

Rivera v 305 E. 40th Owners Corp.
2022 NY Slip Op 31496(U)
May 6, 2022
Supreme Court, New York County
Docket Number: Index No. 450330/2018
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

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LORENZO FIGUEROA RIVERA, 305 EAST 40TH OWNERS CORP., (THIRD-PARTY PLAINTIFF), DOUGLAS ELLIMAN PROPERTY MANAGEMENT, (THIRD-PARTY PLAINTIFF), JOSEPH A. RUDNICK, JR. (THIRD-PARTY PLAINTIFF), GERALD J. SHEPPS, (THIRD-PARTY PLAINTIFF), ASSOCIATE OPHTHALMOLOGISTS OF NEW YORK, (THIRD-PARTY PLAINTIFF),

Plaintiff,

- v -

305 EAST 40TH OWNERS CORP., DOUGLAS E. ELLIMAN PROPERTY MANAGEMENT, JOSEPH RUDNICK JR., GERALD SHEPPS, ASSOCIATE OPHTHALMOLOGISTS OF NEW YORK, TMG CONSTRUCTION CORP., ALAN BRUTOSKY PLUMBER CONTRACTING, LPL CONTRACTING, (THIRD-PARTY DEFENDANT), BELLEVUE HOSPITAL, (THIRD-PARTY DEFENDANT)

Defendant.

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INDEX NO. 450330/2018
MOTION DATE 05/15/2020
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47 were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE/JURY

In this labor law action involving a workplace accident, Defendants/Third-Party Plaintiffs 305 EAST 40th OWNERS CORP., DOUGLAS ELLIMAN PROPERTY MANAGEMENT, JOSEPH A. RUDNICK, JR., GERALD J. SHEPPS, ASSOCIATE OPHTHALMOLOGISTS OF NEW YORK, seek an Order, pursuant to CPLR 3402 and 22 NYCRR §202.21(e), striking the action from the trial calendar and vacating the note of issue, upon the ground that the action is not ready for trial and all preliminary proceedings have not been completed; alternatively defendants seek to extend the time to file dispositive motions to 60 days after the completion of outstanding discovery. Plaintiff opposes the motion but joins in that part of the motion that seeks to extend the time to bring dispositive motions.

Uniform Rules for Trial Courts (22 NYCRR) § 202.21 (e) allows a party to move to vacate a note of issue, within 20 days after service of a note of issue and certificate of readiness, if it appears that a material fact in the certificate of readiness is incorrect. "Where a party timely moves to vacate a note of issue, it need show only 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" (*Vargas v Villa Josefa Realty Corp.*, 28 AD3d 389, 390, 815 N.Y.S.2d 30 [1st Dept 2006] [internal quotation marks and citation omitted]).

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, 923 N.Y.S.2d 66 [1st Dept 2011]; *Matos v. City of New York*, 154 AD3d 532, 63 N.Y.S.3d 324 [1st Dept 2017]). A party may not seek additional discovery after the note of issue has been filed, absent "special, unusual or extraordinary circumstances" (*Goldsmith v. Howmedica, Inc.*, 158 AD2d 335, 336, 551 N.Y.S.2d 23 [1st Dept 1990]; see also *Grant v Wainer*, 179 AD2d 364, 577 N.Y.S.2d 839 [1st Dept 1992]).

The parties in this action last appeared before the court on December 17, 2019, where the court was advised that discovery remained outstanding, including the deposition of defendant TMG Construction Corp. (NYSCEF Doc. No. 23). A further status conference was scheduled by the court on March 24, 2020, and the note of issue date was extended to March 31, 2020. The last status conference scheduled by the court in this matter, however, did not occur due to the disruption caused by the ongoing pandemic. Notwithstanding, plaintiff filed the note of issue and certificate of readiness on May 7, 2020, affirming that all discovery had been completed. (NYSCEF Doc. No. 26).

Thereafter, moving defendants timely filed the within motion seeking to vacate the note of issue because discovery remains outstanding, including non-party depositions and responses to its demands for further authorizations and plaintiff's social media accounts based on plaintiff's deposition testimony that he posted to these accounts prior to appearing for his testimony. Specifically, moving defendants Notice for Discovery and Inspection dated March 18, 2019, which requests social media/networking and notice to preserve litigation funding, and its demand for additional authorizations for the ambulance call report, pharmacy records, and other medical records were served upon plaintiff on March 19, 2019. (NYSCEF Doc. Nos. 43, 44). Plaintiff's responses to those demands remain outstanding.

Given the general policy to encourage "open and far-reaching pretrial discovery" and the preference for addressing matters on the merits, the court finds that there is material discovery that was not waived and remains outstanding, that plaintiff's note of issue misrepresents that all outstanding discovery has been completed and that plaintiff prematurely filed the note of issue. (*Lopez v Kelly Street Realty, Inc.*, 106 AD3d 534, 535, 965 N.Y.S.2d 111 [1st Dept 2013]). Accordingly, the motion to vacate the note of issue is granted, and it is hereby

ORDERED that 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; 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/suptmanh).

5/6/2022

DATE



WILLIAM PERRY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE