

<b>Mendoza v City of New York</b>
2020 NY Slip Op 31487(U)
April 3, 2020
Supreme Court, New York County
Docket Number: 160188/2013
Judge: Lucy Billings
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46

-----X

PEDRO MENDOZA and JEN MARIE MENDOZA,

Index No. 160188/2013

Plaintiffs

- against -

CITY OF NEW YORK, NEW YORK CITY HEALTH  
AND HOSPITALS CORPORATION, HHC  
GOUVERNEUR HEALTHCARE SERVICES, HUNTER  
ROBERTS CONSTRUCTION GROUP, L.L.C.,  
DORMITORY AUTHORITY OF THE STATE OF NEW  
YORK, J. PETROCELLI CONTRACTING, INC.,  
B&G ELECTRICAL CONTRACTORS OF N.Y.,  
INC., PRISTINE SERVICES, INC., and  
ADVANCE CONSTRUCTION,

Defendants

-----X  
-----X

CITY OF NEW YORK, NEW YORK CITY HEALTH  
AND HOSPITALS CORPORATION, HHC  
GOUVERNEUR HEALTHCARE SERVICES, HUNTER  
ROBERTS CONSTRUCTION GROUP, L.L.C.,

Third Party Plaintiffs

- against -

PRISTINE SERVICES, INC.,

Third Party Defendant

-----X  
-----X

DORMITORY AUTHORITY OF THE STATE OF NEW  
YORK,

Second Third Party Plaintiff

- against -

B&G ELECTRICAL CONTRACTORS OF N.Y.,  
INC.,

Second Third Party Defendant

-----X

DECISION AND ORDER

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

A stipulated Status Conference Order dated November 14, 2019, required plaintiffs to file a note of issue by December 17, 2019. In an order dated November 27, 2019, the court granted the motion by defendant-third party defendant Pristine Services, Inc., to compel defendant-second third party defendant B&G Electrical Contractors of N.Y., Inc., to produce its employee John Begatta for a deposition to be conducted December 4, 2019. C.P.L.R. § 3124. All parties other than second third party defendant stipulated to this date at the Status Conference November 14, 2019. Because of the impending deadline for the note of issue, the court ordered that the parties were not to postpone this deposition without the court's permission.

On December 3, 2019, third party defendant changed its attorney. Because its incoming attorney did not receive its case file from its outgoing attorney until December 9, 2019, neither attorney, nor any other parties, conducted Begatta's deposition December 4, 2019. Neither attorney, nor any other parties, ever sought permission to postpone the deposition between December 9 and 17 or after December 17, 2019, or to extend the note of issue deadline. While the failure to conduct Begatta's deposition December 4, 2019, may have been excusable, neither third party defendant nor any other party makes any attempt to excuse the

failure to conduct the deposition between December 9 and 17, 2019, or the failure to seek permission to postpone the deposition.

## II. THE CURRENT MOTIONS

Third party defendant now moves to vacate the note of issue because plaintiffs filed it timely, but before third party defendant had conducted Begatta's deposition, and because the file that third party defendant's incoming attorney received from its outgoing attorney did not include all the authorizations for medical records that plaintiffs had provided to the outgoing attorney. 22 N.Y.C.R.R. § 202.21(e). Third party defendant also moves to compel that disclosure. C.P.L.R. § 3124. Yet third party defendant readily acknowledges that a conference with plaintiffs likely would have resolved the missing authorizations. See 22 N.Y.C.R.R. § 202.7(a) and (c); Pirraglia v. Jofsen, Inc., 171 A.D.3d 521, 523 (1st Dep't 2019); Kelly v. New York City Tr. Auth., 162 A.D.3d 424, 424 (1st Dep't 2018); Perez De Sanchez v. Trevz Trucking LLC, 124 A.D.3d 527, 527 (1st Dep't 2015); Diaz v. Reinersman, 110 A.D.3d 616, 617 (1st Dep't 2013). In fact, third party defendant further acknowledges that, in response to third party defendant's motion, plaintiffs have provided both the authorizations and the medical records themselves that plaintiffs previously provided to the outgoing attorney.

On similar grounds, defendants-third party plaintiffs City of New York, New York City Health and Hospitals Corporation, and Hunter Roberts Construction Group, L.L.C., separately move for

similar relief and also to preclude plaintiffs from introducing evidence of the medical conditions to which claimed outstanding authorizations pertain. C.P.L.R. § 3126(2). If the court denies vacatur of the note of issue, both motions seek to extend the time to move for summary judgment, C.P.L.R. §§ 2004, 3212(a), and third party plaintiffs move also to stay the trial, C.P.L.R. § 2101, until after the outstanding disclosure is completed.

The authorizations that third party plaintiffs claim to be outstanding include authorizations for release of medical records from "Dr. Festa," to interview Dr. Festa, and for release of employment records from Central State Brook Construction, Stony Brook Construction, and RMP Painting, demanded March 10, 2015. *Aff. of Robert F. Fanning Ex. M*, at 6-7. The claimed outstanding authorizations also include authorizations for release of medical records from Alignnetwork PT, Ortho Surgery, Pointview Radiology, West Med, and Dr. Rizwanullah Hammeed, and an authorization to interview Dr. Hammeed, demanded May 7, 2015. *Id.* at 1-2. Third party plaintiffs point to a Status conference Order dated June 6, 2019, which simply required all parties to respond to outstanding disclosure demands within 30 days, to the extent responses had not already been provided, and without specifying the outstanding demands. Nor did any order after that order specify that the authorizations third party plaintiffs requested March 10 or May 7, 2015, remained outstanding.

On June 16, 2015, plaintiffs responded to third party plaintiffs' March 2015 demand for authorizations. Plaintiffs

responded that Dr. Festa treated plaintiff Pedro Mendoza for an ear infection, unquestionably unrelated to the injuries he claims in this action--so unquestionable that no party questioned him about Dr. Festa at Mendoza's depositions. Plaintiffs further responded that they did not recall employment with any of the three entities for which third party plaintiffs demanded authorizations. Again, third party plaintiffs never questioned Mendoza about such employers at his depositions, nor provided him any evidence that might refresh his recollection about such employers, nor followed up in any way, at any Status Conference or otherwise, until the current motion over four years later.

On September 16, 2015, plaintiffs responded to third party plaintiffs' May 2015 demand for authorizations. Plaintiffs similarly responded that they were unaware of any treatment or services rendered to Pedro Mendoza by Alignnetwork PT, Ortho Surgery, Pointview Radiology, West Med, or Dr. Rizwanullah Hammeed and requested that third party plaintiffs provide any evidence showing such a connection. Again, third party plaintiffs never provided any such evidence, nor questioned Mendoza about these treatment or service providers at his depositions, nor followed up in any way until the current motion.

Just as third party plaintiffs failed for over four years to express any dissatisfaction with plaintiffs' responses or, after receiving them, to pursue the requests for authorizations further, third party plaintiffs still fail to address plaintiffs's responses. Third party plaintiffs simply attempt

suddenly to resuscitate requests abandoned long ago.

### III. CONCLUSION

Because the parties seeking Begatta's deposition failed to conduct it December 4, 2019, or before the note of issue deadline December 17, 2019, or seek permission to postpone the deposition, and because third party plaintiffs abandoned their requests for authorizations after plaintiffs responded, third party defendant and third party plaintiffs have waived the disclosure they claim is outstanding. Alvarez v. Feola, 140 A.D.3d 596, 597 (1st Dep't 2016); Perez De Sanchez v. Trevz Trucking, 124 A.D.3d at 528; Stolowski v. 234 E. 178th St. LLC, 104 A.D.3d 569, 570 (1st Dep't 2013); Sereda v. Sounds of Cuba, Inc., 95 A.D.3d 651, 652 (1st Dep't 2012). Neither it, nor the authorizations that third party defendant sought and now acknowledges have been provided, constitute grounds to vacate the note of issue. 22 N.Y.C.R.R. §§ 202(a) and (c), 202.21(e).

Nor do any of the authorizations sought, which no party indicates bear on any party's liability, or the waived deposition constitute grounds to extend the time to move for summary judgment. C.P.L.R. § 3212(a); Andron v. City of New York, 117 A.D.3d 526, 526 (1st Dep't 2014); Jimenez v. Haros, 39 A.D.3d 437, 437 (1st Dep't 2007); Pena v. Women's Outreach Network, Inc., 35 A.D.3d 104, 108 (1st Dep't 2006); Espejo v. Hiro Real Estate Co., 19 A.D.3d 360, 361 (1st Dep't 2005). See Appleyard v. Tigges, 171 A.D.3d 534, 536 (1st Dep't 2019); Kenny v. Turner Constr. Co., 155 A.D.3d 479, 480 (1st Dep't 2017); Burbridge v.

Soho Plaza Corp., 150 A.D.3d 513, 513 (1st Dep't 2017); Waxman v. Hallen Constr. Co., Inc., 139 A.D.3d 597, 598 (1st Dep't 2016). Since no disclosure is outstanding, no preclusion of evidence due to nondisclosure or stay of the trial is warranted. C.P.L.R. §§ 2201, 3126(2).

Consequently, the court denies third party defendant's and third party plaintiffs' separate motions to vacate the note of issue, to compel disclosure, or to extend the time to move for summary judgment. C.P.L.R. §§ 2004, 3124, 3212(a); 22 N.Y.C.R.R. §§ 202.7(a) and (c), 202.21(e). The court also denies third party plaintiffs' motion to preclude evidence due to plaintiffs' nondisclosure and to stay the trial. C.P.L.R. §§ 2201, 3126(2). If all parties agree to proceed with Begatta's deposition at an agreed time and place, they may conduct the deposition, but it will not constitute grounds to vacate the note of issue, to extend the time to move for summary judgment, or to stay the trial.

DATED: April 3, 2020

*Lucy Billings*

\_\_\_\_\_  
LUCY BILLINGS, J.S.C.

LUCY BILLINGS  
J.S.C.

BARRY MCTIERNAN & MOORE LLC  
COUNSELORS AT LAW

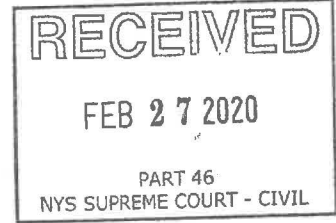
WESTCHESTER OFFICE  
55 CHURCH STREET  
WHITE PLAINS, N.Y. 10601  
TEL: (91\*4) 946-1030  
FAX: (914) 946-3814

101 Greenwich Street, 14th FLOOR  
NEW YORK, NEW YORK 10006  
TEL: (212) 313-3600  
FAX: (212) 608-8901  
FAX: (212) 608-8902 (TOXIC TORT)

NEW JERSEY OFFICE  
15 QUAKER HILL LANE  
RANDOLPH, N.J. 07869  
TEL: (973) 366-1004  
FAX: (212) 608-8901

February 25, 2020

Via Regular Mail and E-File Submission  
Motion Submissions Part  
New York County Supreme Court  
60 Centre Street, Room 130  
New York, New York 10007

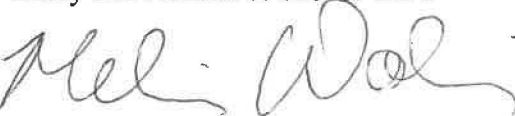


Re: Pedro Mendoza, et al. v. The City of New York, et al.  
Index Number: 160188/2013  
Our File No. : SP-63070

To Whom It May Concern:

Please be advised that the undersigned, counsel for co-defendant Advance Construction, LLC, is hereby withdrawing the cross-motion to vacate plaintiff's Note of Issue, (motion # 012 and numbers 335-339 on NYSCEF) which is returnable today, February 25, 2020.

Thank you for your attention to this matter. If you have any questions, please do not hesitate to contact the undersigned.

Very truly yours,  
Barry McTiernan & Moore LLC  
  
Melissa M. Wolin, Esq.

MMW/

Cc:  
Via Regular Mail and E-File Submission  
Honorable Lucy Billings  
New York County Supreme Court  
71 Thomas Street, Room 203  
New York, New York 10013