

Brown v Mann's Paint & Body Shop N., Inc.
2020 NY Slip Op 34575(U)
August 13, 2020
Supreme Court, Orange County
Docket Number: EF002591-2017
Judge: Sandra B. Sciortino
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To commence the statutory time 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 ORANGE

-----X
MARTIN BROWN and PAMELA BROWN,
Plaintiffs,

DECISION AND ORDER

INDEX NO.: EF002591-2017
Motion Date: 7/22/2020
Sequence No. 2

-against-

MANN'S PAINT & BODY SHOP NORTH, INC.,
FRANK MANN, FISHKILL AUTO BODY INC.,
And QB FISHKILL, LLC,
Defendants.

-----X
QB FISHKILL, LLC,
Third-Party Plaintiff,

-against-

OLYMPIC ELECTRIC OF THE HUDSON
VALLEY, LLC,
Third-Party Defendant.

-----X
SCIORTINO, J.

The following papers numbered 1 to 11 were considered in connection with defendant-third-party plaintiff QB Fishkill, LLC' application brought pursuant to 22 NYCRR 202.21(e) to vacate the note of issue and strike the case from the trial calendar; compel plaintiff to produce an Amended Supplemental Bills of Particulars; permit the independent medical examination of plaintiff Martin Brown; and extend the time for the filing of motions for summary judgment:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Affirmation/Exhibits A-E	1 - 7
Affirmation in Opposition/Exhibit 1-2	8 - 10
Reply Affirmation	11

Background and Procedural History

This is an action for personal injuries allegedly sustained by plaintiff from a construction accident which occurred on the premises of defendants. A Summons and Complaint was filed on April 7, 2017. Issue was joined by defendant QB Fishkill on December 20, 2017. Plaintiff served a Verified Bill of Particulars on March 22, 2018. QB Fishkill initiated a third-party action against Olympic Electric of the Hudson Valley, LLC (“Olympic”) by the filing of a Third-Party Summons and Complaint January 23, 2019. Olympic joined issue as third-party defendant by service of an Answer to the Third-Party Complaint on February 28, 2019.

QB Fishkill objected to plaintiffs’ Verified Bill of Particulars as it contained open-ended language with regard to plaintiffs’ claims. At the January 22, 2020 conference, plaintiffs were directed to serve an Amended or Supplemental Bill of Particulars to address QB’s objections. Plaintiffs served a Supplemental Bill of Particulars on April 14, 2020. QB Fishkill again objected to same on April 28, 2020 averring that the Supplemental Bill of Particulars similarly contains open-ended language that was previously objected to.

On May 29, 2020, plaintiffs e-filed a Note of Issue and Certificate of Readiness. On June 23, 2020, QB Fishkill moved to vacate the Note of Issue and strike the case from the trial calendar. The motion also seeks an extension of time to move for summary judgment. However, since the filing of the motion, dispositive motions have been filed by third-party-defendant Olympic (Seq. #3), fully submitted on July 31, 2020, and by plaintiffs, returnable August 28, 2020 (Seq. #4). In its motion for summary judgment, Olympic seeks the alternative relief of vacating the Note of Issue should the motion not be granted.

QB Fishkill contends that the Note of Issue was prematurely filed as plaintiffs have not properly addressed its objections with respect to the Bill of Particulars, and that plaintiff Martin Brown, whose physical and mental condition is in controversy, has not submitted to independent medical examination or vocational rehabilitation evaluations.

In opposition, plaintiffs contend that the motion is untimely and QB Fishkill failed to provide a “good cause” explanation for the delay. Plaintiffs further argue that QB Fishkill’s objections to the Bill of Particulars were made two years after same was served upon defendant and therefore waived. Plaintiffs further contend that QB Fishkill waived its right to conduct an independent medical examination because no experts were designated by defendant and no notice of a physical or vocational rehabilitation examination was served. Plaintiffs contend that there were no outstanding discovery demands when the Note of Issue was filed and the Certificate of Readiness is correct. Lastly, plaintiffs contend that QB Fishkill failed to submit an affirmation of good faith which is fatal to the motion.

In reply, QB Fishkill contends that it was clear from the several court conferences that it objected to plaintiffs’ Bill of Particulars and that they intended to conduct examinations of plaintiff. QB Fishkill further contends that it was clear from the conferences that the Court was to designate a date by which examinations were to be completed at a conference that was later canceled due to the COVID-19 public health emergency. Defendant notes that plaintiffs do not dispute that the Bill of Particulars and Supplemental Bill of Particulars still contain impermissible language.

Discussion

Within 20 days after service of a note of issue and certificate of readiness, any party to the action may move to vacate the note of issue, upon an affidavit showing in what respects the case is not ready for trial (*see* 22 NYCRR 202.21[e]). Where a party moves for such relief more than 20 days after service of the Note of Issue and Certificate of Readiness, it must show good cause for vacatur (*id.*). “To satisfy the requirement of ‘good cause,’ the party seeking vacatur must demonstrate that unusual or unanticipated circumstances developed subsequent to the filing of the note of issue and certificate of readiness requiring additional pretrial proceedings to prevent substantial prejudice” (*Sposito v Cutting*, 165 AD3d 863, 865 [2d Dept 2018] [internal quotation and citation omitted]). However, the court may vacate the Note of Issue on its own motion if it appears that a material fact in the certificate of readiness is incorrect (*see* 22 NYCRR 202.21[e]; *Levy v Schaefer*, 160 AD2d 1182, 1183 [3d Dept 1990]).

Plaintiffs correctly point out that QB Fishkill’s motion was not filed within 20 days of service of the Note of Issue making the more stringent standard applicable. However, pursuant to 22 NYCRR 202.21(e), “[a]t any time, the court on its own motion may vacate a note of issue if it appears that a material fact in the certificate of readiness is incorrect.” While the Court would not have vacated the Note of Issue simply for the failure to have provided an appropriate Bill of Particulars, here, the Certificate of Readiness incorrectly states that physical examinations and discovery proceedings now known to be necessary were completed, which is materially incorrect. The independent medical examinations and vocational evaluations of plaintiff Martin Brown have not been conducted. The plaintiffs were well aware that it was the intention of defendants to conduct same. The parties were also perfectly aware that it was the intention of the Court to set the deadline

to complete the examinations after depositions had been completed and that those deadlines were to be set at the April 6, 2020 conference. However, due to the COVID-19 public health emergency that conference was administratively adjourned without date; a new conference date has not yet been scheduled. This public health crisis cannot prevent meaningful and necessary discovery. Accordingly, the motion to strike the Note of Issue is granted (*see Spilky v TRW, LLC*, 225 AD2d 539, 540 [2d Dept 1996]; *see also Levy v Schaefer*, 160 AD2d at 1183).

Plaintiffs shall also serve an Amended Supplemental Bill of Particulars no later than September 18, 2020.

The parties are directed to appear for a virtual conference on September 20, 2020 at 11:00 a.m. Physical examinations shall be addressed.

The balance of the application is denied as moot.

This decision shall constitute the order of the Court.

Dated: August 13, 2020
Goshen, New York

ENTER:



HON. SANDRA B. SCIORTINO, J.S.C.

To: *Counsel of Record via NYSCEF*