

**Keceli v AAC Cross County Mall, LLC**

2013 NY Slip Op 32766(U)

September 16, 2013

Sup Ct, Westchester County

Docket Number: 53745/2012

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

To commence the 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 WESTCHESTER - COMPLIANCE PART

-----X  
SUZANNE KECALI,

Plaintiff,

-against-

AAC CROSS COUNTY MALL, LLC,

Defendant.  
-----X

**DECISION & ORDER**

Index No. 53745/2012

Motion Date: Sept. 16, 2013

Seq. No. 2

LEFKOWITZ, J.

The following papers were read on this motion by defendant for an order striking the matter from the trial calendar and vacating the note of issue and compelling plaintiff to provide further discovery.

Order to Show Cause - Affirmation in Support - Exhibits  
Affirmation in Opposition - Exhibits

Upon the foregoing papers and the proceedings held on September 16, 2013, this motion is determined as follows:

Plaintiff commenced the present action to recover damages for personal injuries she allegedly sustained when she tripped and fell on defendant's premises on or about May 29, 2011. Plaintiff alleges that she sustained injuries to her left knee, left hip, lumbar spine, thoracic spine and cervical spine.

Plaintiff appeared for a deposition on November 20, 2012. Plaintiff testified that Dr. Cushner treated her injuries from the subject accident. When questioned as to whether plaintiff had treated with Dr. Cushner before, plaintiff testified that she treated with him previously for a fall on black ice on steps, but could not remember the year and then testified it could have been in 2007 or 2009. Plaintiff testified that as a result of that fall, she sustained injuries to her left knee and back. Plaintiff also testified that she had not seen Dr. Cushner for a few years prior to the subject accident in May, 2011. Plaintiff denied injuring her back prior to the subject accident other than the fall in 2007 or 2009.

By Post-EBT Demand dated December 6, 2012, defendant demanded authorizations for plaintiff's various medical records, including an authorization for her records from Dr. Cushner, who plaintiff testified had treated her left knee and back prior to the subject accident.

A compliance conference was held on January 16, 2013, and a Compliance Conference order was issued directing plaintiff to provide the demanded authorizations on or before February 15, 2013. Plaintiff provided defendant with authorizations, including an authorization for Dr. Cushner, on or about January 22, 2013.

Another compliance conference was held on February 27, 2013. On that same date, this court “so ordered” a Trial Readiness Stipulation & Order executed by the parties, which set forth, inter alia, that all disclosure previously ordered was completed or waived. Pursuant to the Trial Readiness Order, plaintiff filed a note of issue on March 4, 2013.

Defendant now moves for an order vacating the note of issue and compelling plaintiff to provide further discovery. Defendant’s counsel contends that his office received plaintiff’s medical records from Dr. Cushner after plaintiff filed the note of issue. Defendant’s counsel further contends that the medical records indicate that plaintiff sustained injuries to the same body parts allegedly injured from the subject fall from prior falls, including a fall down stairs and a fall in the shower. Accordingly, defendant contends that it is entitled to the vacatur of the note of issue since the certificate of readiness was incorrect since plaintiff did not provide medical documentation or correspondence regarding the prior accidents and pre-existing injuries. Defendant also contends that it is entitled to additional discovery regarding the prior injuries and treatment to the same body parts at issue in the present action, including treatment records and a further deposition of plaintiff.

In support of the motion, defendant submitted the plaintiff’s medical records from Dr. Cushner. The medical records were sent to defendant’s counsel by letter dated May 2, 2013. The medical records indicate that plaintiff fell down stairs on February 21, 2006, sustained an injury to her left knee and pain in her lower spine, and underwent arthroscopy on her knee on May 25, 2007. The records also indicate that Dr. Cushner treated plaintiff in January, 2010 for a shoulder injury and cervical strain. The medical records do not indicate the cause of plaintiff’s injuries in 2010.

Plaintiff opposes the motion. First, plaintiff contends that defendant is not entitled to the vacatur of the note of issue since defendant moved more than 20 days after the filing of the note of issue and, therefore, must show good cause. Plaintiff asserts that defendant’s lack of diligence in seeking the discovery does not establish good cause. Plaintiff also asserts that defendant had the medical records since May 7, 2013 and plaintiff had provided all demanded discovery at the time of the filing of the note of issue. Plaintiff further contends that a further deposition is not needed since prior knee and cervical spine injuries were already explored at plaintiff’s deposition. Finally, plaintiff asserts that there was no mention of outstanding discovery at the compliance conferences prior to the filing of the note of issue.

The note of issue states that discovery proceedings now known to be necessary were completed. Once the note of issue has been filed and discovery presumably completed, the applicable standards for allowing additional discovery and vacating the note of issue are governed by Uniform Rules for Trial Courts [22 NYCRR] § 202.21(d)-(e). Pursuant to § 202.21(d), “[w]here unusual or unanticipated circumstances develop subsequent to the filing of

the note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice, the court ... may grant permission to conduct such necessary proceedings.” Section 202.21 (e) provides that if more than 20 days has elapsed since the filing of the note of issue, good cause must be shown to warrant an order vacating the note of issue.

Contrary to plaintiff’s contention, defendant has demonstrated that unanticipated circumstances developed subsequent to the filing of the note of issue which requires a further deposition of plaintiff. Defendant received plaintiff’s medical records from Dr. Cushner months after the filing of the note of issue and the medical records contradict plaintiff’s deposition testimony and indicate that plaintiff sustained another injury to her lumbar spine, as well as her shoulder, in or around January, 2010, which were treated by Dr. Cushner. Insofar as defendant did not learn of the additional earlier injury to plaintiff’s lumbar spine until after the filing of the note of issue, defendant has not had an opportunity to depose plaintiff with respect to this earlier injury and treatment of the injury. Under the circumstances, defendant has established good cause warranting the vacatur of the note of issue and a further deposition of plaintiff limited to the January, 2010 accident, injury and treatment.

The court notes, however, that plaintiff was deposed and questioned extensively with respect to her prior fall down stairs and the prior injuries resulting from that fall, which plaintiff testified occurred in 2007 or 2009, and which the medical records indicate occurred on February 21, 2006. Defendant, therefore, has not demonstrated entitlement to any further discovery with respect to plaintiff’s fall down stairs and the resulting injuries.

Accordingly, it is

ORDERED that the branch of defendant’s motion seeking to vacate the note of issue is granted, the note of issue is vacated, and the matter is stricken from the trial calendar; and it is further

ORDERED that the branch of defendant’s motion seeking to compel plaintiff to provide further discovery is granted to the extent that plaintiff shall appear for a further deposition limited to the injuries she sustained in or about January, 2010, and the treatment for those injuries; and it is further

ORDERED that counsel are directed to appear for a conference in the Compliance Part, Courtroom 800, on October 18, 2013; and it is further

ORDERED that defendant shall serve a copy of this decision and order upon plaintiff with notice of entry within 10 days of entry.

Dated: White Plains, New York  
September 16, 2013

  
HON. JOAN B. LEFKOWITZ, J.S.C.

TO:

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cc: Compliance Part