

**Iscowitz v County of Suffolk**

2007 NY Slip Op 32187(U)

July 16, 2007

Supreme Court, Suffolk County

Docket Number: 0025155/2002

Judge: Robert W. Doyle

Republished from New York State Unified Court  
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

SUPREME COURT - STATE OF NEW YORK  
POST-NOTE MOTION PART - SUFFOLK COUNTY

**PRESENT:**

Hon. ROBERT W. DOYLE  
Justice of the Supreme Court

MOTION DATE 3-14-07  
ADJ. DATE 5-16-07  
Mot. Seq. # 004 - MD  
005 - XMD

-----X	:	
STEVEN G. ISCOWITZ and NANCY	:	EDELMAN, KRASIN & JAYE, PLLC
ISCOWITZ,	:	Attorneys for Plaintiff
	:	One Old Country Road, Suite 210
Plaintiffs,	:	Carle Place, New York 11514
	:	
- against -	:	GACOVINO, LAKE & ASSOCIATES, P.C.
	:	Attorneys for Defendant Town of Babylon
	:	270 West Main Street
	:	Sayville, New York 11782
	:	
COUNTY OF SUFFOLK, VILLAGE OF	:	
LINDENHURST and TOWN OF BABYLON,	:	
	:	
Defendants.	:	
-----X	:	

Upon the following papers numbered 1 to 24 read on this motion to vacate note of issue; Notice of Motion/ Order to Show Cause and supporting papers 1 - 7; Notice of Cross Motion and supporting papers 8 - 19; Answering Affidavits and supporting papers 20 - 24; Replying Affidavits and supporting papers     ; Other     ; (~~and after hearing counsel in support and opposed to the motion~~) it is.

**ORDERED** that this motion (004) by defendant Town of Babylon for an order pursuant to 22 NYCRR §202.21 vacating the Note of Issue and Certificate of Readiness, striking this matter from the trial calendar, and to extend defendant's time to serve a motion for summary judgment is denied; and it is further

**ORDERED** that this cross motion (005) by plaintiffs Steven G. Iscowitz and Nancy Iscowitz pursuant to CPLR 3126 for an order striking the answer of defendant Town of Babylon for failure to timely provide responses to plaintiffs' discovery demands is denied.

This action was commenced by plaintiffs on September 20, 2002 by the filing of the summons and complaint with the County Clerk. Issue was joined by defendant Town of Babylon by service of a verified answer dated October 17, 2002. A Note of Issue and Certificate of Readiness dated February 8, 2007 were filed by plaintiff. Defendant Town of Babylon filed a third-party complaint with the Clerk of the County of Suffolk on January 10, 2007 against third-party defendants Greenman, Pedersen Associates, P.C. and L & L Excavating Corp., nearly one and a half years after expiration of the statute of limitations in the main action.

The complaint of the main action sounds in negligence wherein plaintiff Steven Iscowitz alleges he was caused to sustain personal injury when he exited a vehicle in front of 921 Niagara Avenue in the Village of Lindenhurst, County of Suffolk, his foot slipped and was caught in a hole/crack in the roadway on January 22, 2002. Causes of action were asserted against the County of Suffolk, the Village of Lindenhurst and the Town of Babylon. A derivative cause of action was asserted by Nancy Iscowitz. The Town of Babylon admitted ownership and control of the site of the accident and is the only defendant appearing in this action.

The third-party complaint by the Town of Babylon asserts a first cause of action against the third-party defendants sounding in negligent repair, construction, excavation, operation, management and supervision, and in allowing and permitting a defective and dangerous condition for which, if plaintiff recovers judgment against the Town of Babylon, the third-party defendants would be obligated to pay such judgment and/or indemnify the Town. A second cause of action asserts a cause of action for contractual indemnification. A third cause of action sounds in contribution against the third-party defendants.

In motion (004), defendant Town of Babylon seeks an order vacating plaintiffs' Note of Issue and Certificate of Readiness for trial, striking the action from the trial calendar, extending defendant Town's time to move for summary judgment to 60 days after an order resolving this motion to strike is entered, or 60 days after completion of discovery, whichever is longer.<sup>1</sup> In support of the instant application, the Town of Babylon has submitted only an attorney's affirmation, copies of the summons and complaint, answer, third party complaint and a copy of the Note of Issue and Certificate of Readiness.

The Town of Babylon sets forth in its attorney's affirmation that the Note of Issue was filed without a certification order and that all discovery has not been completed. However, the procedure for filing of a Note of Issue is set forth in 22 NYCRR §202.21 does not require a certification order.

The Town of Babylon states that it has not received an answer from the third-party defendants, and apparently has not moved for an order of default. The Town of Babylon has not submitted a copy of the affidavit of service for the third-party complaint allegedly served on third-party defendants. The Town acknowledges, however, that the documents upon which it bases the third-party action relate to a drainage project which occurred possibly thirty years prior to the date of the within incident. It has not been demonstrated that the third-party corporate defendants are even in existence at this time, especially in light of the fact that no answer has been received and no affidavit of service has been provided by the Town to indicate that service was actually made upon them. Therefore, other than filing the summons and complaint, defendant has not demonstrated it has attempted to serve the third-party defendants or that this court has

---

<sup>1</sup> It is noted in counsel's affirmation that the Town is seeking an extension of ninety days to file a motion for summary judgment or ninety days from the completion of discovery, whichever is longer.

jurisdiction over them. Further, the Town offers no excuse for its delay in moving for a default, further evincing the neglect and delay which appear to permeate this entire action.

Defendant Town of Babylon asserts it commenced the third-party action after a deposition was conducted of a Town of Babylon witness, Ed Badaracco on August 4, 2006 (plaintiff's exhibit H) after he produced work plans for the area where plaintiff's accident occurred, which plans indicated that third-party defendants performed work on the roadway pursuant to an agreement with the Town.

The Town of Babylon does not offer any excuses in its moving papers for the delay in commencing the third-party action. The person by whom it was advised of the alleged agreement and plans was an employee of the Town of Babylon, under the control of the Town. The information concerning the agreement and plans was in the possession of the Town from the onset of this action. It was an agreement in to which the Town of Babylon claims it was a party. There were no outside forces preventing the Town from searching its own records or questioning its own employees to timely ascertain the existence of this information. No delay is attributed to plaintiff for the delay of over four years in ascertaining this information and the five year delay in commencing the third-party action.

Plaintiff served discovery demands for copies of any contracts, agreements for the repairs, maintenance records, general contractor, sub-contractors and construction companies who performed work on the street area located at 921 Niagara Avenue over a several year period as evidenced by the Preliminary Conference Order dated March 24, 2003, and the notices for discovery and inspection dated January 7, 2003, December 31, 2003, and July 12, 2005 (plaintiff's exhibits C,D,E and F). In its response to the Supplemental Notice for Discovery and Inspection, dated August 4, 2005, the Town of Babylon responded that it is not in possession of this information as the subject contractors, if any, were not hired by the Town of Babylon (plaintiff's exhibit G). Defendant Town offers no excuse why this information was not provided to plaintiff in response to the repeated discovery demands. Defendant Town's attorney's affirmation accompanying this motion is woefully inadequate to support this motion to vacate the note of issue.

22 NYCRR §202.21(e), in pertinent part, provides within 20 days after service of a note of issue and certificate of readiness, any party to the action...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. New York Courts have repeatedly held that a note of issue should be vacated when it is based upon a certificate of readiness that contains erroneous facts, including an incorrect statement that all discovery proceedings have been completed or waived (*See, Ortiz v Arias*, 285 AD2d 390, 727 NYS2d 879 [1<sup>st</sup> Dept 2001]). In this case, defendant Town of Babylon should have known the names of the third-party defendants within a reasonable period of time after the commencement of this action in 2002, and failed to ascertain the same until August, 2006. Even after learning such information from an employee and from its own records, defendant Town did not commence the third-party action until January, 2007 and offers no excuses for the delay. Defendant Town has not articulated a basis for this Court to strike the Note of Issue. The delay is not attributable to any conduct on the part of the plaintiffs. Defendant Town does not assert that prior to the filing of the Note of Issue and Certificate of Readiness, plaintiffs were notified that a third-party action was commenced, nor could plaintiffs have added the third-party defendants as defendants to the main action as the statute of limitations expired before the same was made known to plaintiffs. The Court concludes that the Town of Babylon has

not demonstrated that the certificate of readiness contains erroneous facts, including an incorrect statement that all discovery has been completed or waived. Moreover, the Town of Babylon has not set forth what discovery, if any, it is requesting with regard to the third party action for this Court to determine if the discovery is even relevant or necessary as a basis to vacate the Note of Issue and Certificate of Readiness. Defendant Town has merely submitted an unpersuasive affirmation by an attorney without knowledge, unsupported by an expert affidavit to establish there is even a theory of liability as to the third party defendants after a thirty year lapse since the construction was done to the roadway at issue.

The Town has demonstrated nothing more than excessive delay in this action prior to the filing of the Note of Issue and Certificate of Readiness. The Town has not demonstrated a basis to vacate the Note of Issue and Certificate of Readiness in the main action, nor to sever the third-party action from the main action. To do so would severely prejudice plaintiff in that the statute of limitations expired long before defendant Town disclosed the existence of the third-party defendants. This does not preclude defendant Town, however, from continuing its discovery in the third-party action until such time as the main action is reached for trial. Defendant Town of Babylon has not demonstrated entitlement to an order vacating the Note of Issue and Certificate of Readiness and that part of defendant's motion (004) is, therefore, denied.

The Town of Babylon previously served a motion for summary judgment in this matter on November 15, 2005, but withdrew the same after receipt of plaintiffs' opposition papers which included plaintiffs' expert's supporting affidavit. The Town now seeks an order extending its time to move for summary judgment. To obtain permission of the court to extend the time in which to serve a motion for summary judgment, the moving party must demonstrate good cause for not having timely commenced such motion (*Gonzales v 98 Mag Leasing Corp. et al*, 95 NY2d 124, 711 NYS2d 131 [2000]). In the instant action, the Town has not even demonstrated they have a viable third-party action. They have submitted only a conclusory attorney's affirmation, unsupported by an expert's affidavit, that there is a basis for a third-party action. They have not demonstrated that service was effectuated upon the third-party defendants. They have not even articulated what discovery, if any they need from third-party defendants, and if such discovery would be relevant, material or necessary to bringing a summary judgment motion against plaintiff. The Town has provided no explanation for its failure to discover the contract, plans and existence of the third-party defendants since this action was commenced in 2002. Thus, the Town has failed to demonstrate the requisite good cause and that part of defendant's motion (004) to extend their time to file a motion for summary judgment is denied, as well.

In motion (005) plaintiffs seek an order striking the answer of the Town of Babylon for failing to provide timely responses to plaintiffs' discovery demands and the Preliminary Conference Order. Plaintiff alleges that the defect which caused him to sustain injury is part of a larger defect, specifically a 462 foot long separation caused by the roadway subsurface, which intersects with the storm drains, sinking from improper backfill during the restoration. Plaintiffs also allege that defendant's repeated failures to timely provide response to their demands for discovery and inspection and the Preliminary Conference Order is a basis for this Court to strike defendant Town's answer, arguing that the failure to do so was nothing short of contumacious and a demonstration of bad faith and an attempt to delay and prolong the length of the case.

"All parties and their counsel have an obligation to make good faith efforts to fulfill their discovery and disclosure obligations and to resolve all discovery and disclosure disputes, before seeking judicial intervention. Dilatory tactics, evasive conduct and/or a pattern of non-compliance with discovery and

disclosure obligations may give rise to an inference of willful and contumacious conduct, and may result in severe adverse consequences and sanctions. Among the particular types of conduct of a party that have warranted the imposition of sanctions for non-disclosure are: disobedience to a court order compelling disclosure; willful failure to appear for examination before trial, willful failure or refusal to produce witnesses for examination; willful or contumacious refusal to produce documents or materials demanded; failure to respond to or properly answer interrogatories; refusal to exchange or make available to the adverse party medical reports; refusal to give authorization for disclosure of medical reports where privilege waived; refusal to answer questions during deposition; ignoring a notice for discovery and inspection; removal or destruction of property sought to be produced and inspected; willful failure to sign a deposition; falsely denying the possession of documents sought to be produced; refusal to agree to a mutually convenient date for examination; dilatory tactics, evasive conduct and willful obstruction of a discovery proceeding; and belated compliance with disclosure order or conditional preclusion order” (*Miller v City of New York*, 2007 NY Slip Op 50882U; 2007 NYMisc LEXIS 2966).

As the Court of Appeals set forth in *Kihl v Pfeffer*, (94 NY2d 118, 700 NYS2d 87 [1999]), “If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity. Indeed, the Legislature, recognizing the need for courts to be able to command compliance with their disclosure directives, has specifically provided that a ‘court may make such orders...as are just,’ including dismissal of an action (CPLR 3126). Finally, we underscore that compliance with a disclosure order requires both a timely response and one that evinces a good-faith effort to address the requests meaningfully.” It does not appear that defendants have demonstrated a good-faith effort to respond to plaintiffs’ repeated demands and to comply with the Preliminary Conference Order.

“New York has long favored the far-reaching pretrial discovery. There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof. CPLR 3101(a). The words ‘material and necessary’ as used in the statute are to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist in the preparation for trial” (*Anonymous v High School for Environmental Studies*, 32 AD3d 353, 820 NYS2d 573 [1<sup>st</sup> Dept 2006]). It is noted, however, that plaintiffs certified this case ready for trial in February, and it is only now, after defendant has moved for an order to vacate the note of issue, that plaintiffs are seeking an order striking defendant’s answer.

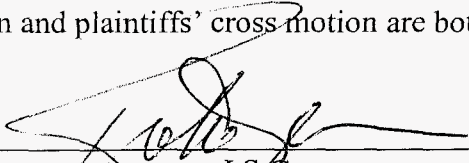
Plaintiffs had responses to their demands from August, 2006 when Mr. Badaracco was deposed, and chose not to move to strike defendant’s answer concerning this discovery matter prior to filing the Note of Issue and Certificate of Readiness. Although this Court certainly values judicial economy, as defendant notes, it is also concerned with allegations of bad faith and willful and contumacious conduct by parties in failing to respond to discovery demands. In its opposition to plaintiff’s motion, defendant still offers no excuse for failing to provide the discovery demanded multiple times by plaintiff, and to which demands the Town eventually responded that it did not hire any contractors. As the Town ultimately argues, it has admitted ownership of the subject road, and pursuant to its non-delegable duty to provide a safe roadway, would be liable to the plaintiff for any acts of negligence of the third party defendants.

In that plaintiffs did certify discovery is complete upon filing the Note of Issue and Certificate of Readiness, they should not now be able to back track to strike defendant’s answer post-note when they could have timely done so prior to filing the Note of Issue and Certificate of Readiness. Plaintiffs offer no reason

for not having done so. In the Second Department, the filing of a Note of Issue and Certificate of Readiness bars a party seeking to enforce a discovery sanction post-note of issue. The filing of a Note of Issue or a demand for such filing is tantamount to asserting that all pretrial proceedings have been completed and that the case is in a trial posture (*see, Siragusa v Teal's Express, Inc.*, 96 AD2d 749, 465 NYS2d 321 [4<sup>th</sup> Dept 1983]). Additionally, this State has a policy preference for deciding actions on their merits, and such a drastic remedy to strike an answer for discovery noncompliance should only be imposed when the party's conduct is willful, contumacious or in bad faith (*Iskowitz v Forkosh Construction Co., Inc.*, 269 AD2d 131, 703 NYS2d 20 [1<sup>st</sup> Dept 2000]). The drastic remedy of striking an answer is unwarranted absent a clear showing that the failure to comply with discovery demands was willful, contumacious, or in bad faith (*Foncette v LA Express*, 295 AD2d 471, 744 NYS2d 429 [2<sup>nd</sup> Dept 2002]). Plaintiffs have not made that clear showing, nor have they offered any proof that they have been prejudiced by the failure of defendants to respond to discovery (*Foncette v LA Express*, supra). Plaintiffs did certify discovery is complete when they filed the Note of Issue and Certificate of Readiness. Therefore, plaintiffs' cross motion (005) for an order striking defendant Town of Babylon's answer is denied.

Accordingly, defendant Town of Babylon's motion and plaintiffs' cross motion are both denied.

Dated: JUL 16 2007

  
\_\_\_\_\_  
J.S.C.

           FINAL DISPOSITION      X   NON-FINAL DISPOSITION