

<b>Mennes v Bloncourt</b>
2021 NY Slip Op 32938(U)
February 2, 2021
Supreme Court, Queens County
Docket Number: Index No. 701523/19
Judge: Janice A. Taylor
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Short Form Order

FILED

NEW YORK SUPREME COURT - QUEENS COUNTY

2/3/2021  
10:55 AM

Present: HONORABLE JANICE A. TAYLOR  
Justice

IAS Part 15

COUNTY CLERK  
QUEENS COUNTY

-----x  
SUSAN MENNES,

Plaintiff(s),

Index No.: 701523/19

Motion Date: 8/18/20

- and -

Motion Cal. No.: 50

Motion Seq. No: 04

KELLY BLONCOURT and LARRY BLONCOURT,

Defendant(s).

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The following papers numbered 1 - 10 read on this motion by defendants, pursuant to 22 NYCRR § 202.21 and CPLR 3124, for an order vacating the note of issue filed February 23, 2020, and compelling responses to outstanding discovery demands and continuation of a nonparty deposition.

PAPERS  
NUMBERED

Notice of Motion-Affirmation-Exhibits-Service.....	1 - 4
Affirmation in Opposition-Exhibits-Service.....	5 - 7
Reply Affirmation-Exhibits-Service.....	8 - 10

Upon the foregoing papers, it is **ORDERED** that the above-referenced motion is decided as follows:

In this personal injury action, plaintiff alleges that on June 26, 2016, she was injured on defendants' premises when, while looking for the restroom, she opened the door to the basement and fell down the stairs. Apparently, plaintiff's husband, nonparty Charles Mennes, was present on the premises at the time of the alleged accident, although he did not witness plaintiff's fall.

According to defendants, plaintiff provided inadequate responses to paragraphs 12(a), 12(b), and 12(d) of their demand for a bill of particulars ("BP"), regarding information on her claims for special damages for physicians' services, nurses' services, and medical supplies, respectively. Defendants also contend that plaintiff did not respond to their letter and notice to produce dated July 22, 2019, and also failed to provide an authorization

for her Medicare records inclusive of the accident date. By compliance conference order dated February 20, 2020, plaintiff was ordered to supplement her responses to paragraphs 12(a), 12(b), and 12(d) of defendants' BP demand, and to respond to their July 22, 2019 letter and notice to produce, within 30 days. Defendants maintain that plaintiff did not comply with this direction, and, to date, has never provided any of the discovery described above.

On September 23, 2019, Mr. Mennes sat for a deposition, conducted by defendants' counsel. Although plaintiff's counsel produced Mr. Mennes for the deposition and made objections on his behalf, the transcript evinces a significant level of confusion, at least as to defense counsel and the witness, himself, as to whether plaintiff's counsel actually represented Mr. Mennes. Nonetheless, the transcript shows that plaintiff's counsel objected to certain lines of questioning, and, on several occasions, he directed Mr. Mennes not to answer questions on the grounds of spousal privilege and/or attorney-client privilege, while also asserting that some of the questions were palpably improper.

On February 23, 2020, plaintiff e-filed and served her note of issue. In the certificate of readiness, plaintiff's counsel indicated that there were outstanding requests for discovery, there had not been a reasonable opportunity to complete the foregoing proceedings, and that the case was not ready for trial. In an affirmation submitted with the note of issue, plaintiff's counsel stated that much discovery was outstanding, which expected discovery to continue, post-note.

Defendants now move to vacate the note of issue. The court "may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect . . ." (22 NYCRR § 202.21 [e]). Where a plaintiff's certificate of readiness incorrectly states that discovery proceedings known to be necessary were completed and that there had been a reasonable opportunity to complete them, this constitutes misstatements of material fact, which renders the filing of the note of issue a nullity, thus, warranting its vacatur (see *Greco v Wellington Leasing LP*, 144 AD3d 981, 981-982 [2d Dept 2016]; *Young v Destaso Funding, LLC*, 92 AD3d 778, 778-779 [2d Dept 2012]).

It cannot be said that plaintiff's certificate of readiness contained misstatements of material fact, since her counsel candidly disclosed that discovery was outstanding. However, despite plaintiff's candor, the filing of a note of issue under these circumstances was counter to the very purpose of such a requirement, which is to signify that discovery is complete and the case is ready for trial. Although the court does not in any way condone plaintiff's filing of a note of issue when she knew that discovery was incomplete, as explained below, those items which are outstanding do not present as of the sort that cannot be rectified

without striking the note of issue.

In opposing the motion, plaintiff contends that she has already provided most of the discovery claimed by defendants as outstanding, having directed the court's attention to Exhibit 2, as appended to her responsive papers. It is noted, however, that this e-filed exhibit contains plaintiff's March 15, 2019 discovery response, which predates both the July 22, 2019 notice to produce of which defendants complain, as well as the February 20, 2020 compliance conference order which directed plaintiff to respond to outstanding demands. It is, thus, evident that plaintiff did not submit the outstanding discovery with her motion papers. To the extent that the incongruence between the contents of Exhibit 2 and plaintiff's counsel's description thereof may be due to a clerical mistake in uploading files to the NYSCEF system, it would appear that plaintiff believed, albeit erroneously, that she had already complied with all outstanding demands. Since plaintiff's position on this motion is that she has already prepared responses to defendants' outstanding discovery demands, it should be relatively easy to forward the responses forthwith.

Also factoring into the court's analysis is its recent order of January 29, 2021, granting plaintiff's unopposed motion for a trial preference based on both her advanced age (she will turn 74 in July of this year) and her recent metastatic breast cancer diagnosis, for which she is undergoing chemotherapy. This further militates against striking the note of issue, at least at this point, based on plaintiff's representation that she has already prepared responses for all of the outstanding discovery, and has only to serve them.

Due to the particular facts of this case, the branches of defendants' motion seeking to vacate the note of issue and compel a continued deposition of Mr. Mennes will be held in abeyance. As set forth below, the outstanding discovery items shall be provided on an expedited basis, and the court will hold a discovery conference regarding all remaining discovery issues, including the parties' dispute over whether Mr. Mennes should be required to sit for an additional deposition, and to what extent plaintiff's counsel may object or direct the witness not to answer certain lines of questioning.

For the foregoing reasons, the above-referenced motion is granted to the extent that it is

**ORDERED** that within 10 days of the date of this order, defendants shall serve the order, with notice of entry, upon plaintiff; and it is further

**ORDERED** that within 10 days of the service of this order with notice of entry, plaintiff shall serve a supplemental bill of

particulars responsive to paragraphs 12(a), 12(b), and 12(d) of defendants' demand for a bill of particulars, a response to defendants' July 22, 2019 letter and demand, an authorization for Medicare inclusive of the June 26, 2016 date of the accident, and the remainder of the motion is held in abeyance pending the below-ordered conference; and it is further

**ORDERED** that all parties shall appear for a virtual discovery conference on Tuesday, February 16, 2021 at 2:30 p.m. to address defendants' request to continue the deposition of nonparty witness Charles Mennes, and to resolve all other outstanding disclosure issues.

The foregoing shall constitute the decision and order of this court.

Dated: February 2, 2021

  
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**JANICE A. TAYLOR, J.S.C.**

**FILED**

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**COUNTY CLERK  
QUEENS COUNTY**