Short Form Order

SUPREME COURT - STATE OF NEW YORK
CALENDAR CONTROL PART - SUFFOLK COUNTY

COPY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

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JOHN MOORE, an infant by his Mother and Natural Guardian LAURA MOORE, and LAURA MOORE individually,

Plaintiffs,

-against-

JOAN BENOWITZ,

Defendant.

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INDEX NO.: 29609/2009
CALENDAR NO.: 201001704MV
MOTION DATE : 9/26/2011
MOTION SEQ. NO. : 003 MD

PLAINTIFF'S ATTORNEY:
SALZMAN & WINER, LLP
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New York, NY 10007

DEFENDANT'S ATTORNEY:
FAUST GOETZ SCHENKER & BLEE
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New York, NY 10006

Upon the following papers numbered 1 to 49 read on this motion for preclusion, etc. : Notice of Motion/ Order to Show Cause and supporting papers 1- 17 ; ~~Notice of Cross Motion and supporting papers~~ ; Answering Affidavits and supporting papers 18 - 46 ; Replying Affidavits and supporting papers 47 - 49 ; ~~Other~~ ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant for, inter alia, an order precluding plaintiffs from presenting evidence at trial or vacating the note of issue is denied.

This action arises out of a motor vehicle accident which occurred in the parking lot of a shopping center on May 30, 2009. The accident allegedly happened when a vehicle operated by defendant Joan Benowitz struck a parked vehicle, which was owned by plaintiff Laura Moore. The force of the impact allegedly propelled the parked vehicle into plaintiff and her infant son, John Moore, both of whom had exited the car and were standing in the parking lot. By order dated March 5, 2010, plaintiffs were granted summary judgment in their favor on the issue of liability. A review of the Court's computerized records shows that a note of issue and certificate of readiness were filed by plaintiffs on August 9, 2010. Thereafter, in May 2011, this Court granted an application to conduct out-of-state depositions of infant plaintiff's treating physicians and psychologist, and directed that the records of such witnesses and the institutions they work for be provided to defendant's attorney 14 days prior to the depositions. The depositions were conducted the following month in North Carolina, where plaintiffs currently reside.

Defendant now moves for an order precluding plaintiff from presenting evidence at trial as to "items demanded by defendant, but not disclosed until after the plaintiff[s] filed their note of issue," arguing she was prejudiced by an alleged failure to provide certain medical records prior to the independent examination of infant plaintiff and the out-of-state depositions of infant plaintiff's treating physicians. Alternatively, defendant seeks an order vacating the note of issue and striking the case from the trial calendar. In addition, defendant seeks leave to conduct a further physical examination of plaintiffs, and leave file a late motion for summary judgment. Defendant's submissions in support of the motion include copies of the pleadings, the note of issue and certificate of readiness, and letters sent by plaintiff's counsel in April, June and July 2011 responding to demands for disclosure.

Plaintiffs oppose the motion, arguing that defendant has been provided with all appropriate authorizations and medical records, and that additional authorizations and records were provided in 2011, because plaintiffs, particularly infant plaintiff, continue to receive treatment for the physical and mental injuries allegedly suffered due to the subject accident. Plaintiffs further allege that they complied with the provision of the May 2011 order requiring them to provide defendant with copies of the medical records of the out-of-state health care providers related to their treatment of infant plaintiff. In addition, plaintiffs point out that the affirmation of defendant's attorney submitted in support of the motion does not contain any arguments or allegations pertaining to the applications set forth in the notice of motion for a further physical examination of plaintiff and for an extension of the time to make a summary judgment motion.

In reply, defendant asserts that she did not have the complete medical records of infant plaintiff's treating physicians prior to the depositions conducted in June 2011, and that she should be afforded an opportunity to conduct a further deposition of such witnesses "should there be additional medical records be [sic] received . . . through the processing of the authorizations." She also argues that all psychiatric claims should be withdrawn if infant plaintiff refuses to submit to a further physical examination, as a complete record of his psychiatric treatment was not available prior to the filing of the note of issue.

Although parties to litigation are entitled to "full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (CPLR 3101[a]), the filing of a note of issue and certificate of readiness denotes the end of the discovery phase of litigation (*Arons v Jutkowtiz*, 9 NY3d 393, 411, 850 NYS2d 345 [2007]; *see Tirado v Miller*, 75 AD3d 153, 901 NYS2d 358 [2d Dept 2010]). A party seeking discovery after the filing of the note of issue, therefore, must move to vacate the note within 20 days after service of the note of issue and submit an affidavit demonstrating that the case is not ready for trial (22 NYCRR 202.21[e]). A party seeking additional discovery after expiration of the 20-day period provided in 22 NYCRR 202.21(e) must show "unusual or unanticipated circumstances develop[ed] subsequent to the filing of the note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice" (22 NYCRR 202.21 [d]; *see Utica Mut. Ins. Co. v P.M.A. Corp.*, 34 AD3d 793, 826 NYS2d 138 [2d Dept 2006]; *Audiovox Corp. v Benyamini*, 265 AD2d 135, 707 NYS2d 137 [2d Dept 2000]). Further, the Uniform Rules for Trial Courts (22 NYCRR) §202.7 (a) provides that a motion relating to disclosure must be supported by an affirmation that moving counsel "has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion."

The applications for vacatur of the note of issue and for leave to conduct a further physical examination of infant plaintiff are denied. Absent from the moving papers is an affirmation by defendant's attorney showing a good faith effort was in fact made to resolve the dispute regarding plaintiffs' obligation to provide further disclosure (*see Mironer v City of New York*, 79 AD3d 1106, 915 NYS2d 279 [2d Dept 2010]; *Natoli v Milazzo*, 65 AD3d 1309, 886 NYS2d 205 [2d Dept 2009]; *Walter B. Melvin, Architects, LLC v 24 Aqueduct Lane Condominium*, 51 AD3d 784, 857 NYS2d 697 [2d Dept 2008]). Even if a proper affirmation of good faith had been included with the moving papers, the application for an order vacating the note of issue is untimely, having been made more than one year after the filing of the note of issue (*see Tirado v Miller*, 75 AD3d 153, 901 NYS2d 358; *Schroeder v IESI NY Corp.*, 24 AD3d 180, 805 NYS2d 79 [1st Dept 2005]; *Audiovox Corp. v Benyamini*, 265 AD2d 135, 707 NYS2d 137).

As to the application for a further physical examination of infant plaintiff, defendant also failed to demonstrate unusual or unanticipated circumstances arose subsequent to the filing of the note of issue warranting additional disclosure, and that she will be substantially prejudiced if another examination is not permitted (*see Salgado v Town Sports Intl.*, 73 AD3d 898, 901 NYS2d 325 [2d Dept 2010]; *Singh v City of New York*, 68 AD3d 1096, 890 NYS2d 333 [2d Dept 2009]). Significantly, defendant does not controvert the allegation by plaintiffs' counsel that plaintiffs, particularly infant plaintiff, continue to receive treatment for injuries resulting from the accident, that updated medical records have been disclosed to defendant's counsel as they are created, and that all available medical records prepared by the out-of-state witnesses had been disclosed prior to their depositions. Rather, in her reply, defendant simply alleges "it is not certain if [she] was provided with complete records," and that she "did not have an opportunity to obtain the records directly from the medical providers prior to the video deposition[s]." Defendant also does not indicate that there was new information contained in the recently disclosed medical records that would be the basis for conducting a second physical examination of infant plaintiff.

The application to preclude plaintiff from introducing evidence at trial of "items demanded by the defendant, but not disclosed until after the plaintiffs filed their note of issue," is denied, without prejudice to renewal at trial. As mentioned earlier, in May 2011, this Court granted plaintiffs' application to conduct out-of-state, post-note of issue depositions of infant plaintiff's treating physicians and psychologist. In arguing that plaintiffs should be precluded from offering evidence regarding infant plaintiff's condition that was disclosed after the filing of the note of issue, defendant, in effect, improperly is attempting to reargue plaintiff's application for leave to conduct such depositions. Further, other than a copy of the preliminary conference order executed by the parties' counsel in December 2009, defendant failed to support the motion with copies of written demands for disclosure of plaintiffs' medical records. Thus, the Court is unable to ascertain which demands for disclosure, if any, defendant allegedly failed to comply with, whether such demands were made during the disclosure phase of this action, and what specific evidence defendant seeks to preclude.

It is noted that the function of a motion in limine is to permit a party, before or during a trial, to obtain a preliminary order excluding the introduction of anticipated inadmissible, immaterial or prejudicial evidence or limiting the use of such evidence (*State of New York v Metz*, 241 AD2d 192, 198, 671 NYS2d 79 [1st Dept 1998]). A trial judge has broad discretion as to the admissibility of evidence offered at trial (*see Radosh v Shipstad*, 20 NY2d 504, 285 NYS2d 60 [1967]), and a ruling on a motion in limine, even when made in advance of trial and on paper, constitutes only an advisory opinion, which is not appealable as of right or by permission (*Winograd v Price*, 21 AD3d 956, 956, 800 NYS2d 649 [2d Dept 2005]). Defendant, if she is so inclined, may seek rulings at the time of trial regarding the admissibility of the documentary evidence at issue, when determinations of relevance may be made in context (*see Grant v Richard*, 222 AD2d 1014, 636 NYS2d 676 [4th Dept 1995]; *Speed v Avis Rent-A-Car*, 172 AD2d 267, 568 NYS2d 90 [1st Dept 1991]).

Finally, the application for leave to file a late summary judgment motion is denied. CPLR 3212(a) provides that if no date for making a summary judgment motion has been set by the court, such a motion "shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown." Absent a showing of good

cause for the delay in filing a summary judgment motion, a court lacks the authority to consider even a meritorious, non-prejudicial application for such relief (*see Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 786 NYS2d 379 [2004]; *Brill v City of New York*, 2 NY3d 648, 781 NYS2d 261 [2004]). Here, the statutory 120-day period for making a summary judgment motion expired on December 7, 2010, and defendant offered no explanation for failing to make a timely motion for such relief.

Dated: December 19, 2011

PAUL J. BAISLEY, JR.

J.S.C.