to resolve this matter in good faith. Only after faced with a threshold motion to dismiss did plaintiff decide to move for sanctions, and only after plaintiff's cross-motion did plaintiff receive the 1953 lease indicating the proper parties.

Accordingly, it is hereby

ORDERED that Transit Authority produce diagrams, blueprints, schematics and construction contracts relating to the accident location;

ORDERED that Transit Authority supply the name of the contractor who removed the security booth from the parking lot;

ORDERED that Transit Authority supply a copy of its contract with Hudson River Cleaning;

ORDERED that Transit Authority produce Anthony Armello for deposition;

ORDERED that Transit Authority produce a witness from the CPM with knowledge of the parking lot area and the security booth;

ORDERED that Transit Authority provide the name, address, and telephone numbers of all contractors involved in the construction of the RCC; and it is

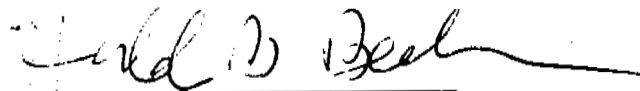
ORDERED the above mentioned documents shall be produced on or before January 31, 2010, and the depositions held on or before March 31, 2009, or Transit Authority's answer will be stricken.

This constitutes the decision and order of the court.

All relief not expressly granted is hereby denied.

Dated: New York, New York
December 17, 2009

ENTER:



Harold B. Beeler, JSC

HAROLD BEELER
J.S.C.

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