

Pruss v Amtrust N. Am. Inc.
2022 NY Slip Op 30502(U)
February 15, 2022
Supreme Court, New York County
Docket Number: Index No. 150223/2018
Judge: Sabrina B. Kraus
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SABRINA KRAUS PART 57TR

Justice

-----X

EITA PRUSS, HARRY KLEIN,
Plaintiff,

INDEX NO. 150223/2018

MOTION DATE N/A, N/A

MOTION SEQ. NO. 010 011

- v -

AMTRUST NORTH AMERICA INC.,AMTRUST FINANCIAL
SERVICES,INC.,BRIAN KUHN, SHERRI PAVLOFF,
FARBER BROCKS & ZANE L.L.P., LESTER SCHWAB
KATZ & DWYER, LLP

**DECISION + ORDER ON
MOTION**

Defendant.

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AMTRUST NORTH AMERICA, INC.

Plaintiff,

-against

Index No 156855/2019

SHERRI N. PAVLOFF, and FARBER BROCKS &
ZANE, LLP,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 010) 350, 351, 352, 357,
358, 359, 360, 366, 367, 368, 377, 378, 379, 380, 381, 382, 388

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

The following e-filed documents, listed by NYSCEF document number (Motion 011) 353, 354, 355, 356,
361, 362, 363, 364, 369, 372, 373, 374, 375, 383, 384, 385, 386, 389

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

BACKGROUND

Defendants LESTER SCHWAB KATZ & DWYER, LLP (LSKD) and SHERRI N.

PAVLOFF (Pavoloff) and FARBER BROCKS & ZANE, LLP, (FBZ) move to strike the note of

issue filed by plaintiff in this action on September 27, 2021. The motions Seq Nos 10 & 11 are consolidated herein for disposition. For the reasons stated below, the motions are granted.

PROCEDURAL HISTORY

Plaintiffs' initially instituted Action 1 on January 9, 2018, asserting claims for fraud, aiding and abetting fraud, and negligent misrepresentation.

Plaintiffs commenced this action against LSKD to recover damages allegedly incurred when LSKD's disclosed principal, AmTrust North America, Inc. ("AmTrust"), failed to fulfill an in-court global settlement agreement which AmTrust had authorized LSKD to enter in a pedestrian knockdown case, entitled Etta (Itty) Pruss v. Infiniti of Manhattan, Inc., Massamba Seck, Dennis C. Blanchette, and Jon-Paul Rorech, Index No. 161240/2013 (Supreme Court, County of New York).

On March 29, 2018, defendants filed a pre-answer motion to dismiss. On September 12, 2018, the court (Borrok, J) issued an order directing defendants to withdraw their motions and answer the complaint, because there was uncertainty as to whether Action 1 ran afoul of the California liquidation court's order prohibiting litigation against AmTrust and its agents.

Defendants re-filed their motions to dismiss, and on January 25, 2019, and the court again compelled defendants to withdraw their motions without prejudice and issued a stay in accordance with an order from the court in the California Proceeding.

Plaintiffs' counsel consented to the stay issued in the California action, and agreed that prosecution of the actions pending in New York would be stayed pending a further ruling from the California court. Plaintiffs first requested that the California stay order be lifted in the New York action on November 6, 2019. Plaintiffs made a second request to lift the stay in New York by letter dated December 9, 2019. The California stay of the New York action remained in effect

through at least December of 2019.

Pursuant to a stipulation filed on December 10, 2020, plaintiffs were permitted to file a Second Amended Verified Complaint on or before November 12, 2020, which alleged three causes of action against LSKD: negligent misrepresentation, violation of Judiciary Law section 487, and a claim for attorney's fees.

The parties simultaneously stipulated to a motion briefing schedule for the defendants, including LSKD, to file pre-answer and/or dispositive motions to dismiss the Complaint on or before December 10, 2020. LSKD filed a motion for summary judgment.

Pavloff and FBZ filed a dismissal motion pursuant to C.P.L.R. 3211.

The same Stipulation provided that the parties may use the depositions and discovery in the related California action for any purpose, and that use of those depositions would not bar any party from taking that person's deposition in the consolidated action. The Stipulation specifically stated that any parties remaining in the action after the motions have been decided "reserve the right to complete discovery...".

The parties did not engage in discovery while these dispositive motions were pending.

The Court (Kelly, J) issued a decision and order denying the defendants' dismissal and dispositive motions on July 16, 2021.

No Preliminary Conference has been held in this action; any initial discovery was conducted within the context of the California litigation.

Defendants are seeking the right to conduct additional discovery and assert that plaintiff improperly alleged all discovery was completed or waived when they filed the note of issue.

DISCUSSION

22 N.Y.C.R.R. §202.21(e) provides in relevant part:

Vacating Note of Issue: Within 20 days after service of a note of issue and certificate of readiness, any party to the action or special proceeding may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect...

N.Y. Comp. Codes R. & Regs. tit. 22, §202.21(e) (2021).

The courts of the State of New York are vested with broad discretion to ensure that adequate pretrial discovery is accomplished. A court should strike a note of issue and certificate of readiness, “if it appears that a material fact therein is incorrect and all discovery proceedings have not been completed.” *Rownan v. Koch Skanska Inc.*, 2014 WL 3797202 (Sup. Ct. Bronx Cty. 2014). “The general rule is that if a case is not ready for trial the note of issue must be stricken.” *Hall and Company, Inc. v. Steiner and Mondore*, 147 A.D.2d 225, 543 N.Y.S.2d 190 (3d Dep’t 1989); *see also*, *Cromer v. Yellen*, 268 A.D.2d 381 (1st Dep’t 2000); *Friedman & Kaplan v. Hoffman*, 166 A.D.2d 188 (1st Dep’t 1990); *Conford Co. v. Fordham Concourse Realty Associates*, 119 A.D.2d 526, 526 (1st Dep’t 1986).

An inaccurate statement in a certificate of readiness that there are no outstanding requests for discovery justifies striking the case from the trial calendar. *Arroyo v. City of New York*, 86 A.D.2d 521 (1st Dep’t 1982); *see also*, *H&Y Realty Co. v. Baron*, 121 A.D.2d 238 (1st Dep’t 1986).

While some discovery has taken place in connection with the California action it is clear from the parties’ prior stipulation in this action that additional discovery was contemplated. It would have been more appropriate for plaintiffs to file a request for a preliminary conference and address discovery in this action then jump directly to filing a note of issue.

The court finds the note of issue was filed prematurely in this action.

WHEREFORE it is hereby:

ORDERED that the motions 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 120 days from service of a copy of this order with notice of entry; and it is further

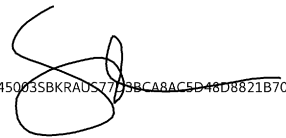
ORDERED that the parties shall appear for a virtual preliminary conference on Thursday March 10th, 2022 at 11:00 am; and it is further

ORDERED that, within 15 days from the entry of this order, LSKD 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; 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/suptctmanh).

2/15/2022
DATE


202202151450035BKRAUS77038CABAC5948D8821B70F954A6F5C0
SABRINA KRAUS, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	OTHER