

**Kyung Seong Kim v Metropolitan Suburban Bus
Auth.**

2009 NY Slip Op 30414(U)

February 18, 2009

Supreme Court, Nassau County

Docket Number: 139-07

Judge: William R. LaMarca

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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 15**

**Present: HON. WILLIAM R. LaMARCA
Justice**

**KYUNG SEONG KIM, Individually and as
father and Guardian of JOSEPH KIM, an
infant over the age of 14 years and YOUNG
KIM, Individually and as guardian of RAY
KIM, an incompetent person,**

**Motion Sequence #2, #3
Submitted November 12, 2008**

Plaintiffs,

-against-

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**METROPOLITAN SUBURBAN BUS AUTHORITY
and ADOLFO MESSON-BEATO,**

Defendants.

The following papers were read on this motion:

Notice of Motion.....	1
Notice of Cross-Motion.....	2
Plaintiffs' Affirmation in Opposition.....	3
Plaintiffs' Affirmation in Opposition to Cross-Motion..	4
Reply Affirmation.....	5

Requested Relief

Counsel for plaintiff, KYUNG SEONG KIM (hereinafter referred to as "Mr. KIM") on the counter-claim, moves for an order precluding the plaintiffs, JOSEPH KIM, YOUNG KIM and RAY KIM, an incompetent person, from testifying or offering any medical evidence at trial regarding their injury for failing to provide discovery, and for an order vacating the Note

of Issue and Statement of Readiness and striking the matter from the trial calendar on the ground that the action is not ready for trial, and extending movant's time to file a motion for summary judgment for 120 days beyond receipt of the outstanding discovery. By cross-motion, counsel for defendants, METROPOLITAN SUBURBAN BUS AUTHORITY (hereinafter referred to as the "MSBA") and ADOLFO MESSON-BEATO (hereinafter referred to as "MESSON -BEATO"), partially opposes the motion in chief and cross-moves for an order vacating the plaintiffs' Note of Issue and striking the matter from the trial calendar. Counsel for plaintiffs, JOSEPH KIM, YOUNG KIM and RAY KIM, an incompetent person, oppose the motions, which are determined as follows:

Background

This personal injury action arises from an automobile accident on September 20, 2006, on Northbound Route 106/107 approximately one half mile north of Jericho Turnpike, Jericho, New York. It is alleged that, as a result of the negligence of the defendant owner, the MSBA and its driver, defendant MESSON-BEATO, a bus came into contact with a motor vehicle owned and operated by plaintiff, Mr. KIM. At the time of the accident, Mr. KIM's wife, plaintiff YOUNG KIM, and their two (2) children, plaintiff JOSPEH KIM, then an infant, and plaintiff RAY KIM, characterized as an incompetent adult, were passengers in the KIM vehicle. The Court notes that, in Motion Sequence #1, by Short Form Order dated March 20, 2008, the Court granted defendants' motion to disqualify plaintiffs then counsel, David N. Sloan, Esq., from representing any of the KIM plaintiffs based upon the apparent conflict of interest in representing the driver and passengers in the KIM vehicle (DR5-105[a]), and found that the mother, YOUNG KIM, was not properly appointed as guardian for RAY KIM and lacked standing to act on his behalf. The Court directed that new counsel

apply to the Court for appointment of a guardian *ad litem* to represent plaintiff RAY KIM and found that JOSPEH KIM was no longer a minor and could properly proceed on his own behalf.

Counsel for Mr. KIM on the counterclaim asserts that the other plaintiffs should be precluded from testifying at trial or from offering evidence because they have failed to respond to discovery demands and that counsel for Mr. KIM on the counter claim cannot adequately prepare for trial. Moving counsel asserts that the case is not ready for trial and that the Certificate of Readiness contains false information that there are no outstanding requests for discovery. Moreover, counsel for Mr. KIM on the counterclaim contends that his office was never advised that defendant MESSON-BEATO was to be deposed on January 11, 2008, despite his attendance at all prior plaintiff and non-party depositions, and he asserts that he should be given an opportunity to depose said defendant and receive all demanded authorizations within a reasonable time prior to trial, if the Note of Issue is not vacated.

On the cross-motion, counsel for defendants partially supports the motion in chief and partially opposes same. It is defendants' position that they have provided all requested discovery and that counsel for Mr. KIM on the counterclaim is not entitled to an order of preclusion nor another deposition of defendant, MESSON- BEATO, because counsel failed to attend the deposition on January 11, 2008, notwithstanding that his office was advised of the scheduled EBT. Counsel for defendants points out that Mr. KIM was represented at the deposition by Jonathan Oxenberg, Esq., the successor attorney to Mr. Sloan in the main action, whose focus was to demonstrate that the MSBA was solely responsible for the subject accident, with no contribution on the part of Mr. KIM. Counsel

for defendants states that the transcript of the proceeding has been provided to counsel for Mr. KIM on the counterclaim, and that, in the eight (8) months since said deposition, during which time numerous Court conferences were held, no mention was made that a deposition of Mr. MESSON-BEATO remained outstanding. It is defendants' position that a second deposition of Mr. MESSON-BEATO is unduly burdensome and has been waived. Counsel for defendants asserts that counsel for Mr. KIM on the counterclaim has not indicated what questions to Mr. MESSON-BEATO have been left unasked and urges that the requested relief be denied.

However, in support of the cross-motion to strike the matter from the trial calendar, counsel for defendants relates that, in contradiction of the Court order, new counsel for YOUNG KIM, JOSEPH KIM and RAY KIM, The Law Offices of Alan Clark & Associates, LLC., has not moved to have a guardian *ad litem* appointed for RAY KIM, and has, instead, served the defendant with a letter informing counsel as follows: "At this time, a claim is not being pursued on behalf of Ray Kim". Counsel for defendant argues that it would be unduly prejudicial to the MSBA to have to proceed in two (2) trials on the same facts and same issues of law, and that the Note of Issue should be vacated so that all four (4) plaintiffs present their causes of action at a single joint trial. Indeed, counsel for the defendants asserts that neither the parents nor the law office representing them has authority to cease pursuing RAY KIM's claim against the MSBA or Mr. KIM, the driver of the vehicle in which RAY KIM was a passenger, because RAY KIM is an adult impaired by Down's Syndrome and is need of a guardian *ad litem* to protect his rights. Counsel for defendants contends that no explanation has been given for failure to appoint the necessary guardian and RAY KIM's claims should neither be discarded nor stalled

because bringing an action on his behalf at another time would be highly prejudicial to the MSBA.

The Court notes that, at the Certification Conference, held on August 13, 2008, the issue of RAY KIM's claims were discussed and all counsel agreed that, due to his incapacity to sue, counsel for RAY KIM was to provide a letter to the parties and the Court that his counsel was not pursuing his case at this time. A "So Ordered" Stipulation was signed on said date and a follow up letter, dated August 18, 2008, was forwarded to all by RAY KIM's counsel. While the Court acknowledges that, from the defendants point of view, the possible need to try the same facts and issues now on behalf of Mr. KIM, YOUNG KIM and JOSEPH KIM, and at a later date on behalf of RAY KIM, would be highly prejudicial to MSBA and wasteful of judicial resources, the Court is more concerned, and the instant motion has brought to light, that the discontinuance of the action on the part of RAY KIM may have occurred without the proper safeguards for the rights of the incapacitated adult. It is, thus, necessary to revisit the issue.

The Law

The Court has been advised that RAY KIM is an adult incapable of adequately prosecuting or defending his rights. As same, he must appear by a guardian *ad litem* appointed by the Court. CPLR §1201. In pertinent part, the statute directs that

. . . [t]he court in which an action is triable may appoint a guardian ad litem at any stage of the action upon its own initiative or upon the motion of:

2. a relative, friend, a guardian or committee of the property or conservator; or
3. any other party to the action if a motion has not been made under paragraph one or two within ten days after completion of service.

CPLR §1202, Although the Court, in a prior order directed RAY KIM's new counsel to make such a motion, no application for said relief has been made and no guardian *ad litem* has been appointed. Given that the Court has been advised of RAY KIM's incapacity, and noting that Down's Syndrome is not a passing incapacity, the Court cannot ignore that RAY KIM's counsel has, in essence, created a "severance" of RAY KIM's action, which may leave his claim open forever. Moreover, counsel has signed off on RAY KIM's claim to "some time in the future" while, at the same time, representing other plaintiffs in the action who may now get a bigger piece of the pie and who may, indeed, exhaust existing insurance coverage. The Court cannot permit this effect. A guardian *ad litem* must be appointed to represent the interests of RAY KIM, a guardian who may decide to sign off against any claim on the part of RAY KIM, but one who is not a party to the action or counsel to one of the parties. To avoid the cost of a Court appointed guardian, the Court suggests that the KIMS find a relative, an aunt, an uncle, an adult cousin, or a trusted adult friend, someone who is not a party to this action, who can serve as a guardian *ad litem* for RAY KIM, and who can submit to the Court facts showing his ability to answer for any damage sustained by his negligence or misconduct. Leaving RAY KIM's claims open forever will not serve his interests, and will be wasteful of judicial resources. Given that all of the witnesses and parties will be preparing for trial with respect to the claims of the other plaintiffs, a joint trial of all parties injured in the subject accident is preferable, so that the fund, if any, that results from the proceeding, is properly allocated to the injured parties.

22 NYCRR § 202.21 (e) in pertinent part grants the Court discretion, "[a]t any time", to vacate a Note of Issue if it appears that a material fact in the certificate of readiness is

incorrect. Additionally, 22 NYCRR § 202.21(d) provides that “[w]here unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice, the court . . . may grant permission to conduct such necessary proceedings”.

Conclusion

After a careful reading of the submissions herein, it appears to the Court that additional pre-trial proceedings are necessary to prevent substantial injustice and that the case is not ready for trial. It is the judgment of the Court that a guardian *ad litem* must be appointed for RAY KIM, and that counsel’s letter delaying his claims will not suffice. Accordingly, it is hereby

ORDERED, that the motion and cross motion are granted to the extent that the Note of Issue in the above captioned action is vacated and the case is removed from the trial calendar; and it is further

ORDERED, that within twenty (20) days from the date of this order, counsel for RAY KIM shall submit a list to the Court consisting of three (3) names of a relative or competent adult friend who can serve as a guardian *ad litem* for RAY KIM, together with affidavits of fact showing their ability to answer for any damage sustained by their negligence or misconduct; and it further

ORDERED, that the caption shall henceforth read as follows:

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

**KYUNG SEONG KIM, JOSEPH KIM, YOUNG KIM,
and RAY KIM, an incompetent person,**

Plaintiffs,

-against-

INDEX NO: 139/07

**METROPOLITAN SUBURBAN BUS AUTHORITY
and ADOLFO MESSON-BEATO,**

Defendants.

and it is further

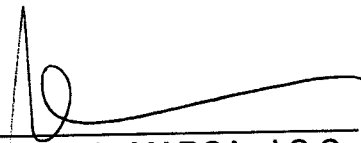
ORDERED, that this matter is returned to the active inventory of the undersigned and a Status Conference is scheduled for March 18, 2009, at 9:30 A.M., at which time any outstanding issues of discovery and Certification of this matter for trial will be addressed. The Court notes that the request for a second deposition of defendant MESSON-BEATO is denied and that demands for additional authorizations for the production of records maintained by health care providers and/or facilities is ongoing; and it is further

ORDERED, that defendants shall serve a copy of this order upon the clerk of the Calendar Control Party (CCP) within twenty (20) days of this order.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: February 18, 2009


WILLIAM R. LaMARCA, J.S.C.

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ENTERED

FEB 20 2009

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**