

Barker v LC Carmel Retail LLC
2018 NY Slip Op 33410(U)
December 31, 2018
Supreme Court, New York County
Docket Number: 159533/2016
Judge: David Benjamin Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY****PRESENT: HON. DAVID BENJAMIN COHEN PART IAS MOTION 58EFM***Justice*

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INDEX NO. 159533/2016

JAMES BARKER,

Plaintiff,

MOTION DATE 08/10/2018,
08/23/2018

- v -

MOTION SEQ. NO. 002 003

LC CARMEL RETAIL LLC, CVS HEALTH INC.

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 48, 49

were read on this motion to/for

VACATE/STRIKE - NOTE OF ISSUE/JURY
DEMAND/FROM TRIAL CALENDAR

The following e-filed documents, listed by NYSCEF document number (Motion 003) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 50, 51, 52

were read on this motion to/for

VACATE/STRIKE - NOTE OF ISSUE/JURY
DEMAND/FROM TRIAL CALENDAR

Upon the foregoing documents:

In this personal injury action, defendant CVS Health Inc. (CVS) moves in motion sequence number 002, pursuant to CPLR 3124 and 3126 and Uniform Rule Section 202.21, (a) to vacate the note of issue (NOI) and certificate of readiness and strike this matter from the trial calendar; or in the alternative to (b) compel plaintiff to comply with the July 11, 2018 order in full; (c) compel plaintiff to appear for his court ordered further deposition concerning his recent knee surgery and medical treatment since his initial deposition on September 28, 2018; (d) compel plaintiff to appear for his neurological independent medical examination on October 25, 2018; (e) compel plaintiff to respond to defendants' Fourth Supplemental Demand for Discovery and Inspection dated August 8, 2018; (f) extend the time for defendants to pursue related

discovery arising out of plaintiff's responses to outstanding written discovery demands; and (g) extend the time to file a motion for summary judgment.

In motion sequence number 003, defendant LC Carmel Retail, LLC (LC Carmel) moves, pursuant to CPLR 3126, to vacate the note of issue (NOI) and certificate of readiness and strike this matter from the trial calendar; (b) preclude plaintiff from testifying or offering any medical evidence regarding all alleged injuries; (c) extend time for the defendants to pursue related discovery arising out of plaintiff's responses to the outstanding written discovery demands; and (d) extend the time for defendants to file a motion for summary judgment.

Both motions are opposed by plaintiff James Barker (plaintiff or Barker).

I. Background and Procedural History

Plaintiff alleges that, on June 15, 2016, he tripped and fell from the sidewalk to the parking lot of the CVS located at 1605 Route 6, Carmel, NY 10512. The summons and complaint in this instant matter were filed on November 11, 2016 and issue was joined by defendant CVS on or about January 5, 2017, and by defendant LC Carmel on or about January 30, 2017.

A preliminary conference order was issued on September 6, 2017 (NYSCEF Doc. No. 15) followed by compliance conference orders spanning the period from January 10, 2018 through and including November 14, 2018 (NYSCEF Doc. Nos. 17, 19, 20 and 53). The parties were first directed on January 10, 2018 to file the NOI by June 8, 2018, then on April 18, 2018 to file by July 25, 2018, and more recently on July 11, 2018, this court ordered the NOI to be filed on or before December 31, 2018 (NYSCEF Doc. No. 20).

The NOI was filed on August 6, 2018 by plaintiff's attorney (NYSCEF Doc. No. 21). Defendant CVS's motion was filed on August 9, 2018 and LC Carmel's motion was filed on August 23, 2018.

II. Analysis

A. Contentions

Defendant CVS argues that significant essential discovery remains outstanding, including plaintiff's further deposition concerning his recent right knee surgery, an independent neurological medical examination and post-deposition discovery.

CVS points out that, in his response to the Demand for Bill of Particulars (BOP) dated January 11, 2017, plaintiff alleges injuries to his right shoulder and arm, right knee and right ankle. However, on December 6, 2017, Barker testified at his examination before trial (EBT) that he also sustained injuries to his lower back, which his doctor advised him were causally related to the accident.

CVS highlights that the following discovery demands are still outstanding: defendant's May 29, 2018 Notice of Physical Examination scheduling an examination before neurologist Adam Bender, M.D. on August 10, 2018 (the neurological IME); defendant's June 11, 2018 Second Supplemental Demand for Discovery and Inspection (D & I Demand) seeking an authorization to obtain various medical records; its Third Supplemental D & I Demand dated July 10, 2018 seeking an authorization to obtain records from plaintiff's surgeon who performed an arthroscopic surgery to his right knee in April 2018; and defendant's Fourth Supplemental D & I Demand dated August 8, 2018 in connection with a prior knee surgery.

Defendant argues that plaintiff served the NOI on or about August 6, 2018, notwithstanding the court's July 11, 2018 compliance conference order extending the time to file

the NOI to December 31, 2018, and directing Barker to appear for the neurological IME on August 10, 2018, and for a further deposition on or before September 28, 2018; to respond to CVS's demands dated June 11, 2018 and July 10, 2018, and to provide authorizations regarding prior related injuries, if related, within 30 days.

Based on the foregoing, defendant argues that plaintiff incorrectly stated in the certificate of readiness that discovery was completed. Defendant requests a fair opportunity to conduct all relevant discovery to adequately defend its case, or in the alternative, requests that the court set forth a schedule for the remaining discovery, and that the time for dispositive motions be extended 60 days after completion of discovery.

Defendant LC Carmel adopts and reiterates the arguments and statements of fact and law raised by CVS and the latter's exhibits annexed to its motion papers. LC Carmel argues that the outstanding discovery, coupled with the inaccurate statements contained in the statement of readiness, should preclude plaintiff from testifying and offering any medical evidence with regard to injuries, and that plaintiff's action should be stricken from the trial calendar.

Plaintiff argues in opposition that he responded to CVS's Second and Third Supplemental D & I Demands and attaches the corresponding responses as exhibits to his papers. Plaintiff points out that CVS's Fourth D & I Demand was served for the first time one day prior to its instant motion, and, therefore, CVS's argument that plaintiff failed to comply therewith is disingenuous. Notwithstanding the foregoing, plaintiff served its response on August 24, 2018 and attaches a copy in its exhibits.

As pointed out by defendants, plaintiff concedes that Barker's further deposition concerning his right knee surgery and further medical treatment since his first deposition was

scheduled for September 28, 2018, and the neurological IME was scheduled for October 25, 2018.

In light of the foregoing, plaintiff requests that the court exercise its discretion, pursuant to 22 NYCRR 202.21 et seq., to allow the case to proceed without the striking of plaintiff's NOI, as there is ample time to conduct the deposition and post-deposition discovery, if any.

Finally, plaintiff argues that CVS has not shown any good cause why an extension of time in which to move for summary judgment should be warranted. Plaintiff points out that his liability testimony was completed on December 6, 2017, LC Carmel's testimony was completed on March 5, 2018, and CVS's testimony was completed on May 16, 2018, as this is a premises liability case where any dispositive motion would be on the issue of liability. Plaintiff thus contends that the matter should remain on the trial calendar while discovery is completed.

In reply, defendant CVS argues that plaintiff admits in his opposition that the NOI was filed prematurely, and concedes that there were material misstatements in the certificate of readiness. Although plaintiff contends that he has now responded to all outstanding discovery demands, he concedes that additional discovery may be required following plaintiff's further deposition, as well as upon the receipt of records pursuant to the authorization provided shortly before the filing of the NOI.

B. Discussion

According to the Uniform Civil Rules for the Supreme Court and the County Court:

“(e) Vacating note of issue. Within 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”

(22 NYCRR 202.21[e]).

The note of issue should be vacated where a party moves within the time prescribed, pursuant to 22 NYCRR 202.21[e], and demonstrates that the certificate of readiness contains erroneous facts, including an incorrect statement that discovery has been completed or waived (*Pua v Lam*, 155 AD3d 487, 487 [1st Dept 2017]; *Matos v City of New York*, 154 AD3d 532, 533 [1st Dept 2017]; *Ortiz v Arias*, 285 AD2d 390, 390 [1st Dept 2001]; *Cromer v Yellen*, 268 AD2d 381, 381 [1st Dept 2000]).

The court notes that plaintiff responded to CVS's Second and Third Supplemental D & I Demands and that the certificate of readiness indicates that all discovery proceedings were completed except for Barker's further deposition scheduled for September 28, 2018.

The record, however, shows that additional discovery was still underway as of the date the NOI was filed, as Barker's neurological IME was also outstanding. This court's July 11, 2018 order directed plaintiff to appear for the neurological IME on August 10, 2018, however the parties appear to have rescheduled the examination to October 28, 2018.

While plaintiff annexed his response to CVS's Fourth Supplemental D & I Demand to its motion papers, no updates were provided by the parties as to the completion of the further EBT and neurological IME.

In light of the foregoing, the recital in the certificate of readiness that discovery is complete was incorrect, thus necessitating the granting of defendants' motions to the extent of vacating the NOI (*Munoz v 147 Corp.*, 309 AD2d 647, 648 [1st Dept 2003]; *Ortiz v Arias*, 285 AD2d at 390).

IV. Conclusion

Accordingly, it is

ORDERED that the motion of defendant CVS Health Inc. is granted, and the note of issue is vacated and the case is stricken from the trial calendar; and it is further

ORDERED that the motion of defendant LC Carmel Retail, LLC is granted to the extent that the note of issue is vacated and the case is stricken from the trial calendar; and it is further

ORDERED that all further discovery in this matter shall be completed within 60 days from the date hereof; and it is further

ORDERED that the parties shall appear for a conference in Room 574, 111 Centre Street, on March 6, 2019 at 9:30 a.m. with a copy of this order; and it is further

ORDERED that, within 15 days from the entry of this order, movants shall serve a copy of this order with notice of entry on all parties and upon the Clerk of the Trial Support Office (Room 158), 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, within 15 days from completion of discovery as hereinabove directed, the plaintiff shall cause the action to be placed upon the trial calendar by the filing of a new note of issue and statement of readiness and payment of the fee therefor.

12/31/2018

DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

☐

CASE DISPOSED

☒

GRANTED

☐

DENIED

☐

SETTLE ORDER

☐

INCLUDES TRANSFER/REASSIGN

☒

NON-FINAL DISPOSITION

☐

GRANTED IN PART

☐

SUBMIT ORDER

☐

FIDUCIARY APPOINTMENT

☐

OTHER

☐

REFERENCE

DAVID BENJAMIN COHEN, J.S.C.

HON. DAVID B. COHEN
J.S.C.