

Mixon v City of New York
2019 NY Slip Op 31118(U)
April 18, 2019
Supreme Court, New York County
Docket Number: 150611/2014
Judge: Lyle E. Frank
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK PART IAS MOTION 52EFM
Justice
INDEX NO. 150611/2014
CLEMMIE MIXON, MOTION DATE 4/17/2019
Plaintiff, MOTION SEQ. NO. 006
- v -

THE CITY OF NEW YORK, EMPIRE CITY SUBWAY COMPANY
(LIMITED), CONSOLIDATED EDISON, INC., CONSOLIDATED
EDISON COMPANY OF NEW YORK, INC., NICO ASPHALT
PAVING, INC., SAFEWAY CONSTRUCTION ENTERPRISES, INC.

DECISION AND ORDER

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 166, 167, 168, 169,
170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 271, 272, 273, 274, 275, 276, 277,
278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 297, 298

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

were read on this motion to/for

Defendant, The City of New York, moves this Court for an order: (1) pursuant to 22
NYCRR § 202.21(e) vacating Plaintiff's Note of Issue; (2) pursuant to CPLR § 3124 compelling
Plaintiff to provide medical authorizations for medical records and films relating to Plaintiff's
1997 and 2007 spinal fusions and thereafter appear for an independent medical examination on
the grounds that the City will be severely prejudiced in its defense of the case with respect to
damages if the Court does not grant the instant application; and (3) pursuant to CPLR §2004, for
an extension of time to hold plaintiff's Independent Medical Examination. Plaintiff opposes the
instant motion and cross-moves for sanctions against the City. For the reasons set forth below
the City's motion is denied, and plaintiff's cross-motion is denied.

This action arises out of alleged injuries sustained by plaintiff, on December 4, 2012, as a
result of a trip and fall in the roadway at the southeast intersection of Madison Avenue and East
106th Street, in the County, City, and State of New York.

Plaintiff filed her note of issue on October 30, 2018, the City filed the instant motion on November 26, 2018. Thus, the Court notes that pursuant to 22 NYCRR §202.21(e) the instant motion is untimely. Notwithstanding the untimeliness of this motion as a basis for denial, the Court will address substantive arguments made by the parties.

Conditional Order of October 25, 2018

It is well settled that a self-executing conditional order is deemed absolute upon a party's non-compliance. (*Wilson v Galicia Contr. & Restoration Corp.*, 10 NY3d 827 [2008]; *AWL Indus., Inc. v QBE Ins. Corp.*, 65 AD3d 904, [1st Dept 2009]).

There is no dispute that pursuant to the Order dated October 25, 2018, So-Ordered by the Honorable Alexander M. Tisch, defendants that did not designate a doctor to conduct the IME had deemed that examination waived. There is nothing in the October 25, 2018 order that alleges any outstanding discovery on behalf of the plaintiff. Further, counsel for the City avers that on 5 occasions, well before this conditional order was issued, the City sent notices for an IME to plaintiff's prior counsel¹. This is particularly worth noting because it is clear that the City was willing and able to go forward with an IME despite the argument that it now needs new authorizations.

The City cites to *Williams v. Long Island College Hosp.*, 147 A.D.2d 558, to support its contention that notwithstanding its waiver of plaintiff's IME, the Court should still compel plaintiff to appear for an IME in the interest of justice. The Court finds this case distinguishable to the instant action. In *Williams*, the IME was deemed waived by the virtue of the filing of the note of issue and defendant's failure to move to vacate the same. Here, unlike in *Williams*,

¹ The City admits that due to an error in its data entry the information for plaintiff's new counsel was not in its database and these notices for IME were not forwarded to plaintiff's current counsel.

before the plaintiff filed her note of issue a Conditional Order was issued that specifically deemed the physical examination of plaintiff waived if the doctor was not designated.

Vacating Note of Issue

Both parties rely on *Audiovox Corp. v Benyamini*, 265 AD2d 135 [2d Dept 2000], in support of their respective positions. In *Audiovox*, the Second Department detailed two primary methods to obtain discovery after a note of issue has been filed. The first is to move pursuant to 22 NYCRR § 202.21(e) within twenty days after a note of issue has been served, detailing why the case is not ripe for trial. The second is to move pursuant to 22 NYCRR § 202.21(d), stating that there are unusual or unanticipated circumstances developed after a note of issue has been filed, which the Second Department has deemed to be a “more stringent standard”. *Id* at 140.

The City argues that its recent discovery of a surgery, that plaintiff denies occurred, is a sufficient basis to satisfy the unusual or unanticipated prong of 22 NYCRR § 202.21(d). The Court rejects this contention. As discussed above, the City has affirmatively represented to the Court that it had on previous occasions been ready and willing to conduct plaintiff’s IME, the Court is not convinced that it was not until the expiration of time of the conditional order that a new surgery was discovered.

The Court finds that there has been no “unusual or unanticipated” circumstances that warrant either the vacating of the note of issue or the compelling of plaintiff’s IME that has been effectively waived by the City. Accordingly, it is hereby

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

ORDERED that any relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the decision and order of the Court.

4/18/2019
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE

**HON. LYLE E. FRANK
J.S.C.**