

<b>Azmi v MTA Bus Co.</b>
2019 NY Slip Op 34283(U)
July 11, 2019
Supreme Court, Queens County
Docket Number: Index No. 701428/2018
Judge: Joseph Risi
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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JOSEPH RISI, A.J.S.C.

IA Part 3

-----X  
LUBNA AZMI,

Index  
Number 701428/2018

Plaintiff,

AMENDED  
DECISION/ORDER

-against-

THE MTA BUS COMPANY, MTA NEW YORK CITY  
TRANSIT, NEW YORK CITY TRANSIT  
AUTHORITY, "JOHN DOE", NAME BEING  
FICTITIOUS AND UNKNOWN and AMIR KHAN

Motion Seq. #2

Defendants.

-----X

The following papers numbered 1 to 4 read on this motion by defendants, for an order, pursuant to CPLR §§3124 and 3126, *inter alia*, striking plaintiff's complaint and precluding plaintiff from offering any evidence at trial.

PAPERS  
NUMBERED

N.M., Affirmations, Exhibits and Service..... 1-4

Upon the foregoing papers, this unopposed motion is determined as follows:

This action arises out of an incident that allegedly took place on January 17, 2017 at or about Union Turnpike at or near its intersection with Little Neck Parkway whereby plaintiff, a passenger on a bus, was injured due to the movement of the bus. Plaintiff alleges that as a result of defendants' carelessness, negligence, and recklessness, she was caused to sustain severe and permanent personal injuries.

Plaintiff commenced this action by filing a summons and verified complaint on January 30, 2018. Issue was joined on or about March 6, 2018 when defendants interposed an answer with

various demands. On or about April 13, 2018, defendants filed an amended answer.

Defendants submit this motion pursuant to CPLR §§3124 and 3126 to strike the plaintiff's complaint, preclude plaintiff from offering any evidence at trial, or to strike the note of issue and certificate of readiness of plaintiff and remove this action from the trial calendar on the grounds that discovery has not been completed. To date, defendants aver that plaintiff has failed to provide the following discovery items: (1) a duly executed Statutory Hearing transcript; (2) HIPAA compliant authorizations as requested in defendants' letter dated June 27, 2018; (3) duly executed authorizations for plaintiff's Medicare records for three (3) years prior to the date of accident to present. If plaintiff is not a Medicare recipient, then an affidavit stating that she does not receive Medicare; (4) a supplemental Bill of Particulars as to question 20, subsection 'e' - lost wages; and (5) for plaintiff to appear for independent medical examinations.

Additionally, pursuant to CPLR §3212, defendants move to extend their time to file summary judgment until 120 days from the date of completion of all outstanding discovery. Defendants contend that the discovery that remains outstanding is material and necessary on the issues of liability and damages in the defense of this case and without such documents and information, defendants would be prejudiced if forced to proceed to trial without same.

Despite defendants continuing requests and good faith efforts to secure the above mentioned items, said discovery still remains outstanding. Plaintiffs are bound by the Preliminary Conference Order dated May 11, 2018 and the Compliance Conference Order dated November 15, 2018.

Defendants' further contend that plaintiff is in willful default of the Court's Order and discovery demands. However, it cannot be said that such conduct rises to the level of "willful, contumacious or in bad faith" to warrant the drastic sanction of preclusion or striking a pleading

under CPLR §3126 (*see Javeed v. 3619 Realty Corp.*, 129 AD3d 1029, 1032 [2015]; *Mackenzie v. City of N.Y.*, 125 AD3d 821 [2015]). Given the strong public policy in favor of resolving matters on the merits (*see Storcheyov v. Blinderman*, 303 AD2d 672 [2003]) and the Court's broad discretion for overseeing the discovery process (*see Maiorino v. City of New York*, 39 AD3d 601 [2007]), sanctions under CPLR §3126 are not appropriate at this juncture.

Moreover, 22 NYCRR 202.21(e) provides that within 20 days after service of a note of issue and certificate of readiness, a court may grant a party's motion to vacate the note of issue upon an affidavit of showing in what respects the case is not ready for trial and if the certificate of readiness fails to comply with the requirements of this section in some material respect (*Rizzo v Drs. Balish & Friedman, DDS*, 153 AD3d 869, 870 [2d Dept 2017]). In the instant matter, defendants timely move to vacate the note of issue by supporting the motion with an affirmation that the case is not ready for trial as substantial discovery remains outstanding (*see Singh v. CBCS Constr. Corp.*, 137 A.D.3d 1250, 27 N.Y.S.3d 403).

In light of the preceding, it is

**ORDERED** that plaintiff Lubna Azmi shall comply with defendants' notice for discovery and provide HIPAA authorizations as demanded in defendants' letter dated June 27, 2018; and it is further

**ORDERED** that plaintiff provide a complete set of medical records in accordance with NYCRR 202.17; and it is further

**ORDERED** that plaintiff provide a duly executed statutory hearing transcript within thirty (30) days of service of the within order with notice of entry; it is further

**ORDERED** that plaintiff shall provide an affidavit stating whether she is or ever has been a recipient of Medicare benefits. If she is, plaintiff is to provide an authorization for Medicare records for the three (3) years prior to the date of the accident to present; and it is further

**ORDERED** that plaintiff shall appear for independent medical examinations (IME) in the appropriate specialties, to the extent not already held. It appearing from the Note of Issue filed on

April 9, 2019, that the orthopedic IME was held on March 18, 2019. Defendants shall designate the physicians to conduct same within ten (10) days after service of this order with notice of entry. Failure by plaintiff to appear for independent medical examinations as directed herein may result in plaintiff being precluded from offering any evidence of damages at the trial of this matter.

**ORDERED** that the within motion, in so far as same seeks to vacate plaintiff's note of issue filed on April 9, 2019 is denied; it is further

**ORDERED** that the application for an extension of time to move for summary judgment is denied, without prejudice to renewal simultaneously with the making of a motion for summary judgment; and it is further

**ORDERED** that all other applications not addressed herein are denied; and it is further

**ORDERED** that defendants shall serve plaintiff with a copy of this order, together with notice of entry, within 15 days of the filing of this order by the Queens County Clerk.

This is the decision and order of the Court.

Date: July 11, 2019

*7/11/19 [Signature]*  
Hon. Joseph Risi, A.J.S.C.

FILED  
JUL 23 2019  
COUNTY CLERK  
QUEENS COUNTY