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

PRESENT: LOUIS B. YORK J.S.C. Justice PART 2

Index Number : 112783/2005

JURMAN, BELLE

VS

DOCTOR'S ASSOCIATES

Sequence Number : 004

STRIKE

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

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

RECEIVED MAR 05 2009 COUNTY CLERK'S OFFICE NEW YORK

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED MAR 13 2009 COUNTY CLERK'S OFFICE NEW YORK

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

Dated: 3/2/09

LOUIS B. YORK J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

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BELLE JURMAN,

Plaintiff,

-against-

DOCTOR'S ASSOCIATES INC. d/b/a SUBWAY SANDWICH SHOP a/k/a SUBWAY; WALTON'S INC. d/b/a SUBWAY SANDWICH SHOP a/k/a SUBWAY; SUBWAY, INC. d/b/A SUBWAY SANDWICH SHOP a/k/a SUBWAY and 214 WEST 50TH STREET, LLC.,

Defendants.

----------x

S. WALTON INC. d/b/a SUBWAY,

Second Third-Party Plaintiff,

-against-

MICHAEL KUO CORP.,

Second Third-Party Defendant.

----------x

S. WALTON INC. d/b/a SUBWAY,

Third Third-Party Plaintiff,

-against-

MICHELLE KUO CORPORATION,

Third Third-Party Defendant.

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Index No. 112783/2005

Index No. 590275/2007

York, J.S.C.:

In this action, plaintiff alleges that on October 12, 2004, she slipped and fell on defendants' property due to defendants' negligence, sustaining various injuries including two pelvic fractures. When the accident occurred, plaintiff was 80 years old.

The parties appeared for a preliminary conference two-and-a-half years ago, on June 28, 2006. The Court ordered a deposition date in October of that year, a discovery deadline of January 30, 2007 and a Note of Issue date of February 14, 2007. Plaintiff was deposed on October 17, 2006.

The Court held a subsequent conference on October 10, 2007, after third and fourth party actions had been commenced. Defendant/movant ("Walton") had not appeared for its deposition at that time. A deposition date of November 15, 2007 was scheduled for Walton's deposition.

Shortly after the conference, plaintiff appeared for a second or a continued deposition, on December 10, 2007. Plaintiff also appeared for a medical examination prior to the October conference, on July 12, 2007. Plaintiff, a California resident, traveled to New York for the depositions and the examination.

Plaintiff filed her Note of Issue on January 8, 2008, prior to the expiration of the discovery deadline. Two months later, plaintiff supplemented her Bill of Particulars. Largely, the document alleges stenosis, herniation, dislocations, and arthritis – which according to plaintiff are exacerbations of her existing injuries rather than new injuries. At that time, she also provided an authorization for related medical records.

Movant alleges that it did not receive notification of the filing and that it found out about the filing on March 26, by E-Law. Movant further alleges that once it found out plaintiff had filed her Note of Issue, it promptly brought this motion to strike based on the allegedly outstanding discovery. The motion is dated March 31, 2008, and had an initial return date of May 8, 2008, although it was adjourned several times and not argued in Part 2 until October 22, 2008. In addition to striking the Note of Issue, movant seeks to preclude plaintiff from alleging

the injuries she asserts in her supplemental bill of particulars. According to movant, these are new injuries rather than exacerbations of the original injuries; and, therefore, plaintiff should not have waited until after the filing of the Note of Issue to assert them.

In her papers opposing the motion to strike and to preclude, plaintiff asserts that she complied with all Court orders. Indeed, she notes, she was deposed twice – first on October 17, 2007 and then on December 10, 2007. Moreover, she asserts, movant appeared for deposition after the designated date; and another party represented by the same counsel never appeared for deposition. Further, plaintiff points out that she provided documentary discovery and the requisite authorizations and she appeared for a physical examination on July 12, 2007.

Finally by way of background, the parties do not dispute the fact that movant has not pursued the discovery at issue in the more than ten months since filing its motion papers. The Court held conferences in late January and early February to obtain an update on the status of the discovery. At these conferences, plaintiff's counsel stated that he made his client available for IME's on two occasions when plaintiff was in New York. However, he states, counsel for movant did not respond to his communications.

Note of Issue

At the outset, the Court rejects plaintiff's threshold argument relating to timeliness. Plaintiff asserts that movant had to make the motion within "the applicable time period." Aff. in Opp. ¶ 6. However, under 22 NYCRR 202.21(e), a party to the action does not have 20 days from the filing of the Note of Issue but "20 days after service of a note of issue and certificate of readiness" to bring the motion to vacate. 22 NYCRR 202.21(e) (emphasis supplied); see Kelley v. Zavalidroga U, 864 N.Y.S.2d 819, 820 (4th Dept. 2008). Plaintiff does not assert that she ever served the note of issue and certificate of readiness on movant and does not annex proof of

service. Moreover, even if she had served the Note of Issue on movant, movant swears that it did not receive the papers. Therefore, at the very least, there is an issue of fact as to whether movant received the notice. In the interest of fairness, the Court would have considered the motion based on this issue of fact.

After careful consideration, however, the Court denies the motion. Based on the above, it is clear that plaintiff has complied with all discovery demands. Among them, plaintiff provided authorizations for past medical records that relate to the underlying injuries and treatment. Therefore movant has always had access to information about – and has conducted an IME relating to – the general conditions from which plaintiff allegedly suffers. Movant does not challenge plaintiff's contention that movant itself delayed in providing discovery to plaintiff. Indeed, shortly before movant brought this motion, plaintiff brought a motion against it and another defendant to compel discovery. Nor does movant claim it has attempted to obtain the discovery at issue or to work out the disputes in the months since it submitted the motion – despite the fact that plaintiff provided medical authorizations to it, and despite plaintiff's asserted willingness to make his client available for examination.

In addition, movant has not been harmed by the service of the supplemental bill of particulars in March. The supplemental bill annexed to the motion show that in March 2008 plaintiff provided an authorization for all relevant medical records. The doctor's bill and records annexed to that document indicate that there were treatments in January and February of 2008 relating to plaintiff's diagnoses. By providing authorizations and by offering to appear for a physical examination when she was in New York, she obviated any prejudice.

In addition, the Court notes that movant already had the opportunity to assert its current arguments to the Court. As indicated above, after movant brought this motion but before this

motion was fully submitted, the parties litigated a separate discovery motion which plaintiff brought against movant and another defendant. The Court considered plaintiff's discovery motion on April 9, 2008, issuing an order in which it directed movant to appear for deposition on May 8, 2008.[1] The April 9 decision does not explicitly refer to the Note of Issue or its filing, but it is clear that the Court knew that the Note of Issue had been filed. At one point, the Court extends the parties' deadline to move for summary judgment to May 30, 2008. This extension would only have been necessary if the Note of Issue was filed, triggering the limitations period within which to bring a summary judgment motion. At another point in the order, the Court severed all remaining third party actions, in order that the case could move to trial without interfering with the added parties' right to discovery.[2] Again, this would not have been necessary unless the Note of Issue had been filed. Thus, the Court already has indicated its position that this case should not be delayed.

Based on the above and on this Court's desire to eliminate further unnecessary delays, the Court denies movant's application to strike the Note of Issue and/or preclude plaintiff from alleging the injuries in the supplemental bill. Plaintiff has attempted to move her case forward for years – years which are especially precious in light of her advanced age. Movant has delayed the litigation by failing to provide discovery in a timely fashion and by failing to process the authorizations or schedule a medical examination relating to the supplemental bill of particulars.

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[1] At conference, plaintiff's also counsel stated that movant articulated its current position at the argument of that motion. Movant could not speak to the issue, and the Court does not make its ruling based on this matter.

[2] Movant includes the third party captions in the current motion papers. The Court website information also does not indicate that the third party actions have been severed. Accordingly, to clarify, at the end of this decision, the Court shall again sever these third party actions and correct the caption.

Plaintiff, who is elderly, should not be forced to make an additional trip to New York for a medical examination at this time based on facts at hand.

However, the Court does not intend to prevent movant from examining plaintiff. At the January and February discovery conferences, plaintiff's counsel indicated that he would make his client available for an examination in his client's home city. This strikes the Court as a fair compromise. Thus, if movant contacts counsel in order to schedule an examination near plaintiff's home in California prior to the trial date, plaintiff shall make herself available. Moreover, plaintiff's counsel indicated that he had or would reserve the authorizations. If movant needs either an additional set of those authorizations or a copy of the medical records themselves, the Court expects plaintiff will provide them on request.

Based on the above, it is

ORDERED that the motion is denied; and it is further

ORDERED that, pursuant to the decision in motion sequence number 3, all third party actions that have not been severed are severed and shall remain active; and it is further

ORDERED that the caption of this action shall be amended to read:

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BELLE JURMAN,

Plaintiff,

Index No. 112783/2005

-against-

DOCTOR'S ASSOCIATES INC. d/b/a SUBWAY SANDWICH SHOP a/k/a SUBWAY; WALTON'S INC. d/b/a SUBWAY SANDWICH SHOP a/k/a SUBWAY; SUBWAY, INC. d/b/A SUBWAY SANDWICH SHOP a/k/a SUBWAY and 214 WEST 50TH STREET, LLC.,

Defendants.

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and all further papers shall contain the caption as amended. Movant or plaintiff shall file a copy of this decision with the Clerk of the Court and the Clerk of Trial Support, who shall mark their records accordingly.

Enter:

Dated: 3/2/09

Louis B. York, J.S.C.

LOUIS B. YORK
J.S.C.

FILED
MAR 13 2009
COUNTY CLERK'S OFFICE
NEW YORK