

Noble v 260-261 Madison Ave., LLC

2010 NY Slip Op 32408(U)

August 31, 2010

Sup Ct, NY County

Docket Number: 100214/07

Judge: Eileen A. Rakower

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

PRESENT: HON. EILSEN A. RAKOWER
Justice

PART 15

Index Number : 100214/2007
NOBLE, TERRENCE
VS.
260-261 MADISON AVENUE, LLC
SEQUENCE NUMBER : 001
VACATE NOTE OF ISSUE/READINESS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1
2

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

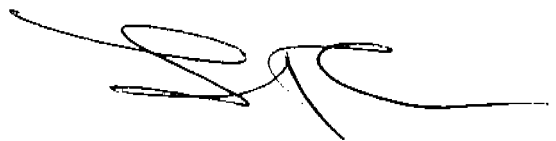
FILED

SEP. 07 2010

NEW YORK
COUNTY CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

Dated: 8/31/10



HON. EILSEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG. SETTLE ORDER /JUDG.

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 15

-----X

TERRENCE NOBLE,

Plaintiff,

Index No.
100214/07

- against -

260-261 MADISON AVENUE, LLC., 260/261 MADISON
EQUITIES CORP., ZAR REALTY MANAGEMENT CORP.,
SAPIR REALTY MANAGEMENT CORP., ZIRUALE
CONSTRUCTION INC., ZIRUALE INC. and
ESTAFFCONTROL, LLC,

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Defendants.

-----X

260-261 MADISON AVENUE, LLC., 260/261 MADISON
EQUITIES CORP., ZAR REALTY MANAGEMENT CORP.,
SAPIR REALTY MANAGEMENT CORP., ZIRUALE
CONSTRUCTION INC.,

Third-Party
Index No.
590120/09

Third-Party Plaintiffs,

**DECISION
and ORDER**

- against -

UNITED STAFFING SYSTEMS, INC. and ESTAFF
CONTROL, LLC,

Mot. Seq.
001

Third-Party Defendants.

-----X

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff brings this action for damages sustained on May 24, 2006, when he allegedly fell from a ladder while working at 261 Madison Avenue in Manhattan, resulting in personal injuries. Presently before the court is a motion by defendants/third-party plaintiffs 260-261 Madison Avenue, LLC, 260/261 Madison

Equities Corp., Zar Realty Management Corp., Sapir Realty Management Corp., and Ziruale Construction, Inc. ("Moving Defendants") for an order pursuant to 22 NYCRR §202.21(e) vacating the Note of Issue and Certificate of Readiness ("NOI") filed on March 29, 2010, and striking this action from the trial calendar. The Moving Defendants also move for an order pursuant to CPLR §3124 directing that Third Party Defendants provide responses to Moving Defendants' outstanding discovery requests.

Moving Defendants state that after Plaintiff testified at his deposition that he had sustained similar injuries to those alleged in the present action in an incident in 1992, Moving Defendants sought and obtained authorization for his workers' compensation records for the 1992 accident. Those records revealed that Plaintiff underwent treatment with a number of physicians in connection with the 1992 accident. Accordingly, Moving Defendants requested that Plaintiff execute written authorizations for these records by discovery requests dated July 15, 2009 and April 23, 2010.

In addition to the above medical records, Moving Defendants state that they seek to take the deposition of non-party Israel Martinez, a former co-employee of Plaintiff who, according to Plaintiff's deposition testimony, may have witnessed the subject accident. Moving Defendants request that, at the very least, they be afforded the opportunity to conduct a post-NOI deposition of Martinez if and when he is located.

Furthermore, Moving Defendants state that Third-Party Defendants' willful failure to produce requested discovery has impeded their defense of the action and delayed these proceedings. Specifically, Moving Defendants state that, on July 16, 2009, Moving Defendants served multiple discovery demands on Third-Party Defendants. Moving Defendants further state that, on January 27, 2010 and February 1, 2010, Third-Party Defendants were served with additional demands for discovery and inspection. However, Third-Party Defendants have failed to provide any response to these demands.

Plaintiff submits an affirmation in opposition to the motion, wherein Plaintiff states that the sought-after authorizations were produced on June 2, 2010. Moreover, Plaintiff states that, while it does not object to third-party depositions, said depositions can be conducted without the action being removed from the trial calendar.

22 NYCRR §202.21(e) provides:

Within 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.

Where a party timely moves to vacate a note of issue, that party need only show that "a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of [22 NYCRR §202.21] in some material respect," such as erroneously indicating that all discovery is complete (*Vargas v. Villa Josefa Realty Corp.*, 2006 NY Slip Op 3155, *2 [1st Dept. 2006]).

Here, the record indicates that discovery is incomplete, and thus vacatur of the NOI is required. Moreover, Third-Party Defendants are ordered to produce responses to Moving Defendants' discovery requests within 20 days of receipt of a copy of this order with notice of entry thereof.

Wherefore it is hereby

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 the parties shall appear for a conference in Room 308, 80 Centre Street, on October 5, 2010 at 9:30 AM; 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 completion of discovery as hereinabove directed, the plaintiff shall cause the action to be placed upon the trial calendar by the

filing of a new note of issue and statement of readiness and payment of the fee therefor; and it is further

ORDERED that Third-Party Defendants shall serve their response to Moving Defendants' discovery demands within 20 days of receipt of a copy of this order with notice of entry thereof.

This constitutes the decision and order of the Court. All other relief requested is denied.

Dated: August 31, 2010



EILEEN A. RAKOWER, J.S.C.

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