

Sakow v Trilobite, LLC
2014 NY Slip Op 30167(U)
January 16, 2014
Supreme Court, New York County
Docket Number: 114103/09
Judge: Kathryn E. Freed
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
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 : 114103/2009
SAKOW, MARION

INDEX NO. _____

vs
CITY OF NEW YORK

MOTION DATE _____

Sequence Number : 003

MOTION SEQ. NO. _____

VACATE NOTE OF ISSUE/READINESS
CAL # 40

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

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

JAN 23 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 1-16-14
JAN 16 2014

~~HON. KATHRYN FREED
JUSTICE OF SUPREME COURT~~, J.S.C.

- 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
MARION SAKOW and WALTER SAKOW,

Plaintiffs,

DECISION/ORDER
Index No. 114103/09
Seq. No. 003,

-against-

TRILOBITE, LLC, BLUE STAR PROPERTIES, LLC,
CITY OF NEW YORK, and N.Y.C. DEPARTMENT OF
TRANSPORTATION,

Defendants.

FILED

JAN 23 2014

COUNTY CLERK'S OFFICE
NEW YORK

-----X
KATHRYN E. FREED, J.S.C.:

RECITATION, AS REQUIRED BY CPLR 2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THESE MOTIONS:

PAPERS	NUMBERED
Seq. No. 003	
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	.1(Exs. A-J).
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
ANSWERING AFFIDAVITS.....	.2(Exs. 1-3).
REPLYING AFFIDAVITS.....3.....
EXHIBITS.....
OTHER.....

PAPERS	NUMBERED
Seq. No. 004	
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	.1(Exs. A-C).
ANSWERING AFFIDAVITS.....2.....
REPLYING AFFIDAVITS.....
EXHIBITS.....
OTHER.....

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

In Sequence No. 003, defendants Trilobite, LLC (“Trilobite”) and Blue Star Properties, LLC (“Blue Star”) move pursuant to 1) 22 NYCRR 202.21(e) to vacate the note of issue and strike the

case from the trial calendar, and 2) CPLR 3124 to compel plaintiffs to provide discovery pursuant to CPLR 3124.

In Sequence No. 004, Trilobite and Blue Star move, by order to show cause, for an Order, pursuant to CPLR 3212(a), extending their time to move for summary judgment until a date no later than 90 days after entry of the Order deciding their motion to strike the note of issue and compel discovery.

Plaintiffs oppose both motions. For the reasons set forth below, the motions are **denied**.

Factual and Procedural Background:

Plaintiff Marion Sakow was allegedly injured on August 28, 2008 when she tripped and fell on a broken sidewalk adjacent to a building located at 210 East 29th Street in Manhattan. On or about October 6, 2009, the plaintiff commenced a personal injury action against Trilobite, the City of New York (“the City”), the New York City Department of Transportation (“DOT”), and Thuesen Management Corp.¹ Plaintiff’s husband, plaintiff Walter Sakow, asserted a derivative claim.² On or about November 19, 2009, plaintiffs amended the complaint to name Blue Star as a defendant. Plaintiffs alleged that Trilobite and Blue Star, respectively, owned and managed the building, and that the City and DOT failed to properly repair and maintain the sidewalk.

On or about October 14, 2010, plaintiffs served a verified bill of particulars as against Trilobite, Bluestar, the City, and the DOT. In the bill of particulars, plaintiffs alleged that, as a result of the accident, plaintiff sustained, inter alia, fractures of the left humerus (arm) and triquetrum

¹The claim against Thuesen has been discontinued.

²All references to “plaintiff” are to Marion Sakow and all references to “plaintiffs” are to Marion Sakow and Walter Sakow.

(wrist). Plaintiff did not assert a claim for loss of enjoyment of life.

On or about August 22, 2011, plaintiffs commenced a separate action against Bluestar Management Corp. and Blue Star Properties, Inc. On or about June 7, 2012, plaintiffs moved to consolidate the two actions and to discontinue all claims against Thuesen. By so-ordered stipulation dated March 5, 2013, the actions were consolidated under the caption and index number above.

The depositions of plaintiffs, Trilobite, Thuesen, and Blue Star were conducted between April, 2012 and March, 2013.

On June 18, 2012, following plaintiff's deposition, Trilobite and Blue Star served her with a discovery demand seeking, inter alia, information concerning an ankle injury which, she testified at her deposition, she had sustained in 2005, three years prior to the alleged incident. Plaintiffs' counsel objected to the demands on June 27, 2012 on the ground that they were irrelevant to this matter. By letters sent in August and November of 2012, counsel for Trilobite and Blue Star requested that plaintiff respond to the June 18 demand. Plaintiffs did not respond to these letters.

A compliance conference was conducted in this matter on October 23, 2012. By so-ordered stipulation on that date, this Court (Jaffe, J.) ordered, inter alia, that "[a]ll non-City parties [were] to respond to outstanding discovery within 45 days."

A further compliance conference was held on March 5, 2013. By so-ordered stipulation on that date, plaintiff agreed to respond to the August, 2012 letter by counsel for Trilobite and Blue Star seeking post-deposition discovery in accordance with their June 18, 2012 demand for the same. Trilobite and Blue Star reserved their rights to move to compel such discovery if it were not provided within 30 days. The order extended the note of issue filing deadline until June 28, 2013.

The final compliance conference in this matter occurred on May 7, 2013. By so-ordered stipulation on that date, plaintiffs' counsel was again directed to respond, within 30 days, to the letter

sent to him by counsel for Trilobite and Blue Star in August, 2012 regarding their post-deposition discovery demand dated June 18, 2012. Again, Trilobite and Blue Star reserved their rights to move to compel a response to the demand if one were not provided.

On June 6, 2013, plaintiffs filed a note of issue and certificate of readiness attesting to the fact that this case was ready for trial. On June 25, 2013, Trilobite and Blue Star moved, pursuant to 22 NYCRR 202.21(e), to strike the note of issue, and, upon the striking of the note of issue, pursuant to CPLR 3124, to compel discovery regarding the plaintiff's 2005 injuries.

On or about October 1, 2013, Trilobite and Blue Star moved, by order to show cause and pursuant to CPLR 3212(a), for leave to file a motion for summary judgment beyond the statutory 120-day requirement, and within 90 days after entry of the Order deciding their motion to vacate the note of issue and to compel discovery.

Positions of the Parties:

Trilobite and Blue Star assert that the note of issue must be stricken because crucial discovery remains outstanding regarding plaintiff's 2005 ankle injury. The movants assert that the condition of the plaintiff's left ankle as a result of the prior incident "may have affected her ability to walk and thus [may] have contributed to...the incident." They further assert that they will be severely prejudiced in defending this matter if they do not obtain this information, which the court ordered plaintiffs to provide.

Plaintiffs oppose the motion to vacate the note of issue and to compel discovery, asserting that the discovery sought is irrelevant since plaintiff merely alleged fractures of her arm and hand and not any ankle injury or exacerbation thereof. Further, plaintiffs assert that they made a timely objection, based on relevance grounds, to the demand by the movants for information regarding

plaintiff's ankle injury. They also maintain that the movants were able to conduct the physical examination of plaintiff on July 6, 2012 without the information demanded.

In a reply affirmation in further support of their motion to vacate the note of issue, the movants argue that they have "sufficiently demonstrated that the injury sustained by [plaintiff] to her left ankle, requiring surgery, in a prior incident [in 2005]...is clearly relevant to [this] case."

In support of their motion to extend their time to move for summary judgment, Trilobite and Blue Star assert that they cannot prepare such a motion without "information regarding [plaintiff's] pre-incident injuries, which very likely had an effect on her ability to ambulate at the time of the August 22, 2008 incident giving rise to this action."

In an affirmation submitted in support of the motion seeking to extend the deadline for moving for summary judgment, counsel for the City and the DOT adopts the arguments made by Trilobite and Blue Star and requests that, if the movants' motion is granted, that the City and the DOT be granted the same relief.

In opposition to the motion to extend the time to move for summary judgment, plaintiffs assert that the movants failed to establish good cause for making an untimely motion for summary judgment. Specifically, plaintiffs assert that the movants failed to establish that they could not have moved for summary judgment without the records pertaining to the plaintiff's 2005 accident.

Conclusions of Law:

A. The Motion To Vacate The Note of Issue And To Compel Discovery

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." Evidence is "material" if sought "in good faith for possible use as evidence-in-chief or rebuttal for cross-examination." *Allen v Crowell-Collier*

Publ. Co., 21 NY2d 403, 407 (1968) (*citation omitted*). Here, the evidence sought by Trilobite and Blue Star is neither material nor necessary to the movants' defense.

The movants admit in their motion papers that plaintiff appeared for a deposition in this matter. However, they do not annex her deposition transcript to their motion and cite to no testimony by her that the condition of her ankle due to her 2005 injury caused or contributed in any way to the alleged 2008 accident which, she claims, caused injuries to her arm and hand. Nor do the movants, who conducted a physical examination of the plaintiff, submit any medical evidence establishing, or even suggesting, that the plaintiff's 2005 injury caused or contributed to her 2008 accident. The movants merely speculate that plaintiff's prior ankle injury "may have affected her ability to walk." Given the foregoing, as well as the fact that plaintiff does not allege that a prior condition arising from her 2005 accident may have contributed to the subject incident, records pertaining to the 2005 accident are not material and necessary to the defense of this action. *Cf.*, *Schechter v 210 E. 90th St. Owners, Inc.*, 271 AD2d 224 (1st Dept 2000)(discovery regarding prior medical condition permitted where plaintiff alleged that the condition may have been a contributing cause of her accident).

Further, neither the complaint nor the bill of particulars contains an allegation that plaintiff sustained a loss of enjoyment of life as a result of the subject accident. Since the nature and severity of any injuries caused by the plaintiff's 2005 accident will not have any impact on the amount of damages, if any, that she can recover for a claim for loss of enjoyment of life, the records regarding the ankle injury are not material or necessary to the movants' defense for this reason as well. *Cf.*, *Amoroso v City of New York*, 66 AD3d 618 (2d Dept 2009)(records regarding preexisting conditions material and necessary to defense where prior medical conditions had potential impact upon claim for loss of enjoyment of life).

Since plaintiff alleged injuries only to her arm and hand, she did not place her entire medical condition into controversy in this matter, and there is no reason why she must be compelled to produce authorizations for any treatment she received in connection with her 2005 ankle injury. *Cf.* *Bravo v Vargas*, 2014 N.Y. App. Div. LEXIS 81 (2d Dept, January 8, 2014)(plaintiff ordered to produce authorizations regarding prior medical history where she “affirmatively placed her entire medical condition in controversy through the broad allegations of physical and mental injuries that were contained in her complaint and bill of particulars, and made during her deposition”).

In asserting that they are entitled to discovery regarding plaintiff’s 2005 ankle injury, the movants rely on *Orlando v Richmond Precast, Inc.*, 53 AD3d 534 (2d Dept 2008) and *Vanalst v City of New York*, 276 AD2d 789 (2d Dept 2000), both of which are inapposite herein. In both of those cases, defendants were permitted to obtain discovery regarding a plaintiff’s prior injuries because it had a potential bearing upon plaintiff’s claim for loss of enjoyment of life. However, as noted above, no such claim was asserted by plaintiff in this matter and the movants are thus not entitled to discovery regarding plaintiff’s 2005 ankle injury.

The movants’ contention that plaintiff failed to obey court orders directing her to provide discovery regarding her 2005 injury is without merit. Despite a court order of October 23, 2012 directing plaintiffs to respond to the movants’ post-deposition demands, subsequent orders of March 5 and May 7, 2013 directed that the movants’ remedy in the event plaintiffs failed to respond would be a motion to compel, the very application before this Court. Since the motion to compel is denied, no discovery remains outstanding and there is thus no basis upon which to strike the note of issue and certificate of readiness for trial. *See* 22 NYCRR 202.21(e).

B. The Motion To Extend The Time To Move for Summary Judgment

CPLR 3212(a) requires a party to move for summary judgment within 120 days after the filing of a note of issue unless the court sets a shorter deadline for doing so. The deadline for moving for summary judgment cannot be extended “except with leave of court on good cause shown.” In this case, the movants had 120 days from the June 6 filing of the note of issue to move for summary judgment and they failed to demonstrate good cause why they should be permitted to extend this deadline. *See* CPLR 3212(a); *Brill v City of New York*, 2 NY3d 648, (2004); *Isolabella v Sapir*, 96 AD3d 427 (1st Dept 2012). In the absence of a showing of good cause, a court has no discretion to entertain even a meritorious, non-prejudicial motion for summary judgment. *See Brill, supra* at 652.

The allegedly outstanding discovery claimed by the movants does not constitute good cause for them to move for summary judgment past the 120-day deadline since the information sought regarding plaintiff’s 2005 accident is “neither relevant nor necessary to the motion for summary judgment.” *The Bruno Maschi v City of New York*, 110 AD3d 460 (1st Dept 2013) (*citations omitted*). As noted above, the movants have failed to adduce even a scintilla of evidence connecting the accident alleged in this case to plaintiff’s 2005 injuries. The movants’ argument that discovery regarding plaintiff’s 2005 accident is relevant to causation is based upon sheer speculation. This is evident from their moving papers, in which they assert, without any substantiation whatsoever, that the 2005 injuries “very likely had a material effect on her ability to ambulate at the time of the August 22, 2008 incident giving rise to this action.”

Since the movants claim that their summary judgment motion would be based upon an absence of causation, and since the only discovery which they claim they were owed at the time of the filing of the note of issue clearly concerned damages, “it dos not avail defendants to argue that the reason they did not move for summary judgment within 120 days of the filing of the note of issue

was because disclosure was not complete.” *Diaz v Altman*, 298 AD2d 126 (1st Dept 2002). The movants have failed to show that their inability to obtain information regarding plaintiff’s 2005 injuries prevented them in any way from moving for summary judgment. *See Martorello v Consolidated Edison Co. of New York, Inc.*, 260 AD2d 317 (1st Dept 1999). Therefore, the movants’ motion to extend their time to move for summary judgment is denied.

The Court may not consider the argument by the City and DOT that the deadline for them to file summary judgment motions should be extended because these parties failed to move for such relief by notice of motion or cross-motion. *See CPLR 2214(a)*; 2215.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motion by defendants Trilobite LLC and Blue Star Properties, LLC, under sequence 003, to strike the note of issue and to compel discovery, is denied; and it is further,

ORDERED that the motion by defendants Trilobite LLC and Blue Star Properties, LLC under sequence 004, for an extension of time in which to move for summary judgment, is denied; and it is further,

ORDERED that the parties are to appear for a settlement conference on February 4, 2014 at 2:30 p.m. at 80 Centre Street, Room 280; and it is further,

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

DATED: January 16, 2014

ENTER:

FILED

JAN 23 2014

COUNTY CLERK'S OFFICE
NEW YORK

Hon. Kathryn E. Freed
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

JAN 16 2014