

Santiago v Post Road Assoc. LLC
2018 NY Slip Op 34386(U)
November 5, 2018
Supreme Court, Westchester County
Docket Number: Index No. 50864/2017
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
KIMBERLY SANTIAGO,

Plaintiff,

-against-

POST ROAD ASSOCIATES LLC and
UNICORN CONTRACTING CORP.,

Defendants.

-----X
UNICORN CONTRACTING CORP.,

Third-Party Plaintiff,

-against-

WHITE PLAINS HOSPITAL MEDICAL CENTER,

Third-Party Defendant.

-----X
LEFKOWITZ, J.

The following papers were read on this motion by plaintiff for an order vacating the note of issue and, (a) compelling defendant, Post Road Associates LLC and Unicorn Contracting Corp to produce witnesses employed by the company for a deposition and that each defendant should be compelled to produce a separate witness for each individual defendant; (b) for an order compelling defendants to provide a response to the preliminary conference order; (c) for an order compelling defendant Post Road Associates LLC to provide a response to its combined demands dated May 16, 2017; (d) for an order compelling both defendants Post Road Associates LLC and Unicorn Contracting Corp. to provide a response to plaintiff's correspondence dated May 2, 2018, May 22, 2018 and plaintiff's notice for discovery and inspection dated May 21, 2018; and (e) for such other and further relief as this Court deems just and proper.

Order to Show Cause-Affirmations-Exhibits A-J
Affirmation in Opposition- Exhibits A-J
Affirmation in Opposition
NYSCEF record

DECISION & ORDER
Index No.: 50864/2017
Motion Return Date: 10/918
Seq. No. 2

Upon the foregoing papers, and the proceedings held on October 9, 2018, this motion is determined as follows:

Plaintiff commenced action against defendants Post Road Associates LLC and Unicorn Contracting Corp. seeking to recover for personal injuries allegedly sustained when she slipped and fell in a staircase located at 101 East Post Road, White Plains, New York. It is undisputed that during discovery proceedings, defendants produced one witness for depositions on behalf of both defendants, Post Road Associates LLC and Unicorn Contracting Corp. Plaintiff filed the Note of Issue on August 9, 2018. Plaintiff now moves to vacate the Note of Issue and compel further discovery, including an additional deposition of defendants.

Defendants oppose the motion. Defendant Post Road Associates, LLC (“Post Road”) notes that seven compliance conferences were held in this action and plaintiff failed to raise the issue of any outstanding discovery or any objection to defendants’ production of Mr. Giamundo on behalf of both Post Road and Unicorn. Post Road asserts that they produced the person with the most knowledge regarding this matter, Steven Giamundo. They offer the affidavit of Paul Guillaro, who is 50% owner of defendant Post Road and owns Unicorn Contracting Corp. (“Unicorn”) in which he states that although Unicorn was the construction manager, he did not play an active role in the management of the construction project. He states that this was handled primarily by Mr. Giamundo. Mr. Guillaro claims that he has no personal knowledge regarding the work performed at the premises and notes that Steven Giamundo who was deposed, is the person with knowledge regarding the matter. Defendant Unicorn additionally asserts that at the May 3, 2018 conference, all parties represented that the defendants’ depositions had been completed on April 20, 2018. Unicorn further states that the discovery responses plaintiff seeks have been served and has attached copies to their opposition papers.

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 not required, and the action is ready for trial (*see Tirado v Miller*, 75 AD3d 153 [2d Dept 2010]). Once a Note of Issue has been filed and discovery presumably completed, section 202.21(d) and (e) of the Uniform Rules for Trial Courts (22 NYCRR) sets the standard for allowing additional discovery: if a party seeks to vacate the Note of Issue within 20 days of its service, that party need show only that a material fact in the certificate of readiness is incorrect or that it fails to comply with that section in a material respect. However, if more than 20 days elapsed since service of the note of issue, the moving party must demonstrate good cause for the motion and the existence of unusual or unanticipated circumstances which developed subsequent to the filing of the Note of Issue to demonstrate that further discovery proceedings are required.

Here, plaintiff moved within twenty (20) days of the filing of the Note of Issue. However, plaintiff has not demonstrated that any discovery is outstanding. First, plaintiff failed to raise any objection to defendants’ production of one witness on behalf of Unicorn and Post Road until the final certification conference. Having been content to wait until the July 23, 2018 certification conference to assert that an additional deposition was required, the Court ruled that any further discovery had been waived. Indeed, the prior orders issued by the Court contained a clear warning to all parties that, “...any disclosure demands not raised at the Compliance Conference are deemed

waived.” Therefore, plaintiff has not demonstrated that a material fact in the certificate of readiness is incorrect to warrant striking the note of issue and certificate of readiness. All discovery has been completed or waived as certified by plaintiff’s counsel.

Moreover, assuming arguendo that plaintiff had not waived the discovery she now seeks, defendants Post Road and Unicorn have produced the individual with knowledge for a deposition. It serves no purpose to require them to produce individuals who are unable to provide testimony. Unicorn has also demonstrated that it has responded to plaintiff’s demands. Although CPLR 3101 (a) requires full disclosure of all material and necessary matter and the discovery provisions of the CPLR are to be liberally construed, “a party does not have the right to uncontrolled and unfettered disclosure” (*Foster v Herbert Slepoy Corp.*, 74 AD3d 1139, 1140 [2d Dept 2010]); *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]). The party seeking disclosure has the burden to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims (*Foster*, 74 AD3d at 1140). Here, plaintiff has not demonstrated that a further deposition or any additional disclosure is reasonably calculated to lead to the discovery of information bearing on her claims.

In view of the foregoing, it is

ORDERED that plaintiff’s motion is denied in its entirety; and it is further

ORDERED that defendant Unicorn shall serve a copy of this order with notice of entry on all other parties within five days of entry.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
November 5, 2018.



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

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