

5443

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

-----X
PATRICIA FORBES,

Index #: 101558/2006

Plaintiff,

ORDER WITH
NOTICE OF
ENTRY

-against-

NEW YORK CITY TRANSIT AUTHORITY and
METROPOLITAN TRANSPORTATION AUTHORITY,

Defendants.
-----X

S I R S:

PLEASE TAKE NOTICE, that annexed is a true copy of an Order duly entered in the office of the Clerk of the within named Court on May 5, 2010.

Dated: New York, New York
May 13, 2010

NEW YORK
COUNTY CLERK'S OFFICE

MAY 21 2010

Audra Roth
By: Audra Roth
Attorneys for Plaintiff
PATRICIA FORBES
192 Lexington Avenue, Suite 802
New York, New York 10016
(516) 425-1020
File #: 5443

NOT COMPARED
WITH COPY FILE

TO: WALLACE D. GOSSETT, ESQ.
Attorneys for Defendants
130 Livingston Street
Brooklyn, NY 11201
(718) 694-3867
File #: TA-05-06-11-03-001

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

PRESENT: Hon. MICHAEL D. STALLMAN

PART 21

Justice

PATRICIA FORBES,

INDEX NO. 101558/08

Plaintiff,

MOTION DATE 2/25/10

- v -

MOTION SEQ. NO. 003

NEW YORK CITY TRANSIT AUTHORITY and
METROPOLITAN TRANSPORTATION
AUTHORITY,

MOTION CAL. NO.

FILED

Defendants.

MAY 05 2010

The following papers, numbered 1 to 7 were read on this motion to vacate

NEW YORK COUNTY CLERK'S OFFICE	
PAPERS NUMBERED	
Order to Show Cause— Affirmation — Exhibits A-E	<u>1-4</u>
Answering Affirmation — Exhibits A-Z— Exhibits A-F	<u>6-8</u>
Replying Affirmation — Exhibits A-C	<u>7</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that defendants' motion, by order to show cause, to vacate a decision and order dated November 4, 2009 (Beeler, J.), which granted plaintiff's motion to strike defendant's answer on default, is denied.

In this action, plaintiff, who is wheelchair bound, alleges that, on June 11, 2005, she was injured when her wheelchair was caught in the gap between the subway car and platform of the shuttle train at Times Square. By decision and order dated November 4, 2009, Justice Beeler granted plaintiff's motion to strike defendants' answer to the complaint because of their failure to comply with discovery demands. Defendants submitted no opposition. Justice Beeler stated,

"Plaintiff presents a detailed record of defendants' failure to comply with 16 demand notices, letters, court orders and stipulations regarding discovery reaching back to November 2008. On two occasions, August 21, 2008 and October 30, 2008 the Court [Mills, J.] levied financial sanctions on defendants because of their conduct. To date, defendants have not made these payments, a total of \$750."

Defendants move to vacate the decision and order. Defendants' counsel claims that, "Due to an office mix-up, the reasons for which are, unfortunately, not known to me, I did not physically receive the papers until after the October 19, 2009 date [the return date of the motion]." Malter Affirm. ¶ 4. Counsel claims that there was only one item of outstanding document discovery in this action from the so-ordered stipulated dated April 23, 2009, which was produced as Exhibit C to the instant motion to vacate. Malter Affirm. ¶ 12.

"A defendant seeking to vacate an order entered upon his or her default in opposing a motion must demonstrate both a reasonable excuse for the default and a meritorious defense to the motion and the action"

(Continued . . .)

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

HSBC Bank USA Natl Assn v Nuteh 72 Realty Corp., 70 AD3d 998 (2d Dept 2010)(citations omitted). Here, plaintiff points out that defendants' excuse of law office failure is devoid of facts. Although counsel claims that the motion was not delivered to him in the office "due to an office mix-up," he candidly admits that he does not know the reasons for the mix up. "While law office failure is an acceptable excuse for vacating a default (CPLR 2005), the conclusory assertion of misplacement of a file ... is rarely an acceptable excuse." *Achampong v Weigelt*, 240 AD2d 247, 248 (1st Dept 1997) (citation omitted). Thus, defendants' conclusory and perfunctory claim of an unexplained office mix-up does not constitute a reasonable excuse. See *Perez v New York City Hous. Auth.*, 47 AD3d 805, 805-808 (1st Dept 2008).

Even assuming that defendants offered a reasonable excuse for their default, they have not demonstrated a meritorious defense to the motion. As plaintiff demonstrates, defendants' belated compliance with court orders was a chronic problem. Defendants' production for track maintenance records for the year prior to the date of plaintiff's alleged accident was two months overdue. See Roth Opp. Affirm., Ex G, H. Defendants' production for certain documents concerning compliance with the American Disabilities Act was three months overdue. See Roth Opp. Affirm., Ex J, M. At some point, counsel for defendants omitted the date of their subsequent discovery responses. Defendants' production for track maintenance records for the two years prior to the date of plaintiff's alleged accident is undated. See Roth Opp. Affirm., Ex P. However, the Court concludes that the correspondence must be subsequent to their response dated June 12, 2008, which provided only one year's worth of maintenance records (which was not responsive to the so-ordered stipulation dated January 1, 2008). Finally, the last item of discovery was not produced until this motion, i.e., the production was more six months past the discovery deadline. See Roth Opp. Affirm., Ex X; Maltzer Affirm., Ex C.

This Court is mindful of the Appellate Division, First Department's decision in *Figdor v City of New York* (33 AD3d 860 [1st Dept 2008]). There, the Appellate Division reversed an order of this Court denying plaintiff's motion to strike the City's answer, stating:

"Defendant's response to the myriad discovery orders entered in this action over the course of some two years has been inexcusably lax. While discovery has trickled in with the passage of each compliance conference, the cavalier attitude of defendant, resulting as it has in substantial and gratuitous delay and expense, should not escape adverse consequence."

Figdor, 33 AD3d at 861. Given defendants' belated compliance with court-ordered discovery deadlines, a discovery sanction was warranted.

As defendants indicate, striking the answer is a drastic remedy. Indeed, "[b]elated but substantial compliance with a discovery order undermines the position that the delay was a product of willful or contumacious conduct." *Cambry v Lincoln Gardens*, 60 AD3d 1081, 1082 (2d Dept 2008); see also *Gradallo v City of New York*, 52 AD3d 279, 284 (1st Dept 2008). However, in this case, Justice Mills had sanctioned defendants twice in the amount of \$250 and \$500. See Roth Opp. Affirm., Ex Q, at 8; *id.*, Ex S, at 8. On October 30, 2008, when Justice Mills sanctioned defendants \$500, she indicated to plaintiff's counsel that if there were further noncompliance, "make the application [to strike] again. I'm inclined to grant it and strike the answer." Roth Opp. Affirm., Ex S, at 8. Although this Court is mindful that Justice Beeler's decision was granted on default, and is not therefore law of the case, defendants' default was only the most recent of a pattern of default. Under all the circumstances, including the defendants' papers here, the Court does not see the situation differently from Justice Mills or Justice Beeler.

In any event, defendants did not demonstrate a meritorious defense to the action. Defendants' defense consist of the denials contained in their answer, a copy of the Gunn memo concerning the tolerance of platform gaps, and the deposition testimony of Carmelita Cadet, an engineer for the New York City Transit Authority. Maltzer Reply Affirm., Exs A-C. However, defendants' reliance on the Gunn Memo is misplaced. The guidelines for a six inch tolerance for platform gaps in the Gunn Memo "do not apply to curves which must be large enough to assure adequate moving car clearance." Maltzer Reply Affirm., Ex B. Cadet did not testify that specific standards existed for curved tracks:

(Continued ...)

"Q. Are there any standards that are required within the Transit Authority that it should not exceed or should not be above, whether it's 4-inches, 6-inches or 8-inches with respect to a curve[d] platform?

A. The curve[d] platform has to be above the radius. . . .

Q. So on a curved track is there an amount of inches that it should not exceed?

A. I don't know what the excess amount is.

Q. Are there any records or memos or standards or any type of records that would indicate what that would be?

A. I don't know of any records that has it. I know it has to do with the radius, the smaller the radius is the larger number can be."

Malter Reply Affirm., Ex C at 30-31. Defendants do not submit the affidavit of any expert concluding that the size of the specific gap in question was reasonably safe on the date of plaintiff's alleged accident. The Space Measurement Survey submitted in reply is apparently dated March 15, 2007, which is two years after plaintiff's alleged accident.

Dated: 4/30/10
New York, New York



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

FILED
MAY 05 2010
NEW YORK
COUNTY CLERK'S OFFICE

AFFIDAVIT OF SERVICE

STATE OF NEW YORK

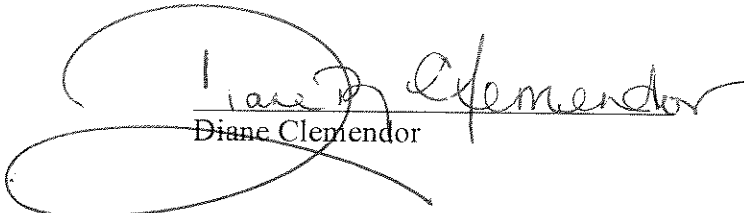
COUNTY OF NEW YORK ss.:

I, Diane Clemendor, being duly sworn, deposes and says:

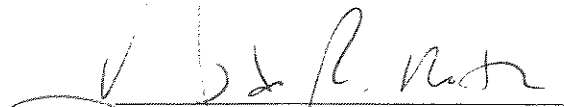
I am over 18 years of age, I am not a party to the action, and I reside in Kings County in the State of New York.

On May 13, 2010, I served a true copy of the annexed **ORDER WITH NOTICE OF ENTRY**, by mailing the same in a sealed envelope, with postage prepaid thereon, in a post office or official depository of the U.S. Postal Service within the State of New York, addressed to the last known address of the addressee as indicated below:

WALLACE D. GOSSETT, ESQ.
Attorneys for Defendants
NEW YORK CITY TRANSIT AUTHORITY
and METROPOLITAN TRANSIT AUTHORITY
130 Livingston Street
Brooklyn, New York 11201


Diane Clemendor

Sworn to before me on this 13th
day of May, 2010


Notary Public

Audra R. Roth
Notary Public, State of NY
No. 12H45025379
Qualified in Nassau County
Comm. Expires March 26, 2011

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

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PATRICIA FORBES,

Plaintiff,

Index No.: 101558/2006

-against-

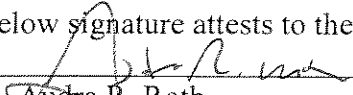
NEW YORK CITY TRANSIT AUTHORITY and
METROPOLITAN TRANSIT AUTHORITY,

Defendants.

-----X

ORDER WITH NOTICE OF ENTRY

The below signature attests to the following papers: Order with Notice of Entry and attached Order

By: 
Audra R. Roth

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