

Beamon v Liverpool

2020 NY Slip Op 35469(U)

November 6, 2020

Supreme Court, Queens County

Docket Number: Index No. 714801/2018

Judge: Maurice E. Muir

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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.

Short Form Order

FILED

NEW YORK SUPREME COURT – QUEENS COUNTY

**11/6/2020
4:00 PM**

Present: HONORABLE MAURICE E. MUIR
Justice

**COUNTY CLERK
QUEENS COUNTY**

KATRINA BEAMON,

Plaintiff,

-against-

TEWELDE B. LIVERPOOL,

Defendant.

IAS Part - 42

Index No.: 714801/2018

Motion Date: 11/5/20

Motion Cal. No. 1

Motion Seq. No. 1

The following electronically filed documents read on this motion by Tewelde B. Liverpool (“Ms. Liverpool”) for an order: (1) striking this action from the trial calendar and vacating Katrina Beamon’s (“Ms. Beamon” or “plaintiff”) Note of Issue and Certificate of Readiness for Trial, pursuant to 22 N.Y.C.R.R. § 208.17; or in the alternative, (2) dismissing plaintiff’s complaint with prejudice, pursuant to CPLR § 3126; and (3) affording defendant a period of 120 days in which to move for summary judgment upon completion of disclosure in this action.

	Papers <u>Numbered</u>
Notice of Motion-Affirmation in Support-Exhibits-Service.....	EF 11 - 21
Affirmation in Opposition-Exhibits.....	EF 23 - 25
Reply Affirmation-Exhibits.....	EF 26

Upon the foregoing papers, it is ordered that this motion is determined as follows:

BACKGROUND

This is an action to recover damages for personal injuries allegedly sustained by Ms. Beamon due to a motor vehicle collision, which occurred in the County of Queens, city and state of New York. The plaintiff alleges that on March 3, 2018, the motor vehicle owned and operated by Ms. Liverpool struck her motor vehicle. As a result, she sustained severe and

permanent personal injuries. On September 27, 2018, the plaintiff commenced the instant action against the defendant; and on January 25, 2019, issue was joined. On March 19, 2019, the parties appeared for a preliminary conference ("PC"), wherein they were directed to conduct Examinations Before Trial ("EBT") on or before June 4, 2019; and Independent Medical Examinations ("IME") forty-five (45) days thereafter. Thereafter, on October 4, 2019, the parties appeared for a compliance conference ("CC"), which directed the parties to complete EBTs on or about November 19, 2019. Thereafter, on February 13, 2020, the plaintiff filed the Notice of Issue and Certificate of Readiness for Trial ("NOI") with the clerk of the court, wherein plaintiff indicated that "discovery proceeding now known to be necessary completed" and "physical examinations completed." On February 27, 2020, the defendant filed the instant motion seeking to vacate the NOI, to dismiss the complaint and to extend her time to move for summary judgment. In essence, the defendant argues that on August 5, 2020, the plaintiff provided an acceptable response to its demands relating to plaintiff's prior accident(s); and they are in the midst of processing the authorizations, and awaiting responses for the records from Rios & Levy, the attorneys who handled the plaintiff's prior accident litigation. As a result, the defendant has scheduled plaintiff's depositions for December 15, 2020. However, they have not been able to perform an IME.

APPLICABLE LAW

CPLR § 3101(a)(1) provides, in relevant part, that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." The terms "material and necessary" in this statute "must be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" (*Matter of Kapon v. Koch*, 23 NY3d 32, 38 [2014], quoting *Allen v. Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]; see also *Brito v. Gomez*, 33 NY3d 1126 [2019]; *Foster v. Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). At the same time, a party is "not entitled to unlimited, uncontrolled, unfettered disclosure" (*Geffner v. Merry Med. Ctr.*, 83 AD3d 998, 998 [2d Dept 2011]; see also *Quinones v. 9 E. 69th St., ILC*, 132 AD3d 750, 750 [2d Dept 2015]). "It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims" (*Crazytown Furniture v. Brooklyn Union Gas Co.*, 150 AD2d 420, 421 [2d Dept 1989]; see *Quinones v. 9 E. 69th St., ILC*, 132 AD3d at 750, *supra*).

Furthermore, CPLR § 3126 permits the court to dismiss an action or to preclude a plaintiff from offering testimony or evidence, which would effectively result in dismissal, where it is determined that the plaintiff's conduct in failing to provide discovery was willful or contumacious (*see Almonte v. Pichardo*, 105 AD3d 687 [2d Dept 2012]; *Harris v. City of New York*, 117 AD3d 790 [2d Dept 2014]; *Zubaidi v. Hasbani*, 136 AD3d 708 [2d Dept 2016]; *Patterson v. New York City Health and Hospitals Corp.*, 284 AD2d 516 [2d Dept 2001]). “Willful and contumacious conduct may be inferred from a party’s repeated failure to comply with court-ordered discovery, coupled with inadequate explanations for the failure to comply, or a failure to comply with court-ordered discovery over an extended period of time” (*Rock City Sound, Inc. v. Bashian & Farber, LLP*, 83 AD3d 685, 686-687 [2d Dept 2011] [internal quotation marks and citations omitted]; *Teitelbaum v. Maimonides Med. Ctr.*, 144 AD3d 1013 [2d Dept 2016]; *Orgel v. Stewart Tit. Ins. Co.*, 91 AD3d 922 [2d Dept 2012].) The determination whether to strike a pleading for failure to comply with court-ordered disclosure lies within the sound discretion of the trial court. (*Teitelbaum v. Maimonides Med. Ctr.*, 144 AD3d 1013 [2d Dept 2016].)

Furthermore, pursuant to the Uniform Rules for Trial Courts, “[w]ithin 20 days after service of a note of issue and certificate of readiness, any party to the action or special proceeding may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect” (Uniform Rules for Trial Courts § 202.21[e]). A statement in a certificate of readiness to the effect that all pretrial discovery has been completed is a material fact, and where that statement is incorrect, the note of issue should be vacated (*see Cioffi v. S.M. Foods, Inc.*, 178 AD3d 1003 [2d Dept 2019]; *citing Barrett v. New York City Health & Hosps. Corp.*, 150 AD3d 949 [2d Dept 2017]; *cf. Slovney v. Nasso*, 153 AD3d 962 [2d Dept 2017]; *Rizzo v. Balish & Friedman*, 153 AD3d 869 [2d Dept 2018]; *see also Gallo v. SCG Select Carrier Group, LP*, 91 AD3d 714 [2d Dept 2012]; *Bundhoo v. Wendy’s*, 152 AD3d 734 [2d Dept 2017]).

DISCUSSION

Here, the defendant moved to vacate the note of issue and certificate of readiness within 20 days and submitted an affidavit in support thereof demonstrating that the case was not ready for trial. Moreover, the note of issue and certificate of readiness contains erroneous facts, which is a basis to vacate the same. Clearly, the defendant has not had an opportunity to either conduct

a physical examination of plaintiff or to depose her. Thus, the court must vacate the note of issue and certificate of readiness and strike the action from the trial calendar so that discovery may be completed. (see *Drapaniotis v. 36-08 33rd Street Corp.*, 288 AD2d 254 [2d Dept 2001]; *Bundhoo v. Wendy's*, 152 AD3d 734 [2d Dept 2017]; *Lynch v. Vollono*, 6 AD3d 505 [2d Dept 2004]; *Slovney v. Nasso*, 153 AD2d 962 [2d Dept 2017]). However, the court does not find that the plaintiff has engaged in willful and contumacious conduct. As such, the defendant's application to dismiss the complaint with prejudice is denied.

Lastly, the plaintiff correctly argues that pursuant to CPLR 3212(a), it requires motions for summary judgment be made no later than 120 days after the filing of the note of issue; and this statutory deadline is strictly enforced and can only be extended upon a showing of good cause (*Brill v. City of New York*, 2 NY3d 648 [2004]). Whether good cause exists is a matter committed to the court's discretion and requires a showing of a "satisfactory explanation for the untimeliness - rather than simply permitting meritorious, nonprejudicial filings, however tardy." (*Id.* at 652; *O'Neil v. Environmental Products Corp.*, 2020 NY Slip Op 05516 [2d Dept 2020]; *Wells Fargo Bank, N.A. v. Apt*, 179 AD3d 1145 [2d Dept 2020]). Here, however, the court finds that the defendant's time to file a motion for summary judgment has not expired because the New York State Governor's Executive Order 202.8 tolled the statute of limitations and suspended other procedural deadlines.

Accordingly, it is hereby

ORDERED that the motion to dismiss the complaint with prejudice, pursuant to CPLR § 3126, is denied; and it is further,

ORDERED that the motion to vacate the Notice of Issue and Certificate of Readiness for Trial, pursuant to 22 NYCRR § 202.21(e), is granted; and it is further,

ORDERED that plaintiff's Notice of Issue and Certificate of Readiness for Trial is vacated and this action shall be stricken from the trial calendar; and it is further,

ORDERED that the defendant's motion to extend the time to move for summary judgment, pursuant to CPLR § 3212(a), is denied as moot; and it is further,

ORDERED that plaintiff shall appear for an examination before trial on or before December 15, 2020; and it is further,

ORDERED that the physical examination of plaintiff, pursuant to CPLR § 3121(a), shall be designated by the defendant on or before January 5, 2021; and it is further,

ORDERED that the physical examination of plaintiff, pursuant to CPLR § 3121(a), shall be conducted 45 days of designation, and the IME report(s) shall be exchanged within 45 days upon completion of the IME; and it is further,

ORDERED that defendant shall serve a copy of this decision and order with notice of entry upon the plaintiff and the clerk of this court on or before November 30, 2020.

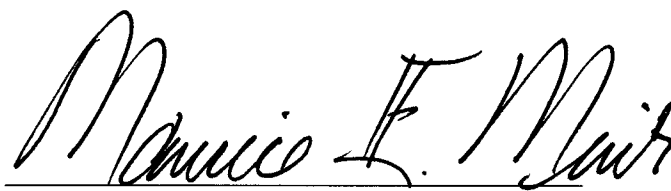
The foregoing constitutes the Decision and Order of the court.

Dated: November 6, 2020
Long Island City, NY

FILED

**11/6/2020
4:00 PM**

**COUNTY CLERK
QUEENS COUNTY**



MAURICE E. MUIR, J.S.C.