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

PRESENT: Joan B. Lobis PART 6

Index Number : 106235/2009

BEATRICE, NANETTE

VS

BIONDO, RONALD L.

Sequence Number : 001

VACATE NOTE OF ISSUE/READINESS

INDEX NO. _____

MOTION DATE 3/22/11

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 ...	1-14
Answering Affidavits — Exhibits	15-16
Replying Affidavits	17

Cross-Motion: ☐ Yes ☑ No

FILED

JUN 02 2011

NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

Dated: 5/27/11

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
NEW YORK COUNTY: IAS PART 6

----------X

NANETTE BEATRICE,

Plaintiff,

-against-

RONALD L. BIONDO, DDS,

Defendant.

----------X

Index No. 106235/09

Decision and Order

----------X

RONALD L. BIONDO, DDS,

Plaintiff,

-against-

THEODORE AARONSON, DDS,

Defendant.

----------X

JOAN B. LOBIS, J.S.C.:

Defendant Ronald L. Biondo, D.D.S., moves for an order vacating plaintiff's note of issue, filed on November 29, 2010, and compelling plaintiff to provide outstanding discovery, or dismissing the complaint pursuant to C.P.L.R. § 3126 for failing to provide such discovery.

In this case sounding in dental malpractice, plaintiff alleges that Dr. Biondo negligently planned and placed dental implants in the upper arch of her mouth; that the implants failed in two places; and that she has suffered pain and the need for additional procedures. After ending her treatment with Dr. Biondo, plaintiff treated with third-party defendant Theodore Aaronson, D.D.S., who apparently created a plaster model of plaintiff's mouth prior to treating her, which presumably reflected the condition of her mouth when she stopped treating with Dr. Biondo

on or about July 14, 2008. Before Dr. Biondo filed his third-party complaint, Dr. Aaronson testified at an examination before trial ("EBT"). He testified that it is his practice to give patients their models. During discovery, plaintiff was ordered to provide Dr. Biondo with a copy of all studies, models, and/or dental records in her possession and control. In affidavits dated November 8, 2010, and November 30, 2010, plaintiff set forth that she had previously turned over all dental x-rays, devices, and models to her attorneys; that she had thoroughly searched her apartment; and that she could find no other x-rays, devices, or models. On November 29, 2010, plaintiff filed her note of issue. In the note of issue, plaintiff's attorney set forth that the preliminary conference had been complied with, in that examinations before trial had been held; medical reports and authorizations had been served; party statements, photographs, and witness information had been supplied; and a physical examination had been waived.

Dr. Biondo's attorney asserts that plaintiff's attorney only disclosed one dental device, and that "it was not the correct model per Dr. Aaronson's [EBT] testimony." Dr. Biondo's attorney points out that plaintiff swore in her affidavits that she had turned over "models" (plural emphasis added), and plaintiff's attorney has only turned over one model. Additionally, Dr. Biondo's attorney contends that eight (8) previously-ordered authorizations remain outstanding, as well as the physical examination of the plaintiff. Dr. Biondo characterizes plaintiff's failure to provide disclosure as willful, and asks that, at a minimum, the note of issue be stricken. Dr. Biondo further contends that plaintiff's violations of court-ordered discovery are so egregious that striking her complaint and dismissing the case is warranted.

Plaintiff argues that the note of issue should not be vacated because she has duly exchanged all discovery. Plaintiff's attorney explains that plaintiff's affidavit that she turned over all "models" to her attorneys, when he only exchanged copies of one "model," is explained by the fact that one "model" actually consists of two parts. He further asserts that he and his office clerk have searched the storage areas and file folders for dental models related to this case and found nothing, so therefore all dental models related to plaintiff have been provided to Dr. Biondo's attorneys. As to the authorizations, plaintiff's attorney sets forth that he provided five authorizations on February 8, 2011, and that plaintiff did not recognize the other three providers; thus, he contends, plaintiff has provided complete and substantive responses to Dr. Biondo's demands for these authorizations.

In reply, Dr. Biondo maintains that plaintiff's attorney has never produced the relevant model—the working model for the upper arch—that Dr. Aaronson testified existed. He also contends that the eight authorizations mentioned in the motion papers still remain outstanding.

Under 22 N.Y.C.R.R. § 202.21(e), the court may vacate a note of issue if, within twenty (20) days of the filing of note of issue, a party demonstrates that the case is not ready for trial because "a material fact in the certificate of readiness is incorrect, or . . . the certificate of readiness fails to comply with the requirements of [22 N.Y.C.R.R. § 202.21]." Vacating the note of issue is not appropriate when the moving party has had "ample opportunity to complete discovery." Mardiros v. Ghaly, 206 A.D.2d 413, 414 (2d Dep't 1994); see also Plonka v. Millard Fillmore Emergency Physicians Servs., P.C., 9 A.D.3d 869, 870 (4th Dep't 2004); Ireland v GEICO Corp., 2 A.D.3d 917 (3rd Dep't 2003).

Dr. Biondo has failed to show that a material fact in the certificate of readiness is incorrect. Plaintiff's affidavits indicate that she is not in possession of any dental x-rays, devices, or models and that she turned over everything she had. The testimony from Dr. Aaronson's EBT that Dr. Biondo relies on as proof that another model exists that plaintiff never turned over is inconclusive. From the excerpted testimony annexed to Dr. Biondo's papers, Dr. Aaronson did not definitively answer whether he knew that more than one model was actually made of plaintiff's teeth; whether he knew that there was a model made other than the "working model," which is what Dr. Aaronson called the model he was examining during the EBT; or whether, if indeed other models were taken, he knew that his office gave plaintiff these other models. Dr. Aaronson's records are not annexed to the motion, which might have shed some light on this issue.

As to the authorizations, plaintiff was ordered to provide authorizations for the eight named physicians at issue herein in compliance conference order dated April 27, 2010. The authorizations are not specifically referenced in any subsequent order annexed to the motion, even though the parties appeared for court conferences at least four more times before plaintiff filed her note of issue at the end of November 2010. Dr. Biondo fails to detail any good faith efforts to resolve the issue of the allegedly outstanding authorizations since the April 27, 2010 conference order as required by 22 N.Y.C.R.R. 202.7(a). Matos v. Mira Realty Mgmt. Corp., 240 A.D.2d 214 (1st Dep't 1997); Vasquez v. G.A.P.L.W. Realty, Inc., 236 A.D.2d 311, 312 (1st Dep't 1997).

As to Dr. Biondo's request to extend his time to conduct a medical examination of plaintiff, the court reviewed this case's prior orders, and in a conference order dated July 20, 2010

(omitted from Dr. Biondo's motion papers), the court ordered that plaintiff's physical examination was to be held within thirty (30) days of the order or the examination would be deemed waived. Dr. Biondo failed to justify his failure to comply with this deadline for conducting the physical examination (which already extended the time within which to conduct the physical examination as set forth in the preliminary conference order). Dr. Biondo failed to show that the allegedly outstanding authorizations had any bearing on the ability to conduct the examination. See Matos, 240 A.D.2d at 214. Dr. Biondo waived his right to conduct a physical examination.

Accordingly, it is hereby

ORDERED that the motion is denied it its entirety; and it is further

ORDERED that the parties shall appear for a previously scheduled conference on June 7, 2011, at 9:30 a.m.

Dated: May 27, 2011

JOAN B. LOBIS, J.S.C.