

**Faust v Gerde**

2014 NY Slip Op 33899(U)

Novemeber 24, 2014

Supreme Court, Suffolk County

Docket Number: 07-32125

Judge: Ralph T. Gazzillo

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FORM ORDER

INDEX No. 07-32125  
CAL No. 14-00841MV

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 6 - SUFFOLK COUNTY

**PRESENT:**

Hon. RALPH T. GAZZILLO  
Acting Justice of the Supreme Court

MOTION DATE 7-3-14  
ADJ. DATE 7-24-14  
Mot. Seq. # 007 - MD  
# 008 - XMD

-----X  
BRIAN FAUST,

Plaintiff,

- against -

LYNNE F. GERDE, FELIX A. CASARES and  
GEORGE F. CASARES and LIBERTY  
MAINTENANCE,

Defendants.  
-----X

MALAPERO & PRISCO LLP  
Attorney for Plaintiff  
295 Madison Avenue  
New York, New York 10017

PICCIANO & SCAHILL, P.C.  
Attorney for Defendant Lynne F. Gerde  
900 Merchants Concourse, Suite 310  
Westbury, New York 11590

ROBERT P. TUSA, ESQ.  
Attorney for Defendants Felix Casares and Gerde  
Casares  
898 Veterans Memorial Highway, Suite 320  
Hauppauge, New York 11788

WILSON, ELSER, MOSKOWITZ, EDELMAN  
& DICKER, LLP  
Attorney for Defendant Liberty Maintenance  
150 East 42<sup>nd</sup> Street  
New York, New York 10017

Upon the following papers numbered 1 to 24 read on this motion to vacate note of issue and this cross motion for the imposition of sanctions; Notice of Motion/ Order to Show Cause and supporting papers 1-15; Notice of Cross Motion and supporting papers 16-20; Answering Affidavits and supporting papers 21-24; Replying Affidavits and supporting papers \_\_\_; Other \_\_\_; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

**ORDERED** that the motion (007) by defendant Liberty Maintenance, Inc. for, inter alia, an order vacating the Note of Issue and extending its time to file dispositive motions in the proceeding is denied, and it is further

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**ORDERED** that this cross motion (008) by plaintiff for an order awarding it monetary sanctions against defendant for filing a frivolous motion is denied.

Plaintiff Brian Faust commenced this action to recover damages for injuries he allegedly sustained as a result of a motor vehicle accident that occurred on or near the Main Span Bridge of the Robert Moses Causeway in the Town of Islip on June 19, 2007. Plaintiff's complaint alleges that he sustained severe permanent injuries when his motor vehicle was struck as a result of a three-car chain collision between motor vehicles operated by defendants Lynne Gerde and George Casares. The accident allegedly occurred when the Casares' vehicle was propelled into the rear of plaintiff's vehicle after it was struck by the vehicle operated by Gerde. The vehicle operated by George Casares was owned by defendant Felix Casares. Plaintiff also brought a separate personal injury action against defendant Liberty Maintenance, Inc. ("Liberty"), a contractor hired by the State of New York to make certain repairs and improvements to the subject roadway. The parties joined issue, and by order dated June 23, 2009, the Court (Baisely, J.) granted plaintiff's motion for an order consolidating the two actions. Following extensive discovery requests and responses between the parties, a discovery compliance conference was held on April 22, 2014 to address outstanding discovery demands. At that time, the parties entered into a court-ordered stipulation that directed plaintiff to file a note of issue no later than May 28, 2014, and to appear for a pretrial conference on June 12, 2014. According to the Court's computerized records, the note of issue was filed on May 28, 2014, and the matter was placed on the Court's trial calendar.

Liberty now moves for an order vacating the note of issue, striking the action from the trial calendar, and extending its time to file dispositive motions in the proceeding. Liberty asserts that codefendant Lynne Gerde has failed to respond to its March 2011 discovery demands, and that plaintiff failed to respond to its demands for expert disclosure and a copy of the agreement provided to him by the New York State Department of Transportation ("NYDOT") for the work undertaken by Liberty during the subject roadway improvement project. Liberty further asserts its initial combined demands for discovery is ongoing, including its request for certain authorizations permitting it to obtain plaintiff's medical records. Plaintiff opposes the motion, arguing that he complied with all of Liberty's discovery demands, including its demands for expert disclosure, medical authorizations, and a copy of Liberty's own agreement with NYDOT. Plaintiff also argues that Liberty failed to specify its request for additional discovery in relation to its "initial and ongoing" discovery demands, and that it failed, despite ample opportunity prior to the filing of the note of issue, to make any motions to compel further discovery from defendant Gerde. Additionally, plaintiff cross-moves for an order, pursuant to 22 NYCRR §130-1.1(a) or CPLR 8303-a, awarding it monetary sanctions against Liberty based on its filing of a frivolous motion.

The Uniform Rules for Trial Courts (22 NYCRR) § 202.7 (a) provides that a motion relating to disclosure must be supported by an affirmation that counsel "has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion." The affirmation of good-faith effort "shall indicate the time, place, and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held" (22 NYCRR § 202.7 [c]).

Although parties to litigation are entitled to “full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof” (CPLR 3101[a]), the filing of a note of issue and certificate of readiness denotes the end of the discovery phase of litigation (*Arons v Jutkowitz*, 9 NY3d 393, 411, 850 NYS2d 345 [2007]; see *Tirado v Miller*, 75 AD3d 153, 901 NYS2d 358 [2d Dept 2010]). Thus, 22 NYCRR §202.21 (e) provides, in relevant part, that within 20 days after service of a note of issue and certificate of readiness, any party to the action 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.” A party seeking additional discovery after expiration of the 20-day period provided in 22 NYCRR §202.21(d) must show “unusual or unanticipated circumstances develop[ed] subsequent to the filing of the note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice” (22 NYCRR 202.21[d]; see *Stock v Morizzo*, 92 AD3d 672, 938 NYS2d 206 [2d Dept 2012]; *Owen v Lester*, 79 AD3d 992, 915 NYS2d 277 [2d Dept 2010]; *Utica Mut. Ins. Co. v P.M.A. Corp.*, 34 AD3d 793, 826 NYS2d 138 [2d Dept 2006]; *Audiovox Corp. v Benyamini*, 265 AD2d 135, 707 NYS2d 137 [2d Dept 2000]).

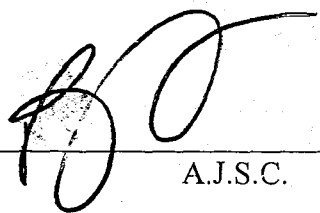
Here, Liberty’s purported affirmation of good faith fails to comply with the requirements of 22 NYCRR §202.7 (c), as it merely recites the dates of letters it sent to plaintiff’s counsel, and does not evince a diligent effort to resolve the alleged discovery dispute (see *Mironer v City of New York*, 79 AD3d 1106, 915 NYS2d 279 [2d Dept 2010]; *148 Magnolia, LLC v Merrimack Mut. Fire Ins. Co.*, 62 AD3d 486, 878 NYS2d 727 [1st Dept 2009]; *Amherst Synagogue v Schuele Paint Co. Inc.*, 30 AD3d 1055, 816 NYS2d 782 [4th Dept 2006]). Further, even if a proper affirmation of good faith had been included, Liberty, having certified the case as ready for trial, failed to demonstrate unusual or unanticipated circumstances arose after the filing of the note of issue and failed to allege it will be prejudiced if the requested discovery is not produced (see *Filippazzo v Kormoski*, 75 AD3d 618, 905 NYS2d 276 [2d Dept 2010]; *Singh v City of New York*, 68 AD3d 1096, 890 NYS2d 333 [2d Dept 2009]; *Racine v Grant*, 65 AD3d 535, 882 NYS2d 908 [2d Dept 2009]; *Audiovox Corp. v Benyamini*, 265 AD2d 135, 707 NYS2d 137). Moreover, Liberty failed to demonstrate that a material fact in the certificate of readiness is incorrect, as a review of the record indicates that plaintiff substantially complied with the requests for discovery by providing Liberty a copy of its own roadway repair agreement with the NYDOT, additional medical records and HIPPA-compliant authorizations, as well as the forms and reports relied upon by plaintiff’s expert (see *ACME ANC Corp. v Read*, 55 AD3d 854, 855, 866 NYS2d 359 [2d Dept 2008]; *Myung Sum Suh v Jung Ja Kim*, 51 AD3d 883, 858 NYS2d 324 [2d Dept 2008]; *Cambry v Lincoln Gardens*, 50 AD3d 1081, 1082, 857 NYS2d 225 [2d Dept 2008]; see also *Zakhidov v Boulevard Tenants Corp.*, 96 AD3d 737, 945 NYS2d 756 [2d Dept 2012]). Furthermore, it is noted that Liberty’s lack of diligence in seeking alleged outstanding discovery from defendant Gerde does not constitute unusual or unanticipated circumstances warranting post-note of issue disclosure (*Tirado v Miller*, 75 AD3d 153, 161, 901 NYS2d 358). Accordingly, Liberty’s motion for, inter alia, an order vacating the note of issue is denied.

Plaintiff’s cross motion for an award of monetary sanctions is denied, as the Court finds that Liberty’s making of the abovementioned motion did not constitute frivolous conduct as that term is defined in 22 NYCRR §130-1.1(c). Additionally, the imposition of a monetary sanction against Liberty pursuant CPLR 8303-a is inappropriate where, as here, the motion by Liberty did not include

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the assertion of any frivolous claims or counterclaims (*see Nyitray v New York Athletic Club*, 274 AD2d 326, 327, 712 NYS2d 89 [1st Dept 2000]; *Gordon v Marrone*, 202 AD2d 104, 108-109, 616 NYS2d 98 [2d Dept 1994]).

Dated: 1/24/14

  
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A.J.S.C.

\_\_\_\_ FINAL DISPOSITION     X  NON-FINAL DISPOSITION