

Barnett v M&E 23rd St. Realty LLC
2022 NY Slip Op 31561(U)
May 12, 2022
Supreme Court, New York County
Docket Number: Index No. 153055/2016
Judge: Sabrina Kraus
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SABRINA KRAUS PART 57TR

Justice

-----X

MARCELLE BARNETT

Plaintiff,

- v -

M&E 23RD STREET REALTY LLC,

Defendant.

-----X

INDEX NO. 153055/2016

MOTION DATE 05/10/2022

MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135

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

BACKGROUND

This is an action to recover damages for personal injuries allegedly caused by a defective sidewalk on May 31, 2014 at 219 East 23rd Street, New York, NY, where plaintiff claims that she tripped and fell over a sidewalk adjacent to the premises.

On February 21, 2019, plaintiff filed the Note of Issue.

On July 22, 2020, plaintiff underwent a Post-Note of Issue Left Knee Replacement.

Plaintiff filed a Post-Note of Issue Second Supplemental Bill of Particulars regarding her left knee replacement on September 25, 2020.

On August 13, 2020, at a conference with the court, the court determined that while they would not vacate the Note of Issue, discovery would continue in light of the additional surgery and Supplemental Bill of Particulars filed by Plaintiff.

Plaintiff appeared at a Post-Note of Issue deposition on April 12, 2021.

On or about May 21, 2021, Lewis Brisbois Bisgaard & Smith LLP substituted as counsel in place and stead of Litchfield Cavo LLP for the defendant.

PENDING MOTION

On April 12, 2022, defendant moved for an order striking the case from the trial calendar and vacating the note of issue or in the alternative, staying the trial until defendant complies with outstanding discovery.

On May 10, 2022, the motion was fully briefed and submitted to this court for determination.

DISCUSSION

Pursuant to 22 NYCRR 202.21(e), a party move to vacate the note of issue within twenty (20) days of service. In the instant action, the note of issue was filed on February 21, 2019. It is undisputed that more than twenty (20) days have passed since service of the note of issue.

Post- NOI discovery is only granted where “unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice...”. *See, Valencia v City of New York*, 188 A.D.3d 549 (1st Dept. 2020), and *Hartnett v City of New York*, 139 A.D.3d 506 (1st. Dept. 2016). Generally Trial Courts have the discretion to allow post Note discovery so long as it does not prejudice a party. *Cuprill v. Citywide Towing & Auto Repair Servs.*, 149 A.D.3d 442 (1st. Dept. 2017).

In this action, as plaintiff underwent post Note knee surgery, the court in August 2020 allowed post note discovery. Although defendant argues that the court re-opened discovery in light of the additional surgery, there was no order issued by the court to this effect. As post Note discovery is only granted in “unusual or unanticipated circumstances” this court finds it

appropriate to allow limited post note discovery to the extent of the surgical procedures that occurred after the filing of the note of issue.

As to defendant's August 14, 2017 demand for a Supplemental Bill of Particulars, and request for documents from prior auto accidents in which plaintiff was involved, the parties agree that plaintiff responded in September 2017. Defendant waited too long, without reasonable explanation, to now challenge plaintiff's response.

As to the authorizations provided to defendant's previous counsel, plaintiff is to provide current counsel for defendant with any authorizations it had provided to prior counsel, and such authorizations should allow for records a year preceding the accident that is the subject of litigation herein.

As to defendant's request for a second dental examination, the court finds the request is untimely. Plaintiff's second deposition was over a year ago and defendant fails to explain why, on the eve of trial, they waited beyond the forty-five (45) days of the deposition to designate a second examination. Defendant also fails to establish that the dental procedure referenced by plaintiff in the second deposition would necessitate an additional IME.

CONCLUSION

Wherefor, it is hereby

ORDERED defendant's motion to vacate or stay the Note of Issue is denied; and it is further


ORDERED that plaintiff is to provide any outstanding authorizations to defense counsel within thirty (30) days of the date of this order; and it is further

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk 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 any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.

<u>5/12/2022</u>					
DATE			SABRINA KRAUS, J.S.C.		
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					<input type="checkbox"/>
					REFERENCE