Friend v West First St. Corp.
2014 NY Slip Op 32906(U)
April 7, 2014
Supreme Court, Westchester County
Docket Number: 56158/11
Judge: Joan B. Lefkowitz
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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

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BERNICE FRIEND,

Plaintiff,

-against-

WEST FIRST STREET CORP., BETTIE JOHNSON and CORDELL JOHNSON AS EXECUTORS OF THE ESTATE OF CLAUDE JOHNSON aka CLAUDE MARSHALL JOHNSON and LINDEN STREET CORP., d/b/a LINDEN STREET PROPERTIES,

Defendants.

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DECISION & ORDER

Index No. 56158/11
Motion Date: April 7, 2014
Seq. No. 3

LEFKOWITZ, J.

The following papers were read on this motion by plaintiff for an order vacating the note of issue and certificate of readiness and compelling the deposition of non-party Delia William ("William"). Defendants oppose the motion.

Amended Order to Show Cause - Affirmation in Support - Exhibits A-E
Affirmation in Opposition

Upon the foregoing papers, and the proceedings held on April 7, 2014, this motion is determined as follows:

Plaintiff commenced this action to recover damages for injuries allegedly sustained when she slipped and fell on a stairway owned and controlled by the defendants. Plaintiff alleges that the stairway was poorly lit which prevented her from noticing that there was water on the stairways allegedly caused by a leaking bathroom. Plaintiff further contends that defendants were aware of this condition but failed to correct it. It is plaintiff's belief that William, who was hired by defendants to perform maintenance services at the premises, has substantial first-hand knowledge of the condition of the stairway and of efforts to repair the condition.

According to the so-ordered Preliminary Conference Stipulation, dated November 15, 2012, all non-party depositions were to be completed by May 30, 2013 and all discovery was to be completed by October 1, 2013.

Defendants filed a motion seeking summary judgment on November 6, 2013. A review of the documents filed on NYSCEF in support of this motion, currently sub judice with this Court (Adler, J.), shows that plaintiff was deposed on June 21, 2013. The transcript of plaintiff's deposition testimony reveals that on the date of the accident plaintiff fell while leaving her granddaughter's apartment located at the subject premises. Plaintiff stated that she went to her granddaughter's apartment each day to take care of her baby while the granddaughter went to work. Plaintiff filed her opposition to defendants' summary judgment motion on December 13, 2013. Plaintiff's opposition to that motion included, among other things, an agreement between the landlord and William, which was produced during the course of discovery, wherein she agrees to provide certain maintenance services at the subject premises in exchange for a reduction in her monthly rent.

The parties appeared on June 27, 2013 for a compliance conference, however the order which issued from that conference does not make any reference to William's deposition or the deposition of any non-parties.

A Trial Readiness Order was issued on August 22, 2013 directing the filing of a note of issue within twenty days.

On September 24, 2013, plaintiff served William with a subpoena directing that she appear for a deposition on October 16, 2013.[1] Although counsel for all parties appeared on that date for William's deposition, she failed to appear.

Plaintiff filed the note of issue on October 24, 2013. The certificate of readiness and the affirmation of compliance filed with the note of issue state that William's deposition and certain documents related to the repair and maintenance of the building remained due.

On December 12, 2013, Plaintiff filed her motion for contempt against William for her failure to appear at her deposition. As that motion was made without a pre-motion conference as required by the DCM Protocol of this Court, a conference was held on December 17, 2013 at which time a briefing schedule to vacate the note of issue was issued. Insofar as plaintiff failed to properly serve William with that order to show cause, an amended order to show cause was issued pursuant to which the instant application is made.

Plaintiff seeks to vacate the note of issue in order to conduct the deposition of non-party William without which plaintiff contends she will be prejudiced.

In opposition, defendants argue that plaintiff's motion should be denied because she did not move to vacate the note of issue until twenty days after it was served.

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[1]Plaintiff improperly characterizes this as a judicial subpoena. Although the words judicial subpoena appear on its face, the subpoena was not judicially ordered.

The filing of a note of issue denotes the completion of discovery, not the opportunity to launch another phase of it (*See Arons v Jutkowitz*, 9 NY3d 393 [2007]). A certificate of readiness certifies that all discovery is completed, waived, or is not required and the action is ready for trial (*see Tirado v Miller*, 75 AD3d 153 [2d Dept 2010]). Once the note of issue has been filed and discovery presumably completed, the applicable standard for allowing additional discovery is governed by 22 NYCRR 202.21[d][e]. If a party seeks to vacate the note of issue within 20 days of its service, that party need show only that a material fact in the certificate of readiness is incorrect or that it fails to comply with the requirements of that section in a material respect. However, if more than twenty days have elapsed since service of the note of issue, the moving party must demonstrate the existence of unusual or unanticipated circumstances which developed subsequent to the filing of the note of issue and certificate of readiness in order for them to be vacated (22 NYCRR 202.21[d]).

Here, plaintiff filed and served her note of issue and certificate of readiness on October 24, 2013, but did not seek their vacatur until December 12, 2013, 49 days after the note of issue was filed. Accordingly, in order to warrant its vacatur, plaintiff must meet the "unusual or unanticipated circumstances" test.

Plaintiff first sought William's deposition on September 24, 2013. Clearly plaintiff was aware that she planned on deposing William prior to the filing of the note of issue. Plaintiff has failed to allege, let alone demonstrate, the existence of unusual or unanticipated circumstances which developed subsequent to the filing of the note of issue and certificate of readiness. Plaintiff provides no explanation for why she did not seek to depose William sooner. As noted in the Preliminary Conference Stipulation, all non-party deposition were due to be completed by May 30, 2013, yet plaintiff waited until 118 days after that deadline to serve her notice to depose William. Even after William failed to appear for her deposition, plaintiff did not seek to compel the deposition by judicial subpoena or by motion, prior to filing the note of issue, nor does plaintiff provide a reason why she did not do so.

Additionally, the deadline for filing the note of issue was twenty days from August 22, 2013, or in other words, by September 11, 2013. Notably, plaintiff did not file the note of issue until October 24, 2013, more than 44 days after it was due. Yet, plaintiff still did not seek William's deposition until October 16, 2013, 56 days after the Trial Readiness Order was issued. The "lack of diligence in seeking discovery does not constitute unusual or unanticipated circumstances warranting post-note of issue disclosure" (*Tirado v Miller*, 75 AD3d at 161).

Plaintiff has submitted no further proof of any additional attempts to secure this deposition prior to the filing of the note of issue. Nor is there evidence that plaintiff continually tried to obtain this deposition during the course of this case. Nothing in the compliance conference order suggests that this deposition remained outstanding or was even discussed at the compliance conference.

Accordingly, plaintiff has failed to demonstrate unusual or unanticipated circumstances and the Court finds vacatur of the note of issue is not warranted (22 NYCRR 202.21[d]).

In view of the foregoing, it is

ORDERED that plaintiff's motion for an order vacating the note of issue and the certificate of readiness and compelling further discovery is denied; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry on defendants' counsel within ten days of entry; and it is further

ORDERED that all parties are directed to appear for a conference in the Settlement Conference Part, Courtroom 1600, on April 24, 2014 at 9:30 a.m.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
April 7, 2014

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

TO: Simon, Eisenberg & Baum, LLP
By Sagar Shah, Esq.
Attorneys for plaintiff
24 Union Square East, 5th floor
New York, NY 10003
BY NYSCEF

Goldberg & Carlton PLLC
By Gary M. Carlton, Esq.
31 East 32nd Street, 4th floor
New York, NY 10016
BY NYSCEF

cc: Robert Arena, Settlement Conference Part Clerk