Lewis v Sorto
2019 NY Slip Op 33920(U)
September 10, 2019
Supreme Court, Nassau County
Docket Number: 610109/16
Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

ENTERED IN COMPUTER CF

TRIAL/IAS PART 32
NASSAU COUNTY

WILLIE LEWIS III,

Plaintiff,

- against -

Index No.: 610109/16
Motion Seq. No.: 03
Motion Date: 06/28/19

JOSE A. SORTO and THE HALLEN CONSTRUCTION COMPANY, INC.,

Defendants.

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmations and Exhibits	1
Affirmation in Opposition and Exhibit	2
Reply Affirmation	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendants move, pursuant to 22 NYCRR 202.21(e), for an order vacating the Note of Issue and Certificate of Readiness for Trial. Plaintiff opposes the motion.

In support of the motion, counsel for defendants submits, in pertinent part, that, "[t]his action was commenced in the County of Kings by the filing of a Summons and Verified Complaint on or about August 1, 2016. Issue was joined by defendants with the service of a Verified Answer on or about September 9, 2016.... Along with the Answer, defendants served a Demand for Change of Venue to Nassau County because plaintiff based the venue on the place of occurrence which is not a proper basis for venue. Thereafter, defendants moved for a change of

venue and ultimately the motion was granted resulting in a transfer of the case to Nassau County.... On or about March 6, 2017, plaintiff served a Verified Bill of Particulars.... On March 7, 2017, a preliminary conference was held at which time a discovery schedule was entered into which required the exchange of various items of discovery and party depositions.... Just two days after the preliminary conference was held and before any meaningful discovery was conducted, plaintiff filed a motion for summary judgment as to liability. Defendants opposed the motion and the motion was fully submitted on April 11, 2017. The Court rendered its decision on June 1, 2017 granting plaintiff's motion solely as to liability.... A compliance conference was held on June 27, 2017. This was the first appearance where defendants were represented by the present law firm, having taken over the defense of this matter from Morris Duffy Alonso & Faley on June 14, 2017. Outstanding discovery was ordered to be provided by plaintiff and depositions were scheduled.... Defendants moved pursuant to CPLR § 2221 for leave to Renew or Reargue the Judge's June 1, 2017 decision. On July 28, 2017, the Court rendered its decision denying defendants' Motion to Renew or Reargue.... The parties appeared again for (*sic*) status conference on October 3, 2017 and again plaintiff was ordered to provide outstanding discovery, and depositions were scheduled. On November 21, 2017, the parties returned for a status conference before Judge Sher. Upon information and belief, the defendants informed the Court that depositions had not been conducted due to plaintiff's non-compliance with discovery demands and because authorizations provided were improperly date restricted. This Court ordered discovery to be provided and for depositions to be held. The parties returned before Judge Sher on January 9, 2018. The defendant (*sic*) informed the Court that the plaintiff's deposition was started on January 8, 2018 but was not completed. The judge ordered outstanding

discovery be provided and for the deposition to be completed. On the next conference on January 30, 2018, counsel informed the Court that the plaintiff's deposition has been completed. Upon information and belief, plaintiff's counsel indicated to the Court that depositions of the defendants were not required as they (*sic*) were awarded Summary Judgment. Accordingly, Judge Sher ordered outstanding discovery to be provided and for plaintiff to appear at the required Independent Medical Exams (IMEs) by February 27, 2018. On January 27, 2018, the parties returned for a status conference and informed the Court that physicians for two of three required IMEs had been retained and exams scheduled, with the third physician set to be retained. The plaintiff was scheduled to appear before Dr. Kuflik, a spine specialist, on March 21, 2018 to undergo the first IME. The plaintiff was also scheduled to meet Dr. Saberski, a pain management specialist, on April 5, 2018. The defendants retained Dr. Roth, a board-certified orthopedic surgeon, and scheduled plaintiff to appear for his IME on March 27, 2018. Upon information and belief, plaintiff failed to appear at his IME at Dr. Roth's office. The IME with Dr. Saberski was canceled due to a snowstorm. The parties next appeared before Judge Sher on April 10, 2018 and informed the Court that the plaintiff had not undergone two of the IMEs. Defendants also informed the court that numerous items of discovery were still outstanding. Judge Sher advised the parties to schedule a conference call with the part to resolve these discovery issues. The remaining IMEs were arranged and plaintiff was scheduled to appear before Dr. Roth on May 1, 2018 and before Dr. Saberski on May 3, 2018. Authorizations for outstanding discovery including Social Security, Medicaid, and the plaintiff's prior psychiatric and drug treatment records were provided by the plaintiff. The parties apprised the Court of these updates at a conference on April 17, 2018. Accordingly, plaintiff was ordered to provide outstanding

discovery.... At an appearance on May 8, 2018, the defendants informed the Court that this case was not ready to be certified ready for trial as they had just received authorizations for Social Security, Medicaid, and the plaintiff's prior psychiatric and drug treatment records and had processed them but had not yet received records. The defendants informed the Court, at a certification conference on June 12, 2018 that the plaintiff's Medicaid records had not yet been obtained and that the Social Security Administration authorizations provided by plaintiff's counsel had been rejected. The parties returned before Judge Sher on June 26, 2018, and the defendants informed the Court that the plaintiff had provided an updated Social Security Administration authorization several days prior to the conference and that they had not yet received the Medicaid records. On August 14, 2018, the parties returned for a certification conference and defendants informed Judge Sher that they had not yet received plaintiff's Medicaid or Social Security Administration records. Further, the defendants served multiple demands for authorizations which required responses. Accordingly, plaintiff was ordered to provide outstanding discovery.... The parties returned for a certification conference on August 28, 2018 and the defendants informed the Court that they had not yet received plaintiff's Medicaid or Social Security Administration records. Further, defendants informed the Court that they (*sic*) not received outstanding discovery despite plaintiff's contentions that it had been provided. The Court ordered the parties to return on September 25, 2018. In the interim, numerous items of discovery were provided, however, upon information and belief, several were improperly date restricted. On September 25, 2018, the parties returned and defendants informed the Court that although many authorizations had been provided, several were improperly restricted. Additionally, based on the review of the records received, defendants had served various demands based on the review of those records. Accordingly, outstanding discovery was

ordered to be provided by plaintiff.... On October 30, 2018, all sides appeared for a certification conference before J. Sher. Upon information and belief, plaintiff's counsel informed the Court that the plaintiff underwent a lumbar fusion surgery on October 4, 2018. Accordingly, plaintiff's counsel indicated that they would be providing a Third Supplemental Bill of Particulars to defendants. Defendants in turn informed the Court that due to the new treatment received by plaintiff that a further deposition would be required along with further IMEs. When the parties returned for a certification conference on November 27, 2018, defendants informed the court that they had not received authorizations for the most recent surgery in addition to numerous other additional discovery demanded. The Judge ordered that the plaintiff provide the discovery within ten (10) days and instructed (*sic*) parties to return on December 11, 2018 to schedule the remaining depositions and IMEs.... On December 11, 2018, defendants informed the Court that they had received the relevant authorizations which were being processed but were still required before the plaintiff's further EBT could be held. The parties appeared before Judge Sher on January 22, 2019, at which point the plaintiff's further deposition was scheduled for February 28, 2019. The Court was further advised that various other discovery was outstanding including numerous authorizations and plaintiffs (*sic*) further IMEs. When the parties returned before Judge Sher on March 5, 2019, the Court was informed that the plaintiff's deposition was not held on February 28, 2019. The Court adjourned the certification conference to March 19, 2019. The plaintiff's further deposition was held on March 19, 2019. Additionally, the plaintiff was scheduled to appear at IMEs with Dr. Roth on April 12, 2019, Dr. Saberski on April 24, 2019, and Dr. Kuflik on June 19, 2019. On March 19, 2019, all sides appeared and the case was certified despite outstanding discovery owed including all three of plaintiff's scheduled IMEs. In an Order of the same date, ... plaintiff was instructed to provide outstanding discovery set forth in

a letter from defendants dated March 5, 2019.... Additionally, plaintiff was instructed to provide an Authorization for Metro Health and appear at the three (3) scheduled IMEs. Finally, plaintiff was instructed **NOT** to file the Note of issue (*sic*) until June 15, 2019, after providing the aforementioned discovery. Nonetheless, despite this Court's directive, the plaintiff filed the Note of Issue on May 8, 2019.... At this time, numerous items of discovery are still outstanding including all discovery ordered at the March 19, 2019 conference pursuant to this office's correspondence to plaintiff dated March 5, 2019.... Also, plaintiff's counsel has objected to this office's demands dated February 27, 2019 and April 10, 2019 ... which requested authorizations for twenty-two (22) providers and the name (*sic*) and address (*sic*) of the (*sic*) two of the plaintiff's associates which were discussed during the plaintiff's continued deposition. Finally, plaintiff is still required to appear at an IME on June 19, 2019 by Paul Kuflik, M.D." *See* Defendants' Affirmation in Support Exhibits A-Q.

Counsel for defendants argues, in pertinent part, that, "[i]n the Note of Issue, plaintiff's counsel indicates that discovery is complete despite the outstanding written discovery and IME.... As a result of the remaining outstanding IMEs and written discovery, trial in this matter is premature. If permitted to stand, the right of the defendants to a reasonable opportunity to complete the discovery process will be prejudiced. Without access to IME results and responses to written discovery, the defendants are precluded from preparing an adequate defense. Defendants are entitled to a complete and full understanding of all of the plaintiff's conditions, all of the plaintiff's allegations and all issues involving the potential damages in this matter. As such, the Court should vacate the Note of Issue, mark this matter off the trial calendar, and allow discovery to progress."

In opposition to the motion, counsel for plaintiff argues, in pertinent part, that, "[d]efendant's long winded affirmation boils down to responses sought for items listed in ¶¶ 36, 37, 38 and 39 of Defendant's (*sic*) moving papers. Throughout this litigation Plaintiff has served appropriate responses to Defendant's (*sic*) numerous Demands for Discovery including those listed in ¶ 36 of the moving papers.... Plaintiff has served appropriate responses to ¶ 37 of Defendant's (*sic*) moving papers.... Plaintiff has served appropriate responses to ¶ 38 of Defendant's (*sic*) moving papers.... Upon inspection of our file, it appears that Plaintiff does not have a Demand from Defendant (*sic*) dated December 20, 2018. Once Plaintiff receives a courtesy copy of said demand, Plaintiff will respond appropriately. ¶ 39 of Defendant's (*sic*) moving papers demands that Plaintiff appear for an IME with Dr. Paul Kuflik. Plaintiff appeared for this IME on June 19, 2019. Of note, Defendant (*sic*) seeks a multitude of authorizations for medical records from numerous doctors and/or facilities without specifying the relevance of these records. Plaintiff has provided all relevant authorizations that have been documented and has appeared for his IME with Dr. Kuflik. Therefore, the motion is moot." *See* Plaintiff's Affirmation in Opposition Exhibit A.

In reply to plaintiff's opposition, counsel for defendants submits, in pertinent part, that, "[p]laintiff's counsel claims that a proper authorization was provided for Dr. Kalasapudi c/o Jamaica Hospital Center with Secti8on (*sic*) 9a initialed. However, the authorization provided is improperly date restricted in contravention of previous court orders. Plaintiff still has not provided a valid consent to obtain records for Social Security Administration despite numerous requests. Plaintiff failed to provide any of the authorizations demanded in the February 27, 2019 demand for authorizations, despite being directed by the court to provide such authorizations. Pursuant to a letter dated March 11, 2019 and in response to correspondence from this office

dated February 26, 2019, plaintiff's counsel claimed that plaintiff never received treatment at Martin Luther King Health Center. We informed counsel that the provider information was obtained from insurance records, thus plaintiff received treatment there. To this date, no authorization has been provided. Additionally, plaintiff has not provided any discovery related to this office's Post Deposition Notice to Produce dated April 10, 2019, a Notice to Produce dated March 20, 2019, a Post Deposition Demand for Authorizations dated April 10, 2019, as well as several Demands for Authorizations dated July 8, 2019.... Further, the records that defendants seek are appropriate, especially those that are for non-date restricted authorizations. The plaintiff's statement in para. 10 of his affirmation in opposition that 'all relevant authorizations that have been demanded' were provided renders the plaintiff the arbiter of relevance in this case. Finally, that the IME was completed does not render the defendants' motion moot. As previously discussed, a defendant is entitled to have a Note of Issue and Certificate of Readiness stricken where the plaintiff is cognizant of outstanding discovery when the Certificate of Readiness is filed. [citation omitted]. In the case at hand, plaintiff knew that the IME of the plaintiff was scheduled for June 19, 2019. He further knew of outstanding written discovery which was still outstanding at the time of defendants' motion. Finally, plaintiff knew that this Court had directed him NOT to file a Note of Issue until June 15, 2019. Nonetheless, plaintiff took it upon himself to file his Note of Issue and Certificate of Readiness on May 8, 2019, in contravention of this Court's Order dated March 19, 2019. He filed these papers knowing full well that there was written and other discovery still outstanding. He erroneously indicated in his Note of Issue that discovery was complete despite this knowledge."

A Note of Issue may be vacated pursuant to New York Court Rules § 202.21(e) if the following circumstances are present:

> 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 any material respect....After such period,...no such motion shall be allowed except for good cause shown. At any time, the court on its own motion may vacate a 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.

That is, a timely motion to vacate the Note of Issue pursuant to 22 NYCRR § 202.21(e) need only demonstrate in what respects the case is not ready for trial. *See Mosley v. Flavius*, 13 A.D.3d 346, 785 N.Y.S.2d 742 (2d Dept. 2004); *Audiovox Corp. v. Benyamini*, 265 A.D.2d 135, 707 N.Y.S.2d 137 (2d Dept. 2000).

In the instant matter, defendants' motion to vacate the Note of Issue was made within twenty (20) days after service of the Note of Issue and Certificate of Readiness. The claim of lack of trial readiness in this case is premised upon defendants' assertion that several necessary items of discovery remain outstanding. Counsel for defendants claims that "[p]laintiff failed to provide any of the authorizations demanded in the February 27, 2019 demand for authorizations, despite being directed by the court to provide such authorizations." The Court notes, however, that, on March 20, 2019, plaintiff served a response to defendants' February 27, 2019 demand for authorizations, which indicated that, "[p]laintiff objects to these demands as being overbroad, unduly burdensome, irrelevant, vague and seeks information not relevant or material to the defense or prosecution of the within action." Defendants did not make a motion to compel with

respect to plaintiff's response to demand for these twenty-two (22) authorizations. The Court would additionally note that, while counsel for defendants claims that plaintiff was "directed by the court to provide such authorizations," there was no such Order by this Court as the March 19, 2019 stipulation entered into by counsel for the parties was not so-ordered by the Court. *See* Plaintiff's Affirmation in Opposition Exhibit A; Defendants' Affirmation in Support Exhibits M and P.

The Court further notes that, on April 29, 2019, plaintiff served a Response To Notice to Produce and a Response to Demand for Authorizations. *See* Plaintiff's Affirmation in Opposition Exhibit A. Again, defendants did not make a motion to compel with respect to said Responses by plaintiff.

Additionally, the Court would be remiss if it did not note that the parties in this action were given almost two (2) years to complete discovery before the matter was certified for trial.

Since the Court, in compliance with the guidelines issued by the Office of Court Administration and the Differentiated Case Management System, certified this matter on March 19, 2019, to now grant this motion at this time would be an embarrassing acknowledgment that a party could ignore the directives of this Court, as well as the guidelines established by the Office of Court Administration, and create a precedent that this Court has worked diligently to avoid setting.

Accordingly, defendants' motion, pursuant to 22 NYCRR 202.21(e), for an order vacating the Note of Issue and Certificate of Readiness for Trial, is hereby **DENIED**. However, it is further

ORDERED that plaintiff provide defendants, within **ten (10) days** of this Decision and Order, with (1) a proper authorization for Dr. Kalasapudi c/o Jamaica Hospital Center, with

Section 9A initialed and omitting the improper date restriction, (2) a valid consent to obtain records from the Social Security Administration, and (3) an authorization for Martin Luther King Health Center.

All parties shall appear for Trial, in Nassau County Supreme Court, Differentiated Case Management Part (DCM), at 100 Supreme Court Drive, Mineola, New York, on October 23, 2019, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
September 10, 2019

ENTERED
SEP 11 2019
NASSAU COUNTY
COUNTY CLERK'S OFFICE