

Lachance v Franzese
2012 NY Slip Op 32148(U)
July 26, 2012
Supreme Court, Putnam County
Docket Number: 1434-2010
Judge: Lewis Jay Lubell
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Stat Conf: 9-10-12

To commence the 30 day statutory
time period for appeals as of right
(CPLR 5513[a]), you are advised to
serve a copy of this order, with
notice of entry, upon all parties

**SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF PUTNAM**

-----X

KATHERINE LACHANCE,

Plaintiff,

-against -

JUSTIN J. FRANZESE and GAIL E. DIVITTO,

Defendant

-----X

JUSTIN J. FRANZESE and GAIL E. DIVITTO,

Third Party Plaintiffs,

-against-

RICHARD J. LACHANCE,

Third Party Defendant.

-----X

LUBELL, J.

DECISION & ORDER

Index No. 1434-2010

Sequence Nos. 2 - 4

Action No. 1

Action No. 2

The following papers were considered in connection with the motion (**MOTION SEQUENCE 2**) by defendants for an Order striking this action from the Calendar and vacating the Certificate of Readiness on the ground that the case is not ready for trial, and for such other and further relief as to the Court may deem just and proper; the motion by defendants (**MOTION SEQUENCE 3**) for an Order directing that Action No. 2 be tried jointly with Action No. 1 pursuant to CPLR 602(a), and for such other and further relief as to the Court may seem just and proper; and the motion by third-party defendant (**MOTION SEQUENCE 4**) for an Order pursuant to General Obligations Law §16-108 and CPLR 3211(a)5 dismissing the third-party complaint or, in the alternative, pursuant to CPLR §603 and Rule 1010 dismissing the third-party complaint or, in the alternative, ordering a severance of such third-party action or, alternatively, striking the entire action from the Court's trial calendar and

directing that the moving third-party defendant be permitted all necessary discovery and that plaintiff and defendants/third-party plaintiffs be precluded from any further discovery, together with whatever further relief the court deems proper:

PAPERS	NUMBERED
Motion Sequence 2	
Motion/Affirmation/Exhibits A-F	1
Motion Sequence 3	
Motion/Affirmation/Exhibits A-B	2
Affirmation in Opposition/Exhibits 1-4	3
Motion Sequence 4	
Cross-motion/Affirmation/Exhibits A-G	4

Plaintiff, Katherine Lachance, commenced Action 1 in connection with alleged injuries sustained in a motor vehicle accident which took place on May 13, 2007, on State Route 22 in the Town of Southeast, County of Putnam, State of New York, when, while a passenger on a motorcycle owned and operated by third-party defendant, Richard J. LaChance, she was struck by an automobile being operated by defendant/third-party plaintiff, Justin J. Franzese, which is owned by defendant/third-party plaintiff, Gail E. DeVitto. In turn, defendants commenced Action 2, a third-party action against Richard J. Lachance.

The motions before the Court follow various court appearance including the April 25, 2011 Status Conference during which the Court directed the completion of discovery in then only pending Action 1 as follows:

- (a) further demands and notices to be served by June 24, 2011;
- (b) responses to be served by July 29, 2011;
- (c) depositions of all parties no later than September 2, 2011; and,
- (d) compliance conference to be held on September 12, 2011.

Plaintiff represents and defendants do not dispute that: defendants did not serve demands by June 24, 2011; plaintiff's deposition took place on September 8, 2011 (less than one week after the deadline set by the Court, due to plaintiff's unavailability on the earlier scheduled August 30, 2011 date); and, defendants failed to appear for depositions, as directed or adjourned.

Upon being advised at the September 12, 2011 Status Conference that defendants failed to appear for depositions as directed or

adjourned on consent, the Court adjourned Action 1 to October 24, 2011 with the admonition that all depositions and independent medical examinations be completed by said date.

Plaintiff appeared before the Court on October 24, 2011; defendants did not. Plaintiff advised the Court that defendants had not yet been deposed and that an IME of the plaintiff had yet to take place or even be scheduled.

As directed by the Court, plaintiff advised defendants, in writing, that the matter was next scheduled for January 30, 2012, and that all outstanding depositions and IMEs had to be completed by then. Plaintiff's letter included the admonishment that plaintiff would seek sanctions, such as the striking of defendants' answer or the preclusion of their testimony. Plaintiff also made note of the receipt of the third-party summons and complaint in the then recently commenced third-party action, and of plaintiff's intention to "move to sever the actions and proceed to trial on the primary action."

The Court was advised during the January 30, 2012, Status Conference that defendants had still not appeared for deposition, nor had defendants noticed or held an IME of plaintiff. In response, the Court directed that plaintiff file a written motion for sanctions, severance and an immediate trial, if so advised.

Although defendant, Justin J. Franzese, was produced for deposition on February 8, 2012, an IME of plaintiff had still not yet been scheduled. Correspondingly, plaintiff again notified defendants in writing that he would seek severance of the two actions.

Upon the parties' April 23, 2012 appearance before the Court, the Court granted plaintiff's oral motion for severance. Notwithstanding that, the Court indicated that it would consider defendants' motion for consolidation, conditioned upon the completion of third-party depositions by May 7, 2012. Plaintiff filed a Certificate of Readiness and Note of Issue with respect to Action 1 on May 8, 2012.

These motions follow.

MOTION SEQUENCE 2

Defendants' motion for an Order vacating the Certificate of Readiness in Action 1 is premised on plaintiff's "failure to appear for an independent [medical] examination [and failure] to respond to [a] supplemental demand for authorizations." The motion is

denied.

Defendants' service of a supplemental demand for discovery seeking HIPAA compliant authorizations was admittedly served almost three months after the Court's June 24, 2011 deadline for the service of same, as was set forth in open Court on April 25, 2011 (see, supra), and neither an explanation nor showing of good cause is advanced for such neglect. With respect to plaintiff's IME, the Court notes that, here again, multiple deadlines were set by the Court and there is neither explanation nor a showing of good cause as to why defendant failed to notice or otherwise make arrangements for same. Defendant neither argues nor establishes that plaintiff refused or otherwise failed to make herself available. In fact, her availability and willingness to undergo an IME is well established.

MOTION SEQUENCE 3

After having granted plaintiff's oral motion for severance of the two actions on April 23, 2012, the Court granted defendant leave to move for consolidation conditioned upon the completion of third-party depositions by May 7, 2012. Having failed to establish or even allege same, the motion is denied.

"CROSS-MOTION" SEQUENCE 4

The Court has already granted severance of the two actions, which is one of the alternative branches of relief demanded in the unopposed cross-motion. Thus, all remaining aspects of said motion are hereby denied, as moot, except to the extent that the Court directs that all outstanding discovery demands in the third-party action be responded to by the next scheduled appearance date, September 10, 2012, on which date the Court will hold a Status Conference thereon (if the case is then properly before the Court, see, infra).

Based upon the foregoing, it is hereby

ORDERED, that defendants' motion for an Order vacating the Certificate of Readiness in Action 1 and for an Order directing that Action No. 2 be tried jointly with Action No. 1 be and is hereby denied; and, it is further

ORDERED, that, defendants' motion for consolidation of Action 1 and 2 is denied; and, it is further

ORDERED, that, the third-party plaintiff is hereby directed to obtain a new index number for Action 2 and file an RJI so that

Action 2 is timely and properly before this Court on September 10, 2012, as an action separate and apart from Action 1; and, it is further

ORDERED, that, absent proper and timely compliance with the aforesaid application for an Index Number, Action 2 will be deemed dismissed without prejudice to its otherwise proper and timely recommencement; and, it is further

ORDERED, that, in the meantime, disclosure in Action 2 shall go forward as hereinabove directed; and, it is further

ORDERED, that, heretofore,

The parties are reminded that, as earlier scheduled, Action 1 shall appear on the Court's calender at 9:30 a.m. on September 10, 2012 and, if third-party plaintiff properly and timely complies with the directives set forth herein, so shall Action 2.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: Carmel, New York
July 26, 2012

S/

HON. LEWIS J. LUBELL, J.S.C.

TO: Robert J. Sambrato, Esq.
Law Offices of Karen L. Lawrence
ATTORNEYS FOR DEFENDANTS, THIRD PARTY PLAINTIFFS
660 White Plains Road, Suite 200
Tarrytown, New York 10591

Marc Oxman, Esq.
Oxman, Tulis, Kirkpatrick, Whatt & Greiger, LLP
ATTORNEYS FOR PLAINTIFF, KATHERINE LACHANCE
120 Bloomingdale Road
White Plains, New York 10605

David P. Redmond, Esq.
Kral, Clerkin, Redmond, Ryan,
Perry & VanEtten, LLP
ATTORNEYS FOR THIRD-PARTY DEFENDANT
170 Broadway, Suite 500
New York, New York 10038

