

Morgan v 400-408 Hous. Dev. Fund Co., Inc.
2022 NY Slip Op 30344(U)
February 8, 2022
Supreme Court, New York County
Docket Number: Index No. 151837/2017
Judge: William Perry
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. WILLIAM PERRY PART 23

Justice

-----X

SHARON MORGAN,

Plaintiff,

- v -

400-408 HOUSING DEVELOPMENT FUND COMPANY, INC. AND, URBAN HOME OWNERSHIP CORPORATION, APEX BUILDING COMPANY INC., APEX BUILDING GROUP, INC.,

Defendant.

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400-408 HOUSING DEVELOPMENT FUND COMPANY, INC. AND, URBAN HOME OWNERSHIP CORPORATION

Plaintiff,

-against-

BRONX CENTER FOR REHABILITATION AND HEALTHCARE, LLC

Defendant.

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DECISION + ORDER ON MOTION

Third-Party Index No. 595637/2020

The following e-filed documents, listed by NYSCEF document number (Motion 006) 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 168, 169, 172, 173, 174, 175, 176, 177

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE/JURY

The following e-filed documents, listed by NYSCEF document number (Motion 007) 159, 160, 161, 162, 163, 164, 165, 166, 167, 170, 171

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE/JURY

The following e-filed documents, listed by NYSCEF document number (Motion 008) 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 198, 199

were read on this motion to/for DISMISSAL

Plaintiff Sharon Morgan brings this action for personal injuries allegedly sustained when she tripped and fell over an uneven door saddle on January 19, 2017. In motion sequence 006,

Defendants Apex Building Company and Apex Building Group (“Apex”) move to strike the Note of Issue and for an order compelling Plaintiff to appear for an independent medical examination.

In motion sequence 007, Defendants/Third-Party Plaintiffs 400-408 Housing Development Company Inc. and Urban Home Ownership Corporation (“400 Housing”) also move to strike the Note of Issue, and to preclude Plaintiff from offering evidence at trial for her failure to provide certain authorizations related to her treatment of COVID-19.

In motion sequence 008, Third-Party Defendant Bronx Center for Rehabilitation and Healthcare LLC (“Bronx”) moves to dismiss the third-party complaint for failure to state a claim. Plaintiff cross-moves to dismiss the third-party complaint as against Bronx. The motions are fully submitted and are hereby consolidated for disposition.

Background

Plaintiff filed the operative amended complaint on May 22, 2018. On April 15, 2020, Plaintiff filed her sixth supplemental bill of particulars, wherein she alleged that “AS A RESULT OF HER CONFINET [sic] TO BRONX CENTER FOR REHABILITATION AND HEALTH CARE FOR INJURIES & THE SEQUALE THEREOF ALLEGED IN THIS ACCIDENT, PLAINTIFF WAS NOT ABLE TO SELF QUARENTINE [sic] AND WAS EXPOSED TO AND INFECED [sic] WITH COVID-19 VIRUS, WITH MUTIPLE SYMTOMS THEREOF[.]” (NYSCEF Doc No. 123 at 3.)

400 Housing filed the third-party complaint against Bronx on August 10, 2020, setting forth causes of action for indemnification and contribution. (NYSCEF Doc No. 117.) Shortly thereafter, Plaintiff, via letter dated August 10, 2020, informed 400 Housing that it intended to withdraw the above paragraph pertaining to the COVID-19 injury and requested 400 Housing to

withdraw the third-party complaint. (NYSCEF Doc No. 125.) Plaintiff filed the Note of Issue on August 27, 2020. (NYSCEF Doc No. 127.)

Motion sequences 006 and 007

Where a party moves to vacate a note of issue, the only showing necessary on the motion is that “a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of ... section [202.21] in some material respect.” (*Sky Coverage Inc. v Alwex Inc.*, 2022 WL 318525, at *1 [1st Dept, Feb 3, 2022].)

Here, it is clear that discovery remains outstanding, as evidenced by Plaintiff’s recent filing of three subpoenas on January 20, 2022. (NYSCEF Doc Nos. 201-203.) As such, both 400 Housing and Apex have shown that the Note of Issue fails to materially comply with the requirements of 22 NYCRR 202.21, and motion sequences 006 and 007 are granted to the extent that the Note of Issue is vacated.

The portion of Apex’s motion sequence 006 seeking an order compelling Plaintiff to appear for an IME is granted and defendants shall designate IMEs within 30 days; plaintiff is directed to schedule IMEs within 30 days of defendants designation and the reports are to be exchanged within 45 days of the IMEs.

Finally, the remaining portion of 400 Housing’s motion sequence 007 seeking an order precluding Plaintiff from offering evidence related to Plaintiff’s COVID-19 infection is granted, pursuant to Plaintiff’s statement of non-opposition. (NYSCEF Doc No. 199 at ¶ 13.)

Motion sequence 008

Bronx’s motion to dismiss the third-party complaint is granted. Because Plaintiff has withdrawn the “COVID-19 claim” from her bill of particulars, there is no basis for Bronx to contribute or indemnify 400 Housing. To the extent that 400 Housing’s opposition to the motion

is based on the informality of Plaintiff's withdrawal of the COVID-19 claim, the court hereby directs Plaintiff to serve a supplemental bill of particulars with that language stricken within 30 days. Thus, it is hereby

ORDERED that motion sequences 006 and 007 to vacate the note of issue are granted and the note of issue is vacated and the case is stricken from the trial calendar; and it is further

ORDERED that all further discovery in this matter shall be completed within 90 days from service of a copy of this order with notice of entry; and it is further

ORDERED that, within 15 days from the entry of this order, movant shall serve a copy of this order with notice of entry on all parties and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who is hereby directed to strike the case from the trial calendar and make all required notations thereof in the records of the court; and it is further

ORDERED that, within 15 days from completion of discovery as hereinabove directed, the plaintiff shall cause the action to be placed upon the trial calendar by the filing of a new note of issue and certificate of readiness (for which no fee shall be imposed), to which shall be attached a copy of this order the plaintiff shall move to reinstate the note of issue as provided in Uniform Rule 202.21 (f); and it is further

ORDERED that such upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that Third-Party Defendant Bronx Center for Rehabilitation and Healthcare LLC's motion sequence 008 to dismiss the third-party complaint is granted, and Plaintiff is

directed to strike that portion of her bill of particulars alleging a COVID-19 injury in accordance with this decision and serve a supplemental bill of particulars within 30 days.

2/8/22
DATE



WILLIAM PERRY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE