

Insurance Co. of the State of Pa. v Abcon Assoc., Inc.
2007 NY Slip Op 32999(U)
September 18, 2007
Supreme Court, Nassau County
Docket Number: 3391-01/
Judge: James P. McCormack
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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL/IAS TERM, PART 51 NASSAU COUNTY**

PRESENT:

Honorable James P. McCormack
Acting Justice of the Supreme Court

_____x

**INSURANCE COMPANY OF THE
STATE OF PENNSYLVANIA,**

Plaintiff(s),

Index No. 13391/01

-against-

Motion Seq. No.: 003
Motion Submitted: 7/19/07

**ABCON ASSOCIATES, INC., AURORA
MANAGEMENT CORP., RE DE TECH, INC.
THE A&D GROUP, INC., MICHAEL
ZENOBIO, JR. AND THERESA M. ZENOBIO,**

Defendant(s).

_____x

The following papers read on this motion:

- Notice of Motion/Supporting Exhibits.....X
- Affirmation in Opposition.....X
- Reply Affirmation.....X

Order to show cause by the defendants pursuant to, *inter alia*, CPLR 3402 and/or 22 NYCRR § 202.21[e], for an order striking the above-captioned matter from the trial calendar and vacating the plaintiff's note of issue; and (2) in the event the foregoing relief is denied, for an order permitting them to file a demand for a jury trial.

The plaintiff Insurance Company of the State of Pennsylvania, as surety, commenced the within action in 2001 to recover sums allegedly due and owing from the defendants arising out of various construction projects located in New York City

The defendants timely answered, denied the material allegations of the complaint and raised various affirmative defenses by which they assert, in substance, that no sums are due and that the project owner in fact owes them some \$1 million (Zenobio Aff., ¶¶ 3-9; Levine Aff., ¶¶ 6-7).

According to the defendants, although the action was commenced in 2001, it was essentially quiescent since for several years thereafter, with no steps being taken by the plaintiff to prosecute the matter until October of 2005 (Levine Aff., ¶ 12).

In October of 2005, the plaintiff moved by order to show cause herein for an order of attachment with respect to certain funds being held in conjunction with an related interpleader action pending in the Federal District Court for the Eastern District of New York (Levine Aff., ¶13) – which application was denied by order of this Court dated April 3, 2006 [Alpert, J., *see*, Defs' Exh., "D"]).

In denying this application, this Court noted that the plaintiff's supporting allegations were some four years old and "stale" and further observed that it was not even clear whether the defendants had any interest in the funds at issue (April 3 Order at 2).

The defendants further contend that, *inter alia*: (1) the plaintiff never served responses to the defendants' discovery notices (dated April 6, 2006); never appeared for a deposition; and never responded to letters and facsimiles written by defense counsel inquiring about plaintiff's failure to provide discovery (Levine Aff., ¶¶ 20-23).

However, and according to defense counsel, in October of 2006, Justice Alpert

issued a certification order – over both parties’ objection – requiring that plaintiff file a note of issue within 90 days, *i.e.*, by January 3, 2007 at the latest (Pltff’s Exh., “A”). The order further provided that failure to comply with the foregoing directive would result in a self-executing dismissal, “without further order of the Court” (Defs’ Exh., “A”).

Despite the Court’s October, 2006 certification order, counsel for the defendants claims that he continued to make efforts to complete discovery, and to that end, sent facsimiles to plaintiff’s counsel – which again elicited no response – reminding the plaintiff that it still had not supplied discovery responses to the defendants’ demands (Levine Aff., ¶¶ 25-26).

Defense counsel argues that after the January 3 deadline for filing the note of issue expired, he assumed the action was abandoned since the plaintiff never attempted to review the documents which the defendants had previously made available to it; never responded to the defendants’ discovery demands; and never filed a note of issue (Levine Aff., ¶¶ 28-29).

The defendants contend that unbeknownst to them, the plaintiff had, in fact, belatedly attempted to file a note of issue on January 9, 2007 – which filing was rejected by the Clerk of the Court on that date (Levine Aff., ¶¶ 29-30).

Counsel for the defendant contends that the next time he heard from the plaintiff was a communication on January 10, 2007, in which plaintiff’s counsel – without mentioning the prior note of issue rejection – requested an extension of time to file the note based upon the certain settlement discussions (Levine Aff., ¶¶ 29-30).

Thereafter, on January 17, 2007, the defendants received a copy of the note of issue with cover letter of same date, which made no mention of the fact that the note of issue had been rejected.

Counsel further notes that shortly thereafter, in mid-January, 2007, he received motion papers from plaintiff which: (1) for the first time, made mention of the clerk's earlier rejection of the note of issue; and (2) sought leave to vacate the plaintiff's default in failing to file the note of issue prior to January 3, 2007 (Defs' Exh., "P"; Pltff's Exh., "B").

This Court granted the application (Order of McCormack, J., dated March 19, 2007 [Defs' Exh., "Q"]).

This Court's order does not state that the previously filed note of issue was "deemed filed" or filed *nunc pro tunc* on any specific date.

The defendants assert that they then awaited the filing of the new note of issue - as authorized by this Court's order - but that none was forthcoming, as allegedly confirmed by website checks and inquires with the office of the Clerk of the Court - up to and including April 26, 2007 (Levine Aff., ¶¶ 36-37).

However, in early June of 2007, the defendants conducted another Unified Court System website check and discovered that a note of issue was now listed as having been filed on "January 9, 2007" - the same date on which the original note of issue had been filed and rejected by the Clerk (Defs' Exh., "V").

Defense counsel advises that he speculated from the foregoing, that the Court

had somehow retroactively revived and accepted for filing, the original, January 9 note of issue without apprising the defendants that it had done so (Levine Aff., ¶ 38-39).

Based on the foregoing, the defendants now move for an order vacating the note of issue and striking the matter from the Court's trial calendar, upon the ground that plaintiff's certificate of readiness contains material misstatements, *i.e.*, that the certificate inaccurately represents that all discovery is complete and that the matter is trial ready.

In opposition to the motion, the plaintiff claims that by excusing its default, the Court also effectively found that the note of issue was substantively proper; and (2) that the defendants previously and unsuccessfully opposed the motion to vacate on the grounds that discovery was incomplete (*see*, March 19 Order) and therefore any such claim is barred by law of the case. The defendants' motion should be granted.

It is settled that "[a] note of issue should be vacated when it is based upon a certificate of readiness that contains erroneous facts, such as that discovery has been completed" (*Drapaniotis v. 36-08 33rd St. Corp.*, 288 AD2d 254 *see also*, *Simon v. City of Syracuse Police Dept.*, 13 AD3d 1228; *Lynch v. Vollono*, 6 AD3d 505; *Garofalo v. Mercy Hosp.*, 271 AD2d 642).

To succeed on their motion to vacate, the defendants were "required to 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 this section in some material respect'" (*Shoop v. Augst*, 305 AD2d 1016, 1017; 22 NYCRR § 202.21[e] *see also*, *Vargas v.*

Villa Josefa Realty Corp., 28 AD3d 389; *Mosley v. Flavius*, 13 AD3d 346).

Applying these principles to the facts presented supports an exercise of discretion in favor of granting the application to strike the note (*Gomes v. Valentine Realty LLC*, 32 AD3d 699, 700).

The plaintiff has not materially disputed the defendants' assertion – and the record in any event support – that discovery is outstanding, assertions which are inconsistent with the representations set forth in the January 9 note of issue (*Lynch v. Vollono, supra see also, Vargas v. Villa Josefa Realty Corp., supra; Curto v. Zittel's Dairy Farm*, 23 AD3d 1055, 1056, *Aviles v. 938 SCY Ltd.*, 283 AD2d 935, 936 *see, High Point of Hartsdale I Condominium v. AOI Const., Inc.*, 31 AD3d 711).

Further, and contrary to the plaintiff's contentions, the Court's March 19 vacatur order merely grants the plaintiff's application to vacate its default in failing to timely file the note of issue.

There is nothing in the Court's order which holds that the original note of issue would be deemed to have been filed retroactively, or *nunc pro tunc*. To the extent that this Court's April order was construed to provide that the note of issue should be deemed filed as of January 9, 2007, or any specific date, the Court notes that its order contains no such directive.

Moreover, the fact that the defendants were served with the note of issue on January 17, 2007 – shortly after it was rejected by the Clerk as untimely – does not constitute service which would commence the twenty day period within which to file

objections thereto (*see*, 22 NYCRR § 202.21[e] *see generally*, *Gomez v. New York City Transit Authority*, 19 AD3d 366). Indeed, at that juncture, the note of issue was effectively a nullity (*cf.*, *Hochberg v. Maimonides Medical Center*, 37 AD3d 660), since it had already been rejected as untimely and the action had been dismissed by virtue of this Court's self-executing certification order.

The Court similarly rejects the plaintiff's assertion that law of the case doctrine is applicable here (based on the March 19 vacatur order), and forecloses the defendants from interposing the claim that discovery is incomplete.

In general, the "law of the case" doctrine – which is not an absolute mandate (*People v Evans*, 94 NY2d 499, 503-504 [2000]) – applies only where a party seek to relitigate "issues of law" that have already been resolved on the merits "at an earlier stage of the proceeding" (*Hampton Valley Farms, Inc. v. Flower & Medalie*, 40 AD3d 699; *Matter of Oyster Bay Assoc. Ltd. Partnership v. Town Bd. of Town of Oyster Bay*, 21 AD3d 964, 966; *Gay v. Farella*, 5 AD3d 540; *Baldasano v. Bank of N.Y.*, 199 AD2d 184, 185 *see generally*, *Martin v. City of Cohoes*, 37 NY2d 162, 165-166 [1975]).

The Court's March 19 order does not comment upon or render any particular determination relating to, the state of discovery. Nor was it necessary to do so in order to grant the relief sought. Further, the October, 2006 certification order was executed over the parties' objection and similarly contains no statement to the effect that discovery has been completed (*cf.*, *Long Island Lighting Co. v. Assessor of Town of Brookhaven*, 122 AD2d 794).

Additionally, while this Court vacated the plaintiff's default and authorized the prospective service of a late note of issue, the Court's order in no sense precludes the defendants from raising relevant objections to the note of issue once it has been properly served.

In short, the Court rejects the assertion that its prior orders are law of the case or preclusive with respect to the defendants' subsequent application to vacate the note (e.g., *Cohen v. Ho*, 38 AD3d 705, 706).

The Court has considered the plaintiff's remaining contentions and concludes that they are insufficient to defeat the defendants' motion.

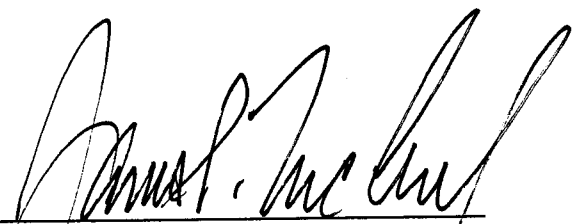
Accordingly, it is,

ORDERED that the defendants' motion is granted to the extent that the note of issue dated January 9, 2007 is vacated and the matter is stricken from the trial calendar pending the completion of discovery, and it is further,

ORDERED that the matter shall be set down for a conference before the undersigned on October 12, 2007, at 9:30am, during which the Court shall consider, *inter alia*, any outstanding discovery issues which currently exist.

The foregoing constitutes the decision and order of the Court.

Dated: September 18, 2007
Mineola, N.Y.



Hon. James P. McCormack, A.J.S.C.

ENTERED
SEP 21 2007
NASSAU COUNTY
COUNTY CLERK'S OFFICE