

Walcott v Nab 2000 Realty LLC
2020 NY Slip Op 32458(U)
July 27, 2020
Supreme Court, New York County
Docket Number: 157811/2015
Judge: Kathryn E. Freed
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
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED **PART** **IAS MOTION 2EFM**

Justice

-----X

INDEX NO. 157811/2015

VERA WALCOTT,

Plaintiff,

MOTION SEQ. NO. 005

- v -

NAB 2000 REALTY LLC and Q DELI CORP.,

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 005) 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE/JURY

In this personal injury action commenced by plaintiff Vera Walcott, defendant NAB 2000 Realty LLC (“NAB”) moves, pursuant to 22 NYCRR 202.21(e), to vacate the note of issue. Defendant Q Deli Corp. (“QDC”) supports the motion and plaintiff opposes the application. After a review of the parties’ contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

This action arises from an incident on March 9, 2015 in which plaintiff allegedly tripped and fell on a sidewalk in front of 2000 2nd Avenue, New York, New York (“the premises”), which were allegedly owned by NAB and leased to QDC. Doc. 1. Plaintiff alleged that the sidewalk was “hazardous” insofar as it was “broken”, “cracked” and “uneven”. Doc. 183. At her deposition,

plaintiff testified that she tripped and fell due to a raised sidewalk flag at the premises. Doc. 169 at 35-36, 51.

On March 22, 2019, plaintiff filed a note of issue and certificate of readiness. Doc. 94. At the same time, plaintiff provided trial authorizations, including one for the records of Healing Rays Hand Therapy, OT and PT PLLC (“HRHT”). Prior to the service of the trial authorizations, NAB was not aware that plaintiff had been treated by HRHT. NAB then discovered that the HRHT records contained notes prepared by plaintiff’s physical therapist, Amanda Iger, indicating that plaintiff admitted to Iger that she was injured on March 9, 2015 when she slipped on snow and ice in the street. The records were devoid of any mention of an uneven sidewalk. Doc. 171. NAB thereafter noticed Iger for a nonparty deposition, at which she testified that she would not have recorded that plaintiff slipped on snow and ice in the street unless that is what plaintiff told her. Doc. 172 at 19.

Iger further testified that the records indicated that her supervisor, Benjamin Baron, an occupational therapist whom, she believed, was a co-owner of HRHT, accessed her records after she prepared them. Baron signed the notes Iger had written about plaintiff but she did not know whether he had changed any of her entries. Doc. 172 at 50-51. Iger believed, but was not certain, that Baron may have accessed her notes for billing purposes. Doc. 172 at 50.

In April 2019, this Court granted plaintiff’s unopposed motion for a trial preference given that she was over the age of 70. Doc. 106.

In July 2019, NAB moved, by order to show cause (“OSC”) (motion sequence 004), to compel plaintiff to provide trial authorizations, which motion was returnable on October 29, 2019. Doc. 136.

By stipulation dated July 31, 2019 and filed August 1, 2019, plaintiff vacated the NOI. Doc. 135.

On September 13, 2019, in the wake of Iger's testimony, and in an attempt to address issues regarding the admissibility of HRHT's records at trial, NAB served Baron with a subpoena and notice demanding that he appear for deposition on September 18, 2019. Docs. 173-174. Plaintiff's counsel objected on the ground that he received insufficient notice of the deposition and requested that it be rescheduled since he was unavailable on the date selected. Doc. 175. NAB's attorney represents that he did not reschedule Baron's deposition, which still has not been conducted, because the parties were attempting to mediate the case and he did not want to incur additional expenses in the event the case did not settle. Doc. 166 at par. 9. The mediation, which was not held until January 31, 2020, was unsuccessful. Doc. 166 at par. 9; Doc. 182 at pars. 14-15.

A status conference order dated October 29, 2019 and filed October 31, 2019 reflected that NAB's OSC (motion sequence 004) was moot because the notice of issue had been vacated. Doc. 155. The order, which also directed plaintiff to provide authorizations, was silent regarding Baron's deposition. Doc. 155.

On January 29, 2020 the parties appeared for a further status conference. Doc. 160. The order issued at that conference did not reflect that *any* discovery was outstanding, and merely directed plaintiff to file the note of issue by February 20, 2020. Doc. 160. Plaintiff re-filed the note of issue on February 19, 2020 and NAB filed the instant motion to vacate the same on March 10, 2020. Docs. 161, 164. Alternatively, NAB asks this Court to leave this case on the trial calendar while directing Baron's deposition to proceed. Doc. 164.

In support of the motion, NAB's attorney argues that this Court should direct Baron's deposition to proceed because it is material and necessary to the defense of this case insofar as it

concerns the authentication of a medical record containing an admission that the accident did not occur in the manner or in the location alleged by plaintiff. Counsel further asserts that plaintiff will not be prejudiced by the granting of this motion since plaintiff was aware before the note of issue was refiled that NAB wished to conduct the deposition, and that the deposition can be conducted far in advance of trial. NAB's attorney also maintains that plaintiff did not object to the deposition when it was initially noticed while the case was on the trial calendar following the initial filing of the note of issue. Thus, counsel claims, there is no reason for plaintiff to object now, after the note of issue was filed for the second time.

In support of the motion, QDC argues that NAB's motion should be granted and incorporates NAB's arguments in support of the application by reference.

In opposition, plaintiff's counsel argues, inter alia, that NAB waived its right to conduct Baron's deposition since its attorney appeared at the January 29, 2020 status conference and failed to address any issues regarding outstanding discovery. Additionally, counsel argues that there are no special circumstances warranting Barron's deposition since the records of HRHT can be authenticated pursuant to CPLR 3122-a.

In reply, NAB's attorney argues, inter alia, that Baron's testimony is crucial to his client's defense. He also reiterates his contention that plaintiff failed to object to NAB's attempt to depose Baron after the note of issue was initially filed.

LEGAL CONCLUSIONS:

22 NYCRR §202.21(d) provides as follows:

Where unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice, the court, upon motion supported by affidavit, may grant permission to conduct such necessary proceedings.

It is apparent to this Court that no “unusual or unanticipated circumstances develop[ed] subsequent to the filing of [the] note of issue and certificate of readiness” for the second time on February 19, 2020 which warrant further discovery. As plaintiff’s counsel asserts, counsel for NAB was present at the status conference on January 29, 2020, which resulted in the issuance of an order which was silent regarding any outstanding discovery and which directed only that the note of issue be filed by February 20, 2020. It is undisputed that counsel for NAB thus had the opportunity at the conference to raise the issue of Baron’s deposition but failed to do so.¹ Indeed, NAB’s attorney admits in his affirmation in support of the motion that:

After reviewing the file in response to the filing of the note of issue, your affirmant was reminded that Mr. Baron's non-party deposition was never held. Thus, on March 4, 2020 and March 9, 2020 your affirmant wrote to plaintiff's counsel requesting he consent to the deposition in lieu of the motion to vacate [the note of issue filed on February 19, 2020].

This explanation does not even attempt to address the issue of counsel’s preparation for the January 29, 2019 conference, and fails to set forth the type of unusual and unanticipated circumstances envisioned by 22 NYCRR §202.21(d). NAB’s attorney clearly wished to depose Baron as early as September, 2019, when Baron was served with a subpoena and deposition notice, but admittedly chose not to do so in an attempt to reduce litigation costs. On January 29, 2020, two days before the mediation, counsel appeared at a status conference and, even if he wished to reduce litigation costs, he could have reserved his right to depose Baron in the event the case did not settle but failed to do so. Thus, the issue of Baron’s deposition clearly does not constitute an

¹ Counsel for NAB also failed to raise the issue of Baron’s deposition at the compliance conference held on October 29, 2019 at which time the note of issue initially filed by plaintiff had been vacated.

unusual or unanticipated circumstance which arose after the filing of the note of issue in February 2020. See *Palmiero v 417 E. 9th St. Assocs., LLC*, 167 AD3d 472 (1st Dept 2018).²

Although NAB correctly cites *Woods v Daniella Realty Corp.*, 15 AD3d 231 (1st Dept 2005) for the proposition that this Court has the discretion to direct that discovery be conducted even after the filing of the note issue, the holding in that decision was limited to the circumstances of that case. However, for the reasons set forth above, this Court declines to exercise its discretion under the circumstances of this matter.

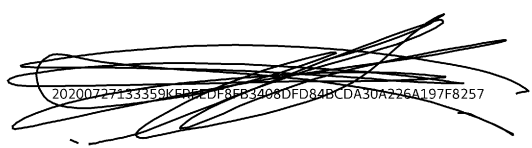
Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by defendant NAB 2000 Realty LLC is denied in all respects; and it is further

ORDERED that defendant NAB is to serve a copy of this order, with notice of entry, on all parties within 10 days after it is uploaded to NYSCEF; and it is further

ORDERED that this constitutes the decision and order of the Court.

7/27/2020
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED
<input type="checkbox"/>	SETTLE ORDER	
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
<input type="checkbox"/>	SUBMIT ORDER	
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:

² This Court is also reluctant to vacate the note of issue where, as here, plaintiff has a trial preference based on her age. Although this does not prevent this Court from directing that discovery proceed while directing that the note of issue remain intact, this Court declines, for the reasons noted above, to order such discovery.