

Murphy v City of New York

2013 NY Slip Op 30948(U)

April 29, 2013

Supreme Court, New York County

Docket Number: 102571/2011

Judge: Kathryn E. Freed

Republished from New York State Unified Court System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

PRESENT: _____
Justice

PART 5

Index Number : 102571/2011
MURPHY, ESTHER

INDEX NO. _____

vs
CITY OF NEW YORK

MOTION DATE _____

Sequence Number : 004 CA-1471

MOTION SEQ. NO. _____

VACATE NOTE OF ISSUE/READINESS _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

MAY 03 2013

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 4-29-13

APR 29 2013

_____, J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 5

-----X
ESTHER MURPHY,

Plaintiff,

-against-

THE CITY OF NEW YORK, ELDORADO HOLDING
CORP., JUDEX ENTERPRISES INC. D/B/A/
PANGEA, POLISH NATIONAL ALLIANCE, JOZEF
& LOUIS, INC. D/B/A THE NINTH WARD,

Defendants.

DECISION/ORDER
Index No.: 102571/2011
Seq. No.: 004

PRESENT:
Hon. Kathryn E. Freed
J.S.C.

HON. KATHRYN E. FREED:

FILED
MAY 03 2013

RECITATION, AS REQUIRED BY CPLR §2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF
THIS MOTION.

PAPERS

NEW YORK
COUNTY CLERK'S OFFICE

NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....1-2.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
ANSWERING AFFIDAVITS.....
REPLYING AFFIDAVITS.....
EXHIBITS.....
STIPULATIONS.....
OTHER.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

Defendant Jozef Pilsudski Institute of American (hereinafter, "The Institute"), moves for an
Order vacating plaintiff's Note of Issue or in the alternative, moves to "enlarge Defendant's motion
to vacate plaintiff's Note of Issue." No opposition has been submitted.

After a review of the instant motion, all relevant statutes and case law, the Court denies the
motion.

Factual and procedural background:

Plaintiff sues to recover damages for personal injuries allegedly sustained on September 10, 2010 between 178 2nd Avenue and 190 2nd Avenue in the County of New York, when she tripped and fell on the sidewalk at the tree front of said premises. The instant action was commenced against the Institute via service of a Summons and Complaint on February 15, 2011. Issue was joined via the service of an Answer, which was accompanied by a Bill of Particulars and various other discovery demands on April 6, 2011.

On March 6, 2013, the Institute's attorney received a copy of plaintiff's Note of Issue and Certificate of Readiness. The Institute's attorney, Hoey, King, Epstein, Prezioso & Marques, by Maureen E. Peknic, Esq., allege that "critical discovery in this action remains outstanding." Thus, on July 11, 2012, Ms. Peknic served defendant The City of New York, with a Notice For Discovery and Inspection, which requested the procurement of several documents. When no response from the City was forthcoming, Ms. Peknic sent three letters of good faith dated respectively, August 10, 2012, September 14, 2012 and October 15, 2012. She alleges that to date, the City has failed to comply with the Institutes's Notice For Discovery and Inspection.

It should be noted that copies of the documents referred to, are annexed to the instant motion as exhibits.

Ms. Peknic also alleges that on December 10, 2012, she served plaintiff's counsel with a Notice for Discovery and Inspection requesting several authorizations. When no response was forthcoming, she also sent counsel a good faith letter on January 16, 2013. To date, plaintiff also has not provided a response to her Notice for Discovery and Inspection. On December 4, 2012, Ms. Peknic served defendant Judcx Enterprises, Inc.'s counsel with a Post EBT Demand requesting a

copy of any documentation pertaining to the 311 call concerning the sidewalk and the brochure received from the City. To date, Judex Enterprises, Inc., has not responded. On February 6, 2013, Ms. Peknic served counsel to Third-Party Defendant, Church & Louis, Inc., D/B/A The Ninth Ward, with a Post EBT Demand requesting a copy of the lease with the Polish National Alliance, which was not responded to.

Ms. Peknic asserts that the aforementioned discovery is vital to her defense and her client will be severely prejudiced if discovery is not completed. Moreover, she argues that in light of the foregoing, plaintiff's filing of her Note of Issue is untimely, in that the instant action is not trial ready and should be stricken from the Trial Calendar pending completion of all discovery. Alternatively, Ms. Peknic argues that "this Court enlarge Defendant's time for substantive motion practice." By this, the Court presumes that she is requesting an extension of time to file additional motions.

22 N.Y.CRR § 202.21 addresses the filing of a note of issue.

Subdivision (d) "Pretrial proceedings," provides that [w]here a party is prevented from filing a note of issue and certificate of readiness because a pretrial proceeding has not been completed for any reason beyond the control of the party, the court, upon motion supported by affidavit, may permit the party to file a note of issue upon such conditions as the court deems appropriate. 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."

Subdivision (e) "Vacating note of issue," provides that "[w]ithin 20 days after service of a note of issue and certificate of readiness, any party to the action or special proceeding, 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, or that the certificate of readiness fails to comply with the requirements of this section in some material respect. However, the 20-day time limitation to make such motion shall not apply to tax assessment review proceedings. After such period, except in a tax assessment review proceeding, no such motion shall be allowed except for good cause shown. At any time, the court on its own motion may vacate a note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this

section in some material respect. If the motion to vacate a note of issue is granted, a copy of the order vacating the note of issue shall be served on the clerk of the trial court.”

Indeed, the more difficult standard is that provided by 22 NYCRR § 202.21(d) because it requires the movant to demonstrate “unusual or unanticipated circumstances” and “substantial prejudice,” whereas a timely motion to vacate the note of issue pursuant to 22 NYCRR § 202.21(e) need only demonstrate in what respects the case is not ready for trial. Another important distinction is that pursuant to 22 NYCRR § 202.21 (e), the court may vacate the note of issue, whereas pursuant to subsection (d), the court does not have such discretion (*see* Audiovox Corp. v. Benyamini, 265 A.D.2d 135 [2d Dept. 2000]).

It is well settled that “a note of issue should be vacated when same is based upon a certificate of readiness which contains an *erroneous fact, such as that discovery has been completed” (Savino v. Lewittes, 160 A.D.2d 176, 177 [1st Dept. 1990]; Club Italia, Inc. v. Italian Fashion Trading, Inc., 268 A.D.2d 219 [1st Dept. 2000]).

In the case at bar, defendant Jozef Pilsudski Institute of America has failed to indicate what statutory authority it moves under. It also fails to indicate with any semblance of specificity how it would be prejudiced by the absence of the documents if requests.

Therefore, in accordance of the foregoing, it is hereby

ORDERED that defendant Jozef Pilsudski Institute of America’s motion to vacate plaintiff’s note of issue is denied; and it is further

ORDERED that the parties shall appear at the conference previously scheduled for August 6, 2013; and it is further

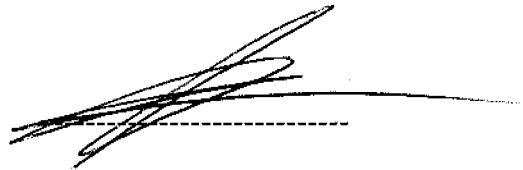
ORDERED that the movant shall serve copies of the instant order on all other parties as well as the Trial Support Office at 60 Centre Street, Room 158; and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: April 29, 2013

ENTER:

APR 29 2013



Hon. Kathryn E. Freed
J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

FILED

MAY 03 2013

NEW YORK
COUNTY CLERK'S OFFICE