

de Meza v DeRosa Bldrs., Inc.
2017 NY Slip Op 33417(U)
November 6, 2017
Supreme Court, Westchester County
Docket Number: Index No. 65396/2016
Judge: Joan B. Lefkowitz
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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
MATILDE LUCANA de MEZA and
ALEJANDRO MEZA,

Plaintiffs,

-against-

DECISION & ORDER

Index No. 65396/2016

Motion Date: Nov. 6, 2017

DeROSA BUILDERS, INC., SCHINDLER
ELEVATOR CORPORATION and STEPPING STONES
ASSOCIATES, L.P.,

Seq. No. 2

Defendants.

-----X
LEFKOWITZ, J.

The following papers were read on this motion by plaintiffs, Matilde Lucana de Meza and Alejandro Meza (hereinafter "plaintiffs") for an order: (1) vacating the note of issue; (2) compelling defendants to permit plaintiffs, their attorneys and/or another acting on their behalf, to enter the premises at 125 Lake Street, White Plains, New York, for the purpose of inspecting, measuring, surveying, sampling, testing, photographing and/or recording by motion picture or otherwise, the property and equipment that is the subject of the lawsuit, including the elevator in question, within twenty (20) days after the hearing on this motion; and (3) for such other and further relief as the Court deems just and proper.

- Order to Show Cause – Affirmation in Support – Affirmation of Good Faith –
- Exhibits A-G
- Affirmation in Opposition – Exhibits A – Affidavit of Service

Upon the foregoing papers and upon the proceedings held on November 6, 2017, the motion is determined as follows:

This is an action for personal injuries stemming from a trip and fall, occurring on March 7, 2015, when the floor of the elevator in an apartment building allegedly failed to level properly with the hallway floor as plaintiff Matilde Lucana de Meza was entering the elevator. Plaintiffs commenced this action by filing of a summons and complaint on or about October 13, 2016. Plaintiffs filed an amended complaint on or about July 13, 2017 (*see* Defendants' Exhibit A). On July 24 and 27, 2017, defendant Schindler Elevator Corporation (hereinafter "Schindler") and defendants DeRosa Builders, Inc. (hereinafter "DeRosa") and Stepping Stones Associates, L.P. (hereinafter "Stepping Stones"), filed their respective answers with cross-claims (*see* Defendants' Exhibit B). Defendant DeRosa is the managing agent for defendant Stepping Stones, the owner of the apartment building at 125 Lake Street in White Plains, New York, and

defendant Schindler was responsible for repairing and maintaining the elevators at the apartment building.

On September 25, 2017, plaintiffs served a Notice to Permit Entry in order to conduct an inspection of the subject elevator on October 10, 2017. Plaintiffs allege that on September 27, 2017, two days after service of their notice of inspection, a compliance conference was held, at which time the Court deemed discovery completed with the exception of the inspection. Plaintiffs contend that the Court indicated at that time that the inspection would be permitted to go forward. Counsel for Schindler, who appeared at the compliance conference, did not object or express any issues with the inspection notice, while counsel for DeRosa and Stepping Stones failed to appear.

Plaintiffs filed the note of issue on October 5, 2017. Plaintiffs allege that they were served on that same day, after they had electronically filed their note of issue, with the response by defendants DeRosa and Stepping Stones, objecting to the inspection. Later on that day of October 5, 2017, plaintiffs sent a letter responding to the objections of defendants DeRosa and Stepping Stones, contending that the inspection should go forward since defendants' counsel had failed to appear at the conference at which the inspection was discussed, no objection was raised by counsel for defendant Schindler at the conference, and the Notice to Permit Entry had been served prior to the filing of the Note of Issue. Plaintiffs indicated that they intended to appear for the inspection on October 10, 2017, as originally noticed.

Plaintiffs state that on October 10, 2017, plaintiffs' counsel and consultant appeared for the inspection of the subject elevator but were denied access to the elevator and escorted out of the building by the building manager. No attorneys other than plaintiff's counsel were present.

The parties then appeared for an immediate conference, after which the Court issued the briefing schedule for the instant motion. Thereafter, defendants DeRosa and Stepping Stones filed their motion for summary judgment, which motion is returnable on November 17, 2017.

By this motion, plaintiffs seek an order vacating the note of issue and compelling an inspection of the subject elevator in defendants' building. Plaintiffs argue that they would be prejudiced by having to oppose a motion for summary judgment without the requested discovery and that defendants DeRosa and Stepping Stones should be compelled to produce the discovery requested and to allow the inspection.

In opposition, defendants DeRosa and Stepping Stones argue that they objected to the inspection because all pretrial discovery was deemed completed at the September 27, 2017 conference, after which the Court issued a Trial Readiness Order. Defendants DeRosa and Stepping Stones also argue that plaintiffs have not offered any reasonable explanation as to their need to inspect the elevator over two years and seven months after plaintiff's accident and that the inspection could not possibly lead to the discovery of material evidence in this case. Finally, defendants DeRosa and Stepping Stones contend that plaintiffs have failed to demonstrate that any unusual or unanticipated circumstances developed subsequent to the filing of the note of issue, as would warrant striking of the note of issue, given that plaintiffs have been aware since the filing of their complaint in October of 2016 of the need for an inspection of the elevator and well before the filing of the note of issue.

Defendant Schindler has not filed any written opposition to this motion.

Analysis

“The purpose of a note of issue and certificate of readiness is to assure that cases which appear on the court’s trial calendar are, in fact, ready for trial” (*Tirado v Miller*, 75 AD3d 153, 156 [2d Dept 2010]). Once a note of issue has been filed and discovery presumably completed, the applicable standards for allowing additional discovery are governed by Uniform Rules for Trial Courts [22 NYCRR] § 202.21(d), (e). One method of obtaining post-note discovery is to vacate the note of issue within twenty days of its service pursuant to 22 NYCRR § 202.21(e), by merely showing that discovery is incomplete and the matter is not ready for trial (*Tirado v Miller*, 75 AD3d at 157). The second method, beyond that twenty days, requires that the movant, pursuant to 22 NYCRR § 202.21(d), meet a more stringent standard and demonstrate “unusual or unanticipated circumstances and substantial prejudice” absent the additional discovery (*Id.*).

The record on the present motion demonstrates that discovery was not complete when the note of issue was filed. Notably, on September 25, 2017, plaintiffs served a Notice to Permit Entry to conduct an inspection on October 10, 2017, a date which was after the filing of the note of issue. Defendants did not allow the inspection to proceed on October 10, 2017, and to date, have not permitted plaintiffs to inspect the subject elevator. Since plaintiffs moved to vacate the note of issue within the twenty-day time prescribed for doing so pursuant to 22 NYCRR 202.21(e), they were required only to demonstrate why the case was not ready for trial, and were not required to establish that additional discovery was necessary because unusual or unanticipated circumstances had developed subsequent to the filing of the note of issue (*see* 22 NYCRR 202.21[d], [e]; *Jacobs v Johnson*, 97 AD3d 538 [2d Dept 2012]; *Mosley v. Flavius*, 13 AD3d 346 [2d Dept 2004]; *Rizzo v DeSimone*, 287 AD2d 609, 610 [2d Dept 2001]). As plaintiff demonstrated that the case was not ready for trial, plaintiffs’ motion to vacate the note of issue is granted (*see* 22 NYCRR 202.21[e]; *Jacobs v Johnson*, 97 AD3d at 538; *Gallo v SCG Select Carrier Group, L.P.*, 91 AD3d 714 [2d Dept 2012]; *Tirado v Miller*, 75 AD3d at 157). Lastly, as the Court finds that the inspection sought could lead to the discovery of information bearing on plaintiffs’ claims, the motion to compel the inspection of the subject elevator is granted.

In view of the foregoing, it is

ORDERED that the branch of the motion by plaintiffs seeking an order vacating the note of issue is granted and the note of issue and certificate of readiness are stricken and the Trial Readiness Order is vacated, in contemplation of additional discovery; and it is further

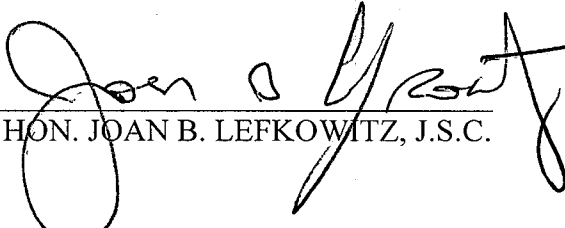
ORDERED that the branch of the motion by plaintiffs seeking an order compelling defendants to permit plaintiffs to enter the premises at 125 Lake Street, White Plains, New York, for the purpose of inspecting the property and equipment that is the subject of the lawsuit, including the elevator in question, is granted and such inspection to be completed on or before December 1, 2017; and it is further

ORDERED that the parties are directed to appear for a conference in the Compliance Part, Room 800, on December 4, 2017, at 9:30 A.M., at which time it is contemplated that all discovery will be completed and a Trial Readiness Order shall issue; and it is further

ORDERED that plaintiffs shall serve a copy of this order on all parties with notice of entry within ten (10) days of entry and shall file proof of service on the NYSCEF website within five (5) days of service.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
November 6, 2017



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

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