

Supreme Court of the State of New York  
Appellate Division: Second Judicial Department

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Submitted - June 6, 2012

REINALDO E. RIVERA, J.P.  
RANDALL T. ENG  
CHERYL E. CHAMBERS  
SANDRA L. SGROI  
ROBERT J. MILLER, JJ.

2012-02713

DECISION & ORDER

Craig Jacobs, respondent, v Henry H. Johnston, Jr.,  
appellant.

(Index No. 101975/09)

Hodges Walsh & Slater LLP, White Plains, N.Y. (Paul E. Svensson of counsel), for  
appellant.

Hecht, Kleeger, Pintel & Damashek (The Law Office of Judah Z. Cohen, PLLC, New  
York, N.Y., of counsel), for respondent.

In an action to recover damages for personal injuries, the defendant appeals, as limited by his brief, from so much of an order of the Supreme Court, Richmond County (Minardo, J.), dated February 16, 2012, as denied that branch of his motion which was pursuant to 22 NYCRR 202.21 to vacate the note of issue and, in effect, to compel the deposition of a nonparty witness, and granted the plaintiff's cross motion to quash a subpoena served upon the nonparty witness.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs, that branch of the defendant's motion which was to vacate the note of issue and, in effect, to compel the deposition of a nonparty witness is granted, and the plaintiff's cross motion to quash the subpoena is denied.

Since the defendant moved to vacate the note of issue within the time prescribed for doing so pursuant to 22 NYCRR 202.21(e), and clearly demonstrated that the case was not ready for trial, that branch of the defendant's motion which was to vacate the note of issue and, in effect, to compel the deposition of a nonparty witness should have been granted (*see* CPLR 2103[b][2]; *Gallo*

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*v SCG Select Carrier Group, L.P.*, 91 AD3d 714; *Tirado v Miller*, 75 AD3d 153, 157). Furthermore, since the defendant timely moved to vacate the note of issue, he was required only to demonstrate why the case was not ready for trial, and was not required to establish that additional discovery was necessary because unusual or unanticipated circumstances had developed subsequent to the filing of the note of issue (see 22 NYCRR 202.21[d], [e]; *Mosley v Flavius*, 13 AD3d 346; *Rizzo v DeSimone*, 287 AD2d 609, 610; *Perla v Wilson*, 287 AD2d 606; *Audiovox Corp. v Benyamini*, 265 AD2d 135, 139).

In opposition to the plaintiff's cross motion to quash the subpoena served by the defendant upon the nonparty witness, the defendant demonstrated, inter alia, that the disclosure sought was relevant, material, and necessary to the defense of the action (see CPLR 3101[a][4]; *Kondratich v Orthodox Church in Am.*, 73 AD3d 708, 709; *Tenore v Tenore*, 45 AD3d 571, 571-572; *Thorson v New York City Tr. Auth.*, 305 AD2d 666; *Maxwell v Snapper, Inc.*, 249 AD2d 374). Contrary to the plaintiff's contention, the defendant did not waive his right to seek discovery from the nonparty witness by failing to raise an objection with respect thereto at the certification conference. Since the identity of the nonparty witness was not made known to the defendant until after the date of the certification conference, and the defendant timely moved to vacate the note of issue, the defendant could not be deemed to have waived his right to compel the nonparty witness to comply with the subpoena and to appear for a deposition (cf. *Jones v Grand Opal Constr. Corp.*, 64 AD3d 543, 544; *James v New York City Tr. Auth.*, 294 AD2d 471, 472). Accordingly, the plaintiff's cross motion to quash the subpoena should have been denied.

The plaintiff's remaining contentions are either without merit or improperly raised for the first time on appeal.

RIVERA, J.P., ENG, CHAMBERS, SGROI and MILLER, JJ., concur.

ENTER:

  
Aprilanne Agostino  
Clerk of the Court