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| Byrne-Ling v City of New York |
| 2016 NY Slip Op 31223(U) |
| June 28, 2016 |
| Supreme Court, New York County |
| Docket Number: 156304/2012 |
| Judge: Manuel J. Mendez |
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

MARY BYRNE-LING,
Plaintiff,
-against-

INDEX NO. 156304/2012
MOTION DATE 05-25-2016
MOTION SEQ. NO. 004
MOTION CAL. NO. _____

CITY OF NEW YORK and
RESTANI CONSTRUCTION CORP.,

Defendants,

The following papers, numbered 1 to 6 were read on this motion to vacate Note of Issue.

| | <u>PAPERS NUMBERED</u> |
|---|------------------------|
| Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ... | <u>1 - 3,</u> |
| Answering Affidavits – Exhibits _____ | <u>4 - 5</u> |
| Replying Affidavits _____ | <u>6</u> |
| Cross-Motion: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No | |

Upon a reading of the foregoing cited papers, it is Ordered that defendants’ motion to vacate the Note of Issue and Certificate of Readiness filed on March 30, 2016, is denied.

This is an action to recover damages for personal injuries sustained by plaintiff on October 19, 2011 when she tripped and fell on a curb adjacent to the Lincoln Center Jazz entrance to the Time Warner Center on West 60th Street at Broadway. Plaintiff commenced this action by Summons and Complaint dated September 4, 2012. Issue was joined by the defendants separately and the parties proceeded with discovery.

Plaintiff previously filed a Note of Issue on June 29, 2015. Pursuant to a motion by the Defendants the Note of Issue was vacated by This Court’s November 6, 2015 Order.

A Status Conference was held before This Court on January 27, 2016 (Mot. Ex. I). It was directed that the Defendants were to provide further discovery demands within 20 days, the Plaintiff was to respond within 30 days of receipt of the demands, and that Plaintiff’s further EBT was to be completed within 45 days from Plaintiff’s response to the demands. Plaintiff’s EBT was to be limited to questions on any medical providers Plaintiff had treated with since her last EBT in 2013, and questions on any new special damages claims. If there was to be another IME designated, Plaintiff would appear for the IME within 45 days from her EBT, if any. At the very end of This Order, the Plaintiff reserved her rights to object to the demands for a further EBT and/or IME.

In accordance with the January 27, 2016 Order, Defendants served Plaintiff on February 9, 2016 with a Notice to Take a Further Deposition of Plaintiff, together with a Notice to Produce, and a Notice for Discovery and Inspection (Mot. Ex. M) requesting

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

a number of items in response to assertions made by Plaintiff in her Sixth Supplemental Verified Bill of Particulars dated September 22, 2015 (Mot. Exh. L). The requests were: (1) for documents, information, and authorizations to obtain documents related to Plaintiff's claims for lost income, and out-of-pocket expenses incurred by Plaintiff's hiring of a cattle ranch management couple, and the loss of her U.S. Forest grazing rights lease due to her inability to work because of the injuries she sustained, (2) for the lien information as to Medicare and United Healthcare, (3) for a Medicare Authorization containing Plaintiff's Social Security Number as the previous Authorization did not have it and the Authorization was rejected, (4) for Plaintiff to provide the totality of her claimed special damages to date, including identifying the location and entities that provided treatment to the Plaintiff as Plaintiff had only provided an itemized list of special damages for the year 2013, and has not provided an itemized list for the years 2011, 2012, 2014, 2015 and 2016. In addition, it is noted on this Order that defendants had not made any formal discovery demands, nor had the parties scheduled a mediation since vacatur of the Note of Issue.

On March 28, 2016, Plaintiff provided, in response to Defendants' demands: (1) a Medical Payment Summary form from Optum (a health care provider with United Healthcare) listing additional special damages for treatment, and stated (as she had done in her past Supplemental Bill of Particulars, with the exception of the Fifth Supplemental Bill of Particulars) that the final amount of the special damages would be provided in the future when Plaintiff's treatment ended because her treatment was ongoing, (2) a HIPAA compliant Medicare Authorization containing Plaintiff's Social Security Number to obtain Plaintiff's records and any and all lien amounts, (3) stated that lien information for Optum, a division of United Healthcare, was not available because Plaintiff nor her husband, who was the owner of this insurance policy, ever worked for the federal government, (4) stated that Plaintiff was withdrawing her claims for loss of her U.S. Forest Service Grazing Lease and reimbursement for the hiring of a ranch management couple, hereby rendering discovery sought for those claims inapplicable, and lastly, (5) Plaintiff objected to an additional deposition and/or additional IME because she was not claiming any new injuries. (Mot. Exh. O).

Plaintiff filed the Note of Issue and Certificate of Readiness for Trial on March 30, 2016. (Mot. Exh. D).

Defendants now move for an Order vacating the Note of Issue arguing that discovery is still outstanding. Plaintiff opposes the motion arguing that the Defendants are not entitled to vacatur of the Note of Issue because it is the Defendants that have been lax in completing discovery, and otherwise all discovery is complete.

Defendants contend that the reason for the delay in serving any discovery demands after the first Note of Issue was vacated, was due to the parties agreeing to stay any further discovery pending an agreement of the parties to go to mediation. Defendants also argue that they are entitled to an additional EBT and/or IME of Plaintiff

because they were not the attorney of record during Plaintiff's first EBT, and the Complaint, the Bill of Particulars, nor any of the five Supplemental Bill of Particulars, or Plaintiff's testimony during her deposition in 2013, specify any injuries other than the injury to Plaintiff's right ankle. However, Defendants are of the belief that based upon the exchanged expert information, Plaintiff's experts will testify to an array of injuries that have caused plaintiff the inability to function, all injuries (with the exception of the right ankle), and their severity, were not the subject of previous disclosure. (Expert Information Mot. Exh. K). Defendants also argue that Plaintiff has failed to properly plead her special damages (with the exception of year 2013 provided in Plaintiff's Fifth Supp. BP Mot. Exh. N), and Defendants are entitled to further discovery in relation to Plaintiff's new loss of income claims asserted in her Sixth Supplemental Bill of Particulars.

Plaintiff contends that no new injuries have been plead (as is evidenced by the Complaint, Plaintiff's Bill of Particulars and five Supplemental Bill of Particulars), that the only injury that has ever been the subject of this litigation is the injury to Plaintiff's right ankle, and that Plaintiff has since withdrawn her loss of income claims. Therefore, Plaintiff argues that not only did Plaintiff reserve her right to object to any further EBT or IME, she properly did so in her March 28, 2016 responses on the basis that no new injuries are being claimed, and that the loss of income claims have now been withdrawn. Therefore, all major discovery is complete and the Note of Issue was properly filed.

"Where 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 A.D.3d 389, 390, 815 N.Y.S.2d 30 [1st Dept., 2006]; see 22 NYCRR § 202.21 [e]).

Uniform Rule 202.21(e)(1) provides the vehicle for vacating a note of issue and striking a case from the trial calendar. A note of issue and certificate of readiness will be vacated where there is still extensive discovery to be completed or where the certificate of readiness erroneously states that all discovery is complete (see *Carte v. Segall*, 134 A.D. 2d 396, 520 N.Y.S. 2d 943 [2nd. Dept. 1987] note of issue vacated where extensive discovery yet to be completed); *Ortiz v. Arias*, 285 A.D. 2d 390, 727 N.Y.S. 2d 879 [1st. Dept. 2001], vacating note of issue that contained erroneous facts including incorrect statement that discovery had been completed or waived). Vacatur of the Note of Issue and Certificate of Readiness is proper where the defendants demonstrate "unusual or unanticipated" circumstances or "substantial prejudice" sufficient to warrant post-note of issue discovery (*Desario v. SL Green Management LLC*, 118 A.D.3d 520987 N.Y.S.2d 151, 152 [2nd Dept., 2014] citing to, *Schroeder v. IESI N.Y. Corp.*, 24 A.D.3d 180, 805 N.Y.S.2d 79 [1st Dept., 2005]; 22 NYCRR 202.21[d]).

All major discovery has been completed. Further, the CPLR provides that claims for continuing special damages and disabilities may be served in a supplemental bill of particulars without leave of court "...at any time, but not less than thirty days prior to trial. Provided however that no new cause of action may be alleged or new injury claimed and that the other party shall upon seven days notice, be entitled to newly exercise any and all rights of discovery but only with respect to such continuing special damages and disabilities." (CPLR §3043). Plaintiff has not plead any new injuries and has since withdrawn her loss of income claims, therefore no further IME or EBT of Plaintiff is warranted. In accordance with the CPLR, Plaintiff's ability to claim special damages and disabilities is continuing and a failure to fully plead these special damages prior to the Note of Issue being filed is not a basis to refrain from filing the Note of Issue, as the CPLR clearly states that such special damages may be provided for in a Supplemental Bill of Particulars up to thirty days before trial. The Defendants have not shown any unusual or unanticipated circumstances, nor would the Defendants suffer any substantial prejudice if vacatur of the Note of Issue is denied.

Accordingly, it is hereby ORDERED that defendants' motion to vacate the Note of Issue and Certificate of Readiness filed on March 30, 2016 is denied.

ENTER:

MANUEL J. MENDEZ
J.S.C.



MANUEL J. MENDEZ
J.S.C.

Dated: June 28, 2016

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE