

Pancholi v 38 Parsons LLC

2013 NY Slip Op 32881(U)

October 16, 2013

Sup Ct, Queens County

Docket Number: 7512/12

Judge: Howard G. Lane

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Short Form Order**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS**Present: HONORABLE HOWARD G. LANE
Justice**IAS PART 6**-----
REKHABEN PANCHOLI,Index No. 7512/12

Plaintiff,

Motion Date: 9/25/13

- against -

Motion Cal. Nos.: 124 and 12538 PARSONS LLC, VERACITY PARSONS LLC,
GALAXY GROUP USA INC., EDMOND LI,
CONGREGATION SHAARAI TEFILLA OF
FLUSHING and KANGHAN MEDICAL
SERVICES, P.C., d/b/a KANGHAN FAMILY
HEALTH CENTER,Motion Seq. Nos.: 2 and 3Defendants.

The following papers numbered 1 to 23 read on this motion (cal. # 124) by defendant, Congregation Shaarai Tefilla of Flushing (Congregation), for an order vacating plaintiff's note of issue and removing this action from the trial calendar of this court or, in the alternative, for an order compelling outstanding discovery and extending the time by which summary judgment motions may be made; motion (cal. # 125) by defendants, 38 Parsons LLC (38 Parsons), Veracity Parsons LLC (Veracity) and Edmond Li (Li), for an order dismissing plaintiff's complaint upon the failure to prosecute or, in the alternative, for an order vacating plaintiff's note of issue and removing this action from the trial calendar of this court and compelling co-defendants to appear for depositions and plaintiff to appear for independent medical examinations or, in the alternative, for an order extending the post-note of issue time to move for summary judgment and staying the trial of this action until all pretrial discovery is completed; and cross motion by plaintiff for an order striking the answer of defendants 38 Parsons, Veracity and Li upon their failure to appear for depositions and precluding all defendants from conducting independent medical examinations of the plaintiff.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits (cal. # 124)	1 - 4
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Ans. Affs. (opp. to CM)	13 - 14
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Upon the papers filed in support of the within motions and cross motion, and the papers filed in opposition or relation thereto, the within motions and cross motion are determined as follows:

Plaintiff, consistent with the directives of this court's compliance conference order (Ritholtz, J.), dated January 28, 2013, did file her note of issue in this matter on July 3, 2013. Notably, the certificate of readiness executed by her counsel indicated that physical examinations of the plaintiff were to be scheduled and that defendants' depositions were outstanding.

Defendant Congregation, and defendants 38 Parsons, Veracity and Li jointly, have each brought motions seeking, inter alia, to vacate plaintiff's note of issue upon the claim that plaintiff has failed to appear for physical examinations. Plaintiff cross-moves, inter alia, for an order striking the answer of defendants 38 Parsons, Veracity and Li upon their failure to appear for depositions and for an order precluding all defendants from conducting independent medical examinations of the plaintiff.

While the recent decision in *Furrukh v Forest Hills Hospital*, 107 AD3d 668 (2d Dept 2013), held that a note of issue was a nullity where it was filed together with a certificate of readiness indicating that discovery proceedings were not completed and the action was not trial ready, this court finds that rigid adherence to this pronouncement, without a review of the specific facts of the present suit, which indicates that the discovery to be done is overwhelmingly that which is due and owing from defendants, would severely prejudice plaintiff by having her ability to proceed blocked by defendants' violation of court orders requiring them, inter alia, to appear for depositions, and fundamental fairness dictates that defendants not be rewarded for such dilatory tactics.

Pursuant to this court's preliminary conference order dated August 22, 2012, and the compliance conference order above-cited, depositions of all parties were ordered. While plaintiff was deposed on May 23, 2013, there is no dispute that presently the depositions of defendants 38 Parsons, Veracity and Li remain to be done. In addition, while plaintiff has not sought relief against defendant Kanghan Medical Services, P.C. d/b/a Kanghan

Family Health Center (Kanghan), in an affirmation supporting the defendants' respective motions, counsel for defendant Kanghan concedes that they also remain to be deposed.

Furthermore, the compliance conference order required defendants, *inter alia*, to designate physicians to conduct plaintiff's independent medical examinations "within 30 days of the completion of plaintiff's deposition, or within ten days of the date hereof, whichever is later." In addition, said order provides that "[f]ailure to make such a designation shall be deemed a waiver of the right to take the examination."

As previously noted above, plaintiff's deposition occurred on May 23, 2013. As such, defendants were required to designate physicians by no later than June 22, 2013.

Initially, this court must point out that the present record is devoid of any evidence that defendants complied with the directive above-discussed by designating physicians within the time period directed. Furthermore, there is no evidence that defendants have ever designated physicians to conduct the examinations, although defendants argue their necessity. Accordingly, defendants have failed to set forth sufficient proof that plaintiff has failed to respond to their designation of physicians before whom plaintiff is to appear for a physical examination.

In short, defendants seek to vacate plaintiff's note of issue for failing to appear for physical examinations which they, in violation of court orders, never designated, and because defendants never appeared for depositions. Holding plaintiff responsible for defendants' failure to comply with their discovery obligations would be to turn said obligations on their head. This, the court declines to do.

Any reliance by the moving defendants upon *Furrukh* in support of their claim of entitlement to physical examination of plaintiff is misplaced, defendants' waiver of their rights to physical examinations of plaintiff not being due to plaintiff having filed a note of issue, but being as the result of defendants' failure to comply with a specific directive of this court's compliance conference order, said order also clearly setting forth the penalty for noncompliance. As such, the vacating of plaintiff's note of issue would still not operate to cure defendants' continuing default in complying with this court's directives.

As pointed out by our Court of Appeals, "[l]itigation cannot be conducted efficiently if deadlines are not taken seriously, and we make clear again, as we have several times before, that disregard of deadlines should not and will not be tolerated (*citations omitted*)" (*Andrea v Arnone, Hedin, Casker, Kennedy and Drake, Architects and Landscape Architects, P.C.*, 5 NY3d 514 [2005]).

Indeed, "the trial court's responsibility remains the same as it always has been: to fashion an order consistent with its obligation to bring discovery to an end as quickly as possible" (*Lopez v Imperial Delivery*, 282 AD2d 190, 198-199 [2d Dept 2001]).

Pursuant to the foregoing, and with the understanding that “[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity” (*Kihl v Pfeffer*, 94 NY2d 118, 124 [1999]), it is

ORDERED that the defendants’ motions, insofar as they seek an order compelling plaintiff to appear for independent medical examinations, is denied in its entirety, and this court deems the moving defendants’ entitlement to independent medical examinations of the plaintiff to have been waived in light of the clear language of the compliance conference order (*see Gill v United Parcel Service, Inc.*, 249 AD2d 265 [2d Dept 1998]); and it is further

ORDERED that the outstanding depositions of the defendants shall commence on or before, but in no event later than, November 18, 2013, with said depositions to continue from day to day until completed; and it is further

ORDERED that there shall be no adjournment of the outstanding depositions without further order of this court; and it is further

ORDERED that the failure of a defendant to appear for depositions shall result in that defendant being precluded from testifying at the time of trial, without further need of application to this court; and it is further

ORDERED that any demands for disclosure arising out of the depositions shall be served within ten (10) days of the deposition of the party upon whom the demand is made, and shall be responded to within thirty (30) days thereafter; and it is further

ORDERED that all other applications contained in the motions and cross-motion which are not specifically addressed herein are denied; and it is further

ORDERED that defendants shall serve a copy of this order on plaintiff, with notice of entry, within fifteen (15) days of entry.

The foregoing constitutes the decision and order of this court.

Date: October 16, 2013

Howard G. Lane, J.S.C.