

**Leggard v City of New York**

2023 NY Slip Op 30589(U)

February 28, 2023

Supreme Court, New York County

Docket Number: Index No. 154167/2021

Judge: Judy H. Kim

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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. JUDY H. KIM PART 05RCP

Justice

-----X

MELISSA LEGGARD,

Plaintiff,

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY
POLICE DEPARTMENT, POLICE OFFICER "JOHN DOE"
(Operator),

Defendants.

-----X

INDEX NO. 154167/2021

MOTION DATE 10/26/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON
MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 31, 32, 33, 34, 35,
36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50

were read on this motion to COMPEL/STRIKE PLEADINGS.

In this negligence action, plaintiff alleges that on September 19, 2020, she sustained
injuries when a vehicle owned by defendants the New York City Police Department ("NYPD")
and the City of New York (collectively, the "City") and operated by an unidentified NYPD officer
collided with her vehicle at or near Exit 12 of the FDR Drive and then left the scene of the collision
(NYSCEF Doc. No. 1 [Compl. at ¶33]).

On or about August 4, 2021, plaintiff served the City with a Notice for Discovery and
Inspection seeking, as pertinent here

12. [A]ll accident, incident and/or unusual occurrence reports alleged to contain a
statement or account of events as provided by the plaintiff herein.

...

15. All photographs, negatives, diagrams, sketches, notes, and visual
representations, taken of the scene of the accident and/or the instrumentalities
involved in and/or related to the accident. This should include but is not limited to

photographs of the accident scene; property damage; vehicle damage; skid marks; roadway conditions and accident locations.

16. All photographs, negatives, diagrams, sketches, notes, and visual representations of the plaintiff taken by any type of photographic and/or video recording device at any time. This should include but is not limited to all photographs, negatives, diagrams, sketches, notes, and visual representations, under the control of the Defendant or Defendant' [sic] attorney and/or representatives, depicting or describing injuries sustained in the accident.

17. All photographs, negatives, diagrams, sketches, notes, and visual representations, under the control of the Defendant or Defendant' [sic] attorney and/or representatives, depicting or describing the condition of the scene which will be alleged to represent the accident scene at the time of the accident, or related to the occurrence, including but not limited to, the scene of the occurrence and intended to be introduced at the trial for that purpose.

...

36. Copies of the police report, EMS call sheet and any MV104's in possession of the Defendant or any of them regarding the occurrence alleged in the complaint.

...

40. [A]ny and all surveillance materials, including but not limited to films, videotapes, CDs, DVDs and/or photographs, depicting or alleging to depict the plaintiff, whether or not you intend to use same at the trial.

(NYSCEF Doc. No. 34 [Notice for Discovery and Inspection]).

On or about December 14, 2021, plaintiff moved to strike the City's answer based upon its failure to provide responses to these discovery demands (NYSCEF Doc. No. 9). While that motion was sub judice, the City responded to plaintiff's Notice for Discovery and Inspection. In its response to document demands 12, 15, 16, 17, and 36, the City stated that "[t]o the extent such documents exist and are within the City's possession, they will be provided under a separate cover" and that it had no documents responsive to document demand number 40 (NYSCEF Doc. No. 35).

In a decision and order dated March 9, 2022, this Court denied plaintiff's motion, noting that defendants had responded to the discovery demand (NYSCEF Doc. No. 28 [March 9, 2022 Decision and Order]).

On or about August 5, 2022, the parties entered into a Case Scheduling Order ("CSO") which "superseded any and all prior combined demands, notices of discovery and inspection, and discovery orders" and required the City to produce, as pertinent here, "the names and addresses of any witnesses to the occurrence and notice witnesses; accident reports; party statements; photographs; and video footage take in the ordinary course of business" and a "Departmental Accident Report from the respective City agency" (NYSCEF Doc. No. 47 [CSO]). On or about November 2, 2022, the City responded to the CSO, denying that it possessed any such records (NYSCEF Doc. No. 41 [CSO Response]).

Plaintiff now moves, once again, to strike the City's answer, arguing that the City "pledged" to provide documents responsive to the Notice for Discovery and Inspection demands 12, 15-17, 36, and 40 "under separate cover" but has failed to do so. Alternatively, plaintiff moves, pursuant to CPLR §3124, to compel production of these documents and compel all party depositions to be held within thirty days of the date of this decision and order.

The City opposes the motion, arguing that it is procedurally defective and that, in any event, the City has complied with its discovery obligations. The City also asserts that its inability to locate responsive documents is due to plaintiff's failure to disclose her vehicle's license plate and identification numbers.

In reply, plaintiff argues, for the first time, that records related to the collision must exist because another NYPD vehicle responded to the scene of the collision immediately thereafter.

## DISCUSSION

CPLR §3124 provides that “[i]f a person fails to respond or comply with any request, notice, interrogatory, demand, question or order under this article ... the party seeking disclosure may move to compel compliance or a response” (CPLR §3124). CPLR §3126, in turn, authorizes the court to sanction a party who “refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed” (CPLR §3126). However, “[t]he striking of a party’s pleading ... is appropriate only where the moving party conclusively demonstrates that the non-disclosure was willful, contumacious or due to bad faith” (Henderson-Jones v City of New York, 87 AD3d 498, 504 [1st Dept 2011] quoting McGilvery v New York City Tr. Auth., 213 AD2d 322, 324 [1st Dept 1995]).

As a threshold matter, plaintiff’s counsel’s good faith affirmation, asserting that he “contacted defense counsel by email and voicemail advising of the outstanding discovery,” is deficient as it does not “indicate the time, place and nature of the consultation and the issues discussed and any resolution” (See 22 NYCRR §202.27[c]; 148 Magnolia, LLC v Merrimack Mut. Fire Inc. Co., 62 AD3d 486, 487 [1st Dept 2009]) nor “evinced a diligent effort by the plaintiff to resolve the discovery dispute” (Roye v Gelberg, 172 AD3d 1260, 1263 [2nd Dept 2019]). The Court further notes that plaintiff has not requested a discovery conference to resolve this particular issue prior to making this motion, as dictated by this Court’s Part Rules.

Even ignoring these procedural deficiencies, the Court does not find that the City engaged in willful or contumacious conduct such that the striking of its answer is appropriate. Plaintiff’s argument that the City has failed to produce documents responsive to her Notice for Discovery and Inspection is unavailing. As an initial matter, these discovery demands were superseded by the CSO. In any event, plaintiff’s contention the City “pledged” to provide documents responsive

to the Notice for Discovery and Inspection “under separate cover” yet has not done so is incorrect. In fact, the City asserted only that these documents would be provided “to the extent such documents exist” but subsequently confirmed, in its response to the CSO, that it had not found any responsive documents. Accordingly, that branch of plaintiff’s motion seeking to strike the City’s answer is denied.

The branch of plaintiff’s motion to compel the City to produce records responsive to the CSO is granted to the limited extent set forth below. After considering plaintiff’s representation that an NYPD vehicle responded to the scene of the collision, together with the City’s assertion that plaintiff’s failure to disclose her vehicle’s license plate and identification numbers has hindered their search for responsive documents, the Court directs plaintiff to provide the City with her vehicle’s license plate and identification numbers within thirty days from the date of this decision and order. The City shall, within sixty days of receiving plaintiff’s vehicle’s license plate and identification numbers, conduct an additional search for documents responsive to the CSO and produce any responsive documents revealed by this search to plaintiff.

However, if this additional search produces no documents responsive to plaintiff’s demands the City shall provide plaintiff with an affidavit by an individual with personal knowledge detailing the good faith efforts undertaken by the City to comply with its discovery obligations, including: (i) the dates of the prior document search as well as the subsequent document search conducted pursuant to this order; (ii) whether, for both searches, the City conducted a thorough search for the requested documents in all areas where such documents were likely to be found, setting forth the specific records searched and search parameters used; and (iii) whether any relevant documents were disposed of by the City prior to the first search or prior to this decision and order (See Jackson v City of New York, 185 AD2d 768 [1st Dept 1992]; see also Trade Expo

Inc. v Sterling Bancorp, 171 AD3d 634, 635 [1st Dept 2019]). In light of the foregoing, the Court declines to compel party depositions within thirty days.

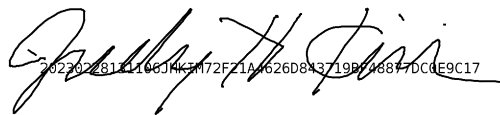
Accordingly, it is

ORDERED that the branch of plaintiff's motion to strike the City's answer is denied; and it is further

ORDERED that the branch of plaintiff's motion to compel is granted to the limited extent set forth above; and it is further

ORDERED that the Clerk of the Court is directed to schedule this matter for a status conference in the Differentiated Case Management Part on or after May 29, 2023.

This constitutes the decision and order of the Court.



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2/28/2023

DATE

HON. JUDY H. KIM, J.S.C.

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