

Slevin v City of New York
2014 NY Slip Op 31665(U)
June 23, 2014
Sup Ct, New York County
Docket Number: 104810/2006
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED
JUSTICE OF SUPREME COURT
Justice

PART 5

Index Number : 104810/2006
SLEVIN, ANNE E.
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 005
VACATE NOTE OF ISSUE/READINESS

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

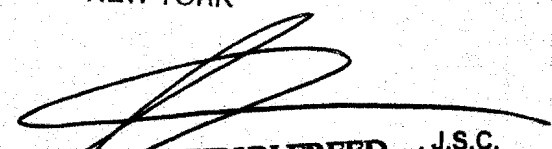
MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

JUN 30 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/23/14
JUN 23 2014


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

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
ANNE SLEVIN,

Plaintiff,

-against-

THE CITY OF NEW YORK,

Defendant,

-----X
THE CITY OF NEW YORK,

Third-Party Plaintiff,

-against-

SECURITY CONTROL CONCEPTS, INC.,

Third-Party Defendant.

-----X
HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR 2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	1-3(Exs. A-P)
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
ANSWERING AFFIDAVITS.....
REPLYING AFFIDAVITS.....
EXHIBITS.....
STIPULATIONS.....
OTHER.....

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

Third-Party Defendant Security Control Concepts, Inc. ("SCC") moves for an order,

DECISION/ORDER

Index No.: 104810/2006

Seq. No.: 005

PRESENT:

FILED

JUN 30 2014

COUNTY CLERK'S OFFICE
NEW YORK

pursuant to 22 NYCRR § 202.21(e), vacating the note of issue and certificate of readiness and striking this case from the trial calendar or, in the alternative, directing the completion of discovery pursuant to CPLR 3124, and granting SCC an extension of time to move for summary judgment. No opposition has been submitted to the motion. After a review of the instant motion, all relevant statutes and case law, the Court **grants** the motion.

Factual and Procedural Background:

This case arises from two trip and fall accidents involving plaintiff Anne Slevin. Plaintiff tripped and fell at or near One Police Plaza in Manhattan on November 10, 2003 and May 10, 2005. Plaintiff commenced a suit against The City of New York (“the City”) arising from her 2003 accident on or about June 4, 2004. Ex.A.¹ On or about April 4, 2006, plaintiff commenced an action against the City arising from her 2005 accident. Ex. B. By order entered June 30, 2008, this Court (Rakower, J.) granted plaintiff’s motion to consolidate the actions. Ex. C.

On or about April 12, 2012, the City impleaded third-party defendant SCC and SCC joined issue by service of its verified third-party answer. Ex. D. On or about May 30, 2012, SCC served demands for a verified bill of particulars and preservation and inspection of evidence on the City. Ex. E. It also served a demand for expert information on the City and plaintiff. Ex. E. On or about August 14, 2012, SCC served a demand for document discovery on the City. Ex. F. The same day, SCC served plaintiff with a supplemental demand for authorizations, including those for Dr. Michael Diaz and Dr. Wright. Ex. G.

¹All references are to the affirmation in support of the instant motion submitted by counsel for SCC.

On August 21, 2012, a compliance conference was held at which the parties entered into a stipulation so-ordered by this Court (Jaffe, J.). Pursuant to the stipulation, the City was to respond to SCC's discovery demands and plaintiff was to provide HIPAA-compliant authorizations. Ex. H. The stipulation also set forth dates on which SCC was to depose plaintiff and the City and provided for SCC to conduct a physical examination of plaintiff. Ex. H.

On or about March 25, 2013, SCC's attorney wrote to counsel for the City to advise that the City still owed certain discovery initially demanded by SCC on August 14, 2012. Ex. I. On or about April 2, 2013, counsel for SCC wrote to plaintiff's counsel to advise that it still had not received plaintiff's response to SCC's August 14, 2012 supplemental demand for authorizations. Ex. J.

On May 14, 2013, another compliance conference was held before this Court. Ex. K. Pursuant to the so-ordered stipulation entered into by the parties on that date, the City and the plaintiff agreed to produce the discovery demanded in SCC's letters of March 25 and April 2, 2013, respectively. Ex. K. On August 27, 2013, yet another compliance conference was held and another discovery stipulation so-ordered by this Court. Again, the City and plaintiff agreed to provide discovery demanded in the March 25 and April 2, 2013 letters, respectively. Ex. L.

On April 8, 2013, SCC's attorney wrote to plaintiff's counsel stating that it had processed an authorization it had received from plaintiff's counsel for the release of the records of Sports Physical Therapy of New York, PC, which responded that it had no records for plaintiff. Ex. O. SCC's attorney thus requested any records of Sports Physical Therapy of New York in possession of plaintiff's counsel. Ex. O.

On August 14, 2013, SCC's attorney wrote to plaintiff's counsel to advise that, although it had processed an authorization for the release of the records of New York Musculoskeletal &

Medical Center, PC, that facility was no longer in operation. Ex. O. Therefore, urged SCC's attorney, SCC could not obtain the 2005 MRI films of plaintiff's left knee taken at that facility. Ex. O. SCC's attorney advised that such a study had been taken at that facility since plaintiff's counsel had provided a radiological report for the same. Thus, SCC's attorney requested the film of that MRI if it was in plaintiff's possession. Ex. O.

On August 26, 2013, SCC's attorney wrote to plaintiff's counsel to advise that, although he had processed the authorization provided by plaintiff's counsel releasing the records of Mt. Sinai Hospital, Mt. Sinai advised that it had no records relating to the plaintiff. Ex. O. Thus, SCC's attorney requested that plaintiff's attorney provide any medical records pertaining to plaintiff's treatment at Mt. Sinai. Ex. O.

On August 28, 2013, SCC's attorney wrote to counsel for plaintiff to request any records in plaintiff's possession relating to treatment by Dr. James Liguori, as Dr. Liguori's office had advised SCC's attorney, in response to an authorization provided by plaintiff's attorney and processed by SCC's attorney, that plaintiff's records had been discarded. Ex. O.

On November 13, 2013, SCC's attorney wrote to counsel for the plaintiff to advise that, although he had tried to process an authorization for the release of plaintiff's records from Dr. Stuart Springer of New York Musculoskeletal & Medicine Center, his attempt to process the authorization was rejected insofar as it contained the name of New York Musculoskeletal & Medicine Center and not just the doctor. Ex. O. SCC's attorney advised plaintiff's counsel that he had learned that the authorization had to be in the name of Dr. Stuart Springer of 424 Orthopaedics PLLC and he requested an authorization in such form. Ex. O.

On November 22, 2013, plaintiff served a response to SCC's combined demands. Ex. N. As part of the response, plaintiff represented that it was annexing authorizations for the release of the records of the District Surgeon of the NYPD, Dr. Fred Fensterer, Dr. Steven Stuchin, Dr. Anthony Milea, Dr. Michael Diaz c/o O'Connor Hospital,² O'Connor Hospital, Blue Cross and Blue Shield, Medilane Pharmacy, Social Security Administration, Medicare, and NYPD Employee Management Division. Ex. N. Plaintiff's counsel further represented in the response that authorizations and medical records for Dr. Springer, Dr. Herbert, Dr. Vallo Benjamin, Dr. Leff, Dr. Liguori, Dr. Kim, Dr. Pertry, Dr. Bruce Rokito, and Hospital for Joint Diseases were previously exchanged by plaintiff on July 31, 2012. Ex. N.

A subsequent compliance conference was conducted on February 11, 2014. Ex. M. At that conference, counsel for the City agreed to provide the documents demanded in SCC's letter dated March 25, 2013. Ex. M. The City also agreed that SCC could conduct a site inspection at the accident site. Ex. M.

On March 10, 2014, plaintiff filed a note of issue placing this case on the trial calendar. The affidavit of service of the note of issue reflects that it was served on counsel for the City but not on counsel for SCC. Ex. P.

On March 11, 2014, SCC's attorney wrote to plaintiff's attorney to advise that, although plaintiff's counsel had provided an authorization releasing plaintiff's Social Security Administration records, the authorization was unsigned. Ex. O. SCC's attorney thus requested that he be provided with a signed, valid authorization. Ex. O.

²SCC's attorney maintains that, despite the representation by plaintiff's counsel, plaintiff's response did not contain an authorization for Dr. Diaz. *See* SCC's Aff. in Support, at n. 1.

On April 1, 2014, SCC's attorney advised plaintiff's counsel that, when he attempted to process an authorization provided by plaintiff for the release of her records from Dr. Fred Fensterer, he was advised that Dr. Fensterer was no longer at the same address and no forwarding information was provided. Ex. O. SCC's attorney thus requested all records of Dr. Fensterer in plaintiff's possession. Ex. O.

On April 2, 2014, counsel for SCC advised plaintiff's counsel that an authorization provided by plaintiff's counsel for the release of plaintiff's NYPD employment records was rejected because plaintiff had directed it to the NYPD FOIL Unit. Ex. O. Thus, SCC's counsel requested a replacement authorization directed to the NYPD Personnel Records Unit. Ex. O. The same day, SCC's attorney requested a new Medicare authorization, since the authorization provided by plaintiff's counsel contained the wrong date of loss.

On April 2, 2014, when SCC's attorney contacted the City in an attempt to schedule a site inspection, the City's attorney advised him that plaintiff had filed a note of issue.

Contentions of SCC:

Counsel for SCC asserts that the note of issue must be stricken given the discovery outstanding in this matter. In the alternative, counsel asserts that this Court should direct all discovery to be completed and should extend SCC's time to move for summary judgment.

Legal Conclusions:

22 NYCRR § 202.21 addresses the filing of a note of issue. Subdivision (a) provides, inter alia, that "[n]o action or special proceeding shall be deemed ready for trial or inquest unless there

is first filed a note of issue accompanied by a certificate of readiness, *with proof of service on all parties entitled to notice*, in the form prescribed by this section” (*emphasis added*).

Subdivision (e), entitled “Vacating note of issue,” provides that:

[w]ithin 20 days after service of a note of issue and certificate of readiness, any party to the action or special proceeding, may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect. However, the 20-day time limitation to make such motion shall not apply to tax assessment review proceedings. After such period, except in a tax assessment review proceeding, no such motion shall be allowed except for good cause shown. At any time, the court on its own motion may vacate a note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect. If the motion to vacate a note of issue is granted, a copy of the order vacating the note of issue shall be served on the clerk of the trial court.”

Here, the note of issue must be stricken since the affidavit of service of the note of issue clearly establishes that it was not served on SCC’s attorney in accordance with § 202.21 (a). Since service “on all parties entitled to notice” was not effectuated, this case cannot be “deemed ready for trial”. 22 NYCRR § 202.21 (a).

In addition, it is well settled that “a note of issue should be vacated when same is based upon a certificate of readiness which contains an “erroneous fact, such as that discovery has been completed.” *Savino v. Lewittes*, 160 A.D.2d 176, 177 (1st Dept. 1990); *see Club Italia, Inc. v. Italian Fashion Trading, Inc.*, 268 A.D.2d 219 (1st Dept. 2000). Here, as noted above, SCC’s attorney made numerous requests on plaintiff’s counsel for additional authorizations and medical records which went unanswered. Ex. O. Therefore, the following representations by plaintiff’s counsel in

the certificate of readiness are false: that “[d]iscovery [p]roceedings now known to be necessary [are] completed”, “[t]here are no outstanding requests for discovery”, “there has been compliance with any order issued pursuant to the [p]re-[c]alendar [r]ules”, and “[t]he case is ready for trial.” Ex. P.

Further, this Court finds that, although the instant motion has been made beyond the 20-day time limitation set forth in 22 NYCRR § 202.21 (e), SCC has established “good cause shown” for this delay (22 NYCRR § 202.21 [e]) by demonstrating, by means of the affidavit of its attorney, that it did not learn that the note of issue was filed until April 2, 2014 because it was not served with the same as required by 22 NYCRR § 202.21 (a).

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

ORDERED that the motion by third-party defendant Security Control Concepts, Inc. To strike the note of issue is granted to the extent that the note of issue and certificate of readiness are hereby vacated and the case is stricken from the trial calendar; and it is further,

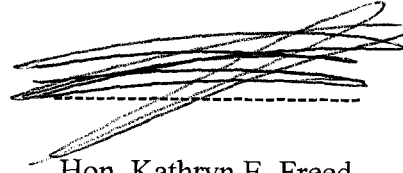
ORDERED that within thirty (30) days from the entry of this order, defendant Security Control Concepts, Inc. shall serve a copy of this order with notice of entry on all parties and upon the Clerk of the Trial Support Office, who is hereby directed to strike the case from the trial calendar and make all required notations thereof in the records of the court; and it is further,

ORDERED that the parties shall appear for a compliance conference on September 30, 2014 at 80 Centre Street, Room 103, at 2 p.m.; and it is further,

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

DATED: June 23, 2014

ENTER:

A handwritten signature in black ink, appearing to be "Kathryn E. Freed", written over a horizontal dashed line. The signature is somewhat scribbled and overlaps the line.

Hon. Kathryn E. Freed
J.S.C.

FILED

JUN 30 2014

COUNTY CLERK'S OFFICE
NEW YORK