Reyes v 1890 Andrews Ave. Hous. Dev. Fund Corp.
2018 NY Slip Op 33989(U)
February 9, 2018
Supreme Court, Bronx County
Docket Number: 22854/2016E
Judge: Lucindo Suarez

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART LPM

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GUILLERMO REYES,

Plaintiff,

- against -

1890 ANDREWS AVENUE HOUSING DEVELOPMENT FUND CORPORATION, MORRIS HEIGHTS RESTORATION LLC, RENTAL & MANAGEMENT ASSOCIATES CORP. and MDG DESIGN & CONSTRUCTION LLC,

Defendants.

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MDG DESIGN & CONSTRUCTION LLC,

Third-Party Plaintiff,

- against -

FAUSTO RENOVATIONS CORP.,

Third-Party Defendant.

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1890 ANDREWS AVENUE HOUSING DEVELOPMENT FUND CORPORATION, MORRIS HEIGHTS PRESERVATION LP S/I/H/A MORRIS HEIGHTS RESTORATION LLC and RENTAL & MANAGEMENT ASSOCIATES CORP.,

Second Third-Party Plaintiffs,

- against -

FAUSTO RENOVATIONS CORP.,

Second Third-Party Defendant.

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DECISION AND ORDER

Index No. 22854/2016E

Third-Party Index No. 43298/2016E

Second Third-Party Index No. 43322/2016E

PRESENT: Hon. Lucindo Suarez

Upon defendants' notice of motion dated January 9, 2018 and the affirmations and exhibits submitted in support thereof; plaintiff's affirmation in opposition dated January 24, 2018 and the exhibits submitted therewith; defendants' reply affirmation dated February 5, 2018 and the exhibit submitted therewith; and due deliberation; the court finds:

Defendants move to vacate the note of issue pursuant to 22 NYCRR § 202.21(e) and strike the action from the trial calendar; compel discovery pursuant to CPLR 3124 or preclude plaintiff from offering evidence at the time of trial; and extend their time to move for summary judgment. Plaintiff filed the note of issue and certificate of readiness with the court on December 21, 2017 and certified that discovery was complete. Defendants, though, contend that discovery remains outstanding. Plaintiff provided incomplete responses to their August 28, 2017 discovery demands. He has yet to appear for a medical examination or for a vocational examination. Defendants claim they are entitled to a further deposition and a supplemental medical examination based on a second supplemental bill of particulars served November 9, 2017. In addition, defendants' witnesses have not been deposed.

Plaintiff argues that defendants have had ample time to complete discovery. He served the second supplemental bill of particulars six weeks before he filed the note of issue on December 21 but defendants did not request additional discovery until January 8. Plaintiff objected to several items in defendants' demands but they did not raise an issue concerning his responses until they filed the instant motion. Defendants also failed to inform the court that their witness was deposed on October 10. The witness admitted that defendants owned the premises or served as the general contractor on the project. As such, no further depositions were needed.

Defendants in reply do not dispute that plaintiff deposed their witness and do not oppose plaintiff waiving the depositions of defendants 1890 Andrews Avenue Housing Development Fund Corporation and Morris Heights Restoration, LLC so long as those parties are not precluded from

testifying at trial. They state that medical authorizations and a further deposition and medical examination is essential for their defense. As for the employment authorizations, they request an affidavit stating that plaintiff cannot recall any contact information for those employers.

"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, 815 N.Y.S.2d 30 (1st Dep't 2006) (internal citation omitted). The motion to vacate the note of issue is denied as defendants have not demonstrated that the certificate of readiness contained erroneous facts when it was filed. *See Suarez v. Shapiro Family Realty Assoc., LLC*, 149 A.D.3d 526, 53 N.Y.S.3d 23 (1st Dep't 2017); *Beni v. Green 485 TIC LLC*, 144 A.D.3d 613, 41 N.Y.S.3d 427 (1st Dep't 2016). Plaintiff waived his right to conduct additional depositions when he filed the note of issue. Defendants' reply revealed that Dr. Eial Faierman conducted an independent orthopedic examination on October 27. Plaintiff did not state whether he appeared for a vocational examination but defendants have not shown that they requested one. They did not object to plaintiff's responses or seek additional discovery until three weeks after the note of issue was filed. Defendants also failed to demonstrate the existence of any unusual or special circumstances. *See Nikqi v. Dedona Contr. Corp.*, 117 A.D.3d 620, 986 N.Y.S.2d 123 (1st Dep't 2014). Nevertheless, plaintiff "[i]n the interest of good faith" is willing to appear for a "further deposition and IME if so ordered to appear for one by the Court." Such examinations shall take place within thirty (30) days. The action will remain on the trial calendar. *See May v. American Red Cross*, 282 A.D.2d 285, 722 N.Y.S.2d 868 (1st Dep't 2001).

Defendants also move to compel plaintiff to provide additional responses to items 1, 2, 4, 5, 6, 8, and 16 and authorizations from their August 28, 2017 demand. Prior authorization is required before a discovery-related motion may be made but the court waives the requirement in this instance. A

discovery-related motion must include an affirmation of good faith. *See* 22 NYCRR § 202.7(b). Under 22 NYCRR § 202.7(c), the affirmation must "indicate the time, place and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held." Defendants' affirmation of good faith is deficient as it does not refer to any communications or consultations between the parties. *See 241 Fifth Ave. Hotel, LLC v. GSY Corp.*, 110 A.D.3d 470, 973 N.Y.S.2d 129 (1st Dep't 2013). The affirmation in support of the motion and the reply affirmation fail to remedy this deficiency. *See Cuprill v. Citywide Towing & Auto Repair Servs.*, 149 A.D.3d 442, 49 N.Y.S.3d 624 (1st Dep't 2017). The motion insofar as it seeks to compel discovery is denied.

Defendants' motion for an extension of time to file a motion for summary judgment is also denied. An extension may be granted upon a showing of good cause. *See Ocasio-Gary v. Lawrence Hosp.*, 69 A.D.3d 403, 894 N.Y.S.2d 11 (1st Dep't 2010). Good cause can be established where outstanding discovery is relevant to the motion. *See Filannino v. Triborough Bridge & Tunnel Auth.*, 34 A.D.3d 280, 824 N.Y.S.2d 244 (1st Dep't 2006). Here, defendants have not shown that discovery related to plaintiff's damages is relevant the motion and therefore have not established good cause.

Accordingly, it is

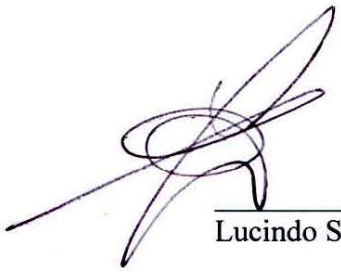
ORDERED, that defendants' motion seeking to vacate the note of issue and certificate of readiness filed on December 21, 2017, compel discovery and extend the time to move for summary judgment is granted to the extent that plaintiff shall appear for a further deposition at a mutually agreed upon date, time and location within thirty (30) days after the date of this order and for a further independent medical examination before a physician designated by defendants within thirty (30) days thereafter; and it is further

ORDERED, that the parties shall appear in the Labor Law, Products Liability, and Non-Medical

Professional Malpractice ("LPM") Part, courtroom 411, at 9:30 a.m. on April 17, 2018 for a pre-trial conference.

This constitutes the decision and order of the court.

Dated: February 9, 2018



Lucindo Suarez, J.S.C.