

Kaplan v New York Mercantile Exch.

2007 NY Slip Op 33268(U)

October 3, 2007

Supreme Court, New York County

Docket Number: 0102080/2006

Judge: Louis B. York

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.

SUDGE YORK

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT Index Number : 102080/2006
KAPLAN, MYRTLE

PART 2

vs
NEW YORK MERCANTILE EXCHANGE
Sequence Number : 002
OTHER RELIEFS

102080/2006

DATE _____
SEQ. NO. 002
CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits
Replying Affidavits

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion ~~be granted~~

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.

FILED
OCT 12 2007
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S)

Dated: 10/3/07

Luy

J.S.C.

Check one: FINAL DISPOSITION **LOUIS B. YORK** NON-FINAL DISPOSITION

CLERK'S OFFICE DO NOT POST FOR REFERENCE J.S.C.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2**

-----X
MYRTLE KAPLAN

Plaintiff,

-against-

NEW YORK MERCANTILE EXCHANGE,

Defendant.
-----X

Index No. 102080/06

FILED
OCT 12 2007
NEW YORK
COUNTY CLERK'S OFFICE

York, J.S.C.:

Plaintiff, Myrtle Kaplan, currently moves for an order pursuant to CPLR 3101(d)(iii) and CPLR 3117(a)(4) to permit use of a deposition of her treating physician and expert, Dr. Mark Schwartz, at trial. Plaintiff also requests permission to schedule the deposition of Dr. Schwartz, notwithstanding the fact that she has filed Note of Issue. For the reasons below, the Court grants the motion.

At a December 6, 2006 conference, the court set a March 15, 2007 deadline for the conclusion of all outstanding non-party depositions. At that conference, the parties disputed Plaintiff's right to conduct a trial deposition of her expert physician. The court directed Plaintiff to move for this relief. At a January 17, 2007 compliance conference, this court extended Plaintiff's Note of Issue filing date from March 15, 2007 to April 5, 2007 to permit the conclusion of those outstanding non-party depositions. On February 22, 2007, pursuant to Judge York's request, Plaintiff filed the motion under consideration here. Plaintiff then filed the Note of Issue on March 5, 2007.

Plaintiff correctly states CPLR 3101(d)(iii) and CPLR 3117(a)(4) permit her to take her treating physician's testimony without a court order and to use that deposition at trial without showing special circumstances or the physician's unavailability. The issue of whether she may now take the deposition post-Note of Issue is a procedural one. In *Brandes v. North Shore University Hospital*, 22 A.D.3d 777, 778, 803 N.Y.S.2d 178, 179 (2nd Dept. 2005), the court held that a deposition of the doctor who had treated the plaintiff's decedent was not in the nature of discovery. The deposition was not covered by the general rule that forecloses discovery after filing the Note of Issue. Therefore, there is no requirement that Plaintiff here show "unusual or unanticipated circumstances" to conduct this post-Note of Issue deposition of her treating physician.

Defendant, New York Mercantile Exchange, argues that *Schroeder v IESI NY Corp*, 24 A.D.3d 180, 805 N.Y.S.2d 79 (Sup. Ct. 1st Dept. 2005) and *Bajaj a/a/o Krzysztof Wielgosz v. Progressive Insurance Co.*, 14 Misc. 3d 1202(A), 831 N.Y.S.2d 358 (Civ Ct. Queens County 2006) control. Both cases prohibit post-Note of Issue depositions absent a showing of unusual or unanticipated events that would otherwise cause substantial prejudice. Accordingly, defendant contends this Court should prohibit a post-Note of Issue deposition of Plaintiff's treating physician because she failed to provide evidence demonstrating unusual or unanticipated events.

Defendant's reliance on *Schroeder v IESI NY Corp* is misplaced. There, the defendant moved to vacate Plaintiff's Note of Issue and sought additional discovery seventeen months after the Note of Issue was filed. First, as stated, the present issue is procedural, not one of discovery. Second, unlike the defendant in *Schroeder*, Defendant here is neither moving to vacate Plaintiff's Note of Issue nor requesting additional discovery. Plaintiff here sought permission to conduct her physician's deposition one and one-half weeks before she filed the Note of Issue.

Defendant also misapplies *Bajaj v. Progressive*. The defendant in that case wanted to use its expert physician's deposition at trial in place of live testimony. The defendant there did not provide notice or conduct the physician's deposition until three months post-Notice of Trial. Here, on the other hand, Plaintiff provided notice of her intent use her treating physician's deposition at trial in place of live testimony when she filed this motion. Plaintiff also moved for relief to conduct her expert physician's deposition ten days before filing her Note of Issue. Thus, Defendant here is not prejudiced because Plaintiff provided notice of Dr. Schwartz's deposition and moved for permission to conduct the deposition before she filed the Note of Issue.

Defendant's argument that general rules of discovery prohibit post-Note of Issue discovery also lacks merit. Although Plaintiff did not demonstrate the existence of unusual or unanticipated circumstances, this failure is irrelevant. As the Second Department stated in *Brandes v. North Shore University Hospital*, a party need not show "unusual or unanticipated circumstances" to conduct a post-Note of Issue deposition. 22 A.D.3d 777, 778, 803 N.Y.S.2d 178, 179 (2nd Dept. 2005).

Defendant's only other objection is that conducting a post-Note of Issue deposition will be substantially prejudicial. Because Plaintiff has already submitted a motion for a special trial preference based on age, Defendant is concerned that it may be forced to conduct discovery while preparing for a trial that is already expedited. As long as the deposition is held at least sixty days before trial, however, Defendant will not be prejudiced.

Accordingly, it is

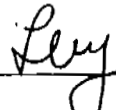
ORDERED that the motion is granted, and plaintiff has the right to conduct the

deposition of Dr. Mark Schwartz, her treating physician and expert witness, and to introduce his deposition transcript at trial; and it is further

ORDERED that plaintiff has until 60 days before trial to schedule and hold the deposition of Dr. Schwartz, or she waives the right to use the deposition transcript at the trial.

ENTER:

Date: 10/3/07



Louis B. York, J.S.C.
LOUIS B. YORK
J.S.C.

FILED
OCT. 12 2007
NEW YORK
COUNTY CLERK'S OFFICE