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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ALLISON CONWAY,

Plaintiff,

-against-

ELITE TOWING & FLATBEDDING CORP., D&G AUTO REPAIR, INC. SAFEWAY TOWING AND HAULAGE, INC. and "JOHN DOE",

Defendants.

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DECISION & ORDER

Index No. 63134/2012
Date: Dec.22, 2014
Motion Seq. Nos. 2 & 3

LEFKOWITZ, J.

The following papers were read on this motion by plaintiff (sequence number 2) for an order vacating plaintiff's note of issue and directing defendants to serve supplemental expert responses fully setting forth the information required pursuant to CPLR 3101(d), and for such other and further relief as this Court deems just. Defendants oppose the motion.

Order to Show Cause - Affirmation in Support - Exhibits
Affirmation in Opposition
Reply -Exhibits[1]

The following papers were read on this motion by defendants (sequence number 3) for an order vacating the note of issue and certificate of readiness on the grounds that all discovery now known to be necessary has not been completed. Plaintiff has not submitted opposition to the motion.

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

Upon the foregoing papers and the proceedings held on December 22, 2014, these motions are determined as follows:

Plaintiff commenced this action to recover damages for personal injuries allegedly sustained as the result of a motor vehicle accident which occurred on March 13, 2012. The action was commenced by the service of a summons and verified complaint on or about August 17, 2012. Defendants served their Verified Answer on or about September 27, 2012. The note of issue was filed on October 7, 2014. After being provided a briefing schedule, plaintiff filed an order to show cause seeking to vacate the note of issue to compel defendants to provide additional expert disclosures. The affirmation submitted in support of plaintiff's motion stated,

[1]Although not authorized pursuant to the Order to Show Cause, the reply and exhibits have been considered on this motion.

among other things, that plaintiff was scheduled to have an anterior cervical discectomy and fusion performed at C2-C3 on October 21, 2014, and that this surgery was related to the injuries plaintiff suffered as a result of the subject accident (Gash Affirmation in Support, ¶15) and that plaintiff would supplement her bill of particulars to reflect this additional surgery (Gash Affirmation, ¶15). On October 29, 2014, defendants were provided a briefing schedule for their motion to vacate the note of issue and certificate of readiness in order to obtain discovery concerning plaintiff's C2-C3 herniation and subsequent fusion surgery.

Plaintiff's Motion to Vacate the Note of Issue

Plaintiff states that on August 14, 2014 defendants served an expert response for expert John G. Karpovich ("Karpovich"), an accident reconstructionist employed by SKE Forensic Consultants, LLC. On August 15, 2014, defendants served an expert response for expert Robert T. Bove, Jr., Ph.D. ("Bove"), an expert on injury biomechanics with an emphasis on kinematics and human tolerance to mechanical forces. On September 5, 2014, plaintiff's counsel rejected both expert disclosures as "woefully inadequate" in that they did not fully comply with CPLR 3101(d). On September 11, 2014 defendants served supplement expert disclosures for both experts.

Karpovich's revised disclosure states, among other things, that his testimony "...will be based upon photos of the plaintiff's vehicle and the defendants' tow truck exchanged during discovery, the deposition testimony of the parties and on and [sic] his professional background, training and knowledge in accident reconstruction, collision severity analysis and resulting accelerations or changes in velocity: and that his anticipated testimony is expected to include, among other things "his assessment of the lateral velocity change experienced by plaintiff and her vehicle during the collision at issue. It is expected that Mr. Karpovich will testify that plaintiff's vehicle experienced lateral and longitudinal velocity changes of less than five miles per hour, that the impact duration was less than one second, and that the average lateral and longitudinal acceleration of plaintiff's vehicle was less than 1 g."

Bove's revised disclosure states that his testimony will be based "...upon the medical records, photos of the plaintiff's vehicle and the defendants' tow truck exchanged during discovery, the deposition testimony of the parties, the law of physics, an understanding of the mechanical deformation of vehicle structures, crash test information, biomechanical studies of human tissue mechanics and tolerance to forces and on and [sic] his professional background, training, and knowledge." His testimony is expected to include "....his assessment of the mechanical forces and motions experienced by plaintiff during the accident. He will comment on the change in velocity experienced by plaintiff's vehicle and the severity of the collision. It is expected that Dr. Bove will testify that plaintiff's contact with the interior of her vehicle occurred at speeds less than typical walking speeds, and that she experienced limited movement during the collision." Additionally, "Dr Bove is expected to comment on the issue of causation, and it is anticipated that Dr. Bove will testify that plaintiff's alleged injuries are not consistent with the impact and resulting force that occurred during the subject accident. Dr. Bove is expected to testify that the collision did not cause or exacerbate plaintiff's claimed spinal injuries and that the accident did not cause or exacerbate plaintiff's claimed knee injury.

Plaintiff's counsel contends that these supplemental responses were still inadequate as they did not set forth in reasonable detail the subject matter of the experts' testimony and did not

set forth the "substance of the facts and opinions on which the expert is expected to testify" or "as summary of the grounds for each expert's opinion." On September 11, 2014 the court issued a trial readiness order. Plaintiff filed the note of issue with certificate of readiness on October 7, 2014. The certificate of readiness contains the following footnote: "Defendant's [sic] discovery and expert response are incomplete and inadequate." The footnote references a letter sent to the court by plaintiff's counsel dated September 30, 2014, attached as an exhibit to the certificate of readiness, explaining the alleged inadequacies of defendants' expert and supplemental expert responses. Plaintiff now seeks an order vacating the note of issue and directing defendants to serve supplemental expert responses.

Defendants oppose the motion arguing that the expert and supplemental responses which defendants have submitted fully satisfy the requirements of CPLR 3101(d). Defendants argue that they have provided in reasonable detail (a) the subject matter on which each expert is to testify; (b) the substance of the facts and opinions on which each expert is expected to testify; (c) a summary of the grounds for each expert's opinion; and, (d) the qualifications of each expert witness.

The note of issue states that discovery proceedings now known to be necessary were completed. "The purpose of a note of issue and certificate of readiness is to assure that cases which appear on the court's trial calendar are, in fact, ready for trial" (*Tirado v Miller*, 75 AD3d 153 [2d Dept 2010]). Once the note of issue has been filed and discovery presumably completed, the applicable standards for allowing additional discovery and vacating the note of issue are governed by Uniform Rules for Trial Courts [22 NYCRR] § 202.21(d)-(e). Pursuant to § 202.21(d), "[w]here unusual or unanticipated circumstances develop subsequent to the filing of the note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice, the court ... may grant permission to conduct such necessary proceedings." Section 202.21(e) provides that if more than 20 days has elapsed since the filing of the note of issue, good cause must be shown to warrant an order vacating the note of issue so that further discovery may be completed.

CPLR 3101 (d) (1)(I) provides in relevant part:

> Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion.

Contrary to plaintiff's assertions otherwise, it appears that defendants' supplemental expert disclosures do set forth in reasonable detail the subject matter of the experts' testimony, the substance of the facts and opinions on which the experts will testify and each expert's qualifications and a summary of the grounds for each expert's opinion. Accordingly, that branch of plaintiff's motion to direct further supplemental expert responses is denied. As to that branch of plaintiff's motion which seeks to vacate the note of issue, the note of issue is vacated for the reasons set forth below.

Defendants' Motion to Vacate the Note of Issue

Defendants' also seek to vacate the note of issue on the grounds that additional discovery is necessary as a result of plaintiff's post note of issue surgery which occurred on October 21, 2014. In connection with this surgery, defendants seek medical records, a continued deposition of plaintiff and an additional medical examination of plaintiff. In support of this motion, defendants submit, among other things, the operative report wherein plaintiff's physician notes that plaintiff had a herniated disc at C2-C3. Defendants argue that since plaintiff's bill of particulars did not allege this injury or the potential need for fusion surgery, the note of issue and certificate of readiness should be vacated in order to allow further discovery.

In light of plaintiff's October 21, 2014 surgery, plaintiff's intention to supplement her bill of particulars, and in the absence of opposition to the motion by plaintiff, defendants have demonstrated grounds for additional discovery. Accordingly, defendants are entitled to the vacatur of the note of issue and certificate of readiness in order that additional discovery may occur with respect to the C2-C3 disc herniation and plaintiff's fusion surgery which occurred subsequent to the filing of the note of issue.

In view of the foregoing, it is

ORDERED that the branch of plaintiff's motion which seeks an order directing defendants to serve supplemental expert responses fully setting forth the information required pursuant to CPLR 3101(d) is denied; and it is further

ORDERED that the branch of plaintiff's motion seeking to vacate the note of issue is granted to the extent that the note of issue is stricken so that defendants may seek additional discovery with respect to plaintiff's C2-C3 disc herniation and fusion surgery; and it is further

ORDERED that defendants' motion seeking to vacate the note of issue and certificate of readiness is granted and the matter is stricken from the trial calendar in order that defendants may seek additional discovery with respect to plaintiff's C2-C3 disc herniation and fusion surgery; and it is further

ORDERED that all parties are directed to appear for a conference in the Compliance Part, Courtroom 800, on January 13, 2015 at 9:30 a.m.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
December 24, 2014

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