

Meyer v Fusco

2019 NY Slip Op 34048(U)

June 17, 2019

Supreme Court, Westchester County

Docket Number: 68390/2016

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

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
GRACE E. MEYER,

Plaintiff,

DECISION & ORDER

-against-

Index No. 68390/2016
Motion Date: June 17, 2019
Seq. No. 3

EILEEN M. FUSCO AND FRANK P. FUSCO,

Defendants.

-----X
LEFKOWITZ, J.

The following papers were read on this motion by defendants for an order striking the note of issue, vacating the certificate of readiness, removing the matter from the trial calendar and for such other and further relief as this court deems just and proper.

Order to Show Cause; Affirmation in Support; Exhibits A-M;
Affirmation of Good Faith
Affirmation in Opposition; Exhibits A-E
NYSCEF File

Upon the foregoing papers and the proceedings held on June 17, 2019, this motion is determined as follows:

Plaintiff commenced this action by filing a summons with verified complaint on December 5, 2016 seeking damages for injuries allegedly sustained as a result of a car accident occurring on October 27, 2016. As evidenced by the police accident report the car plaintiff was driving at the time of the accident was registered to Jeffery R. Meyer ("J. Meyer"), plaintiff's father. Issue was joined upon the service of defendants' answer on or about January 6, 2017.

On May 19, 2017, the parties executed a Preliminary Conference Stipulation, which was so ordered by this court. The Preliminary Conference Order directed, inter alia the service of all discovery demands on or before June 16, 2017, with responses thereto within 30 days thereof, the completion of all nonparty depositions on or before October 15, 2017, and the completion of all discovery on or before April 7, 2018.

The parties engaged in a long course of discovery. Compliance Conference Orders were

entered on September 21, 2017, November 15, 2017, December 19, 2017,¹ March 8, 2018,² April 25, 2018,³ May 23, 2018,⁴ June 26, 2018, July 25, 2018, October 3, 2018, November 2, 2018,⁵ November 27, 2018,⁶ and January 31, 2019. All compliance conference orders contained the warning that “[a]ny disclosure demands not raised at the Compliance Conference are deemed waived.”

Plaintiff appeared for her deposition on September 18, 2017. During her deposition, plaintiff testified, inter alia, that the car she was driving on the day of the accident was registered to J. Meyer (Meyer Tr. p. 51).

On or about February 19, 2019, defendants served post-deposition demands on plaintiff seeking, inter alia, unlimited authorizations for a number of plaintiff’s medical providers.

Defendants sent a Good Faith Letter to plaintiff’s counsel on or about March 5, 2019 requesting a response to the post-deposition demand. The parties appeared for a conference on March 6, 2019. During the conference the issue of unlimited authorizations was discussed. The parties agreed that plaintiff would provide authorizations subject to certain limitations in time on March 6, 2019. The matter was adjourned to March 13, 2019, at which time the parties were advised a Trial Readiness Order would be issued. By email dated March 6, 2019, plaintiff provided the authorizations, subject to the time limitations agreed upon at the conference that day. Defendants did not object to the authorizations provided by plaintiff. Counsel did not appear on March 13, 2019 and the Court issued a Trial Readiness Order. The note of issue and certificate of readiness were filed on March 13, 2019. The certificate of readiness indicates that all bills of particulars had been served, all medical reports had been exchanged, and that all discovery proceedings were complete.

¹ This Order directed, inter alia, the completion of nonparty depositions on or before March 14, 2018.

² This Order directed, inter alia, the completion of nonparty depositions on or before April 17, 2018.

³ This Order directed, inter alia, the completion of nonparty depositions on or before May 14, 2018.

⁴ This Order directed, inter alia, service of post-deposition demands on or before June 1, 2018 and responses thereto on or before June 18, 2018.

⁵ This Order directed, inter alia, service of responses to plaintiff’s October 9, 2018 discovery demands on or before November 19, 2018 and was marked “final.”

⁶ This Order directed, inter alia, service of responses to plaintiff’s October 9, 2018 discovery demands on or before December 3, 2018 and was marked “final, no further extensions.”

On March 29, 2019 defendants' counsel sent an email to plaintiff's counsel stating that counsel had recently retained a biomechanical expert and requested an inspection of plaintiff's vehicle. On April 1, 2019 defendants filed a motion to strike the note of issue.⁷

On April 4, 2019, defendants served a demand seeking production of the vehicle plaintiff was driving on the date of the accident for inspection. On April 12, 2019, defendants served a notice to take J. Meyer's deposition. The parties appeared for a conference on April 29 2019 at which time defendants were provided a briefing schedule for the present motion.

Defendants argue that the note of issue should be stricken since there is outstanding discovery. Defendants contend that since their motion is made within 20 days after the note of issue was filed⁸ they need only show that discovery is incomplete in order to vacate the note of issue. Defendants contend that plaintiff has not provided the demanded unlimited authorizations for various providers, despite the demand for same and a good faith letter. Furthermore, defendants state that the inspection of plaintiff's vehicle and J. Meyer's deposition remain outstanding. Defendants concede that the demand for the inspection of the car and the nonparty deposition were not made prior to the filing of the note of issue. Defendants nonetheless contend they are entitled to this discovery since both demands were made within the twenty days immediately after the service of the note of issue.

In opposition, plaintiff contends that she has worked diligently to provide defendants with discovery. Plaintiff contends that defendants demanded extensive discovery and that the discovery process also involved extensive delays which she contends are attributable to defendants' refusal to comply with court orders. Plaintiff states that at the March 6, 2019 compliance conference, the issue of authorizations unrestricted in time was discussed extensively. Plaintiff states that at that conference it was determined by all present that plaintiff would provide authorizations restricted by date starting on the "incurred from" date through one year following the "incurred to" date. Plaintiff states that the Court ordered plaintiff to produce said authorizations on March 6, 2019. Plaintiff states that on March 6, 2019, plaintiff served the agreed upon said authorizations by email and mail to defendants. Plaintiff contends that defendants had a week from receiving the authorization until the issuance of the Trial Readiness Order in which to object to the authorizations. Plaintiff states that defendants did not object to the production prior to the issuance of the Trial Readiness Order. Plaintiff further contends that at no time prior to the filing of the note of issue did defendants request that plaintiff produce her vehicle for inspection nor did they raise this as an issue at any compliance conference. Plaintiff argues that defendants are not entitled to vacate the note of issue as they have failed to establish that a material fact in the certificate of readiness is incorrect. Plaintiff contends that no material fact in the certificate of readiness was incorrect because all discovery proceedings then known were completed and there were no outstanding discovery requests.

⁷ This motion was subsequently withdrawn as it was improperly made by notice of motion and without a pre-motion conference in violation of the DCM Protocol.

⁸ Defendants are credited with the date of filing the initial application.

Plaintiff argues that with respect to J. Meyer's deposition and inspection of the vehicle defendants failed to request these until after the note of issue was filed.

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 is not required and the action is ready for trial (*see Tirado v Miller*, 75 AD3d 153 [2d Dept 2010]). Once the note of issue has been filed and discovery presumably completed, the applicable standard for allowing additional discovery is governed by 22 NYCRR 202.21(d)(e). Within twenty days after service of a note of issue, a party 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 (22 NYCRR 202.21[e]). Pursuant to § 202.21(d), "[w]here unusual or unanticipated circumstances develop subsequent to the filing of the note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice, the court ... may grant permission to conduct such necessary proceedings." Section 202.21 (e) provides that if more than 20 days have elapsed since the filing of the note of issue, good cause must be shown to warrant an order vacating the note of issue. The "lack of diligence in seeking discovery does not constitute unusual or unanticipated circumstances warranting post-note of issue disclosure" (*Tirado v Miller*, 75 AD3d 153, 161 [2d Dept 2010]; *see Utica Mut. Ins. Co. v P.M.A. Corp.*, 34 AD3d 793, 794 [2d Dept 2006]; *Shumakh v Shumakh*, 21 Misc2d 1142(A) [Sup Ct, Kings County 2008]).

Here, the certificate of readiness is correct. With respect to the deposition of nonparty J. Meyer and inspection of the subject car, defendants sought this discovery for the first time after the filing of the note of issue. Insofar as J. Meyer and the car were known to defendants since plaintiff's deposition, if not since the beginning of the case, there is no reasonable excuse that defendants could offer for not previously seeking this discovery. Notably, none of the twelve compliance conference orders mention the inspection of the car. While three compliance conference orders direct deadlines for taking nonparty depositions (*see infra* footnotes, 1, 2, and 3), the deposition of nonparty J. Meyer's is never specifically mentioned as having been raised during any of the compliance conferences. Additionally, insofar as J. Meyer is a nonparty defendants were required to secure his deposition by service of a subpoena (CPLR 3120; *see* Siegel NY Prac §351 2019 [Note online edition]). Moreover, the authorizations which defendants now seek in unrestricted form were the subject of detailed discussions at the March 6, 2019 compliance conference. If defendants found plaintiff's proffer of authorizations to be somehow lacking, defendants failed to object to the authorizations provided. Contrary to defendants' assertions, the standard is not whether the discovery demands were made within twenty days of the filing of the note of issue, but whether the certificate of readiness was materially incorrect when filed. Defendants had more than sufficient time to obtain discovery in this case. Defendants have failed to establish that the certificate of readiness was incorrect as filed and have otherwise failed to establish any reasonable excuse for not previously seeking this discovery or good cause for vacating the note of issue. Since there is no showing on this motion that the information in the certificate of readiness is incorrect and the matter is ready for trial, the motion shall be denied.

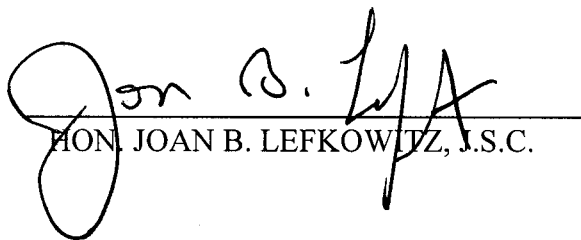
In view of the foregoing, it is

ORDERED that defendants' motion to strike the note of issue, vacate the certificate of readiness, and remove the action from the trial calendar in order to conduct further discovery is denied; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry upon plaintiff within 10 days of entry.

The foregoing constitutes the decision and order of this court.

Dated: White Plains, New York
June 17, 2019


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

TO:

Service upon all counsel via NYSCEF

Jeffrey Meyer
16 Terrace Place
Tuckahoe, New York 10707
By First Class Mail

CC: Compliance Part Clerk