

LeFavre v 568 Broadway Holding LLC

2022 NY Slip Op 31808(U)

June 6, 2022

Supreme Court, New York County

Docket Number: Index No. 161241/2017

Judge: William Perry

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. WILLIAM PERRY

PART

23

Justice

-----X

KATHERINE LEFAVRE, SEBASTIEN LEFAVRE,

Plaintiff,

INDEX NO. 161241/2017

MOTION DATE 02/07/2022

MOTION SEQ. NO. 016 017

- v -

568 BROADWAY HOLDING LLC, 568 BROADWAY
PROPERTY LLC, AURORA CAPITAL ASSOCIATES, LLC, A
& H ACQUISITIONS CORP., SCF MANAGEMENT
LLC, ROCK GROUP NY CORP., SIMRANPAL SINGH,
ROCK GROUP ENTERPRISES CORP., RHG MANPOWER
INC., DANIEL ODIGIE, DAN ENGINEERING SERVICES,
SATO CONSTRUCTION CO., INC., SATO
CONSTRUCTION CO. INC., D/B/A FLAG
WATERPROOFING AND RESTORATION LLC, FLAG
WATERPROOFING AND RESTORATION, LLC, MUGHAL
GENERAL CONSTRUCTION, INC.,

Defendant.

**DECISION + ORDER ON
MOTION**

-----X

SATO CONSTRUCTION CO., INC., SATO CONSTRUCTION
CO. INC., D/B/A FLAG WATERPROOFING AND
RESTORATION LLC, FLAG WATERPROOFING AND
RESTORATION, LLC

Plaintiff,

Third-Party
Index No. 595647/2020

-against-

VIDARIS INC., MAGA CONTRACTING CORPORATION

Defendant.

-----X

ROCK GROUP NY CORP.

Plaintiff,

Second Third-Party
Index No. 595442/2021

-against-

MAGA CONTRACTING CORPORATION

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 016) 815, 816, 817, 818, 819, 820, 828, 829, 830, 831, 832, 833, 837, 838, 839

were read on this motion to/for

DISCOVERY

The following e-filed documents, listed by NYSCEF document number (Motion 017) 821, 822, 823, 824, 825, 826, 827, 834, 835, 836, 840

were read on this motion to/for

MISCELLANEOUS

This action arises from a November 19, 2017 scaffolding collapse which resulted in Plaintiff Katherine Lefavre sustaining severe personal injuries for which she is seeking to recover substantial damages from defendants, including a claim for future lost wages.

In motion sequences 016 and 017, the Sato Defendants and RHG Manpower Inc. separately move to compel Plaintiff to submit to a further vocational examination, on the grounds that their initial vocational expert, Dr. Alan Getreu unexpectedly passed away on March 1, 2021. (NYSCEF Doc No 816, Sato Memo.; NYSCEF Doc No. 822, RHG Memo.) Defendants argue that a second vocational examination of Plaintiff is necessary because they would be unable to introduce Dr. Getreu's vocational report into evidence in the absence of Dr. Getreu's appearance at the time of trial, which would prejudice their ability to litigate Plaintiff's claims for lost earnings.

Plaintiff opposes the motions, arguing that Defendants: fail to demonstrate the necessity for a further vocational examination, merely want a second bite at the apple by subjecting Plaintiff to a duplicative examination, and are seeking to cause further delay, as evidenced by the fact that Defendants waited for almost a year since Dr. Getreu passed away before filing the motions in January 2022. (NYSCEF Doc No. 830, Ms016 Opp.; NYSCEF Doc No. 834, Ms017 Opp.) Plaintiff also represents that she agreed to stipulate to permitting Defendants to use Dr. Getreu's report at trial and that Plaintiff would not cross-examine any new expert on the fact that he or she did not perform the examination themselves. (Ms016 Opp at ¶¶ 26-30.)

“The Supreme Court, in its discretion, may grant permission to conduct additional discovery after the filing of a note of issue and certificate of readiness, where the moving party demonstrates that ‘unusual or unanticipated circumstances’ developed subsequent to the filing requiring additional pretrial proceedings to prevent substantial prejudice.” (*Karakostas v Avis Rent A Car Sys.*, 306 AD2d 381, 382 [2d Dept 2003], quoting 22 NYCRR 202.21[d].) “There is case law dealing with the propriety of ordering a second examination due to the unavailability of the first examining physician at trial.” (*Vasquez v Keyspan Corp.*, 2017 WL 9324942, at *2 [Sup Ct, Kings County 2017], citing *Nathanson v Johnson*, 126 AD2d 475 [1st Dept 1987].)

Here, the court finds that the death of Dr. Getreu constitutes “unusual or unanticipated circumstances” and that Defendants would be prejudiced if a second vocational examination were not conducted. The court is also cognizant of the extreme litigiousness of the parties in this case, which pertains to a scaffolding collapse that occurred almost five years ago. As such, the court “will ensure [the second vocational IME] is completed expeditiously.” (*Vasquez*, 2017 WL 9324942, at *2.)


Accordingly, it is hereby

ORDERED that motion sequences 016 and 017 are granted; and it is further

ORDERED that Defendants have 60 days from the date of this order to conduct disclosure and the vocational examination of the Plaintiff and provide necessary disclosures pursuant to CPLR 3101[d] and CPLR 3121; and it is further

ORDERED that upon Defendants’ failure to complete the vocational exam within 60 days of the date of this order, Defendants may be precluded from conducting any additional vocational examinations before trial; and it is further

ORDERED those reasonable accommodations shall be provided for Plaintiff during the vocational examination, including breaks as needed.

<u>6/6/22</u> DATE	 WILLIAM PERRY, J.S.C.			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
APPLICATION:	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE