Bronx Mgt., Inc. v Dalal Med. PC
2020 NY Slip Op 33211(U)
September 30, 2020
Supreme Court, New York County
Docket Number: 651216/2013
Judge: Carol R. Edmead
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. CAROL R. EDMEAD** **PART** **IAS MOTION 35EFM**

Justice

----------X

BRONX MANAGEMENT, INC.,MICHAEL BEREZOVSKY, IBRAHIM FATIHA, ROSARIO BASCON

Plaintiff,

- v -

DALAL MEDICAL PC,RASHIKESH DALAL,

Defendant.

----------X

INDEX NO. 651216/2013

MOTION DATE 9/24/2020

MOTION SEQ. NO. 008

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 008) 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE/JURY DEMAND/FROM TRIAL CALENDAR.

Upon the foregoing documents, it is

ORDERED that the motion of defendant Dalal Medical, PC is granted to the extent that the note of issue and certificate of readiness filed May 10, 2019 (NYSCEF Doc No. 90) are hereby vacated, and the action stricken from the trial calendar, and the balance of the motion otherwise denied with leave to renew; and it is further

ORDERED that all further discovery shall be completed within 90 days from service of a copy of this decision and order with notice of entry; and it is further

ORDERED that, within 15 days from completion of discovery as hereinabove directed, the plaintiffs shall cause the action to be placed upon the trial calendar by the filing of a new note of issue and certificate of readiness (for which no fee shall be imposed), to which shall be attached a copy of this order; and it is further

ORDERED that the Clerk of the General Clerk's Office (60 Centre Street, Room 119), is hereby directed to strike the case from the trial calendar and make all required notations thereof in the records of the court; and it is further

ORDERED that counsel for defendant shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.

MEMORANDUM DECISION

In this breach of contract action, defendant Dalal Medical, PC (defendant) moves, pursuant to Uniform Rules for Trial Courts (22 NYCRR) § 202.21 (d) and (e), for an order striking the note of issue filed with the court on May 10, 2019.

BACKGROUND FACRTS

Plaintiffs Bronx Management, Inc., (BMI), Dr. Ibrahim Fatiha (Dr. Fatiha), Dr. Rosario Bascon and Michael Berezovsky (Berezovsky) (collectively, plaintiffs) commenced this action to recover damages for defendant's alleged breach of a collection agreement (the Collection Agreement), among other claims.[1] According to the terms of the Collection Agreement, BMI agreed to act, in effect, as a collection services agent for defendant and recover on no-fault claims filed with insurance carriers related to patients who received treatment at defendant's facility (NY St Cts Elec Filing [NYSCEF] Doc No. 116, Rishikesh Dalal [Dalal] aff, exhibit A at 1-2). In connection with the Collection Agreement, defendant's president, Dalal, granted a power of attorney to Berezovsky, and provided Berezovsky with a stamp bearing Dalal's signature (NYSCEF Doc No. 115, ¶ 5). Dalal avers that in January 2013, he revoked the power of attorney granted to Berezovsky by letter and by email (*id.*, ¶ 6; NYSCEF Doc No. 109, affirmation of Marc B. Schlesinger [Schlesinger], exhibit K at 1 and 6-7). Dalal further avers that he terminated defendant's Collection Agreement with BMI in writing in April 2013 (NYSCEF Doc No. 115, ¶ 7). In a decision and order dated February 8, 2018, this court denied a motion brought by plaintiffs to restrain defendant from interfering with the performance of collections pursuant to the Collection Agreement (NYSCEF Doc No. 88 at 5-6).

[1] The court has previously dismissed plaintiffs' first cause of action alleging a claim for breach of a lease agreement and dismissed the claims against the individual defendant, Rashikesh Dalal (Dalal) (NY St Cts Elec Filing [NYSCEF] Doc No. 39).

On February 12, 2019, defendant served upon plaintiffs a notice to resume prosecution under CPLR 3216 (b) and demanded that plaintiffs serve and file a note of issue within 90 days of the date of the notice (NYSCEF Doc No. 103, Schlesinger affirmation, exhibit E at 1). In response to defendant's notice, plaintiffs filed a note of issue and a certificate of readiness on May 10, 2009, certifying that discovery was complete (NYSCEF Doc No. 104, Schlesinger affirmation, exhibit F at 1-2). By letter dated May 20, 2019, defendant's counsel requested that plaintiffs provide the discovery initially demanded after the depositions of Dr. Fatiha and Berezovsky held in 2017 (NYSCEF Doc No. 105, Schlesinger affirmation, exhibit G at 1). It appears that plaintiffs subsequently forwarded at least part of the documentary discovery that defendant had requested (NYSCEF Doc No. 121, affirmation of Svetlana Sobel [Sobel], exhibit A at 1-2).

Meanwhile, on or about June 10, 2019, Dalal began searching for legal counsel regarding the no-fault claims that were the subject of the Collection Agreement, and learned from Rubin, Fiorella, Friedman & Mercante LLP, one of the firms he had contacted, that "*the firm was already defending claims for a client* ***in which I and Dalal Medical were plaintiffs***" (NYSCEF Doc No. 115, ¶¶ 9-11 [emphasis in original]). Dalal explains that he learned Tsirelman Law Firm PLLC (Tsirelman) represented defendant and Dalal as plaintiffs in that action (*id.*, ¶ 13). After contacting Tsirelman, Dalal learned that Berezovsky had retained Tsirelman under a "fraudulent and forged engagement letter dated August 4, 2017 (*id.*, ¶ 14). Dalal submits that Berezovsky used the stamp bearing Dalal's signature to sign an "Arbitration Retainer Agreement" with Tsirelman, even though Dalal had previously revoked the power of attorney granted to Berezovsky more than six years earlier (*id.*, ¶ 15; NYSCEF Doc No. 107, Schlesinger affirmation, exhibit I at 2). Dalal claims that the engagement letter was notarized by a convicted

felon who does not possess a notary license (NYSCEF Doc No. 115, ¶ 15). In addition, it appears that Berezovsky may have retained another attorney, Ilya Parnas, Esq., to represent defendant and Dalal on other no-fault claims as early as 2014 (*id.*, ¶ 20).

Dalal states that Tsirelman has collected approximately $200,000 from its efforts, and that the funds were placed into an account bearing the name "Brook Medical Health Practice, P.C." (Brook Medical) at Capital One (*id.*, ¶ 17). Brook Medical's chief executive officer is Dundar S. Tuzun (Tuzun) (NYSCEF Doc No. 110, Schlesinger affirmation, exhibit L at 1). Dalal submits that Tuzun's medical license is inactive, and surmises that Tuzun died in November 2013 (NYSCEF Doc No. 115, ¶ 18). Dalal also claims that the attorneys at Tsirelman confirmed they dealt only with Berezovsky, who collected the checks made payable to defendant or Dalal, and that Berezovsky paid Tsirelman's fees (*id.*, ¶ 19). On June 12, 2019, defendant and Dalal requested that Tsirelman cease representing them on the no-fault claims (NYSCEF Doc No. 111, Schlesinger affirmation, exhibit M at 1). At that time, Tsirelman represented defendant and Dalal in nearly 200 active cases (*id.*, ¶ 14; NYSCEF Doc No. 108, Schlesinger affirmation, exhibit J). Dalal avers that Tsirelman has dismissed all cases with prejudice (*id.*, ¶ 23).

Defendant now argues that in view of these recent developments, the note of issue should be stricken and further discovery should be had concerning the extent of Berezovsky's alleged fraudulent conduct. Defendant also wishes to amend its answer to pursue counterclaims against plaintiffs based upon the additional information likely to be revealed in discovery.

Plaintiffs, in opposition, urge the court to summarily deny the motion because the moving papers fail to include an affirmation of good faith in conformity with Uniform Rules for Trial Courts (22 NYCRR) § 202.7 (c). Plaintiffs also submit that the missing discovery is a "farce"

given that defendant had not raised the issue of missing discovery prior to the date the note of issue was filed.

DISCUSSION

Preliminarily, plaintiffs' contention that the motion should be dismissed because it lacks an affirmation of good faith is unpersuasive. The correspondence between the parties demonstrates that defendant had requested the outstanding discovery by letter dated May 20, 2019 (NYSCEF Doc No. 105 at 1). Although a good faith attempt to resolve discovery requires something more than merely sending a letter addressed to an adversary (*see 241 Fifth Ave. Hotel, LLC v GSY Corp.*, 110 AD3d 470, 472 [1st Dept 2013]; *Amherst Synagogue v Schuele Paint Co., Inc.*, 30 AD3d 1055, 1057 [4th Dept 2006] [concluding that two letters informing the plaintiff that its rejection of the defendants' discovery demands does not constitute a good faith effort]), it is evident from the parties' subsequent email correspondence that good faith attempts were made before defendant sought court intervention (NYSCEF Doc No. 121, at 1-2). Consequently, defendant's failure to furnish the court with the requisite good faith affirmation is excused because the requirements have been satisfied through counsel's affirmation in support and the exhibits submitted on the motion (*see Loeb v Assara N.Y. I L.P.*, 118 AD3d 457, 457-458 [1st Dept 2014]).

Uniform Rules for Trial Courts (22 NYCRR) § 202.21 (d) and (e) detail the two methods by which post-note of issue discovery may take place (*see Schroeder v IESI NY Corp.*, 24 AD3d 180, 181 [1st Dept 2005]). First, Uniform Rules for Trial Courts (22 NYCRR) § 202.21 (d), provides, in part, that "[w]here unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice, the court, upon motion supported by affidavit, may grant

permission to conduct such necessary proceedings." Thus, a party seeking post-note discovery must demonstrate both "'unusual or unanticipated circumstances' as well as 'substantial prejudice'" (*Hartnett v City of New York*, 139 AD3d 506, 506 [1st Dept 2016]; *Audiovox Corp. v Benyamini*, 265 AD2d 135, 138 [2d Dept 2000]). Second, Uniform Rules for Trial Courts (22 NYCRR) § 202.21 (e) states, in pertinent part, that "the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect." A motion brought under this subsection must be made within 20 days after service of the note of issue and certificate of readiness.

Although defendant did not formally move for relief within 20 days after the date the note of issue was filed, defendant has demonstrated good cause for the delay (*see Allen v Hiraldo*, 144 AD3d 434, 434 [1st Dept 2016] [denying an untimely motion to vacate the note of issue and certificate of readiness where the defendants failed to demonstrate good cause for the delay]). Defendant contacted the court two weeks after plaintiffs filed the note of issue to request a conference to resolve the outstanding discovery (NYSCEF Doc No. 98, Schlesinger affirmation, ¶ 13). Furthermore, the court notes that defendant was granted express leave to move to vacate the note of issue and seek additional discovery (NYSCEF Doc No. 95, oral argument tr at 2-3). Thus, the instant motion is timely.

"Where a party timely moves to vacate a note of issue, it need show only that 'a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of . . . section [202.21] in some material respect'" (*Vargas v Villa Josefa Realty Corp.*, 28 AD3d 389, 390 [1st Dept 2006] [internal citation omitted]). At issue are defendant's discovery demands related to BMI's collection efforts, which were first made in

2017 (NYSCEF Doc No. 99, Schlesinger affirmation, exhibit A at 5-6; NYSCEF Doc No. 100, Schlesinger affirmation, exhibit B at 1). Plaintiffs furnished partial responses on June 7, 2019, but defendant claims the responses were deficient (NYSCEF Doc No. 98, Schlesinger affirmation, ¶ 15). In particular, it does not appear that plaintiffs exchanged documents pertaining to BMI's collection efforts prior to filing the note of issue (NYSCEF Doc No. 106, Schlesinger affirmation, exhibit H at 1). The documents are particularly relevant in view of plaintiffs' claim that defendant breached the Collection Agreement and defendant's recent discovery of Berezovsky's alleged fraud in pursuing collection actions even after Dalal purportedly revoked his power of attorney. Thus, defendant has demonstrated that the certificate of readiness contains an incorrect statement, which warrants the striking of the note of issue and the certificate of readiness (*see Ruiz v Park Gramercy Owners Corp.,* 182 AD3d 471, 471 (1st Dept 2020), *Perez v Kone*, 166 AD3d 555, 555 [1st Dept 2018]).

Moreover, defendant has recently learned that plaintiffs, purporting to act on behalf of defendant and Dalal, retained counsel to collect no-fault payments from insurance carriers in at least 200 cases. This development constitutes a new and unanticipated claim that warrants post-note discovery (*see Hartnett*, 139 AD3d at 506).

Lastly, defendant argues that it wishes to assert counterclaims against plaintiffs arising out of Berezovsky's allegedly fraudulent conduct. Although the notice of motion indicates that defendant seeks "the right to amend its Answer … based on the information Defendant uncovers during the course of its discovery" (NYSCEF Doc No. 96, defendant's notice of motion, at 1), the motion is not accompanied by a proposed amended answer to the court for review (*see* CPLR 3025 [b]; *Sutton Animal Hosp. PLLC v D&D Dev., Inc.*, 177 AD3d 467, 467 [1st Dept 2019]). As such, this branch of the motion is denied with leave to renew upon appropriate papers.

CONCLUSION

Accordingly, it is

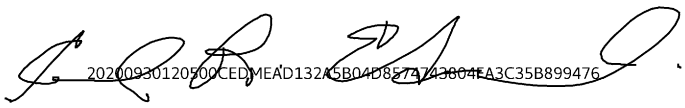
ORDERED that the motion of defendant Dalal Medical, PC is granted to the extent that the note of issue and certificate of readiness filed May 10, 2019 (NYSCEF Doc No. 90) are hereby vacated, and the action stricken from the trial calendar, and the balance of the motion otherwise denied with leave to renew; and it is further

ORDERED that all further discovery shall be completed within 90 days from service of a copy of this decision and order with notice of entry; and it is further

ORDERED that, within 15 days from completion of discovery as hereinabove directed, the plaintiffs shall cause the action to be placed upon the trial calendar by the filing of a new note of issue and certificate of readiness (for which no fee shall be imposed), to which shall be attached a copy of this order; and it is further

ORDERED that the Clerk of the General Clerk's Office (60 Centre Street, Room 119) is hereby directed to strike the case from the trial calendar and make all required notations thereof in the records of the court; and it is further

ORDERED that counsel for defendant shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.



9/30/2020
DATE

CAROL R. EDMEAD, J.S.C.

CHECK ONE:		CASE DISPOSED		x	NON-FINAL DISPOSITION	
		GRANTED	DENIED	x	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT	REFERENCE