

Cohen v 450 7th Ave. Assoc., LLC

2010 NY Slip Op 31834(U)

July 16, 2010

Supreme Court, New York County

Docket Number: 104457/2009

Judge: O. Peter Sherwood

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

PRESENT: O. PETER SHERWOOD
Justice

PART 61

BERNARD COHEN,
Plaintiff,
-against-
450 7TH AVENUE ASSOCIATES, LLC, et al.,
Defendants.

INDEX NO. 104457/09
MOTION DATE June 25, 2010
MOTION SEQ. NO. 006
MOTION CAL. NO. 30

The following papers, numbered 1 to 8 were read on this motion to vacate the Note of Issue

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-3</u>
Answering Affidavits — Exhibits _____	<u>4-6, 7</u>
Replying Affidavits _____	<u>8</u>

Cross-Motion: Yes No

Upon the foregoing papers, the motion of defendant 450 7th Avenue Associates, LLC for an order, *inter alia*, vacating the Note of Issue and Certificate of Readiness and striking the case from the trial calendar and the cross motion of thirld-party defendant 34th Street Partnership, Inc., *inter alia*, for the same relief are decided in accordance with the accompanying decision and order.

FILED
JUL 20 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/16/10

O. Peter Sherwood
O. PETER SHERWOOD, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61**

-----X

BERNARD COHEN,
Plaintiff,

-against-

**450 7TH AVENUE ASSOCIATES, LLC, KAILASH
PARTNERS, LLC, CONWAY STORES, INC.,
VINJAS ENTERPRISES, INC., Individually and
d/b/a AL'S DELI, R.J. NY INC., d/b/a EYEBROW
THREADING SALON and EYEBROW
THREADING SALON, INC.,**

Defendants.

-----X

**R.J. NY INC., d/b/a EYEBROW THREADING
SALON,**
Third-Party Plaintiff,

-against-

34TH STREET PARTNERSHIP, INC.,

Third-Party Defendant.

-----X

O. PETER SHERWOOD, J.:

In this action to recover damages for personal injuries sustained in a trip and fall accident, defendant 450 7th Avenue Associates, LLC ("7th Ave.") moves for an order: (1) vacating the Note of Issue and Certificate of Readiness and striking the action from the trial calendar; and (2) compelling plaintiff to provide a HIPAA compliant authorization for release of her records with Blue Cross/Blue Shield. Third-Party defendant 34th Street Partnership, Inc. ("34th St.") cross moves for the same relief and also seeks an extension of the time to file dispositive motions until 60 days after discovery is complete. Plaintiff opposes the motion and cross motion. For the reasons that follow, the motion and cross motion are granted in part, and denied in part.

Plaintiff Bernard Cohen ("plaintiff") commenced the instant action by filing the summons and complaint on or about March 31, 2009, to recover for personal injuries alleged to have been sustained on November 4, 2008, when he tripped and fell on a public sidewalk adjacent to premises

**DECISION AND
ORDER**

Index No. 104457/2009

**F I L E
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COUNTY CLERK'S OFFICE
NEW YORK**

**Third-Party Index No.
591037/2009**

located on the west side of 7th Avenue, between 34th and 35th Streets, in front of premises known as 450 7th Avenue and 458 7th Avenue, New York, New York. On or about November 5, 2009, a third-party action was commenced by defendant R.J. NY, Inc. ("RJ") against 34th St. for common-law indemnification and contribution.

The preliminary conference order dated December 2, 2009, set an end date for disclosure of April 30, 2010 and required the Note of Issue to be filed by May 7, 2009. The order also directed plaintiff to provide authorizations for all related medical treatment and collateral sources by January 15, 2010, to the extent not already provided. Thereafter, on or about February 9, 2010, 7th Ave. served a demand for authorizations, *inter alia*, for plaintiff's medical records from Blue Cross/Blue Shield. At a compliance conference on March 17, 2010, all parties were directed to respond to all outstanding discovery demands within 30 days and an additional compliance conference was scheduled for April 28, 2010. On the latter date, a "so-ordered" stipulation was entered directing that depositions of defendant Kailash Partners, Inc. ("Kailash") and Marianne of defendant Vijnas Enterprises, Inc. ("Vijnas") be conducted commencing on or before May 26, 2010 and provided further that plaintiff "may file the Note of Issue on or before 5/7/10, while discovery continues."

Plaintiff filed the Note of Issue on May 4, 2010, indicating that plaintiff had completed all discovery and that the depositions of Kalish and Vijnas, by its witness Marianne, would be conducted post filing of the Note of Issue pursuant to the order of this court.

By Notice of Motion, dated May 25, 2010 and filed June 10, 2010, 7th Ave. made the instant motion to vacate the Note of Issue and Certificate of Readiness and strike the case from the trial calendar. 7th Ave. contends that the plaintiff has failed to furnish a HIPAA authorization for Blue Cross/Blue Shield records, Vijnas refused to produce Marianne as it had already produced a witness for deposition, and Kailash never produced a witness. Thus, since discovery is not complete, 7th Ave. claims that vacatur of the Note of Issue and Certificate of readiness is appropriate and the court should compel plaintiff to produce a HIPAA authorization for the Blue Cross/Blue Shield records, Vijnas to produce Marianne, and Kailash to produce a witness for depositions.

34th St. in its cross motion joins 7th Ave.'s motion. It also seeks an extension of time within which to file any dispositive motion until 60 days after the completion of discovery claiming that it

has yet to receive any deposition transcripts and the deposition of Kailash and the further deposition of Vinjas have not been conducted.

In opposition, plaintiff notes that contrary to the Uniform Rules of New York State Trial Courts (22 NYCRR § 202.7) the Affirmation of Good Faith submitted by 7th Ave. fails to detail the time, place and manner of consultation undertaken to obtain compliance with outstanding discovery. Plaintiff contends that 7th Ave. did not make reasonable efforts to obtain compliance and further contends that counsel for 34th St. has agreed to withdraw that portion of its motion as seeks to vacate the Note of Issue on the strength of the April 2010 so-ordered stipulation permitting the parties to continue with discovery after the filing of the Note of Issue. With respect to the authorization for Blue Cross/Blue Shield records, plaintiff claims that such demand is overbroad and improper as it does not specify the nature of the documents demanded or a time frame.

Under section 202.21 (e) of the Uniform Rules for Trial Courts (22 NYCRR), any party to an action may move within twenty (20) days of service of a note of issue and certificate of readiness to vacate the note of issue upon an affidavit showing in what respects the case is not trial ready. “Where a party timely moves to vacate a note of issue, it need only show that ‘a material fact in the certificate of readiness fails to comply with the requirements of . . . section [202.21] in some material respect’” [citations omitted] (*Vargas v Villa Josefa Realty Corp.*, 28 AD3d 389, 390 [1st Dept 2006]). Here, 7th Ave. has timely moved to vacate the note of issue. However, the certificate of readiness contains no factual error as it references the April 2010 order of this court permitting discovery to continue post filing of the Note of Issue. In addition, as plaintiff notes, 7th Ave. has failed to demonstrate that it engaged in diligent efforts to obtain the outstanding authorization and depositions. Although plaintiff has sought and obtained a trial preference based upon his age, there has been no showing that any party would be prejudiced by reason of an additional brief delay while the outstanding discovery is completed as the case will be retained on the trial calendar (*see, Torres v New York City Transit Authority*, 192 AD2d 400 [1st Dept 1993]; *see also, Sun Plaza Enterprises Corp. V Crown Theatres, L.P.*, 307 AD2d 352 [2d Dept 2003], *appeal dismissed* 2 NY3d 794 [2004]). Moreover, in view of this outstanding discovery, the court will grant that branch of the cross motion as seeks an extension of time to make dispositive motions. Accordingly, it is

ORDERED, that defendant 7th Ave.'s motion to vacate plaintiff's Note of Issue and Certificate of Readiness and strike the case from the trial calendar is granted only to the extent that: (1) plaintiff is directed to furnish to defendants within 14 days of entry of this decision and order a properly executed authorization for his Blue Cross/Blue Shield records limited to a period from the date of the accident at issue to the present related to payments made for treatment of injuries sustained in this accident; (2) defendant Vinjas is directed to produce "Marianne" for a deposition within twenty (20) days of entry of this decision and order; and (3) defendant Kailash is directed to appear for a deposition within twenty (20) days of entry of this decision and order; and in all other respects the motion is denied; and it is further

ORDERED that the cross motion of third-party defendant 34th St. is granted to the extent that the time to file dispositive motions is extended and such motions shall be served and filed no later than 45 days after the completion of the outstanding depositions; and it is further

ORDERED that defendant 7th Ave. shall serve a copy of this order with notice of entry upon all parties with 10 days of entry.

This shall constitute the decision and order of the court.

DATED: 7/16/10

ENTER,



O. PETER SHERWOOD

J.S.C.

FILED

JUL 20 2010

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