

Battiste v Mathis

2012 NY Slip Op 31082(U)

April 9, 2012

Supreme Court, Queens County

Docket Number: 7588/11

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE
Justice

IAS PART 6

KEISHA BATTISTE,

Plaintiff,

-against-

GEORGE MATHIS and MALCOLM A. PURNELL,
Defendants.

Index No. 7588/11

Motion
Date February 28, 2012

Motion
Cal. Nos. 4 and 5

Motion
Sequence Nos. 2 and 3

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Upon the foregoing papers it is ordered that the motion by defendants, George Mathis and Malcolm A. Purnell for an order:

(a) Pursuant to CPLR 2221(d) granting reargument of this Court's decision and order dated December 6, 2011 insofar as that order denied the motion of defendants, George Mathis and Malcolm A. Purnell to vacate the Note of Issue;

(b) Pursuant to 22 NYCRR 202.21(3) vacating the Note of Issue and Certificate of Readiness filed and served by the plaintiffs and striking this action from the trial calendar on the grounds that the Certificate of Readiness is incorrect in that all discovery now known to be necessary has not been completed; and therefore, this case is not ready to proceed to trial;

(c) Pursuant to CPLR 3212(a) extending defendants' time to move for summary judgment until 120 days from the date of completion of all outstanding discovery, or to a date that this Court deems just and proper;

(d) Pursuant to CPLR 3124 and 3126(2) directing the plaintiff to

comply with all outstanding discovery yet to be completed; or, in the alternative, precluding the plaintiff from offering any evidence at the trial of this action as to any subject on which discovery has not been provided; and the order to show cause by Defendants George Mathis and Malcolm A. Purnell for an order:

(a) Allowing the submission of this motion pursuant to NYCRR 202.21(d), as additional pretrial proceedings are necessary to prevent substantial prejudice against the defendants George Mathis and Malcolm A. Purnell;

(b) Pursuant to 22 NYCRR 202.21(3) vacating the Note of Issue and Certificate of Readiness filed and served by the plaintiffs and striking this action from the trial calendar on the grounds that the Certificate of Readiness is incorrect in that all discovery now known to be necessary has not been completed; and therefore, this case is not ready to proceed to trial;

(c) Pursuant to CPLR 3212(a) extending defendants' time to move for summary judgment until 120 days from the date of completion of all outstanding discovery, or to a date that this Court deems just and proper;

(d) Pursuant to CPLR 3124 and 3126(2) directing the plaintiff to comply with all outstanding discovery yet to be completed; or in the alternative, precluding the plaintiff from offering any evidence at the trial of this action as to any subject on which discovery has not been provided, are hereby consolidated solely for the purposes of disposition of the instant motion and order to show cause and are hereby decided as follows:

It is undisputed that plaintiff served and filed a Note of Issue and Certificate of Readiness on October 12, 2011. Defendants previously moved this Court for an order vacating the Note of Issue and Certificate of Readiness and removing the action from the trial calendar on the grounds that there were outstanding post EBT Demands and supplemental Post EBT Demands, which Demands requested HIPAA Compliant authorizations. In a decision and order dated December 6, 2011, this Court held in relevant part:

Upon the foregoing papers it is ordered that the branch of defendants' motion for an order vacating the Note of Issue and Certificate of Readiness and removing this action from the trial calendar is hereby denied. The record reflects that it has not been established that all discovery has not yet been completed, and the matter is not yet

ready for trial (22 NYCRR 202.21[e]; see, *Drapaniotis v. 36-08 33rd Street Corp.*, 288 AD2d 254 [2d Dept 2001]). The underlying action is one for personal injuries allegedly sustained by plaintiff, Keisha Battiste when her vehicle was struck in the rear by a vehicle owned and operated by the defendants on June 26, 2008. . . . It is undisputed that plaintiff served and filed a Note of Issue and Certificate of Readiness on October 12, 2011.

It has been established that the defendants post EBT Demands and Supplemental Post EBT demands have been timely responded to.

The Court notes that to the extent movant raises the issue that there is an outstanding physical examination by the plaintiff, this argument is procedurally improperly before the Court as this issue was not noticed in defendants' original motion papers and is only raised for the first time in defendants' reply papers (see, *Belcastro v. Hewlett-Woodmere Union Free Sch. Dist No. 14*, 286 AD2d 744 [2d Dept 2001]).

Additionally, that branch of defendants' motion for an order to compel plaintiff to complete discovery in this matter . . . is denied as moot.

That branch of the instant Order to Show Cause seeking an order pursuant to 22 NYCRR 202.21(3), vacating the Note of Issue and Certificate of Readiness filed and served by the plaintiffs and striking this action from the trial calendar on the grounds that the Certificate of Readiness is incorrect in that all discovery now known to be necessary has not been completed; and therefore, this case is not ready to proceed to trial is hereby denied as it is untimely. Uniform Rules for Trial Courts 22 NYCRR 202.21(e) sets forth specific procedures for vacating a Note of Issue when there is a discovery dispute. Within 20 days after service of a Note of Issue/Certificate of Readiness a party can move to vacate the Note of Issue upon a showing that the Certificate of Readiness is incorrect in some material way. This Court finds that it is undisputed that the Note of Issue was filed on October 12, 2011 and defendants failed to move to vacate the Note of Issue on the grounds that physical examinations are

outstanding, within 20 days of service of the Note of Issue and Certificate of Readiness, as the instant order to show cause fails to even indicate a date of service. As defendant failed to timely move to vacate the Note of Issue on the grounds that a physical examination is outstanding, this branch of the order to show cause is denied.

That branch of defendants' order to show cause allowing the submission of this motion pursuant to NYCRR 202.21(d), as additional pretrial proceedings are necessary to prevent substantial prejudice against the defendants George Mathis and Malcolm A. Purnell is denied. Pursuant to the Appellate Division, Second Department, to make a discovery motion thereafter, "the defendant [is] required to demonstrate that unusual or unanticipated circumstances developed subsequent to the filing of the note of issue and certificate of readiness which required additional discovery to prevent substantial prejudice (see, 22 NYCRR 202.21[d])." (*Audiovox Corp. v. Benyamini*, 265 AD2d 135 [2d Dept 2000]). The Court finds that defendants failed to proffer **any unusual or unanticipated circumstances which developed subsequent to the filing** of the Note of Issue and Certificate of Readiness and as such the second prong of the standard i.e. "substantial prejudice" need not be addressed (*Utica Mutual Ins. Co. v. P.M.A. Corp.*, 2006 NY Slip Op 8971 [2d Dept 2006]); *Gomez v. New York City Transit Authority*, 19 AD3d 366 [2d Dept 2005]). Accordingly, as defendants have failed to comply with NYCRR 202.21(d), this branch of the order to show cause is denied.

The remaining branches of the order to show cause are denied as moot.

Those branches of defendants' motion pursuant to CPLR 2221(d) granting reargument of this Court's decision and order dated December 6, 2011 insofar as that order denied the motion of defendants, George Mathis and Malcolm A. Purnell to vacate the Note of Issue and for an order pursuant to 22 NYCRR 202.21(3), vacating the Note of Issue and Certificate of Readiness filed and served by the plaintiffs and striking this action from the trial calendar on the grounds that the Certificate of Readiness is incorrect in that all discovery now known to be necessary has not been completed; and therefore, this case is not ready to proceed to trial; is granted solely to the extent that reargument is granted, but upon reargument, these branches of the motion are denied. Defendants failed to set forth a prima facie case that they are entitled to any independent physical examination of plaintiff after the filing of the Note of Issue. Defendants present no Demands or Letters seeking a Physical Examination of plaintiff and the plaintiff, in his opposition papers presents a

Preliminary Conference Order of this Court dated June 8, 2011, which Order indicates all physical examination were to be held within thirty (30) days of plaintiff's examination before trial, which examination before trial was to be held on August 18, 2011. Accordingly, these branches of the motion are denied.

The remaining branches of the motion are denied as moot.

This constitutes the decision and order of the Court.

Dated: April 9, 2012

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Howard G. Lane, J.S.C.