

Zurich Am. Ins. Co. v Miller Mech. Sys., LLC
2022 NY Slip Op 30537(U)
February 17, 2022
Supreme Court, New York County
Docket Number: Index No. 158792/2017
Judge: Frank P. Nervo
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANK NERVO PART 04

Justice

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INDEX NO. 158792/2017

ZURICH AMERICAN INSURANCE COMPANY, RC
DOLNER LLC

MOTION DATE 10/07/2021

Plaintiff,

MOTION SEQ. NO. 002

- v -

MILLER MECHANICAL SYSTEMS, LLC,

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 53, 54, 55, 56, 57, 58, 59, 60, 61

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

Defendant Miller Mechanical (hereinafter "Miller") seeks to vacate the note of issue filed September 30, 2021. The motion is unopposed.

A note of issue should be vacated where "it is based upon a certificate of readiness that incorrectly states that all discovery has been completed" (Nielsen v. New York State Dormitory Auth., 84 AD3d 519, 520 [1st Dept 2011]; Matos v. City of New York, 154 AD3d 532 [1st Dept 2017]). A party may not seek additional discovery after the NOI has been filed, absent "special, unusual or extraordinary circumstances" (Goldsmith v. Howmedica, Inc., 158 AD2d 335, 336 [1st Dept 1990]; see also Grant v Wainer, 179 AD2d 364 [1st Dept 1992]). At any time where it appears a party has made a material misstatement in the

certificate of readiness or the certificate otherwise fails to comply with 22 NYCRR § 202.21, the Court may, *sua sponte*, vacate the note of issue (22 NYCRR § 202.21[e]).

Here, defendant Miller has established, and plaintiff having failed to oppose this motion has not disputed, that in response to correspondence regarding outstanding depositions, plaintiff's counsel advised he would endeavor to provide acceptable deposition dates to defense counsel (see NYSCEF Doc. Nos. 60 & 61). It is further undisputed, that instead of providing deposition dates for the following week, as advised, plaintiff's counsel filed a note of issue attesting that all known discovery was complete. Consequently, it is beyond cavil that plaintiff's counsel's certificate of readiness contains material misrepresentations regarding the status of discovery.

Under these circumstances, filing an improper note of issue is sanctionable as frivolous behavior. A finding of frivolity is further supported by plaintiff's failure to appear on this motion or offer any explanation for improperly filing a note of issue. Plaintiff's failure to properly schedule outstanding depositions or seek an extension of the note of issue deadline has

resulted in an entirely avoidable waste of this Court's limited resources on the instant motion.

Accordingly, it is

ORDERED that the note of issue filed under NYSCEF Doc. No. 52 is stricken and vacated; and it is further

ORDERED that all parties shall serve courtesy copies of any previously served outstanding discovery demands within 10 days of this decision and order; all parties shall respond thereto within 20 days of receipt of courtesy copy of demand; and it is further

ORDERED that all other discovery demands not otherwise addressed herein shall be served within 20 days of this decision and order and shall be responded to within 20 days of receipt of demand; and it is further

ORDERED that failure to timely serve discovery demands, as above, shall constitute waiver of same; and it is further

ORDERED that failure to timely respond to discovery demands, as above, shall result in sanctions, including but not limited to the striking of pleadings, in the Court's discretion; and it is further

ORDERED that depositions shall be completed, either in-person or via electronic means as follows:

- (1) All parties shall notice outstanding depositions by March 11, 2022;
 - (2) All parties' depositions shall be completed by April 15, 2022;
 - (3) All non-party depositions shall be noticed by April 29, 2022;
 - (4) All non-party depositions shall be completed by June 3, 2022;
- and it is further

ORDERED that all depositions and notices of deposition shall comply with the Uniform Rules, including § 202.20-d; and it is further

ORDERED that the failure to timely notice a deposition shall constitute waiver of same; and it is further

ORDERED that the failure to timely appear for a timely noticed deposition shall result in sanctions, including but not limited to the striking of pleadings, in the Court's discretion; and it is further

ORDERED that all post-deposition demands shall be served within 20 days of completion of deposition giving rise to demand; responses thereto shall be served within 20 days of receipt of demand; and it is further

ORDERED that the failure to timely serve post-deposition demands shall constitute waiver of same; and it is further

ORDERED that failure to timely respond to a timely served post-deposition demand shall result in sanctions, including but not limited to the striking of pleadings, in the Court's discretion; and it is further

ORDERED that plaintiff shall file a proper note of issue, at the completion of discovery and without reservation of any outstanding discovery, on or before July 29, 2022; and it is further

ORDERED that, within 15 days from the entry of this order, plaintiff 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 such service 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 the parties shall show cause, on the Court's own motion, on March 21, 2022 via paper submissions only, why plaintiff's counsel, Clausen Miller, should not be sanctioned pursuant to 22 NYCRR § 130 for engaging in frivolous conduct by advising opposing counsel that outstanding deposition dates would be scheduled and shortly thereafter filing an improper note of issue, resulting in a substantial waste of this Court's, and opposing counsel's, resources and necessitating the instant avoidable motion practice; and it is further

ORDERED that papers in support and opposition, if any, shall be filed via NYSCEF, with courtesy copy via first-class mail to chambers, on or before March 11, 2022 and such papers shall comply with the Uniform Rules.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

2/17/2022
DATE


FRANK NERVO, 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
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
		<input type="checkbox"/>	OTHER
		<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: