

**Nicholas v Morgan**

2017 NY Slip Op 31208(U)

June 5, 2017

Supreme Court, New York County

Docket Number: 156608/2015

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED, J.S.C.
Justice

PART 2

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IRIS NICHOLAS,
Plaintiff,

INDEX NO. 156608/2015

MOTION DATE

MOTION SEQ. NO. 003

- v -

STANFORD MORGAN, ADVANCE TRANSIT CO., INC., NEW YORK CITY TRANSIT AUTHORITY, KITT HAMILTON

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number were read on this application to/for Strike Note o

Upon the foregoing documents, it is ordered that the motion is granted.

Handwritten note: Judge - Please re-sign. I will fix in double space. TX

Defendants Advance Transit Co., Inc., Stanford A. Morgan and New York City Transit Authority ("movants") move for an order: 1) striking plaintiff Iris Nicholas' note of issue and vacating her statement of readiness; 2) extending the time for all parties to file motions for summary judgment; and 3) granting such other relief as this Court deems just and proper. No opposition has been submitted to the motion. After a review of the motion, as well as all relevant statutes and case law, this Court grants the motion.

This case arises from a motor vehicle accident in New York County in which plaintiff was allegedly injured on November 7, 2014. Ex. A. Plaintiff commenced the captioned action alleging negligence against movants and defendant Kitt Hamilton by filing a summons and verified complaint on July 2, 2015. Ex. A. Movants joined issue by service of their verified answer on or about July 27, 2015. Ex. B. In her bill of particulars dated October 6, 2015, plaintiff again alleged, inter alia, that she was injured due to the negligence of the defendants. Ex. C.

A preliminary conference was held before this Court (Stallman, J.) on March 17, 2016. Ex. D. At the preliminary conference, plaintiff's deposition was scheduled for July 12, 2016 and defendants' depositions were scheduled for July 19, 2016. Id. The preliminary conference order specifically directed that plaintiff was to appear for an independent medical examination within 60 days after the completion of her deposition. Id.

On June 22 and July 12, 2016, movants served demands on plaintiff seeking duly executed HIPAA-compliant authorizations for medical, union, insurance, and pharmacy records. Ex. E. On July 27, 2016, movants served a notice of physical examination demanding that plaintiff appear for independent medical examinations by, inter alia, Sheeraz Qureshi, M.D., a spinal specialist. Ex. F.

On September 8, 2016, a compliance conference was held at which this Court (Stallman, J.) directed, inter alia, that plaintiff respond to movants' June 22 and July 12, 2016 demands within 30 days and that IMEs were to be completed within 45 days. Ex. G.<sup>1</sup>

Plaintiff filed a note of issue and certificate of readiness on May 9, 2017. Ex. H. In her certificate of readiness, plaintiff represented, inter alia, that all physical examinations were completed, all medical reports were exchanged, and that all discovery was complete. Id. Plaintiff further represented that there were no outstanding requests for discovery. Id.

22 NYCRR § 202.21(a) provides that “[n]o action or special proceeding shall be deemed ready for trial or inquest unless there is first filed a note of issue accompanied by a certificate of readiness . . .” Subdivision (e) of 22 NYCRR 202.21, entitled “Vacating note of issue,” provides, in pertinent part, that:

[w]ithin 20 days after service of a note of issue and certificate of readiness, any party to the action or special proceeding, 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, or that the certificate of readiness fails to comply with the requirements of this section in some material respect. If the motion to vacate a note of issue is granted, a copy of the order vacating the note of issue shall be served on the clerk of the trial court.”

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<sup>1</sup> Although this Court notes that the affidavits of service annexed to the movants' discovery notices dated June 22, July 12, and July 27, 2016 are blank, which omission would typically warrant the denial of a motion of this kind, it is evident from the compliance conference order that these demands had been received by plaintiff. However, this Court strongly urges counsel to exercise great effort to avoid this type of omission in the future.

Plaintiff's note of issue must be stricken since it is clear that it is based upon a certificate of readiness which contains an "erroneous fact, such as that discovery has been completed." *Savino v. Lewittes*, 160 A.D.2d 176, 177 (1<sup>st</sup> Dept. 1990); see *Club Italia, Inc. v. Italian Fashion Trading, Inc.*, 268 A.D.2d 219 (1<sup>st</sup> Dept. 2000). Here, as noted above, movants' attorney made requests on plaintiff's counsel for additional authorizations and an IME which went unanswered. Exs. E and F. Such discovery remains outstanding despite the fact that plaintiff was ordered to provide the same in the compliance conference on September 8, 2016. Ex. G. Therefore, the following representations by plaintiff's counsel in the certificate of readiness are clearly false: all physical examinations were completed, all medical reports were exchanged, all discovery was complete, and there were no outstanding requests for discovery. Ex. H.

Therefore, in accordance of the foregoing, it is hereby:

ORDERED that the motion by defendants Advance Transit Co., Inc., Stanford A. Morgan and New York City Transit to strike the note of issue is granted to the extent that the note of issue and certificate of readiness are hereby vacated and the case is stricken from the trial calendar; and it is further,

ORDERED that within thirty (30) days from the entry of this order, defendants Advance Transit Co., Inc., Stanford A. Morgan and New York City Transit shall serve a copy of this order with notice of entry on all parties and upon the Clerk of the Trial Support Office, who is hereby directed to strike the case from the trial calendar and make all required notations thereof in the records of the court; and it is further,

ORDERED that the time in which the parties may move for summary judgment is hereby extended until 60 days after a proper note of issue is filed; and it is further,

ORDERED that the parties shall appear for a compliance conference on October 17, 2017 at 80 Centre Street, Room 280, at 2:30 p.m.; and it is further,

ORDERED that this constitutes the decision and order of the Court.

6/5/2017  
DATE

  
HON. KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input checked="" type="checkbox"/>	GRANTED			<input type="checkbox"/>	GRANTED IN PART		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER		
	<input type="checkbox"/>	DO NOT POST			<input type="checkbox"/>	FIDUCIARY APPOINTMENT		<input type="checkbox"/>
								REFERENCE