

Apoo v Tri Star Constr. Corp.
2020 NY Slip Op 31583(U)
May 28, 2020
Supreme Court, New York County
Docket Number: 150122/2018
Judge: Frank P. Nervo
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART IV

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VISHNU APOO,

Plaintiff,

-against-

TRI STAR CONSTRUCTION CORP., 605 THIRD AVENUE FEE LLC, 605 THIRD AVENUE LLC, FISHER BROTHERS MANAGEMENT CO. LLC and LAB PUMBING & HEATING CO. INC.,

Defendants.

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TRI STAR CONSTRUCTION CORP.,
Third-Party Plaintiff,

-against-

DONNELLY MECHANICAL CORP.,
Third-Party Defendants.

-----X

DONNELLY MECHANICAL CORP.,
Second Third-Party Plaintiff,

-against-

SEAMLESS MECHANICAL, INC.,
Second Third-Party Defendants.

-----X

TRI STAR CONSTRUCTION CORP.,
Third Third-Party Plaintiff,

-against-

SEAMLESS MECHANICAL, INC.,
Third Third-Party Defendants.

-----X

HON. FRANK P. NERVO, J.S.C.:

Defendant and third-party plaintiff Tri Star Construction Corp. (hereinafter “Tri Star”) seeks, inter alia, to strike plaintiff’s Note of Issue contending that discovery remains outstanding and the Note of Issue contains factual misrepresentations.

Defendant and third-party defendant Donnelly Mechanical Corp. (hereinafter “Donnelly”) joins that portion of the motion seeking to strike the Note of Issue, but opposes all other relief sought, including compelling discovery. Plaintiff opposes the motion in its entirety, contending that the various defendants in this matter are responsible for the delay and are, in essence, willfully failing to complete discovery for strategic benefit. The Court notes that plaintiff’s opposition is untimely; however, given the preference for addressing matters on the merits, the Court has considered this opposition (*see e.g. Scott v. Allstate Ins. Co.*, 124 AD2d 481 [1st Dept 1986]).

A note of issue is should be vacated where the certificate of readiness incorrectly states discovery is complete when discovery, in fact, remains outstanding (*Matos v. City of New York*, 154 AD3d 532 [1st Dept 2017]; *Nielsen v. New York State Dormitory Auth.*, 84 AD3d 519 [1st Dept 2011]).

It is incontrovertible that discovery remains outstanding in this matter and plaintiff’s Note of Issue, at best, misrepresents that all discovery is complete and the matter is trial ready. Plaintiff’s assertion that this court removed deposition dates in a March 6, 2020 order and directed all discovery be completed within two weeks is disingenuous and fails to address this Court’s November 15, 2019 Decision and Order (Mot. Seq. 002) directing these same depositions occur throughout January, February, and early March 2020. This Court’s Part Rules require extensions of the Note of Issue deadline be brought by order to show cause and directs that there shall be no further discovery after the Note of Issue deadline (Part IV Rules, Supreme Court, New York Country – Dedicated Trial Division Justice Frank P. Nervo “Note of Issue. ... extensions

of this deadline shall be brought by order to show cause, on notice to all counsel and returnable in this Part, as soon as counsel becomes aware that the deadline is impracticable. In no event shall such order to show cause be made after the note of issue deadline. There shall be no further discovery after the note of issue date”). Plaintiff cannot now contend that his failure to comply with the Part Rules favors allowing this matter to remain on the trial calendar while discovery continues. Consequently, the Note of Issue is vacated.

The Court finds Donnelly’s position, striking the note of issue and allowing the parties to schedule discovery, untenable. This matter has history of discovery disputes and delays, as well as noncompliance with the Court’s discovery orders. Given the foregoing, and the parties inability to complete depositions as ordered by this Court’s November 15, 2019 Decision and Order, all depositions shall be completed by September 4, 2020 and post-deposition demands shall be exchanged by September 18, 2020. Likewise, defendants shall schedule plaintiff’s independent medical examination (IME) to occur by August 14, 2020, with report(s) exchanged within 45 days of examination. Plaintiff shall file the Note of Issue on or before September 30, 2020. Discovery shall proceed by Skype or other electronic means.

The Court has considered the current COVID-19 pandemic and its impact in setting the discovery deadlines and reaching its decision. Absent extraordinary circumstances, failure to complete discovery, as outlined herein, will result in sanctions, including, but not limited to, the preclusion of such evidence at the time of trial, and

striking of pleadings, as appropriate. All parties shall complete any outstanding required authorizations within 20 days of entry of this Decision and Order.

To the extent that Tri Star seeks an extension of time to file a summary judgment, such relief is academic in light of the vacatur of the note of issue. CPLR § 3212(a) provides that a summary judgment motion must be made within 120 days after the filing of a note of issue; however, where a note of issue has been vacated no such time limit begins to run (David D. Siegel, Practice Commentaries, C3212:12 Time for Making Summary Judgment Motion [2006]).

This decision is without prejudice to further application, including the Court's own motion, for sanctions against counsel should any party fail to complete discovery as ordered (22 NYCRR 130-1.1).

Accordingly, it is

ORDERED that the motion to vacate the note of issue is granted and the note of issue is vacated and the case is stricken from the trial calendar; and it is further

ORDERED that depositions, medical exams, and demands shall be completed and exchanged as directed herein; and it is further

ORDERED that any outstanding required authorizations shall be completed and exchanged within 20 days of notice of entry of this Decision and Order; and it is further

ORDERED that any other outstanding discovery not specifically addressed herein shall be completed by September 18, 2020; and it is further

ORDERED that failure to comply with this order shall result in the preclusion of material not produced, exchanged, or completed at the time of trial, absent further order of this Court; and it is further

ORDERED that this Decision and Order is without prejudice to further applications, including the Court's own motion, for sanctions against counsel should discovery not be completed in accordance with this Decision.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: May 28, 2020

ENTER:



Hon. Frank P. Nervo, J.S.C.