

Louis v Joseph
2021 NY Slip Op 30411(U)
February 3, 2021
Supreme Court, Kings County
Docket Number: 522993/19
Judge: Lawrence S. Knipel
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At an IAS Term, Part 57 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 3rd day of February, 2021.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

-----X

WILKEN LOUIS,
Plaintiff,

- against -

Index No. 522993/19

JOSHUA JOSEPH and MEDIC EAST CORP,

Defendants.

-----X

The e-filed papers read herein:

NYSCEF Doc Nos.¹

Notice of Motion/Order to Show Cause/

Petition/Cross Motion and

Affidavits (Affirmations) Annexed_____

59-66

Opposing Affidavits (Affirmations)_____

69-80

Reply Affirmation_____

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Upon the foregoing papers, plaintiff, Wilken Louis (plaintiff or Lewis) moves in this motor vehicle accident case against defendants Joshua Jackson (Jackson) and Medic East Corp. (Medic) (collectively, defendants) in motion sequence (mot. seq.) three for an order (1) granting reargument and reconsideration of this court's November 4, 2020 order in mot. seq. two, which vacated the note of issue herein and scheduled depositions and independent medical examinations (i.e. defendant-requested examinations) that had already been completed before the filing of the note of issue and (2) upon reargument, denying that motion.

¹New York State Courts Electronic Filing Document Numbers

Background and the Parties' Positions

Defendants moved in mot. seq. two to vacate the note of issue, as discovery purportedly remained outstanding, specifically, records from plaintiff's former employer, Hudson News, and also sought an authorization for plaintiff's union records (*see* NYSCEF Doc Nos. 35-36). Plaintiff opposed the motion and noted that the authorization for the union records was not requested until after the note of issue had been filed, and that plaintiff had provided an authorization to Hudson News months earlier. Defendants' difficulty in actually obtaining the records from Hudson News was an issue outside of plaintiff's control and not due to any act or fault of plaintiff. (*see* NYSCEF Doc No. 48). Plaintiff contends in the present motion that the court erred in vacating the note of issue and scheduling depositions and IMEs as there were no outstanding discovery demands, and depositions and IMEs had already been completed when the note of issue was filed. Defendants, in reply to the opposition in mot. seq. two and in opposition to the present motion, have contended that the outstanding records are essential to their defense of this action, and that vacatur of the note was warranted to allow discovery to be completed and enable timely summary judgment motions after discovery was complete (*see* NYSCEF Doc Nos. 36 and 69).

Discussion

The November 4, 2020 order inadvertently failed to recognize that all discovery had been completed when the note of issue was filed in this case. Plaintiff has correctly highlighted that, as no discovery was due from plaintiff when the note was filed,

defendants' belated post-note of issue demand for an authorization for union records would not provide a proper basis to vacate the note. Defendants never obtained a court order directing plaintiff to provide an authorization to his union, and the motion papers do not set forth the basis for their demand. Nevertheless, to the extent that the union records may include plaintiff's work schedule and wages, and inasmuch as defendants allege that plaintiff's employer has not provided these records as authorized, plaintiff is being directed to provide authorization to his union to provide such records, limited to work schedule and earnings, notwithstanding the lateness of the demand.

Defendants' contempt motion against nonparty Hudson News, mot. seq. one, for its failure to provide plaintiff's entire work records, beyond the payroll and attendance records plaintiff authorized, is sub judice. That motion also does not provide a basis to sanction plaintiff by vacating the note of issue duly filed upon completion of the parties' discovery obligations. Indeed, plaintiff provided the proper authorization and is not responsible for Hudson's alleged failure to provide records. He also appeared for an examination before trial and provided employment and IRS authorizations. Plaintiff's motion to reargue and reconsider the November 4, 2020 order thus warrants being granted.

Defendants' request for a 60-day extension of time to submit a summary judgment motion cannot be addressed at this juncture as defendants have not moved or cross-moved to properly seek such affirmative relief (*see* CPLR 2215 entitled "Relief demanded by other than moving party" and Professor Patrick M. Connors, 2020 Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C2215:1D . . . Necessity of Cross Motion . . .). In any event, defendants may move for permission to make a

summary judgment motion before the IAS Judge, pursuant to *Brill v City of New York* (2 NY3d 648, 651-653 [2004]), if the forthcoming further discovery appears to provide a basis for such motion. Accordingly, it is

ORDERED that leave to reargue is granted, and, upon reargument, the court's November 4, 2020 order vacating the note of issue is, in turn, vacated in its entirety; and it is further

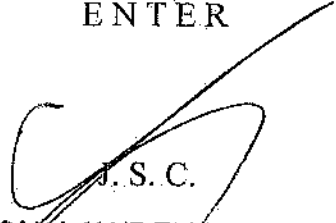
ORDERED that the matter is restored to the trial calendar as of September 30, 2020, when it was filed; and it is further

ORDERED that plaintiff provide an authorization for payroll and attendance records maintained by his union by February 26, 2021; and it is further

ORDERED that defendants' request for a 60-day extension of time to submit a summary judgment motion cannot be addressed at this juncture, as discussed in the opinion, but defendants may move for permission to make a summary judgment motion before the IAS Judge, pursuant to *Brill v City of New York* (2 NY3d 648 [2004]), if the forthcoming further discovery appears to provide a basis for such motion.

This constitutes the decision and order of the court.

ENTER


J. S. C.
HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE