

Alaverdi v Bui

2019 NY Slip Op 32743(U)

September 13, 2019

Supreme Court, New York County

Docket Number: 159549/2017

Judge: Adam Silvera

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ADAM SILVERA PART IAS MOTION 22

Justice

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INDEX NO. 159549/2017

LOURA ALAVERDI, AN INCAPACITATED PERSON, BY
HER TEMPORARY GUARDIAN, RUDYARD WHYTE, ESQ,

MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 008

- v -

HUEY BUI, JENNY YMOUI CHEV, ROSEANN
BIRRITTELLA, RALPH LAUREN CORPORATION,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 008) 203, 204, 205, 206, 207, 208, 209, 210, 211, 213, 216, 217, 218

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE/JURY

Upon the foregoing documents, it is ordered that defendant Roseann Birrittella’s motion and defendant Jenny Ymoui Chev’s cross-motion to vacate the note of issue are denied.

Defendant Birrittella moves, and defendant Chev cross-moves, to vacate the note of issue on grounds that discovery is outstanding. Defendant Ralph Lauren Corporation filed an affirmation in support arguing that additional discovery is needed, and plaintiff opposes. No reply was received.

The Court notes that the note of issue was filed on July 18, 2019 within the deadline to file the note of issue set by the Court. Notably, while defendant Birrittella argues that there is outstanding discovery in that two depositions, an independent medical examination, and various written discovery is outstanding, she fails to detail what written discovery, if any, has not been exchanged. The same holds true for defendant Chev’s cross-motion. Defendant Ralph Lauren Corporation filed an affirmation in support of defendant Birrittella’s motion arguing that defendant Birrittella has failed to provide court ordered discovery. Plaintiff opposes, and

defendant Jenny Ymoui Chev cross-moves to vacate the note of issue and to compel discovery. As of the filing of the cross-motion on September 5, 2019, defendant Chev argues that the deposition of defendant Ralph Lauren Corporation, an independent medical examination, and various written discovery is outstanding.

Here, the Court notes that defendant Birrittella's blanket statement that various written discovery demands remain outstanding is insufficient to establish that any discovery remains as she fails to detail the written discovery that was allegedly not exchanged. As of the date of the last discovery conference order, dated May 17, 2019, the remaining written discovery was as follows: (1) defendant Birrittella to respond to plaintiff and defendant Ralph Lauren Corporation's demand for text messages within 45 days; (2) defendant Ralph Lauren Corporation to conduct search for defendant Birrittella emails and defendant Birrittella to produce emails within 45 days; (3) plaintiff to respond to defendant Ralph Lauren Corporation's demands dated May 13, 2019 for economist's records referenced in 3101(d); (4) defendant Ralph Lauren Corporation to produce records of paystubs of defendant Birrittella from 2011-July 2017; (5) plaintiff reserves the right to further ESI demands and defendants reserve the right to object; (6) defendant Bui to respond to defendant Birrittella's May 14, 2019 demands within 30 days and to respond to demand for IRS records within 30 days; and (7) defendant Ralph Lauren Corporation to provide communications between Mary Haas and members of asset protection in the NY team from January 20, 2017 to July 20, 2017. According to defendant Chev, plaintiff has provided the economist's records and defendant Bui responded to defendant Birrittella's May 14, 2019 demands. Defendant Ralph Lauren Corporation alleges that defendant Birrittella provided only six (6) months of text messages rather than one year. A review of all the papers submitted by all parties on the instant motion reveals that no other written discovery, ordered by this Court on

May 17, 2019, was explicitly mentioned, and no defendant has even alleged that such discovery was not provided. The Court notes that the further depositions of defendant Birrittella and of Mary Haas have both been completed. Thus, the only remaining discovery articulated in the motions is the independent medical examination of plaintiff, the deposition of defendant Ralph Lauren Corporation, and a full response to defendant Ralph Lauren Corporation's demand for text messages by defendant Birrittella.

The Court notes that counsel for all parties appeared in court on April 27, 2018 to discuss any and all outstanding discovery. The parties entered into a so ordered stipulation detailing all outstanding discovery which specifically stated that the issue of an independent medical examination would be discussed on the adjourn date. Thereafter, on the next discovery conference date, counsel for all parties appeared in court again to discuss all outstanding discovery. At such conference, all counsel entered into another stipulation, so ordered by Hon. Adam Silvera, which details all outstanding discovery. Notably absent from such stipulation is any mention of an independent medical examination. Furthermore, counsel for all parties appeared at yet another discovery conference, and oral arguments on two discovery motions, on October 17, 2018. A discovery order was issued, for the third time, wherein no mention was made of an independent medical examination of plaintiff. Subsequently, counsel for all parties prepared and entered into a type written discovery stipulation dated February 22, 2019, so ordered by Judge Silvera, which, again, made no mention of an independent medical examination. At the final discovery conference on May 17, 2019, all counsel appeared in court to discuss all outstanding discovery. By Order on such date, the Court ordered the remaining discovery within a specified time. However, no party requested an independent medical examination of plaintiff. The Court notes that plaintiff, who was an innocent and lawful

pedestrian when she was violently struck by a motor vehicle, was gravely and permanently injured in the subject motor vehicle accident. The Court further notes that plaintiff has remained in a vegetative state in the same hospital since the happening of the accident on July 20, 2017. Plaintiff never objected to an independent medical examination. However, inexplicably, only now, after the note of issue has been filed, do defendants raise the issue of an independent medical examination for the first time in approximately fifteen (15) months after it was agreed on April 27, 2018 that it would be discussed at the next discovery conference. Here, defendants proffered no evidence that they made any good faith attempt to resolve the issue of an independent medical examination, nor did any of the defendants notice such examination despite knowing plaintiff's location since the date of the accident. 22 NYCRR §202.21(d) states that “[w]here unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice, the court, upon motion supported by affidavit, may grant permission to conduct such necessary proceedings.” Here, plaintiff has provided all discovery requested and defendants’ over litigation of the discovery issues, rather than complying with the court orders, has delayed this action. Thus, vacating the note of issue for alleged outstanding discovery which is based primarily upon defendants’ actions, and the alleged outstanding discovery of an independent medical examination which defendants never requested and never noticed, would only serve to delay a trial in this action and substantially prejudice plaintiff. *See Attie v City of NY, et. al.*, 221 AD2d 274, 274 (1st Dep’t 1995). As such, defendant Birrittella’s motion, and defendant Chev’s cross-motion, both seeking to vacate the note of issue is denied, and discovery is ordered below.

Defendant Ralph Lauren Corporation's deposition shall be completed within 30 days. Failure to complete such deposition shall result in the preclusion of defendant Ralph Lauren Corporation from testifying at trial and from offering an affidavit in substantive motion practice and/or striking of their answer. Within 21 days, defendant Birrittella shall produce copies of all text message communications between herself and defendant Huey Bui for the period of August 1, 2016 up to and including August 1, 2017. Failure to provide any and all such text message communications shall result in defendant Birrittella's answer being stricken. The independent medical examination of plaintiff is hereby deemed waived by all defendants.

Accordingly, it is

ORDERED that defendant Roseann Birrittella's motion to vacate the note of issue is denied; it is further

ORDERED that defendant Jenny Ymoui Chev's cross-motion to vacate the note of issue is denied; and it is further

ORDERED that defendant Ralph Lauren Corporation's deposition shall be completed within 30 days. Failure to complete such deposition shall result in the preclusion of defendant Ralph Lauren Corporation from testifying at trial and from offering an affidavit in substantive motion practice and/or striking of their answer; and it is further

ORDERED that the independent medical examination of plaintiff is hereby deemed waived by all defendants; and it is further

ORDERED that defendant Birrittella shall produce copies of all text message communications between herself and defendant Huey Bui for the period of August 1, 2016 up to and including August 1, 2017 within 21 days. Failure to provide any and all such text message communications shall result in defendant Birrittella's answer being stricken; and it is further

ORDERED that the time to file an order to show cause for summary judgment is extended until November 8, 2019. Opposition, if any, shall be filed by November 22, 2019 and reply, if any, shall be filed by December 6, 2019; and it is further


ORDERED that any and all applications to the Court shall be made by order to show cause; and it is further

ORDERED that all parties shall appear for a conference on December 10, 2019 at 10:00am in room 136 of 80 Centre Street, New York, NY 10013; and it is further

ORDERED that, within 30 days of entry of this decision/order, plaintiff shall serve a copy upon all parties with notice of entry.

This constitutes the decision and order of this Court.

9/13/2019
DATE


ADAM SILVERA, J.S.C.

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION

APPLICATION: GRANTED DENIED GRANTED IN PART OTHER

CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE