

**Dragutescu v New York City Tr. Auth.**

2007 NY Slip Op 31587(U)

June 7, 2007

Supreme Court, Queens County

Docket Number: 0013891/2006

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE  
Justice

IAS PART 22

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ECATERINA DRAGUTESCU,  
Plaintiff,  
  
-against-

Index No. 13891/06  
  
Motion  
Date May 22, 2007

NEW YORK CITY TRANSIT AUTHORITY,  
Defendant.  
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Motion  
Cal. No. 5  
  
Motion  
Sequence No. S002

The following papers numbered 1 to 8 read on this motion by defendant for an order pursuant to 22 NYCRR 202.21(3) striking the Note of Issue and Certificate of Readiness and removing this action from the trial calendar on the grounds that the Certificate of Readiness is incorrect in that all discovery has not been completed; cross motion by plaintiff for a special preference.

	<u>PAPERS</u> <u>NUMBERED</u>
Notice of Motion-Affidavits-Exhibits.....	1-4
Cross Motion.....	5-8

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Defendant's Motion

That branch of defendant's motion for an order pursuant to 22 NYCRR 202.21(3) striking the Note of Issue and Certificate of Readiness, and removing this action from the trial calendar on the grounds that the Certificate of Readiness is incorrect in that all discovery has not been completed is hereby decided as follows:

Defendant maintains that plaintiff has failed to comply with the directives of a Preliminary Conference Order dated December 4, 2006 by not: providing a Supplemental Bill of Particulars, appearing for an examination before trial, submitting to orthopedic and neurologic independent medical examinations and providing HIPAA compliant authorizations.

Defendant also alleges that there is a Compliance Conference scheduled for July 16, 2007.

Plaintiff argues that the reason she has not appeared for an EBT is "[d]efendant refused to go forward with the plaintiff's (and defendant's) deposition on April 5, 2007 although [plaintiff] called the Transit Authority on at least three occasions on April 4 to confirm that it would take place - as plaintiff was ready to proceed." Plaintiff's counsel then deemed that defendant waived the deposition of plaintiff. Additionally, plaintiff contends that she had not been served with a notice for a physical examination, and as such, plaintiff's counsel deemed that defendant waived the physical examination. Furthermore, plaintiff claims that completed HIPAA authorizations were served on defendant. Finally, plaintiff argues that the Note of Issue/Certificate of Readiness was filed on April 9, 2007 and received by counsel for defendant on April 10, 2007 and as such defendant's instant motion is untimely as it was made well beyond the 20-day time period in which to move to strike an action's Note of Issue. (22 NYCRR § 202.21[e]).

Uniform Rules for Trial Courts (22 NYCRR) § 202.21(e) sets forth specific procedures for vacating a note of issue. Within 20 days after service of a Note of Issue/Certificate of Readiness a party can move to vacate the Note of Issue upon a showing that the Certificate of Readiness is incorrect in some material way. This Court finds that it is undisputed that the Note of Issue was filed on April 9, 2006 and the defendant's motion to vacate the Note of Issue was served on May 4, 2006. It is undisputed that defendant did not move to vacate the Note of Issue within 20 days of its filing. Pursuant to the Appellate Division, Second Department, where the defendant does not move to vacate the Note of Issue within 20 days of its filing, "the defendant [is] required to demonstrate that unusual or unanticipated circumstances developed subsequent to the filing of the note of issue and certificate of readiness which required additional discovery to prevent substantial prejudice (see, 22 NYCRR 202.21[d])." (*Audiovox Corp. v. Benyamini*, 265 AD2d 135 [2d Dept 2000]). The Court finds that defendant failed to proffer any unusual or unanticipated circumstances which developed subsequent to the filing of the Note of Issue and Certificate of Readiness and as such the second prong of the standard ie. "substantial prejudice" need not be addressed. (*Utica Mutual Ins. Co. v. P.M.A. Corp.*, 2006 NY Slip Op 8971 [2d Dept 2006]); *Gomez v. New York City Transit Authority*, 19 AD3d 366 [2d Dept 2005]).

However, pursuant to 22 NYCRR § 202.21(e), the Court can, at any time, on its own motion, vacate the Note of Issue if it appears that a material fact in the Certificate of Readiness is incorrect or if the certificate fails to comply with the section's requirements in some respect (*Basetti v. Nour*, 287 AD2d

126, 132 [2d Dept 2001]; *Jones v. Lynch*, 298 AD2d 499 [2d Dept 2002]); *Vasquez v. Gomez*, 2005 NY Slip Op 25119 [Sup. Ct., Bronx Cty 2005]. In the instant matter, the Court finds that material facts in the Certificate of Readiness are incorrect.

The Preliminary Conference Order sets forth a timetable for the completion of disclosure in this matter, including specific dates for depositions of the parties and physical examinations, and the date of July 16, 2007 for a Compliance Conference. The order also directs that plaintiff shall file a Note of Issue/Certificate of Readiness on or before November 20, 2007. In the Certificate of Readiness dated April 5, 2007 filed by plaintiff, plaintiff's counsel attests, *inter alia*, that (1) physical examinations were waived, (2) discovery proceedings now known to be necessary were waived; (3) there are no outstanding requests for discovery; (4) there has been a reasonable opportunity to complete discovery; (5) there has been compliance with any order issued pursuant to the precalendar rules (22 NYCRR 202.12); and (6) the case is ready for trial. The Court finds that these representations by plaintiff are incorrect statements of material facts.

In opposition to the defendant's motion, plaintiff's counsel attests that physical examinations have been waived. Plaintiff's counsel affirms that his conversations with the employees of defendant, and the fact that his client had not been noticed for a deposition, led him to believe that the depositions were also waived. However, such assumption that defendant waived its right to disclosure was erroneous, unilateral, premature and in contravention of the directions of the Preliminary Conference Order. Pursuant to the provisions of the Order, the Court has the authority to determine whether defendant waived disclosure and whether all discovery is complete. Indeed, these issues were ripe and proper subjects for the Compliance Conference scheduled for July 16, 2007. At the Compliance Conference, the Court could have determined if defendant waived any disclosure proceedings, instead of the plaintiff unilaterally deciding to deem discovery complete. Here, the New York City Transit Authority established that it had not conducted a deposition or physical examination of plaintiff, that it did not waive such disclosure proceedings or any other disclosure proceedings, and that the case is not ready for trial.

Accordingly, as material facts in the Certificate of Readiness are incorrect, the Court *sua sponte* vacates the Note of Issue and Certificate of Readiness. As all discovery has not yet been completed, the matter is not yet ready for trial. (*Garofalo v. Mercy Hosp.*, 271 AD2d 642 [2d Dept 2000] [where the Court held that incorrect statement in personal injury plaintiffs' certificate of readiness, asserting that all pretrial discovery had been completed when it had not been, was material, and thus,

their filing of a note of issue was a nullity and properly vacated]; 22 NYCRR § 202.21[e]; *see, Drapaniotis v. 36-08 33<sup>rd</sup> Street Corp.*, 288 AD2d 254 [2d Dept 2001]). The action shall be stricken from the trial calendar upon presentation of this order to the calendar clerk. Plaintiff may restore the matter to the trial calendar upon completion of all outstanding discovery and the resolution of any discovery issues, along with payment of the appropriate fee.

That branch of defendant's motion for an order pursuant to CPLR 3212(a) extending defendant's time to move for summary judgment until 120 days from the date of completion of all outstanding discovery is denied. As the Note of Issue has been vacated, pursuant to CPLR 3212(a) and the Preliminary Conference Order, defendant may move for summary judgment no later than one hundred twenty days after the filing of a new Note of Issue.

Additionally, that branch of defendant's motion for an order pursuant to CPLR 3124 and 3126 to compel plaintiff to complete discovery in this matter or, in the alternative, to preclude the plaintiff from offering any evidence at the trial of this action as to any subject on which discovery has not been provided is granted solely to the following extent:

It is ordered that the parties are to appear for examinations before trial on a date, time, and place mutually agreed upon by the parties, but no later than sixty (60) days from the date of service of a copy of this order with notice of entry.

It is further ordered that plaintiff is to appear for independent neurologic and orthopedic medical examinations on a date, time, and place mutually agreed upon by the parties, but no later than sixty (60) days from the date of service of a copy of this order with notice of entry.

It is further ordered that plaintiff is to comply with defendant's demand for a Supplemental Verified Bill of Particulars within sixty (60) days after service of a copy of this order with notice of entry.

Should plaintiff fail to comply with this order, defendant may move for sanctions pursuant to CPLR 3126.

Defendant is directed to serve a copy of this order upon plaintiff.

#### Plaintiff's Cross Motion for a Special Trial Preference

Plaintiff's cross motion for a trial preference is granted

without opposition. Plaintiff established through her affidavit of merit, driver's license, and United States Passport that she is 73 years old and therefore entitled to a trial preference under CPLR 3403(a)(4) (see, *Pagliocca v. M. Grossman Lumber Corp.*, 29 AD2d 520 [1<sup>st</sup> Dept 1967]; *Barbero v. City of New York*, 16 AD2d 770 [1<sup>st</sup> Dept 1962]).

Plaintiff is directed to file a copy of this order with notice of entry upon the clerk of the Trial Term Office, Room 140.

This constitutes the decision and order of the Court.

Dated: June 7, 2007

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**Howard G. Lane, J.S.C.**