

**Salitan v Town of Yorktown**

2016 NY Slip Op 33172(U)

August 1, 2016

Supreme Court, Westchester County

Docket Number: Index No. 63261/2012

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

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  
-----X  
MICHAEL SALITAN, M.D.,

Plaintiff,

**DECISION & ORDER**

-against-

Index No. 63261/2012  
Motion Date: July 22, 2016

THE TOWN OF YORKTOWN,

Seq. No. 1

Defendant.  
-----X

LEFKOWITZ, J.

The following papers were read on this motion by defendant for an order pursuant to 22 NYCRR 202.21(e), vacating the note of issue and certificate of readiness filed by plaintiff, directing that defendant's engineering and appraisal experts be permitted to inspect plaintiff's property in accordance with an agreement between counsel, compelling plaintiff to produce documents responsive to defendant's March 10, 2016 supplemental discovery demands, or alternatively, seeking an extension of time to file a motion for summary judgment until 120 days after the completion of all outstanding discovery in this matter.

Order to Show Cause - Affirmation in Support - Affirmation of Good Faith - Exhibits

Upon the foregoing papers, this motion is determined as follows:

Plaintiff alleges that in the Fall of 2009, defendant's agent WP Sells, an engineering company, wrongfully trespassed onto plaintiff's premises at defendant's direction to survey the land for a proposed construction project. It is alleged that plaintiff was informed at a January 2010 public meeting that the roadbed, the culvert, and drainage pipes beneath the road were in need of significant repairs. Plaintiff allegedly discovered an illegal drainage system, which diverted water through a pipe onto the property line, causing a large volume of water to flow onto the premises and erode plaintiff's land, as well as sweeping a large volume of sediment into the stream and pond on the premises (Defendant's Exhibit A, Summons and Complaint).

On June 10, 2015, a preliminary conference order was issued setting forth a discovery schedule. The order provides that defendant was to inspect the premises and the sewer gate. Demands for discovery and inspection were to be served on or before July 10, 2015 and responses to the demands were to be served within thirty days of receipt of the demands. Party

depositions were to be completed on or before December 30, 2015 and nonparty depositions were to be completed on or before January 30, 2016. All discovery was to be completed by May 6, 2016. A February 16, 2016 compliance conference order directed that defendant's post deposition demands were to be served on or before March 1, 2016 with responses due by April 1, 2016. Defendant's deposition was to be completed on February 26, 2016. Plaintiff's post deposition demands were to be served on or before March 10, 2016 with responses due by April 15, 2016. An inspection of the premises was to be completed by April 25, 2016. The order provides that any disclosure demands not raised at the compliance conference were deemed waived.

A trial readiness order was issued on May 9, 2016 and plaintiff was directed to file a note of issue within twenty days of entry of the order. On May 20, 2016, plaintiff's counsel filed a note of issue together with an addendum in the form of a May 13, 2016 letter executed by plaintiff's counsel and defendant's counsel regarding the completion of discovery (hereinafter referred to as "May 13, 2016 stipulation" or "the stipulation"). The May 13, 2016 stipulation provided additional time for the parties to complete a nonparty deposition, exchange documents responsive to a subpoena served on the nonparty, provide discovery responses, serve expert witness disclosures, and complete an inspection of the premises. The stipulation provides for several items of discovery to be provided on or before June 30, 2016. The stipulation also provides that the parties were to submit joint letters to the Compliance Part, requesting an additional thirty days to submit dispositive motions and an additional sixty days to submit answering and reply papers, extending the return date of any dispositive motion to November 20, 2016 (Defendant's Exhibit B, Note of Issue and May 13, 2016 stipulation).

Defendant now moves to vacate the note of issue and certificate of readiness, arguing a material fact in the certificate of readiness is incorrect, discovery remains outstanding, and the outstanding discovery is necessary to the defense of this matter. Defendant argues its hydrology expert and potential real estate appraisal expert have not inspected the premises. The parties have not conducted a nonparty deposition and documents within the control of the nonparty witness have not been produced. Defendant argues plaintiff responded to defendant's discovery demands dated March 10, 2016, but failed to produce responsive documents, videos and photographs, most of which were referenced in plaintiff's deposition testimony. The motion is unopposed.

The Court issued a trial readiness order on May 9, 2016, directing plaintiff to serve and file a note of issue and certificate of readiness within twenty days. The trial readiness order provides "all discovery has been completed or waived and the matter is ready for trial." Any motion for summary judgment was to be served via NYSCEF within sixty days following the filing of the note of issue, opposition papers were to be served within thirty days of service of motion papers, and reply papers were to be served within ten days following service of

opposition papers.<sup>1</sup> Plaintiff filed a note of issue and certificate of readiness on May 20, 2016. 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]. Within twenty days after service of a note of issue, a party 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 (22 NYCRR 202.21[e]).

Here, the Court issued a preliminary conference order and a compliance conference order, directing that the parties complete depositions, paper discovery and an inspection of the premises. As noted by the Court of Appeals, “if the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity” (*Kihl v Pfeffer*, 94 NY2d 118 [1999]; *see also Gibbs v St. Barnabas Hospital*, 16 NY3d 74 [2010]). “The failure to comply with deadlines not only impairs the efficient functioning of the courts and the adjudication of claims, but it places jurists unnecessarily in the position of having to order enforcement remedies to respond to the delinquent conduct of members of the bar, often to the detriment of the litigants they represent. Chronic non-compliance with deadlines also breeds disrespect for the dictates of the Civil Practice Law and Rules and a culture in which cases can linger for years without resolution” (*Gibbs v St. Barnabas Hospital*, 16 NY3d 74 [2010]). Moreover, the Court has broad discretion in the supervision of discovery and may exercise its discretion in denying an application to vacate a note of issue based upon its determination that, pursuant to a compliance conference order, the additional discovery sought by the plaintiff was waived (*Accent Collections, Inc. v Cappelli Enterprises*, 94 AD3d 1027 [2012]).

It is incumbent on the parties to diligently pursue discovery and to comply with Court orders directing that discovery be completed. After failing to comply with many of the Court’s directives in the preliminary conference order and the compliance conference order, the parties entered into the May 13, 2016 stipulation, agreeing to conduct discovery after the trial readiness order was issued. The parties relied on this agreement after the note of issue was filed. In defense counsel’s affirmation of good faith, counsel states that both sides agreed to certain dates for the completion of discovery despite the May 20, 2016 deadline for filing the note of issue. Such side agreements are not countenanced by the Court and undermine the purpose of a trial readiness order and note of issue. When parties agree to continue discovery after the filing of the trial readiness order, they do so without judicial superintendence. Parties cannot use a stipulation

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<sup>1</sup> The Court so ordered a stipulation dated June 10, 2016, in which the parties agreed that the deadline to file and serve their respective motions for summary judgment was extended to August 19, 2016

entered into by counsel four days after a trial readiness order was issued as a basis to strike the note of issue. This is especially so where, as here, defendant fails to set forth a justifiable excuse for the failure to diligently pursue paper discovery, an inspection of the premises, and a nonparty deposition. It is unclear whether a subpoena was even served on the nonparty, as neither a subpoena nor an affidavit of service were submitted on this motion. The nonparty deposition was not addressed in the conference orders. The February 16, 2016 compliance conference order states “any disclosure demands not raised at the compliance conference are deemed waived.” The parties fail to provide any explanation as to why the other items of discovery were not completed within the time frames set forth in the court orders. Furthermore, when discovery was not completed in accordance with the court orders, the parties failed to timely seek court intervention by requesting a conference or making a motion to compel further discovery.

Both parties failed to comply with Court ordered deadlines. Defendant’s counsel fails to demonstrate on this motion that he diligently pursued discovery by following up with plaintiff’s counsel, by seeking Court intervention, or by making a motion. Under these circumstances, the Court is not inclined to vacate the note of issue. Insofar as certain items of discovery were not completed prior to this case being certified as trial ready, such discovery is deemed waived. The movant fails to demonstrate on this motion that the case is not ready for trial and the Court finds vacatur of the note of issue is not warranted (22 NYCRR 202.21[e]). In light of this determination, the Court need not consider the branch of the motion seeking an order that defendant’s time to file a summary judgment motion be extended until 120 days following the completion of discovery.

In view of the foregoing, it is

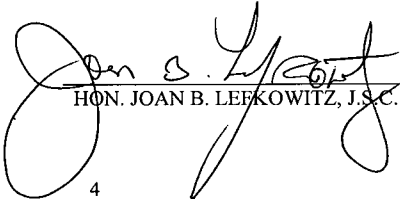
ORDERED that defendant’s motion for an order vacating the note of issue and compelling plaintiff to provide further discovery is denied; and it is further

ORDERED that the branch of the motion seeking an order extending defendant’s time to file a summary judgment motion until 120 days following the completion of discovery is denied as moot; and it is further

ORDERED that defendant’s counsel shall serve a copy of this order with notice of entry on plaintiff’s counsel within ten days of entry.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York  
August 1, 2016

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

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