

BRUCE L. MAAS,

Plaintiff,

DECISION AND ORDER

v.

Index #2002/05602

NATIONAL INDEMNITY COMPANY and
NATIONAL LIABILITY & FIRE
INSURANCE COMPANY,

Defendant.

Plaintiff asserts, and defendants acknowledged, both in its papers and at oral argument, that defendants had no outstanding discovery requests pending at the time plaintiff filed the note of issue. Accordingly, and in view of the nearly five years afforded to the parties to conduct discovery dating from denial of the motion to dismiss on February 5, 2003, “[s]ince no formal discovery requests were pending, the plaintiff did not act improperly in filing his note of issue.” Tilden Financial Corp. v. Muffoletto, 161 A.D.2d 583, 584 (2d Dept. 1990). “To vacate the note of issue, discovery requests must be legitimate and pending . . .” Ireland v. Geico Corporation, 2 A.D.3d 917, 918 (3d Dept. 2003). See also, Plonka v. Millard Fillmore Emergency Physician’s Services, P.C., 9 A.D.3d 869, 870 (4th Dept. 2004).

At least since Grant v. Wainer, 179 A.D.2d 364 (1st Dept. 1992), the courts in this state have held that, in these circumstances, a party moving to vacate a note of issue is

relegated to a portion of the standard of 22 N.Y.C.R.R. §202.21(d). Id. 179 A.D.2d at 364-65 (“a party may not obtain further disclosure after the filing of a note of issue and certificate of readiness absent a factual showing of . . . ‘‘special, unusual or extraordinary circumstances’’”) (quoting Goldsmith v. HowMedica, Inc., 158 A.D.2d 335, 336). See Pannone v. Silberstein, 40 A.D.3d 327, 328 (1st Dept. 2007); Allen v. Braxton, 21 A.D.3d 1272, 1273 (4th Dept. 2005); Plonka, supra.¹ Application of the §202.21(e) standard is limited to situations in which the record at the very least shows notification to opposing counsel “prior to the filing of the note of issue” of a desire to conduct further discovery, Moss v. McKelvey, 32 A.D.3d 1281, 1282 (4th Dept. 2006) (and cases cited therein), if not the prior interposition of a “formal discovery request” as referred to in Tilden, supra. It is undisputed here that no formal or informal discovery requests were extant at the time plaintiff filed the note of issue.

Defendants fail to show “special, unusual or extraordinary circumstances” to justify further discovery. An assumption that plaintiff would depose some of the witnesses defendants now wish to depose does not establish special, unusual or extraordinary circumstances. The stark fact of the matter is that, in the

¹ The cases in this line do not refer to that portion of §202.21(d) which requires a showing of “substantial prejudice.”

nearly five year long history of discovery in this action, defendants gave no clue that they wanted the discovery they now seek until this post note of issue motion to vacate. Inasmuch as defendants admit that they neglected to notice the now desired discovery because they assumed that plaintiff would want to depose some of the witnesses, they cannot show that "[t]he unusual or unanticipated circumstances develop[ed] subsequent to the filing of the note of issue," and their failure to seek it sooner must be chalked up to a "lack of diligence." Marks v. Morrison, 275 A.D.2d 1027 (4th Dept. 2000). In Marks v. Morrison, the court was faced with a motion to vacate brought after the 20 day time period of §202.21(e) whereas here the motion was timely brought. This distinction is highlighted in defendant's post submission letter received this date. But the application of the "special, unusual or extraordinary circumstances" standard here does not result from the timing of the motion under §202.21(e), but rather the fact that defendants did not show any inaccuracy of the representations made in the note of issue (because no outstanding formal or other discovery requests existed at the time of filing). Parrone v. Silberstein, supra; Allen v. Braxton, supra; Plonka, supra; Tilden Financial Corp., supra; Grant v. Wainer, supra.

The motion to strike is denied.

SO ORDERED.

KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: November __, 2007
Rochester, New York