

**Smith v Columbus Manor, LLC**

2010 NY Slip Op 32281(U)

August 23, 2010

Supreme Court, New York County

Docket Number: 110729/08

Judge: Louis B. York

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

PRESENT: LOUIS B. YORK  
J.S.C.

PART ✓

Index Number : 110729/2008

SMITH, TONI

vs

COLUMBUS MANOR

Sequence Number : 004

VACATE NOTE OF ISSUE/READINESS

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM DECISION.

FILED

AUG 25 2010

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 8/23/10

[Signature]  
LOUIS B. YORK J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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 2

-----X  
TONI SMITH and MOSES SMITH,

Plaintiffs,

Index No.: 110729/08

-against-

COLUMBUS MANOR, LLC., a/k/a COLUMBUS  
MANOR STOCK, LLC, STELLAR MANAGEMENT  
LLC,

Defendants.

-----X  
COLUMBUS MANOR, LLC., a/k/a COLUMBUS  
MANOR STOCK, LLC, STELLAR MANAGEMENT  
LLC,

Third-Party Plaintiffs,

Index No.: 590262/09

-against-

CONCORD BUILDING SERVICES, INC., ARIES  
MANAGEMENT, ARIES MANAGEMENT  
COLLECTIONS, INC. and ARIES MANAGEMENT,  
INC.,

Third-Party Defendants.

**FILED**  
AUG 25 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
**YORK, J.:**

Motion sequence numbers 003 and 004 have been consolidated for disposition. This action involves personal injuries which Toni Smith, plaintiff, allegedly sustained as a result of a cabinet falling on her in her apartment located at 70 West 93<sup>rd</sup> Street in Manhattan. The owner of the building where the accident took place is Columbus Manor, LLC, and Stellar Management, is the managing agent of the building. Aries Management, Inc., and Aries Management

Collections, Inc., are alleged to be the former agents of the building, and Concord Building Services, Inc., is a company that allegedly replaced cabinetry in the building.

In sequence 003, Concord Building Service, Inc., and Aries Management Collections, Inc., third-party defendants, move, pursuant to Title 22, Part 202.21(e) of the New York Code, Rules and Regulations, to strike this action from the trial calendar and vacate the note of issue which plaintiff filed on February 4, 2010. In sequence 004, Columbus Manor, LLC, and Stellar Management, LLC, third-party plaintiffs, move, pursuant to CPLR 3402 and Title 22, Part 202.21(e) of the New York Code, Rules and Regulations, to strike this action from the trial calendar and vacate the note of issue. Both third-party plaintiffs and third-party defendants contend that, if the note of issue is vacated and extended, the time to file a motion for summary judgement should also be extended.

Prior to the submission of motion sequence numbers 003 and 004, and before the note of issue was filed, third-party defendants, moved pursuant to CPLR 3101 and CPLR 3124, to compel third-party plaintiffs, to provide new responses to the first and second set of interrogatories, to respond to the first document demand, and to conduct depositions. This motion was originally scheduled to be argued on January 14, 2010, but was adjourned twice, and eventually submitted on March 10, 2010. On July 9, 2010, this court issued a written decision which ordered that it would not compel further answers to interrogatories, that third-party plaintiffs are to provide requested documents within 15 days of receipt, that third-party defendants were to respond to third-party plaintiffs document demand within 15 days of entry of the order, and that depositions of Tobia Stahl, Pedro Soto, and a company representative of third-party plaintiffs, are to take place by September 10, 2010.

Third-party defendants contend that it was improper for the note of issue to be filed while the above discovery motion was pending before the court. Third-party defendants also maintain that plaintiffs served an amended/supplemental verified bill of particulars which alleges new injuries which were not discussed in the original verified bill of particulars. Specifically, the amended bill of particulars alleges that plaintiff suffered a cerebral concussion and acute head trauma triggering and/or worsening pre-existing vascular occlusive disease in the distribution of the right posterior cerebral artery causing the development of permanent and irreversible loss of peripheral vision/visual field loss of the left eye, causing vasospasm in the PCA resulting in the development of left homonymous hemianopia and onset of complaints of permanent and irreversable loss of peripheral vision/visual field loss of the left eye.

Third-party plaintiffs argue that although plaintiffs have complied with the discovery previously ordered by the court, discovery in the third-party action remains to be completed. Third-party plaintiffs contend that because third-party defendants have yet to provide outstanding discovery and produce witnesses for depositions, the note of issue should not have been filed and must be vacated.

Plaintiffs argue that their action should remain on the trial calendar pending the completion of discovery in the third-party action. Plaintiffs maintain that they provided authorizations, that plaintiff appeared for three independent medical examinations, that EBT's of both plaintiffs took place, and that the only remaining discovery involves the third-party action. Plaintiffs maintain that pursuant to the CPLR 3042 (b), the amended bill of particulars was served before the note of issue was filed and that the bill of particulars was only amended to conform to the findings of the expert witness report of Dr. Allan E. Rubenstein, M.D.

The First Department has held that “[w]here a party timely moves to vacate a note of issue, it need show only that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of . . . section 202.21 in some material respect.” *Vargas v Villa Josefa Realty Corp.*, 28 AD3d 389, 390 (1st Dept 2006) (citations omitted); *see also Munoz v 147 Corp.*, 309 AD2d 647, 648 (1st Dept 2003) (holding that the note of issue must be vacated because the recital in the certificate of readiness that discovery is complete is incorrect).

Here, although counsel for plaintiffs filed the note of issue on February 4, 2010, and stated that discovery was complete, this was inaccurate. At the time of the filing of the note of issue, a motion to compel discovery was pending before the court, and injuries were listed in the amended bill of particulars which counsel for third-party defendants maintains were not specified in the original bill of particulars.

Plaintiffs contend that they complied with CPLR 3042 (b), which provides that “a party may amend the bill of particulars once as of course prior to the filing of the note of issue.” However, counsel for plaintiffs signed the amended bill of particulars on February 3, 2010, the same day which the certificate of readiness was signed, making it impossible for the amended bill of particulars to be reviewed by counsel for the other parties prior to the filing of the note of issue. Counsel for plaintiffs should have alerted the court that due to the service of the amended bill of particulars, as well as the pending discovery motion, the note of issue deadline had to be extended.

Although plaintiffs maintain that the injuries alleged in the amended bill of particulars are not new injuries and were only included in the amended bill of particulars in order to conform to

the expert witness report, plaintiffs are now alleging that the alleged accident triggered or worsened a pre-existing condition and both third-party plaintiffs and third-party defendants must be allowed to conduct discovery regarding all of the injuries listed in the amended bill of particulars. Therefore, the note of issue will be vacated. To the extent that third-party plaintiffs or third-party defendants seek any discovery concerning the injuries discussed in the amended bill of particulars, such discovery must be requested and provided by September 30, 2010, and the note of issue must be filed on or before October 15, 2010.

Also, because third-party defendants maintain that they may seek an inspection of the premises and the cabinet that allegedly caused plaintiff's injuries, such inspection must take place on or before September 30, 2010. There will be no adjournments of the above dates without prior court approval.

As a result of the note of issue being vacated and extended, pursuant to the rules of Part 2, motions for summary judgment must be filed within 60 days of the filing of the note of issue or denied, absent showing good cause.

In conclusion, it is ORDERED that the motion is granted and the note of issue is vacated and the case is stricken from the trial calendar; and it is further

ORDERED that all further discovery in this matter shall be completed on or before September 30, 2010; and it is further

ORDERED that, within 15 days from the entry of this order, movant shall serve a copy of this order with notice of entry on all parties and upon the Clerk of the Trial Support Office (Room 158), who is hereby directed to strike the case from the trial calendar and make all required notations thereof in the records of the court, and it is further

ORDERED that, within 15 days from the completion of discovery, the plaintiff shall  
cause the action to be placed upon the trial calendar by filing a new note of issue and statement  
of readiness and payment of the fee therefor.

Dated: 8/23/10

ENTER: *Luy*  
J.S.C.

**LOUIS B. YORK**  
**J.S.C.**

**FILED**  
**AUG 25 2010**  
**NEW YORK**  
**COUNTY CLERK'S OFFICE**