

Jenkins v MTA

2010 NY Slip Op 30095(U)

January 11, 2010

Supreme Court, Nassau County

Docket Number: 21872/07

Judge: Michele M. Woodard

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.

SCAN

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

-----x

JOSEPH R. JENKINS,

Plaintiff,

-against-

MTA, METROPOLITAN SUBURBAN BUS
AUTHORITY a/k/a LONG ISLAND BUS, and
MARK A. CLARKE,

Defendants.

-----x

CURTIS BROWN,

Plaintiff,

-against-

JOSEPH R. JENKINS and DOLORES JENKINS,

Defendants.

-----x

DOLORES JENKINS and JOSEPH R. JENKINS,

Third-Party Plaintiffs,

-against-

METROPOLITAN SUBURBAN BUS AUTHORITY
d/b/a MTA LONG ISLAND BUS, and MARK A. CLARKE,

Third-Party Defendants.

-----x

Papers Read on this Motion:

Third-Party Defendants' Notice of Motion	02
Plaintiff Curtis Brown's Affirmation in Opposition	xx
Defendants Jenkins' Notice of Cross-Motion	03
Third-Party Defendants' Reply Affirmation	xx

**MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 12
Index No.: 21872/07
Motion Seq. Nos.: 02 & 03**

DECISION AND ORDER

Index No.: 5964/08

Third-party Defendants Mark A. Clarke and Metropolitan Suburban Bus Authority d/b/a MTA-
Long Island Bus move for an order pursuant to Uniform Rules §202.21(e) and CPLR §3212(b) vacating

the Plaintiff's Note of Issue and directing Plaintiffs to comply with all outstanding discovery and extending Defendant's time to move for summary judgment. In motion sequence number three, Defendants/Third-Party Plaintiffs Dolores Jenkins and Joseph R. Jenkins cross-move for an order pursuant to 22 NYCRR § 202.21(e) vacating the note of issue and statement of readiness filed and served by Plaintiff and striking this action from the trial calendar, an order pursuant to CPLR §3212(a) extending Defendants/Third-Party Plaintiffs' time to move for summary judgment until one hundred-twenty (120) days from the date of completion of all outstanding discovery, and an order pursuant to CPLR §§3124 and 3126(2) directing Plaintiff to comply with all outstanding discovery yet to be completed, including appearing for court-ordered Independent Medical Examinations(hereinafter "IME"), and precluding the Plaintiff from offering any evidence at trial of this action as to any subject on which discovery has not been provided.

THIRD-PARTY DEFENDANTS CLARKE AND MSBA

Within twenty (20) days after service of a Note of Issue and Certificate of Readiness, any party to the action or special proceeding 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. After such period, except in a tax assessment review proceeding, no such motion shall be allowed except for good cause shown. At any time, the court may vacate a 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. If the motion to vacate a Note of Issue is granted, a copy of the order vacating the Note of Issue shall be served upon the clerk of the trial court. 22 NYCRR §202.21(e).

Here, the Court finds that the third-party Defendants have shown that discovery is not complete and therefore the instant case is not ready for trial. In addition, the Plaintiff's certificate of readiness contains misstatements of material facts in that it incorrectly stated that discovery proceedings now known to be necessary were completed and that physical examinations have been completed. 22 NYCRR §202.21(e). Accordingly, motion sequence number two by third-party Defendants for an order vacating the Note of Issue is **granted** and a copy this decision and order shall be served upon the clerk of the trial court in this matter forthwith. *Brown v Astoria Fed. Sav.*, 51 AD3d 961 (2d Dept 2008).

Pursuant to CPLR §3101(a), 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.

Here, since the nature and severity of the Plaintiff's prior medical conditions may have an impact upon the amount of damages, if any, recoverable for a claim of loss of enjoyment of life, the Court finds that the records regarding those preexisting medical conditions are material and necessary to the defense. *Orlando v Richmond Precast, Inc.*, 53 AD3d (2d Dept 2008); *Diamond v Ross Orthopedic Group, P.C.*, 41 AD3d 768 (2d Dept 2007). Accordingly, motion sequence number three by Third-Party Defendants for an order directing Plaintiff to comply with all outstanding discovery is **granted** to the extent that Plaintiff is hereby

ORDERED, to provide medical authorizations to Third-Party Defendants for any and all medical records that pertain to Plaintiff's prior trip and fall on March 6, 2006, MRI in 2006 and prior injury and surgery to his right and left knees within sixty (60) days of service of a copy of this order, with notice of entry, upon the attorney for the Plaintiff.

Plaintiff has failed to show that it would be prejudiced if an orthopedic IME was performed in this matter. Accordingly, Plaintiff is hereby

ORDERD, to undergo an orthopedic IME within ninety (90) days of service of a copy of this order, with notice of entry, upon the attorney for the Plaintiff. *Barbosa v Capolarello*, 52 AD3d 629 (2d Dept 2008).

CPLR §3212(a) provides that any party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the Note of Issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the Note of Issue, except with leave of court on good cause shown.

CPLR §3212(a) requires a showing of good cause for the delay in making the motion—a satisfactory explanation for the untimeliness—rather than simply permitting meritorious, nonprejudicial filings, however tardy. That reading is supported by the language of the statute—only the movant can show good cause—as well as by the purpose of the amendment, to end the practice of eleventh-hour summary judgment motions. No excuse at all, or a perfunctory excuse, cannot be good cause. *Brill v City of New York*, 2 NY3d 648 (2004). Significant outstanding discovery may, in certain circumstances, constitute good cause for delay in making a motion for summary judgment. *Czernicki v Lawniczak*, 25 Ad3d 581(2d Dept 2006).

Here, Third-Party Plaintiffs have demonstrated good cause by explaining that an orthopedic IME of the Plaintiff has not been done, significant discovery requests regarding Plaintiffs prior medical conditions remain outstanding and by promptly bringing the instant motion after being served by the Plaintiff with the defective Note of Issue and certificate of readiness. *Brill*, supra. Accordingly, motion by Third-Party Defendants for an extension of time to move for summary judgment is granted to the extent that motions for summary judgment must be filed within sixty (60) days of the re-filing of a Note

of Issue in this matter.

DEFENDANTS/THIRD-PARTY PLAINTIFFS
DOLORES AND JOSEPH JENKINS

The nature and degree of the penalty to be imposed pursuant CPLR §3126 against a party who fails to obey an order directing disclosure is generally a matter within the discretion of the trial court. However, the remedy should be as narrowly tailored as possible to the circumstances of the individual case. Any sanction imposed should be narrowly designed to prevent a party who has refused to disclose evidence from exploiting or benefitting from the unavailability of the proof during the pending civil action. *Matuszewicz v Jo Jo's Auto Parts, Inc.*, 18 AD3d 828 (2d Dept 2005).

While the nature and degree of the penalty to be imposed on a motion pursuant to CPLR §3126 is a matter of discretion for the court *Castellano v Mainco El. & Elec. Corp.*, 292 AD2d 556 (2d Dept 2002); *Polanco v Duran*, 278 AD2d 397 (2d Dept 2000), an order of preclusion should only be imposed where the moving party establishes that the failure to disclose is willful and contumacious. *Mangiapane v Brookhaven Beach Health Related Facility*, 305 AD2d 642 (2d Dept 2003); *Klutchko v Baron*, 1 AD3d 400 (2d Dept 2003). Here, Defendant/Third-Party Plaintiffs have failed to show that Plaintiffs failure to appear for an orthopedic IME was willful or contumacious. Accordingly, motion by Defendants/Third-Party Plaintiffs for an order pursuant to CPLR §3126 precluding the Plaintiff from offering any evidence at trial of this action as to any subject on which discovery has not been provided is **denied**.

The Court finds that Defendants/Third-Party Plaintiffs have demonstrated good cause by explaining that an orthopedic IME of the Plaintiff has not been done and by promptly bringing the instant motion after being served by the Plaintiff with the defective Note of Issue and certificate of readiness. *Brill*, supra. Accordingly, motion by Defendants/Third-Party Plaintiffs for an order pursuant

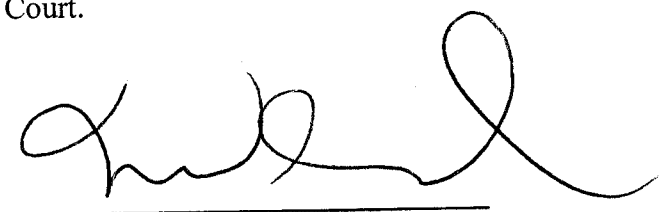
to CPLR §3212(a) extending Defendants/Third-Party Plaintiffs time to move for summary judgment until one hundred-twenty (120) days from the date of completion of all outstanding discovery is **granted** to the extent that motions for summary judgment must be filed within sixty (60) days of the re-filing of a Note of Issue in this matter. It is hereby

ORDERED, that the parties are directed to appear on April 19, 2010 at 9:30 a.m. for a Recertification Conference before the undersigned.

This constitutes the Decision and Order of the Court.

DATED: January 11, 2010
Mineola, N.Y. 11501

ENTER:



HON. MICHELE M. WOODARD
J.S.C.

H:\NOTE OF ISSUE (90 days overdue)\Jenkins v MTA CH CC.wpd

ENTERED
JAN 14 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE