Berger v New York City Tr. Auth.
2024 NY Slip Op 34453(U)
December 18, 2024
Supreme Court, New York County
Docket Number: Index No. 157005/2018
Judge: Richard Tsai
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. RICHARD TSAI** **PART** **21**

Justice

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ELIZABETH BERGER,

Plaintiff,

- v -

NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSIT AUTHORIT and/or NEW YORK CITY TRANSIT AUTHORITY d/b/a MTA NEW YORK CITY TRANSIT,

Defendants.

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INDEX NO. 157005/2018

MOTION DATE 11/06/2024

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 004) 6, 129, 132, 134-142, 145-148, 150-160

were read on this motion to/for DISCOVERY.

Plaintiff alleges that, on January 13, 2018, subway car doors allegedly closed upon plaintiff as she went to exit the train at the 42nd Street subway station, and the doors did not "retract or recycle" automatically (see affirmation of plaintiff's counsel in support of motion ¶ 4 [NYSCEF Doc. No. 135]). To free herself, plaintiff allegedly forcefully thrusted her body forward, which allegedly sent her "sprawling onto the platform," resulting in injuries (*id.*).

Plaintiff moves for an order: (1) precluding defendants from asserting the defense of qualified immunity, and (2) precluding defendants from denying at trial that certain incidents reflected in documents obtained through the Freedom of Information Law (FOIL) are not substantially similar to plaintiff's incident. Defendants oppose the motion.

Oral argument was held on the stenographic record on November 6, 2024 (Vanessa Miller, court reporter).

BACKGROUND

Issue was joined as to defendants on or about August 27, 2018 (*see* NYSCEF Doc. No. 6 [answer]). The answer asserts two affirmative defenses: plaintiff's culpable conduct, and collateral source (*see id.*).

Meanwhile, according to plaintiff's counsel, defendants' FOIL unit provided plaintiff's counsel with a spreadsheet detailing a number of incidents of persons "Caught/Struck By Train Doors" during the period from 2013 to January 13, 2018 (*see*

affirmation of plaintiff's counsel ¶ 15; *see also* plaintiff's Exhibit 5 in support of motion [NYSCEF Doc. No. 141]).

By a decision and order dated and entered August 2, 2024, this court partially granted plaintiff's motion to compel defendant to produce discovery (*see* NYSCEF Doc. No. 129). This court directed defendants to produce, among other things, certain documents during the period from January 13, 2013 to January 13, 2018, such as customer unusual occurrence reports (and other reports) and unredacted notices of claim filed by anyone claiming injury to an incident which a Transit Authority subway train car door closed on a passenger as they were entering or exiting the subway train car, anywhere in the New York City Transit Authority subway (*see id.*).

On August 21, 2024, defendants filed a notice of appeal of that decision and order (*see* NYSCEF Doc. No. 132).

DISCUSSION

Plaintiff's counsel argues that an order precluding defendants from asserting the defense of qualified immunity is warranted because

> "Unfortunately, your affirmant has had the experience with this particular Defendant raising and litigating issues of qualified immunity mere days before the commencement of a trial, years after the action was commenced, even though it was never asserted as an affirmative defense in their Answer. The prejudice to Plaintiff is significant in having to potentially confront a defense to which there has been no discovery" (affirmation of plaintiff's counsel in support of motion ¶ 8).

Plaintiff's counsel argues that defendants should be precluded from asserting at trial that the incidents contained in the spreadsheet obtained from the FOIL unit, if defendants do not produce the documents directed in this court's decision and order dated and entered August 2, 2024. Without such records, plaintiff might be unable to prove whether any of those incidents in the spreadsheet were similar to plaintiff's incident, such that those prior incidents could be admissible at trial (*see* affirmation of plaintiff's counsel ¶ 15).

The branch of plaintiff's motion seeking an order precluding defendants from asserting the defense of qualified immunity is denied. Given that the answer does not assert any defense of qualified immunity (*see* NYSCEF Doc. No. 6), plaintiff essentially seeks to curtail defendants' right to amend its answer to raise the defense of qualified immunity, should they choose to do so.

However, to grant preclusion (or to deem that the right to amend was waived) would contravene CPLR 3025(b), which specifies that "[a] party may amend his pleading ... at any time by leave of court," and "leave shall be freely given upon such terms as may be just." The standards for granting leave to amend already take into

account whether there would be prejudice or surprise if leave to amend were granted (*see e.g. Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352, 354 [1st Dept 2005]). Thus, to depart from what the CPLR already provides and to impose preclusion or waiver is unnecessary, as the argument of surprise or prejudice (including the loss of the right to conduct discovery about a newly asserted defense) can be raised in opposition to a motion by defendants for leave to amend their answer to assert a defense of qualified immunity.

The branch of plaintiff's motion for an order precluding defendants from asserting at trial that the incidents contained in the spreadsheet obtained from the FOIL unit are not similar to plaintiff's incident, if defendants do not comply with discovery, is denied.

As defendants point out, this branch of plaintiff's motion bears on the admissibility at trial of the records obtained through FOIL. Plaintiff does not seek to preclude defendants from introducing evidence at trial. Rather, plaintiff essentially seeks to preclude defendants from objecting at trial to the admissibility of the prior incidents contained in the spreadsheet of other incidents that were obtained through FOIL (presumably on the grounds of relevance). That is, plaintiff apparently argues that defendants should not be heard to object that plaintiff cannot show that the prior incidents were substantially similar to plaintiff's incident, if defendants themselves do not furnish the discovery that would have allowed plaintiff's counsel to determine whether the factual circumstances in any of those prior incidents in the spreadsheet were substantially similar to plaintiff's incident.

Thus, plaintiff essentially wants the issue of the admissibility of the FOIL records to be resolved in the plaintiff's favor as a discovery sanction.[1] Factual issues or even liability can be resolved in a party's favor as a discovery sanction (*see e.g. Husovic v Structure Tone, Inc.*, 171 AD3d 559, 560 [1st Dept 2019]; *Rogers v Howard Realty Estates, Inc.*, 145 AD3d 1051, 1052 [2d Dept 2016]; *Morano v Westchester Paving & Sealing Corp.*, 7 AD3d 495, 496 [2d Dept 2004] [the penalties set forth by CPLR 3126 include deciding the disputed issue in favor of the prejudiced party]; *see* CPLR 3216 [1]).

However, the court agrees with defendants that this court's decision and order dated and entered August 2, 2024, which directed defendants to produce certain documents, was automatically stayed when defendant New York City Transit Authority filed a notice of appeal of that decision and order (*see* Public Authorities Law § 1212-a [3]). This stay is akin to an automatic stay under CPLR 5519 (a) (1). "When a stay is obtained pursuant to [CPLR 5519 (a) (1)] it has the effect of temporarily depriving the prevailing party of the ability to use the methods specified by law to enforce the

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[1] Defendants' argument that this branch of plaintiff's motion should be denied because plaintiff failed to make a good faith effort to secure the discovery sought (as required by 22 NYCRR 202.7) is unpersuasive, as such efforts would have been futile (*see e.g. Perez v Kone*, 166 AD3d 555 [1st Dept 2018]), given defendants' appeal of the decision and order which directed the discovery sought.

executory provisions of the judgment or order appealed from" (*Matter of Pokoik v Dept. of Health Servs. of County of Suffolk*, 220 AD2d 13, 15 [2d Dept 1996]).[2]

Here, because this court's decision and order dated and entered August 2, 2024 has been automatically stayed, plaintiff therefore cannot seek enforcement of that order through a discovery sanction of a conditional order of preclusion, or a conditional order resolving an issue at trial in the plaintiff's favor.

CONCLUSION

Accordingly, it is hereby **ORDERED** that plaintiff's motion for an order precluding defendants from asserting the defense of qualified immunity, and precluding defendants from denying at trial that "the hundreds of 'Caught/Struck by Train Doors' incidents from 2013 through January 2018,' obtained from defendants through FOIL, are not substantially similar to the caught/struck by train door incident in this action (Motion Seq. No. 004) is **DENIED**; and it is further

ORDERED that the parties are directed to appear for a previously scheduled status conference on January 30, 2025 at 2:15 p.m. in IAS Part 21, 80 Centre Street Room 280, New York, New York.

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12/18/2024			
DATE		RICHARD TSAI, 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

[2] CPLR 5519 (c) provides that "only the court to which an appeal is taken may vacate, limit or modify a stay imposed by paragraph one of subdivision (a)."