

Minorczyk v City of New York
2006 NY Slip Op 30833(U)
October 30, 2006
Supreme Court, New York County
Docket Number: 102928/04
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

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EUGENIUSZ MINORCZYK and BARBARA
MINORCZYK,

Plaintiff,

Index No.
102928/04

- against -

**ORDER AND
DECISION**

CITY OF NEW YORK, DORMITORY AUTHORITY
OF THE STATE OF NEW YORK and LIRO
ENGINEERING AND CONSTRUCTION
MANAGEMENT, PC.,

Defendants.

-----X
THE CITY OF NEW YORK and
LIRO ENGINEERING AND CONSTRUCTION
MANAGEMENT PC.,

Third Party Plaintiffs,

- against -

INTER CONNECTION ELECTRIC, INC.,

Third Party Defendants.

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EILEEN A. RAKOWER, J.S.C.

FILED
NOV 06 2006
NEW YORK
COUNTY CLERK'S OFFICE

Plaintiffs commenced this action to recover damages for injuries sustained by Eugeniusz Minorczyk while on his job. Defendant Dormitory Authority of the State of New York ("Dormitory") moves to strike plaintiffs' Note of Issue dated July 11, 2006 on the ground that there is discovery outstanding. Third party defendant Inter-Connection Electric, Inc. ("Inter Connection") submits an affirmation in support of the instant motion.

Preliminarily, Dormitory urges the Court to treat the instant motion as timely, despite its being made beyond the 20 days from plaintiffs' filing the Note of Issue.

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Dormitory shows that it previously served and filed a timely motion with the Court that was rejected on technical grounds.¹ Plaintiff does not object, and the Court will consider the motion as timely. See, 22 NYCRR 202.21(e).

Defendant Dormitory argues that plaintiffs' filing of a Note of Issue was premature because several items of discovery are owed to them by their co-defendants and third party defendant Inter Connection. These include the deposition of a witness produced by Inter Connection (ordered at a compliance conference dated April 18, 2006), Liro Engineering and Construction Management PC ("Liro")'s response to defendant Dormitory's third notice for discovery and inspection dated March 7, 2006, and outstanding items from Liro that Dormitory requested at a deposition taken on June 16, 2006 (including addresses for Al Palma, Zhen Livosky and Eugene McCarthy; a copy of Inter Connection's daily field report for December 5, 2003, a copy of Liro's safety program, a copy of Inter Connection's site safety plan, copies of job site progress photographs and a copy of Liro's engineering site safety checklist).

Plaintiffs oppose Dormitory's motion to strike, and argue that the instant matter has been unduly delayed by defendants. Further, plaintiffs assert that they have complied with all discovery demands. Plaintiffs conclude they should not be punished due to the defendants' inability to complete discovery among themselves.

Within 20 days after service of a note of issue and certificate of readiness, any party to the action or special proceeding may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial, and 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...If the motion to vacate a note of issue is granted, a copy of the order vacating the note of issue shall be served upon the clerk of the trial court. 22 NYCRR 202.21 (e)

¹ Third party defendant Inter Connection timely moved to vacate plaintiff's Note of Issue and strike the case from the trial calendar on or about July 17, 2006. Dormitory then filed a timely cross motion dated July 21, 2006 seeking the same relief. Dormitory's cross-motion was rejected by the Court because Inter Connection's motion was never received by and/or filed with the Court.

Third party defendant Inter Connection supports Dormitory's motion, yet it fails to provide documents according to the prior compliance Order or explain its failure to do so. Notably, Dormitory seeks no sanction against the malingering parties or an order facilitating closure to discovery.

Plaintiffs' attorney affirmation in support of its request that this matter be placed on the trial calendar makes no material misrepresentation. Indeed, it attaches a copy of the Compliance Conference Order of Justice Stallman and states that "[p]laintiffs have complied with all directives of said Order and this case is now ready to be placed on the trial calendar." Absent from the papers submitted to this Court is any reason why discovery was not completed by the dates stated in that compliance order or why such discovery cannot be completed within the next 60 days.

While it is well settled that if a party requests such relief and affirms that discovery is legitimately outstanding the note of issue is seen as premature and must be vacated *See, Schecter v. 210 E. 90th St. Owners, Inc., et al.*, 271 A.D.2d 224, 225 (1st Dept. 2000) (note of issue should be vacated when it is clear that all discovery was not yet complete at the time of filing), plaintiff should not be held hostage to passivity among defendants.

Wherefore it is hereby,

ORDERED that defendant Dormitory Authority of the State of New York's motion is granted and the plaintiff's note of issue is vacated, on the condition that all discovery is completed within 60 days of this order, and it is further

ORDERED that defendant Liro Engineering and Construction Management PC., and Third Party Defendant Inter-Connection Electric, Inc. shall provide defendant Dormitory Authority of the State of New York with all outstanding discovery on or before December 29, 2006, and it is further

ORDERED that plaintiffs' time to file their note of issue is extended until January 5, 2007.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: October 30, 2006



EILEEN A. RAKOWER, J.S.C.

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