

Allard v Excel Realty Partners, L.P.

2021 NY Slip Op 33312(U)

December 20, 2021

Supreme Court, Nassau County

Docket Number: Index No. 604391/16

Judge: James P. McCormack

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack

Justice

_____ X

PATRICIA ALLARD,

**TRIAL/IAS, PART 12
NASSAU COUNTY**

Index No. 604391/16

Plaintiff(s),

-against-

Motion Seq. No.: 003

Motion Submitted: 10/28/21

**EXCEL REALTY PARTNERS, L.P.,
STEWART CLEANERS, INC., d/b/a
ESTEEM CLEANERS, THOMAS
EDMONDS and KILHEE GIM,**

Defendant(s).

_____ X

The following papers read on this motion:

Notice of Motion/Supporting Exhibits.....X
Affirmation in Opposition.....X
Reply Affirmation.....X

Defendants, Excel Realty Partners, L.P., Stewart Cleaners, Inc., d/b/a Esteem Cleaners, and Kilhee Gim (the Moving Defendants”), move this court for an order vacating the note of issue and compelling Plaintiff to comply with certain discovery demands, or in the alternative precluding Plaintiff from offering evidence at trial of her left shoulder surgery. Plaintiff, Patricia Allard (Allard). opposes the motion.

Allard commenced this action by summons and complaint dated June 14, 2016. Issue was joined by Excel Realty Partners by service of an answer with cross claims dated September 13, 2016. Excel Realty Partners then changed counsel and submitted an answer along with Stewart Cleaners, Inc., d/b/a Esteem Cleaners and Kilhee Gim, dated April 5, 2017.¹ The case certified ready for trial on November 29, 2018, and a note of issue was filed on February 20, 2019. This matter involves allegations that Allard tripped and fell due to an uneven gap in concrete.

Before a motion relating to discovery or bill of particulars can be brought, the movant is required to submit an affirmation of good faith indicating “that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion.” 22 NYCRR 202.7(a). The affirmation of good faith is supposed to indicate that the parties consulted over the discovery issues and the “time, place and nature of the consultation and the issues discussed...”, or that such conferral would be futile. 22 NYCRR 202.7(c). The parties are to make a diligent effort to resolve the discovery dispute. (*Deutsch v. Grunwald*, 110 A.D.3d 949 [2nd Dept. 2013]; *Murphy v. County of Suffolk*, 115 A.D.3d 820 [2nd Dept. 2014]; *Chichilnisky v. Trustees of Columbia University in City of New York*, 45 A.D.3d 393 [1st Dept. 2007]). While Defendants’ affirmation of good faith appears nominally sufficient, the court notes, based upon the papers submitted herein, that any further conferral would have been futile.

Nine months after Allard filed her note of issue, in November, 2019, she underwent a shoulder surgery that was allegedly related to the subject accident. By

¹It does not appear Defendant Thomas Edmonds ever answered, nor does it appear that any party sought to take his default.

emails submitted between the parties in January, 2020, they agreed to mark the case off of the trial calendar so that there could be a further Independent Medical Examination (IME) and deposition, though there is no indication in the court file that the case ever left the trial calendar.² Later in January, 2020, Defendants' counsel sent Allard's counsel an email indicating they wanted to either continue settlement discussions, or move to have the case stricken from the trial calendar. There was a court conference on January 28, 2020, and then due to the Covid-19 pandemic, there was no activity for a period of time.

In August of 2020, the parties agreed to conduct a further deposition of Allard on October 2, 2020. Because the deposition would be done virtually, Defendants wanted Allard to agree to the terms of a comprehensive, nine page stipulation that laid out how the deposition would take place. Allard's counsel waited until the afternoon of the day before the day the deposition would take place to raise some issues with the stipulation, including complaining about a "typo" that was not identified. The deposition did not go forward, nor did Allard provide a supplemental bill of particulars.

It appears the next activity was Defendants' "good faith letter" dated July 19, 2021, nine months after the deposition was scheduled. Defendants' counsel followed up with a phone call on July 28, 2021 and then another email on August 3, 2021. When

²This matter was assigned to the Hon. L. Parga formerly of this court, who retired while the matter was in Central Jury. It was subsequently assigned to this Part.

Allard neither provided a supplemental bill of particulars nor produced Allard for a deposition, this motion ensued.

In opposition, Allard points out how, once she was served with the motion, her counsel then wrote to Defendants' counsel offering to provide updated authorizations and to have Allard appear for a further deposition in return for withdrawal of the motion. Allard is under the impression that this letter, and a follow-up letter also agreeing to a further IME, renders the motion moot. What Allard fails to explain is why a motion had to be made before these offers were made. Defendants made efforts to move the matter along, albeit over vast periods of time, and Allard seemed only interested in delaying things. It should not have taken 23 months and the making of a motion to get Allard to agree to provide the things she was required to provide in the first place.

The court agrees that even with the delays caused by the pandemic, this motion is late at best. However, Allard was under an obligation to provide updated authorizations, a supplemental bill of particulars and to appear for a further IME and deposition as of November, 2019. It is now December, 2021, and none of these things have taken place, except perhaps some authorizations were provided at one point.

The note of issue will not be vacated. Allard will have seven days from being served with notice of entry of this order to provide a supplemental bill of particulars. Allard will have 30 days from being served with notice of entry of this order to appear for a further deposition. The deposition will take place virtually unless all parties, counsel

and the reporter agree to be in person. If the deposition will take place virtually, Allard is not required to agree to all of the terms of Defendants' nine page stipulation. Allard is required to appear visually on a screen through Teams, Zoom or other electronic video method. She must be able to be sworn in, and must have the capability of reviewing documents placed on a screen if necessary. The parties may agree to any other terms as to the mechanics of taking the deposition, but no other terms are required. Defendants will schedule the further IME immediately. There is no need to wait for the further deposition to take place to schedule the IME. Allard will appear for the further IME as scheduled. Should Allard fail to comply with any of these deadlines, she will be precluded at trial from offering any evidence related to the shoulder surgery. This order will be self-executing.

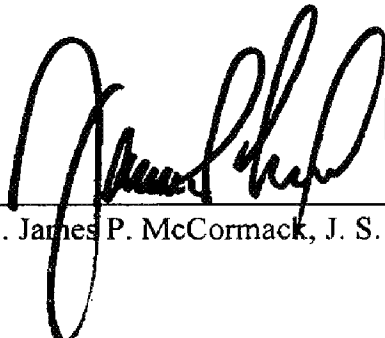
Accordingly, it is hereby

ORDERED, that the Moving Defendants motion to vacate the note of issue is DENIED; and it is further

ORDERED, that the Moving Defendants' motion to compel is GRANTED consistent with the terms of this order.

This constitutes the decision and order of the court.

Dated: December 20, 2021
Mineola, New York


ENTERED
Dec 24 2021
 Hon. James P. McCormack, J. S. C. NASSAU COUNTY
 COUNTY CLERK'S OFFICE