

Joseph v Forestdale, Inc.

2020 NY Slip Op 35620(U)

April 17, 2020

Supreme Court, Queens County

Docket Number: Index No. 712443/2018

Judge: Leslie J. Purificacion

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS:

HONORABLE LESLIE J. PURIFICACION, JSC

PART 39

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Index
Number 712443/2018

WILMA JOSEPH,

DECISION/ORDER

Plaintiff,

Motion Seq. 2

-against-

FILED

FORESTDALE, INC., and DALIA DAKHIL
SARRYEH,

**5/11/2020
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Defendants.

**COUNTY CLERK
QUEENS COUNTY**

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The following papers numbered 1-4 read on this order to show cause by defendants for an order pursuant to 22 NYCRR 202.21(e) vacating the Note of Issue and Certificate of Readiness and striking the matter from the trial calendar, compelling plaintiff to provide any outstanding discovery, including medical authorizations, and compelling plaintiff to submit to deposition examination before trial ("EBT") and independent medical examination ("IME"), and extending defendants' time to move for summary judgment after the completion of discovery.

**PAPERS
NUMBERED**

O.S.C., Aff., Exhibits and Service..... 1-4

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

Plaintiff commenced this action on August 10, 2018, for personal injury resulting from a motor vehicle accident that occurred on June 19, 2018, on the Southern State Parkway, at or near the intersection with Peninsula Boulevard, in the County of Nassau, Town of Hempstead and State of New York.

On August 10, 2018, plaintiff filed her Summons and Verified Complaint and on September 26, 2018, defendants filed their Verified Answer and Demand for Bill of Particulars. On January 28, 2019, plaintiff filed her Verified Bill of Particulars and thereafter, on January 31, 2020, plaintiff filed her Note of Issue and Certificate of Readiness for Trial and Affirmation of Compliance.

A Preliminary Conference was held and an Order issued on February 21, 2019, and a Compliance Conference was held and an Order issued on September 5, 2019, which required plaintiff to provide to defendants HIPAA compliant authorizations for Sachin Shah, M.D., Mercy Medical Center, Stan Avshalumov, D.O. and plaintiff's cervical and lumbar spine MRI films.

After plaintiff failed to provide the Court ordered discovery, defendants sent a notice to plaintiff on June 10, 2019, requesting the Court ordered discovery.

On August 21, 2019, plaintiff filed a motion for summary judgment, which motion was marked as fully submitted on November 21, 2019, however as plaintiff had not provided the Court ordered discovery to defendants, the summary judgment motion remains undecided.

On September 5, 2019, another Compliance Conference was held and plaintiff was again directed by order of the Court to provide to defendants the HIPAA compliant authorizations for Sachin Shah, M.D., Mercy Medical Center, Stan Avshalumov, D.O. and plaintiff's cervical and lumbar spine MRI films.

Plaintiff again failed to provide the Court ordered discovery, defendants sent a second notice to plaintiff on November 13, 2019, and a third notice to plaintiff on January 27, 2020, requesting the outstanding Court ordered discovery.

The Note of Issue and Certificate of Readiness function to ensure that only those cases which are ready for trial are on the trial calendar. As such, if outstanding discovery remains to be completed after the filing of the Note of Issue and Certificate of Readiness, the Note of Issue must be vacated and the action removed from the trial calendar. *Frierson v. Concourse Plaza Assoc.*, 189 A.D.2d 609, 592 N.Y.S.2d 309 (1st Dep't 1993); *Arroyo v. City of New York*, 86 A.D.2d 521, 445 N.Y.S.2d 753 (1st Dep't 1982); *Friedman & Kaplan v. Hoffman*, 166 A.D.2d 188, 189, 560 N.Y.S.2d 430, 431 (1st Dep't 1990)(finding trial court abused its discretion in permitting the filing of a Note of Issue when defendants had outstanding discovery demands); *Naijar v. National Kinney Corp.*, 89A.D.2d 845,453 N.Y.S.2d 27 (2d Dep't 1962).

A Note of Issue should be vacated when it is based upon a Certificate of Readiness, which contains an erroneous fact, such as that discovery has been completed. *Club Italia, Inc. v. Italian Fashion Trading, Inc.*, 268 A.D.2d 219, 219-220, 701 N.Y.S.2d 34, 35 (1st Dep't 2000); *Garofalo v. Mercy Hospital*, 271 A.D.2d 642, 642, 706 N.Y.S.2d 477, 477-78 (2d Dep't 2000) (noting that the misstatement of a material fact caused the filing of a Note of Issue to be a nullity, and therefore, the Note of Issue was properly vacated). Specifically, it has been held that an incorrect statement contained in the Certificate of Readiness will result in an order striking the case from the calendar. *Spilky v. TRW, Inc.*, 225 A.D.2d 539, 540, 638 N.Y.S.2d 792, 793 (2d Dep't 1996).

Plaintiff has failed to provide the Court ordered discovery and plaintiff has failed to appear for EBT and an IME.

The motion is granted to the extent that the Note of Issue and Certificate of Readiness are vacated, plaintiff is directed to serve upon movants duly executed HIPAA compliant authorizations and MRI films as set forth in the Compliance Conference order dated, February 21, 2019, within 30 days of service of a copy of this order together with notice of entry. Plaintiff is further directed to appear for EBT within 60 days of the resumption of regular court proceedings or otherwise agreed to by the parties, and an IME within 30 days after the EBT.

This is the decision and order of the court.

Date:

4/11/20



Hon. Leslie J. Purificacion, JSC

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**COUNTY CLERK
QUEENS COUNTY**