

McKernan v Turner Constr. Co.

2010 NY Slip Op 33491(U)

December 20, 2010

Supreme Court, New York County

Docket Number: 114464/07

Judge: Martin Shulman

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

PRESENT: MARTIN SHULMAN
J.S.C.

PART 1

Index Number : 114464/2007
MCKERNAN, MICHAEL
VS.
TURNER CONSTRUCTION
SEQUENCE NUMBER : 001
VACATE NOTE OF ISSUE/READINESS

INDEX NO. 114464/07
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

this motion to/for _____

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits A-L
Answering Affidavits — Exhibits 1-3
Replying Affidavits _____

PAPERS NUMBERED	
1, 2	_____
3	_____
4	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the attached decision and order.*

FILED

NEW YORK COUNTY CLERK'S OFFICE

Dated: December 20, 2010

MARTIN SHULMAN
J.S.C.

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 1

-----X

MICHAEL MCKERNAN,

Plaintiff,

Index No. 114464/07

-against-

TURNER CONSTRUCTION, CO. and ZIEGENFUSS
DRILLING INCORPORATED,

Defendants.

-----X

TURNER CONSTRUCTION COMPANY i/s/h/a
TURNER CONSTRUCTION, CO.,

Index No. 590249/08

Third-Party Plaintiff

-against-

GATEWAY INDUSTRIES, INC./JD POSILLICO, INC.
et al,

Third-Party Defendants.

-----X

MARTIN SHULMAN, J. :

FILED

NEW YORK
COUNTY CLERK'S OFFICE

In this personal injury action, defendant third-party plaintiff Turner Construction ("Turner") moves to vacate plaintiff's note of issue and compel plaintiff and the third-party defendants to provide outstanding discovery. Plaintiff filed the note of issue on or about July 28, 2010. Turner's motion contends that the following discovery is outstanding from plaintiff: 1) responses to Turner's June 16 & 18, 2010 notices for discovery and inspection (collectively the "demands"); 2) updated authorizations for the Workers' Compensation Board and carrier; 3) authorization for Clouster Community College records; 4) neurological independent medical examination ("IME"); and 5) further orthopedic IME. Additionally, the third-party defendants have failed to provide a

copy of their general liability and excess insurance policies and have not responded to Turner's April 20, 2009 discovery demands.

The third-party defendants do not oppose the motion and as such, the portion of the motion seeking to compel them to provide copies of their liability and excess insurance policies and to respond to Turner's April 20, 2009 demands is granted. The third-party defendants shall provide the outstanding items within 20 days of the date hereof.

Plaintiff opposes the motion, contending: 1) he has now responded to Turner's demands, thereby rendering that portion of the motion moot; and 2) Turner may have waived the right to any further IME's, however, plaintiff will attend them if the court so directs. In reply, Turner contends plaintiff has only partially complied, noting that some authorizations remain outstanding¹ and plaintiff has not served any response to the June 18, 2010 demand requesting information pertaining to plaintiff's expert witness.²

Discovery clearly remains outstanding from plaintiff. Plaintiff shall properly respond to the June 18, 2010 demand and provide the outstanding authorizations within 20 days of the date hereof. In the event plaintiff is still unable to recall relevant names and/or addresses, he shall submit an affidavit detailing his efforts to obtain such

¹ At his deposition, plaintiff was unable to recall the names and/or addresses of a particular pharmacy and doctor, nor could he recall the name of the facility which fitted him for a leg brace. Turner seeks authorizations for these items.

² By letter dated August 30, 2010, plaintiff's counsel responded that "most of the information [Turner] requested is privileged" and stated that plaintiff would respond to the expert demand in accordance with the CPLR. There is no indication on this record that plaintiff has served any further response.

information. Finally, if he has not already done so, plaintiff shall appear for the outstanding IME's within 60 days of the date hereof. Accordingly, it is hereby

ORDERED that the motion is granted, 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 from plaintiff shall be completed as set forth herein above; and it is further

ORDERED that the third-party defendants shall respond to Turner's outstanding discovery demands within 20 days of the date hereof; and it is further

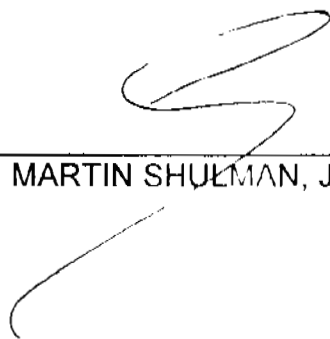
ORDERED that the parties shall appear for a final status conference in Room 325, 60 Centre Street, New York, New York on March 1, 2011 at 9:30 a.m.; and it is further

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 herein above 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.

This constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for the parties.

DATED: New York, New York
December 20, 2010



HON. MARTIN SHULMAN, J.S.C.

FILED

NEW YORK
COUNTY CLERK'S OFFICE