

Zirpolo v Topel

2012 NY Slip Op 30755(U)

March 21, 2012

Sup Ct, New York County

Docket Number: 116504/10

Judge: Joan B. Lobis

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

PRESENT: LOBIS
Justice

PART 6

LAUREN ZIRPOLO

INDEX NO. 116504/10

MOTION DATE _____

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

- v -
MELVYN TOPEL, D.D.S.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-14

15-16

17-18

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION &

ORDER

FILED

MAR 26 2012

Dated: 3/21/12

[Signature]
NEW YORK
COUNTY CLERK'S OFFICE

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

JOAN B. LOBIS J.S.C.

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
LAUREN ZIRPOLO,

Plaintiff,

Index No. 116504/10

-against-

Decision and Order

MELVYN TOPEL, D.D.S.,

FILED

Defendant.

MAR 26 2012

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

NEW YORK
COUNTY CLERK'S OFFICE

Defendant Melvyn Topel, D.D.S., moves, by order to show cause, pursuant to 22 N.Y.C.R.R. § 202.21(e), for an order vacating the note of issue, and, pursuant to C.P.L.R. Rule 3124, for an order compelling plaintiff to provide outstanding discovery. Plaintiff Lauren Zirpolo opposes the motion.

Plaintiff commenced this dental malpractice action by filing a summons and complaint on or about December 22, 2010. Plaintiff alleges that between January 2010 and December 2010, defendant improperly placed two veneers on teeth numbers 8 and 9. Plaintiff alleges injuries, including loss of natural teeth structure; removal and replacement of veneers; treatment of root canal; and continued maintenance of teeth. Plaintiff was also displeased with the aesthetics of her teeth. Plaintiff subsequently treated with Dr. Jan Linhart, who, prior to treating her, took photographs of the veneers placed by defendant.

On May 3, 2011, the parties appeared for a preliminary conference. On May 12,

2011, defendant served plaintiff with a demand for all photographs depicting plaintiff's front teeth with the veneers placed by defendant during the period of alleged negligence.¹ On September 16, 2011, during her deposition, plaintiff testified that there were photographs taken of her during the week of Thanksgiving in 2010. Defendant made a demand for those photographs. On September 20, 2011, the parties appeared for a compliance conference, during which plaintiff's counsel stated that plaintiff's house was burglarized, and among the items stolen was plaintiff's computer, which contained the photographs of her taken during Thanksgiving week. However, the resulting order from the compliance conference did not reflect this conversation. By letter dated October 27, 2011, defendant requested copies of the photographs to which plaintiff testified during her deposition. On November 23, 2011, plaintiff filed the note of issue and certificate of readiness, certifying that all discovery proceedings now known to be necessary was complete. On December 6, 2011, the parties appeared for a pretrial conference and plaintiff was directed to provide an affidavit regarding the existence of the photographs taken during Thanksgiving week in 2010. By telephone conversation on December 9, 2011, plaintiff's counsel informed defendant that plaintiff was able to locate a few pictures from Thanksgiving week that were not lost with the stolen laptop. On or about December 14, 2011, defendant subpoenaed Dr. Linhart for a non-party deposition, which was scheduled for January 27, 2012.

Defendant moves to strike the note of issue on the grounds that there remains outstanding discovery necessary for the proper defense of the suit. Defendant states that plaintiff

¹ Although plaintiff provided defendant with a compact disc containing twenty-five (25) photographs in response to this request, defendant states that these photographs were irrelevant because the dates corresponding with these pictures predated the dates of alleged negligence.

failed to produce photographs taken during Thanksgiving week that were demanded during plaintiff's deposition and by defendant's letter dated October 27, 2011. Defendant also states that during the telephone conversation with plaintiff's attorney on December 9, 2011, he indicated that plaintiff would not produce at least one photograph depicting her front teeth because it also included images of individuals who are not parties to the case, and because the photographs were not taken at a distance close enough for a proper examination of her front teeth. Defendant argues that plaintiff should be compelled to produce all photographs that depict her teeth with veneers placed by defendant, and that the photographs taken during Thanksgiving week should have been produced in response to defendant's May 12, 2011 demand. Additionally, defendant argues that the deposition of Dr. Linhart remains outstanding.

In opposition, plaintiff states that defendant's motion to strike note of issue and compel discovery should be denied. Plaintiff argues that at the time of the filing of the note of issue, there were no pending matters of discovery, and that defendant fails to show in what respect the certificate of readiness was incorrect. Plaintiff also argues that she produced two photographs from the week of Thanksgiving, even though the photographs were not taken close enough to show any defects in the veneers. Plaintiff states that the photographs taken by Dr. Linhart were detailed and were exchanged in response to defendant's May 12, 2011 demand. As directed by the December 6, 2011 pretrial conference order, plaintiff provided an affidavit attesting to the facts regarding the stolen laptop, which is annexed to her opposition papers. Plaintiff states in her affidavit that the photographs taken during Thanksgiving week were not close-ups and did not depict the defects in the veneers placed by defendant, and that they were merely group shots. She further states in her

affidavit that on September 17, 2010, her laptop was stolen from her parent's Long Island home, but she was, nonetheless, able to locate two photographs, both of which were provided to defendant. As to the non-party deposition for Dr. Linhart, plaintiff argues that defendant served the subpoena after she filed the note of issue, which is not grounds for vacating the note of issue.

In reply, defendant argues that plaintiff's affirmation that the photographs from Thanksgiving week were contained in her laptop contradicts her deposition testimony stating that they were stored on an external memory card. Defendant states that because only the computer was stolen, plaintiff should be able to produce those photographs stored on the memory card. Additionally, defendant points out that during her deposition, plaintiff was unable to identify whether the photographs taken by Dr. Linhart depicted the veneers placed by defendant.

The Uniform Rules for Trial Courts state, in pertinent part, that a party "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[.]" 22 N.Y.C.R.R. § 202.21(e). A statement in the certificate of readiness that erroneously asserts that all discovery known to be necessary has been completed is a basis for vacating the note of issue. Savino v. Lewittes, 160 A.D.2d 176, 177 (1st Dep't 1990).

Here, defendant fails to demonstrate that a material issue in the certificate of readiness is incorrect. As to the non-party deposition, the court agrees with plaintiff that because defendant subpoenaed Dr. Linhart after the filing of the note of issue, it is not grounds to vacate the note of

[* 6]

issue. Plonka v. Millard Fillmore Emergency Physicians Svcs., P.C., 9 A.D.3d 869, 869–70 (4th Dep’t 2004). As to the photographs, the court agrees with the defendant that plaintiff should have exchanged them pursuant to the May 12, 2010 demand. However, given that plaintiff believed, at that time, that all photographs taken during Thanksgiving week were stored in her stolen laptop and were unable to be produced, her certification that all discovery was complete was not inaccurate. Additionally, plaintiff complied with the pretrial conference order directing her to provide an affidavit regarding the whereabouts of the photographs. That she subsequently located a few pictures after the filing of the note of issue is of no consequence, so long as she provided defendant with copies of the photographs thereafter.

Similarly, as C.P.L.R. § 3121(a) requires the full disclosure of all matters “material and necessary” in the prosecution of an action, defendant is entitled to all photographs to the extent that they are responsive to his demand. That some photographs show individuals who are not parties to the case should not prevent plaintiff from exchanging photographs depicting her front teeth with the veneers placed by defendant, as these individuals can be easily redacted or blacked out. Additionally, that some photographs were taken at a distance should not prevent plaintiff from exchanging these photographs, as these photographs are relevant to the litigation. Plaintiff has not demonstrated that these photographs are privileged or should otherwise be protected. Accordingly, it is hereby

ORDERED that the portion of defendant’s motion seeking to vacate the note of issue and strike the case from the trial calendar is denied; and it is further

ORDERED that the portion of defendant's motion seeking to compel plaintiff to provide outstanding discovery is granted, and plaintiff is directed to exchange copies of all photographs responsive to defendant's May 12, 2010 demand within thirty (30) days after service of a copy of this order, to the extent that the photographs have not already been provided.

Dated: March 21, 2012

ENTER:



JOAN B. LOBIS, J.S.C.

FILED

MAR 26 2012

NEW YORK
COUNTY CLERK'S OFFICE