Landa v Town Sports Intl., LLC
2016 NY Slip Op 31306(U)
July 12, 2016
Supreme Court, New York County
Docket Number: 151374/2014
Judge: Manuel J. Mendez

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ PART 13
Justice

BENJAMIN LANDA,
Plaintiff,

-against-

TOWN SPORTS INTERNATIONAL, LLC, D/B/A NEW YORK SPORTS CLUB,
Defendant.

INDEX NO. 151374/2014
MOTION DATE 06/01/2016
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to 6 were read on this motion to vacate the note of issue.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4-5
Replying Affidavits	6

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is ordered that Defendant's motion to vacate the note of issue is denied.

This is an action to recover damages for personal injuries allegedly sustained by Plaintiff on December 21, 2013, in a trip and fall inside a gym owned and operated by Defendant. Plaintiff commenced this action by Summons and Complaint dated February 19, 2014, issue was joined, and the parties proceeded with discovery.

Plaintiff filed the Note of issue and Certificate of Readiness for Trial on November 30, 2015, indicating that all discovery had been completed and the matter was ready to be placed on the trial calendar. (Mot. Exh. E). Defendant now moves to vacate the Note of Issue. Plaintiff opposes the motion.

Defendant seeks an Order (1) vacating Plaintiff's Note of Issue and Certificate of Readiness, and striking the action from the trial calendar because there remains outstanding discovery, (2) compelling Plaintiff pursuant to CPLR §3124 to provide his experts' reports per the expert disclosures served on November 25, 2015, and directing Plaintiff to appear for several IME's if so demanded from Defendant, or (3) in the alternative, precluding Plaintiff's experts from testifying if the reports are not produced.

Defendant contends that on the same date the Note of Issue was filed, Plaintiff also served expert disclosures for three experts stating that the experts' reports would be provided under separate cover. Defendant states that the expert disclosures for (1) Dr. Goldman, economist; (2) Dr. Carfi, Physical Medicine and Rehabilitation Specialist (a.k.a "life care" expert); and (3) Dr. Schuster, Vocational Expert, give no reasonable detail of the subject matter expected to be testified to, and are therefore insufficient because said disclosures do not comport with CPLR 3101(d). Defendant argues that

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

because it does not know the subject matter that the experts will testify to, it cannot determine whether further IME's are necessary before trial, or whether or not it needs to retain its own vocational expert in order to defend the damages aspect of the case. Further, Defendant contends that Plaintiff never disclosed his intent to call a life care planner at trial, nor did he indicate that he intended to claim inability to work, thereby warranting a vocation expert, because Plaintiff testified at his deposition in January 2015 that he was working as a musician/guitarist after being out of work for four months following the accident.

In light of this, Defendant contends the Note of Issue should be stricken, Plaintiff should be compelled to turn over the experts' reports so Defendant can determine whether it wants to conduct additional IME's (according to the vocational and life care expected expert testimony), or in the alternative preclude Plaintiff from offering testimony from these experts at trial due to the insufficiency of the expert disclosures, because Defendant will be irreparably prejudiced otherwise.

Plaintiff opposes the motion stating that the disclosures were timely because under CPLR §3101(d) it is not required that actual expert reports must be exchanged. Plaintiff contends that the Defendant is not prejudiced because it has not been hindered in choosing its experts for trial, and because the Defendant has been aware of the claims being brought by Plaintiff and never requested any outstanding discovery it thought relevant during the multiple discovery conferences that were held. Further, Plaintiff's testimony during his deposition detailed the accident as well as his lost earnings claim. (Aff. In Opp. Exh. B). Plaintiff contends that the Defendant choosing not to identify further witnesses should not be held against the Plaintiff since the Defendant was well aware of the Note of Issue date and had multiple opportunities to pick and choose experts it desired.

"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]).

CPLR 3101(d)(1)(i) provides in part that, "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. However, where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on the grounds of noncompliance with this paragraph. In that instance, upon motion of any party, made before or at trial, or on its own initiative, the court may make whatever order may be just."

CPLR § 3101(a) allows for the "full disclosure of all evidence material and necessary in the prosecution or defense of an action regardless of the burden of proof." CPLR § 3124 grants the court the power to compel a party to provide discovery demanded.

Pursuant to CPLR § 3124, the Court may compel compliance upon failure of a party to provide discovery. It is within the Court's discretion to determine whether the materials sought are "material and necessary" as a legitimate subject of inquiry or are being used for purposes of harassment to ascertain the existence of evidence (see Roman Catholic Church of the Good Shepherd v. Tempco Systems, 202 A.D. 2d 257, 608 N.Y.S. 2d 647 [1st Dept., 1994]. "The words 'material and necessary' as used in section 3101 must be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist in preparation for trial by sharpening the issues and reducing delay and prolixity" (Kapon v. Koch, 23 N.Y.3d 32, 38, 11 N.E.3d 709, 988 N.Y.S.2d 559 [2014] citing to, Allen v. Crowell–Collier Publishing Co., 21 N.Y.2d 403, 406, 288 N.Y.S.2d 449, 452, 235 N.E.2d 430, 432 [1968]).

Plaintiff's expert disclosures do not attach the experts' reports, nor do the disclosures state with reasonable detail the subject matter each expert is expected to testify to, nor do the disclosures contain the substance of the facts and opinions upon which each expert will testify. This failure by Plaintiff, however, does not warrant preclusion of the expert testimony at trial, as is evidenced by the statute. The CPLR expressly states that a party's expert shall not be precluded solely upon the fact that an expert was retained within an insufficient period of time before the trial commences. Furthermore, Defendant was provided with notice of the Plaintiff's retention of these experts as of the date the Note of Issue was filed. Preclusion is not warranted.

Furthermore, there is no extensive discovery outstanding that would warrant striking of the Note of Issue. Defendant does not cite to any relevant authority in support of its contention that providing these expert disclosures at the time the Note of Issue was filed, warrants striking of the Note of Issue because it would unduly prejudice the Defendant. Nor is any authority cited in support of Defendant's contention that further IME's are warranted due to the testimony expected to be given by the experts at trial. There are no claims of new injuries, new surgeries, nor claims of new damages. Therefore, Defendant has not stated unusual or unanticipated circumstances, nor substantial prejudice warranting the Note of Issue to be vacated.

In fact, the one case that Defendant cites in support of its contention that preclusion of the experts' testimony is warranted, is unrelated to the facts in the instant motion. In Peguero v. 601 Realty Corp., 58 A.D.3d 556 [1st Dept. 2009], the Appellate Division, First Department stated that a Court is within its power to preclude a defendant from introducing its expert at trial when the expert disclosure was served a few days before the trial began, and this disclosure failed to provide the substance of the expert's anticipated testimony with "reasonable detail" as mandated by CPLR 3101(d)(1)(i). Here, the disclosures were served on the same date the Note of Issue was filed, unlike in Peguero where the disclosures were served just a few days prior to when the trial was set to begin.

Accordingly, it is ORDERED, that Defendant's motion to vacate the note of issue, compel Plaintiff to provide the experts' reports and direct Plaintiff to appear for IMEs upon Defendants' request, is denied.

Enter:

MANUEL J. MENDEZ
J.S.C.

Dated: July 12, 2016

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE