

**O'Brien v Port Auth. of N.Y. & N.J.**

2013 NY Slip Op 31153(U)

May 21, 2013

Supreme Court, New York County

Docket Number: 114853/10

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: LOUIS B. YORK  
J.S.C.  
Justice

PART <sup>2</sup> ~~114550~~

obrien, jr.  
-v-  
The Port Authority et al.

INDEX NO. 114550/10  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 004

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

**FILED**  
MAY 28 2013  
NEW YORK  
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM DECISION**

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

Dated: 5/21/13

Lly, J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED
- 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

**LOUIS B. YORK**  
**J.S.C.**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 2

-----X  
THOMAS J. O'BRIEN, JR.,

Plaintiff,

-against-

Index No.: 114853/10

THE PORT AUTHORITY OF NEW YORK AND  
NEW JERSEY, SILVERSTEIN PROPERTIES, INC.,  
LOWER MANHATTAN DEVELOPMENT  
CORPORATION, DURST 1 WTC CONSULTANT LLC,  
THE DURST ORGANIZATION L.P., THE DURST  
ORGANIZATION, INC., TISHMAN CONSTRUCTION  
CORPORATION OF NEW YORK, TISHMAN REALTY  
& CONSTRUCTION CO., INC., REGIONAL  
SCAFFOLDING & HOISTING CO., INC. and ATLANTIC  
HOISTING & SCAFFOLDING, INC.,

**FILED**

MAY 28 2013

Defendants.

**NEW YORK  
COUNTY CLERK'S OFFICE**

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YORK, J.:

In this action in which plaintiff Thomas J. O'Brien, Jr. alleges personal injuries as a result of an accident at a construction site, defendants The Port Authority of New York and New Jersey, Tishman Construction Corporation i/s/h/a Tishman Construction Corporation of New York and Atlantic Hoisting & Scaffolding, LLC, move, pursuant to CPLR 2004, and pursuant to Title 22, Part 202.21(e) of the New York Code, Rules and Regulations, to vacate the note of issue and the certificate of readiness. Defendants move, pursuant to CPLR 3101, 3124, and 3126, to compel plaintiff to supply all outstanding discovery, and to preclude plaintiff from proving the elements of his case for which the particulars have not been provided. Defendants also move, pursuant to CPLR 2201, to stay the trial until after the completion of all discovery, and, pursuant to CPLR 2004 and 3212, to extend the time period in which defendants can move

for summary judgment. Defendants alternatively move, pursuant to CPLR 3126, to dismiss plaintiff's complaint for failing to comply with discovery demands.

Plaintiff was an employee of DCM Erectors, Inc., and was a construction worker at 1 World Trade Center. Plaintiff alleges that on July 13, 2010, he was injured at work when he slipped and fell on wet scaffolding steps. He maintains that he sustained injuries to his cervical spine, lumbar spine, right shoulder, right leg and right ankle. Plaintiff maintains that he will not be able to return to work or to gainful employment due to the subject accident.

Defendants contend that although plaintiff filed the note of issue on August 17, 2012, a great deal of discovery remains. Specifically, defendants maintain that plaintiff owes the following authorizations: Hudson Valley Center/St. Francis Ambulatory Center; Dr. Bibi; Dr. Mark D. Aierstock; Dr. Stephen Ring; Dr. O. Bouhlev; Dr. A. Bloch; Dr. R. Reddy; Rosendale Family Practice; Dr. Adam Soyer; Sound Shore Medical Center; River Radiology; Kingston Physical Therapy; New York Downtown Hospital; Dr. Carol Smith; Dr. Eric Stamberg; and Dr. Susan Rosner. Defendants also seek records from a neck MRI conducted in Newburgh, New York; intra operative films taken during plaintiff's November 18, 2011 right ankle arthroscopic surgery; MRI films of plaintiff's right shoulder; and records for plaintiff's employment from 2005 to present; plaintiff's Medicare, Medicaid, DDS, MSP, Social Security Disability Income, or Supplementary Security Income; Union Annuity and Pension Fund, Union Health and Welfare Fund; union disability; Social Security Administration/Disability; Cornwall High School; plaintiff's prior right rotator cuff surgery; prior right carpal tunnel surgery; collateral source reimbursement information; defense physical examinations; and plaintiff's vocational rehabilitation assessment.

Defendants argue that the complaint must be stricken because plaintiff's counsel has repeatedly violated the court's orders and has failed to respond to defendants' demands for discovery and inspection. Defendants alternatively argue that, due to the outstanding discovery, this case is not ready for trial, and that the note of issue must be vacated. Defendants contend that plaintiff deliberately chose not to disclose that he had been previously treated for carpal tunnel syndrome of the right hand for which he had surgery; that he consulted an orthopedic spine surgeon regarding neck problems; that he had a herniated disc and had fusion surgery; and that he had prior chiropractic treatment to the cervical spine. Defendants argue that despite their efforts to gain medical authorizations and records, plaintiff has failed to provide the requested discovery.

Plaintiff's counsel argues that his conduct can not be considered to be willful, contumacious, or designed to frustrate the discovery process. Plaintiff's counsel maintains that following the defendants' motion to strike, which was filed on September 6, 2012, medical records which were contained within plaintiff's old union records, disclosed that plaintiff received medical treatment for his cervical spine when he was injured in an accident which predated the subject slip and fall. Plaintiff's counsel affirms that defendants' counsel would be entitled to authorizations for all medical providers which plaintiff treated with for his prior neck conditions without a date restriction. Plaintiff's counsel maintains that he recently served a supplemental bill of particulars which sets forth a claim of aggravation and/or exacerbation and submits a copy of the supplemental bill of particulars as an exhibit. Plaintiff's counsel also contends that the authorizations which defendants seeks to be compelled have either been provided, or are in the process of being provided.

The First Department has held that “[w]here a party timely moves to vacate a note of issue, it need show only that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of . . . section 202.21 in some material respect.” *Vargas v Villa Josefa Realty Corp.*, 28 AD3d 389, 390 (1st Dept 2006) (citations and quotations omitted); *see also Munoz v 147 Corp.*, 309 AD2d 647, 648 (1st Dept 2003) (holding that the note of issue must be vacated because the recital in the certificate of readiness that discovery is complete is incorrect).

Here, although counsel for plaintiffs filed the note of issue on August 17, 2012, and stated that discovery was complete, this is inaccurate. The affirmation from plaintiff’s counsel explains some of the delays in the exchange of the disclosure, however, the note of issue should not have been filed if discovery remained outstanding. Furthermore, as instructed in the preliminary conference order dated April 6, 2011, counsel for defendants should have contacted Part 2 by the discovery end date deadline, and before the note of issue was filed, in order to alert the court as to any deficiencies in plaintiff’s responses. The last discovery conference took place on December 14, 2011, and there is no indication that either party contacted the part to arrange a conference after the court issued its decision regarding the motion to strike on June 5, 2012.

As there is a large amount of discovery which remains to be exchanged, the court will vacate the note of issue. Any outstanding authorizations must be provided within 20 days of a copy of this order with notice of entry. To the extent that a further EBT is required of plaintiff due to the disclosure of new medical records, such EBT must be held within 60 days of a copy of this order with notice of entry. Furthermore, because plaintiff alleges injuries to his right arm and shoulder, any medical authorizations regarding the prior treatment, injury, or surgery of the

right arm and hand must be provided by plaintiff within 20 days.

Regarding defendants' request for an authorization from "Dr. Bloch," plaintiff's counsel indicates that he cannot identify this physician, however defendants' counsel maintains that plaintiff Walgreen's pharmacy records refer to this physician. In order to determine if this physician can be identified, and to ensure that authorizations can be expeditiously requested if necessary, plaintiff is to review the Walgreen's pharmacy records within 10 days from service of a copy of this order with notice of entry and contact defendants' counsel, informing him whether this physician can be located. There will be no adjournments of the above dates without prior court approval and the parties must contact Part 2 in order to schedule a further status conference, if necessary.

The note of issue deadline will be extended to July 31, 2013. As the note of issue will be vacated and extended, and pursuant to the rules of Part 2, the deadline for dispositive motions will be extended to 60 days following the filing of the note of issue.

### **CONCLUSION and ORDER**

Accordingly, it is hereby

ORDERED that the part of the motion seeking to dismiss plaintiff Thomas J. O'Brien, Jr.'s complaint for failing to comply with discovery demands is denied, and it is further

ORDERED that the part of defendants The Port Authority of New York and New Jersey, Tishman Construction Corporation of New York, and Atlantic Hoisting & Scaffolding, LLC's motion which seeks to strike the note of issue is granted. The note of issue is vacated and the

case is stricken from the trial calendar; and it is further

ORDERED that all further discovery in this matter shall be completed pursuant to the above directives, and the note of issue must be filed on or before July 31, 2013; and it is further

ORDERED that within 15 days from the entry of this order, defendants shall serve a copy of this order with notice of entry on all parties and upon the Clerk of the Trial Support Office (Room 158), who is hereby directed to remove this action from the trial calendar; and it is further

ORDERED that the deadline for dispositive motions will be extended to 60 days following the filing of the note of issue.

Dated: 5/21/13

ENTER:

**FILED**  
MAY 28 2013  
NEW YORK  
COUNTY CLERK'S OFFICE

  
\_\_\_\_\_  
J.S.C.

**LOUIS B. YORK**  
**J.S.C.**