

**Braca v Frances**

2011 NY Slip Op 32820(U)

October 19, 2011

Supreme Court, New York County

Docket Number: 103114/10

Judge: Barbara Jaffe

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

PRESENT: JAFFE BARBARA JAFFE  
J.S.C.

PART 5

Index Number : 103114/2010  
BRACA, JOYCE  
vs.  
FRANCES, REYNOLD  
SEQUENCE NUMBER : 005  
COMPEL  
*C.A.L. # 16*

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for compel

PAPERS NUMBERED  
1  
2  
3

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

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

**FILED**  
OCT 24 2011  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 10/19/11 [Signature]  
OCT 19 2011 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 5

-----X  
JOYCE BRACA,

Index No. 103114/10

Plaintiff,

Motion Subm.: 8/2/11

Motion Seq. No.: 005

-against-

**DECISION & ORDER**

REYNOLD FRANCES, THE CITY OF NEW YORK,  
and NEW YORK CITY POLICE DEPARTMENT,

Defendants.

-----X  
BARBARA JAFFE, JSC:

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**For City:**  
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By notice of motion dated May 11, 2011, defendants move for an order compelling plaintiff to appear for an independent medical examination (IME) and striking her pleadings or, should she fail to appear, precluding her from offering any evidence on damages. Plaintiff opposes.

I. PERTINENT BACKGROUND

By notice dated April 7, 2010, plaintiff served on defendants a copy of her hospital/medical records from Bellevue Hospital (Bellevue) and NYU Hospital Center (NYU), along with authorizations for same, which expire upon the conclusion of the action. (Affirmation of Jeffrey A. Berson, Esq., dated June 3, 2011 [Berson Aff.], Exh. B).

By case scheduling order dated July 8, 2010, defendants were directed to conduct plaintiff's IME within 45 days after completion of her examination before trial, which was

conducted on September 28, 2010. (*Id.*, Exhs. D, F).

By compliance conference stipulation dated January 18, 2011, defendants reserved their right to designate plaintiff's IME within 45 days, to the extent it had not yet been done. (*Id.*, Exh. G).

On March 18, 2011, plaintiff filed and served her note of issue. (*Id.*, Exh. A).

## II. CONTENTIONS

Defendants allege that on February 16, 2011, they informed plaintiff's counsel that they were unable to locate plaintiff's medical authorizations or records which counsel asserted had been sent previously. Defendants subsequently located the authorizations which had since expired, and although they processed them, no records were produced. Defendants also allege that on April 20, 2011, plaintiff's counsel sent them an excerpt of plaintiff's Bellevue records and an expert medical report, that on May 3, 2011, they obtained a copy of plaintiff's NYU records, and that they unsuccessfully sought an extension of their time to designate the IME. Defendants thus explain their delay in designating the IME as resulting from the delay in receiving plaintiff's medical records. (Affirmation of Andrew Lucas, ACC, dated May 11, 2011).

Plaintiff argues that as defendants failed to move for an order striking her note of issue within 20 days of its service or show the existence of any unusual or unanticipated circumstances, there is no justification for compelling the IME. She observes that the medical authorizations have not expired and that defendants never requested additional time to designate the IME. (Berson Aff.).

In reply, defendants assert that they are unable to locate plaintiff's April 2010 notice and records in their files, and annex authorizations they found which expired on August 3, 2010.

They also contend that their failure to move for an order striking the note of issue resulted from my practice of discouraging motions and they hoped to resolve the issue during the May 2011 compliance conference. (Reply Affirmation, dated June 9, 2011).

### III. ANALYSIS

Pursuant to 22 NYCRR 202.21(e), a party may move to vacate note of issue within 20 days of its service, and after 20 days, no motion “shall be allowed except upon good cause shown.” However, “where unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice, the court, upon motion supported by affidavit, may grant permission to conduct such necessary proceedings.” (22 NYCRR 202.21[d]).

As plaintiff’s note of issue was served on March 18, 2011, defendants were required to interpose the instant motion, to the extent it may be deemed to be a motion to vacate the note of issue, on or before April 12, 2011. Although I discourage discovery motions, they are not prohibited, especially where a statute requires filing within a specific timeframe. And while defendants may have hoped to resolve the issue at the May 2011 compliance conference, nothing prevented them from preserving their rights by moving to strike the note of issue in the meantime. I thus find that defendants have failed to establish good cause to permit the late motion. (*See Ocasio-Gary v Lawrence Hosp.*, 69 AD3d 403 [1<sup>st</sup> Dept 2010] [motion to vacate note of issue properly denied as untimely absent showing of special circumstances or sufficient explanation for delay]; *Phelps v Boy Scouts of Am.*, 305 AD2d 335 [1<sup>st</sup> Dept 2003] [motion to strike note of issue in order to permit defendants to depose witnesses properly denied as untimely and as defendants had previously been given opportunity to conduct depositions]).

Defendants also failed to demonstrate the existence of any unusual or unanticipated circumstances arising service of the note of issue, as they knew by July 2010 of the need to designate plaintiff's IME and believed before the note of issue was served that they did not have plaintiff's medical records or authorizations, and yet failed to look for plaintiff's medical records until the deadline had almost passed and did not contact plaintiff's counsel until after the note had been served. (*See Owen v Lester*, 79 AD3d 992 [2d Dept 2010] [motion to extend time to conduct IME properly denied as defendants waived right to IME by failing to take it by court-ordered deadline and to move timely to vacate note of issue]; *Manzo v City of New York*, 62 AD3d 964 [2d Dept 2009] [defendants waived right to conduct additional IME by failing to move timely to vacate note of issue]; *Colon v Yen Ru Jin*, 45 AD3d 359 [1<sup>st</sup> Dept 2007] [lack of diligence in seeking discovery does not constitute unusual or unanticipated circumstance, and defendant waived right to IME by failing to conduct it despite having several opportunities to do so before deadline set forth in order]; *Rodriguez v Sau Wo Lau*, 298 AD2d 376 [2d Dept 2002] [defendant waived right to IME by failing to designate it within 45-day deadline in order and failed to show unusual or unanticipated circumstances had arisen since note of issue filed]).

Moreover, while defendants were unable to locate plaintiff's authorizations until February or March 2011, plaintiff established that they were served in April 2010. Consequently, defendants have not shown that any delay in obtaining plaintiff's medical records was caused by plaintiff instead of their own lack of diligence. (*Compare Bermel v Dagostino*, 50 AD3d 303 [1<sup>st</sup> Dept 2008] [motion to compel IME granted as defendant had unsuccessfully requested medical records both before and after note of issue filed and was thus unable to schedule IME timely]; *Urena v Bruprat Realty Corp.*, 179 AD2d 505 [1<sup>st</sup> Dept 1992] [permitting post-note examination

as plaintiff's failure to provide defendants with authorizations contributed to delay in scheduling exam]).

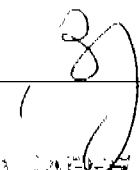
IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion to compel is denied.

ENTER:

Barbara Jaffe, JSC

  
BARBARA JAFFE  
J.S.C.

DATED: October 19, 2011  
New York, New York

**FILED**  
OCT 24 2011  
NEW YORK  
COUNTY CLERK'S OFFICE