

Merchan v Merkel Prop., LLC

2014 NY Slip Op 30429(U)

January 19, 2014

Sup Ct, New York County

Docket Number: 105602/10

Judge: Louis B. York

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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

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

PART 2

Index Number : 105602/2010
MERCHAN, BEATRIZ
vs.
MERKEL PROPERTIES LLC
SEQUENCE NUMBER : 007
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

FEB 25 2014

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: 2/19/14

Ley
LOUIS B. YORK, J.S.C.
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 2

-----X
BEATRIZ MERCHAN,

Plaintiff,

-against-

Index No.: 105602/10

MERKEL PROPERTIES, LLC, the Estate of FRED
STARK, RITA STARK, and JFK CENTER
ASSOCIATES, LLC,

Defendants.

FILED

-----X
MERKEL PROPERTIES, LLC and JFK CENTER
ASSOCIATES, LLC,

FEB 25 2014

Third-Party Plaintiffs,

NEW YORK
COUNTY CLERK'S OFFICE

-against-

Third Party Index No.:
590257/12

ALLIED /CMS, INC. and U.S. ENVIRONMENTAL
ABATEMENT, CORP.,

Third-Party Defendants.

-----X
MERKEL PROPERTIES, LLC and JFK CENTER
ASSOCIATES, LLC,

Second Third-Party Plaintiffs,

Second Third Party
Index No.: 590047/13

-against-

CREATIVE ENVIRONMENTAL SOLUTIONS CORP.,

Second Third-Party Defendant.

-----X
YORK, J.:

Defendants/third-party plaintiffs/second third-party plaintiffs, Merkel Properties, LLC
(Merkel), and JFK Center Associates, LLC (JFK), move, pursuant to CPLR 3126, to dismiss

plaintiff Beatriz Merchan's complaint for failing to provide discovery. Specifically, Merkel and JFK contend that plaintiff failed to respond to notices for discovery and inspection dated June 7, 2013, and July 17, 2013, and letters dated June 7, 2013, June 13, 2013, June 24, 2013, and July 19, 2013. Merkel and JFK argue that plaintiff failed to provide complete and proper responses pursuant to an order of this court dated May 1, 2013, and failed to provide authorizations containing correct information for the release of plaintiff's employment records from CKAB, medical records from Dr. Schwartz, pharmaceutical records from Walgreens Pharmacy, collateral source records from the Workers Compensation Board, plaintiff's W-2 records for the years 2004 to present, and tax authorizations.

Merkel and JFK also move to preclude plaintiff from offering evidence at trial, and from testifying at trial, regarding liability and damages due to her failure to provide discovery. They also seek additional time to conduct non-party depositions.

Second third-party defendant Creative Environmental Solutions Corp. (Creative), cross-moves, pursuant to CPLR 3124, to compel plaintiff to respond to its discovery demands, including a notice for discovery and inspection, a request for Medicare information, and a supplemental notice for discovery and inspection which requested authorizations for medical records. Creative seeks an order precluding plaintiff from offering evidence at the time of trial with regards to liability and damages, due to plaintiff's failure to respond to its discovery demands and this court's May 1, 2013 order.

Merkel, JFK, and Creative all move, pursuant to CPLR 3402 and 22 NYCRR 202.21 (e) to vacate the note of issue and the certificate of readiness which were filed on August 15, 2013. Merkel, JFK, and Creative request that a stay be issued on the trial proceedings until all

discovery has been completed, and seek additional time in order to file dispositive motions.

Plaintiff submits an affirmation from her counsel, Gene L. Chertock, Esq., which states that defendants' motions are moot because the discovery which defendants seek has been provided. Plaintiff attaches a letter dated October 21, 2013, which includes authorizations from the Workers' Compensation Board, Boyle Environmental Services, Glorios Flores, Jeremy Schwartz, Judah Schor, Maria Molina, Health Plus, JVN Restoration, Rite Aid Pharmacy, New Age Physical Therapy, Jackson Kuan, Walgreen Pharmacy, Elmhurst Hospital Center, Medicaid, copies of exhibits from plaintiff's deposition, and a statement regarding plaintiff's lack of Medicare statements. Plaintiff maintains that it has previously provided sets of authorizations to defendants, and that, on October 18, 2013, it provided a response to defendants' notices for discovery and inspection.

Despite plaintiff's argument that the motions are moot, defendants contend that there is discovery which remains to be provided. In their reply affirmation, Merkel and JFK maintain that the majority of the discovery which they requested was provided following the filing of the note of issue and the filing of this motion, and that some of the authorizations which plaintiff recently provided were not complete because section 9 (a) of the authorization was not filled out. For example, counsel for Merkel and JFK affirms that defendants had previously notified plaintiff that Elmhurst Hospital Center had rejected an authorization because section 9 (a) was not initialed by plaintiff.

To the extent that any of the authorizations have been rejected due to incomplete information, defendants are to alert plaintiff by letter, within 14 days of service of notice of entry of this order, regarding which authorizations have been rejected. Plaintiff is to provide new

authorizations for those medical providers within 20 days thereafter.

Merkel and JFK also request a response to defendants' demands which seek the full name and address of the physical therapy office identified as "being located next to Dr. Silver's office where plaintiff received treatment following the alleged subject accident"; duly executed original HIPPA compliant authorizations for plaintiff's complete medical records from the physical therapy office where she received treatment following the subject accident; the full name, address, and HIPPA authorizations for complete medical records and any diagnostic films from the facility plaintiff visited on Main Street where she got an MRI of her foot; and the full name and address of the facility and HIPPA authorizations for complete medical records from the facility plaintiff visited located on 260th Street and Broadway, where she received treatment following the subject accident. Defendants maintain that they requested this information several times, including in a letter sent to plaintiff's counsel dated February 1, 2013. As it is unclear whether plaintiff has responded to these requests, or objects to the disclosure of such information, plaintiff is to provide a response to such requests within 20 days of service of notice of entry of this order.

Merkel, JFK, and Creative contend that plaintiff has also not provided an authorization for the release of her tax records from 2004 to present, as well as plaintiff's employment records from CKAB. Both items were previously ordered by this court on May 1, 2013. As such discovery was previously ordered, plaintiff must provide such documents within 20 days of service of notice of entry of this order.

Creative contends in its cross motion that plaintiff has yet to provide it workers compensation authorizations, as well as authorizations from New Age Physical Therapy, Medisys

Ambulance Services, and records and diagnostic studies from Jackson Kuan. To the extent that updated authorizations have not been provided to this defendant, plaintiff is to provide such authorizations within 20 days of service of notice of entry of this order.

Along with their requests for outstanding discovery, defendants also request that the note of issue be vacated. 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, the note of issue should not have been filed because discovery remains to be provided. Therefore, the note of issue is to be vacated, and the discovery end date will be extended to April 4, 2014. The note of issue is to be filed on or before April 10, 2014. The court will permit any non-party disclosure to take place post-note of issue, if necessary.

Finally, because defendants' motion to vacate the note of issue was timely filed, the court will extend the deadline for dispositive motions until June 10, 2014. There will be no adjournments of the above dates without prior court approval.

CONCLUSION and ORDER

Accordingly, it is

ORDERED that defendants Merkel Properties, LLC, JFK Associates, LLC, motion and Creative Environmental Solutions Corp.'s cross motion are granted in part, to the extent that the

note of issue is vacated and is extended to April 10, 2014; and it is further

ORDERED that the parties are to comply with the discovery directives listed above, and to the extent that there is noncompliance with this order, the parties must call Part 2 at (646) 386-3852, before the end date of disclosure, in order to schedule a status conference; and it is further

ORDERED that the part of the motion and cross motion seeking to dismiss plaintiff Beatriz Merchan's complaint, preclude the plaintiff from offering evidence at trial, and preclude plaintiff from testifying at trial regarding liability and damages, is denied; and it is further

ORDERED that the deadline for dispositive motions is extended to June 10, 2014.

Dated: 1/29/14

ENTER:

[Signature]
J.S.C.

FILED
FEB 25 2014
NEW YORK
COUNTY CLERKS OFFICE

LOUIS B. YORK
J.S.C.