

Dantzig v Mueller

2022 NY Slip Op 31991(U)

June 24, 2022

Supreme Court, New York County

Docket Number: Index No. 805253/2018

Judge: John J. Kelley

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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. JOHN J. KELLEY **PART** **56M**

Justice

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PAUL DANTZIG,

Plaintiff,

- v -

RICHARD L. MUELLER, M.D., and PRAMOD SANGHI,
M.D.,

Defendants.

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INDEX NO. 805253/2018

MOTION DATE 05/03/2022

MOTION SEQ. NO. 015

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 015) 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 316, 317, 318, 319, 325, 326, 327, 328, 329, 330 were read on this motion to/for DISMISS/STRIKE NOTE OF ISSUE.

In this action to recover damages for medical malpractice, the defendant Pramod Sanghi, M.D., moves pursuant to CPLR 3126 to dismiss the complaint insofar as asserted against him for the plaintiff's failure to comply with discovery demands and orders or, in the alternative, pursuant to 22 NYCRR 202.21(e) to vacate the note of issue and certificate of readiness. Sanghi also moves pursuant to CPLR 2004 to extend the time for making a summary judgment motion. The plaintiff opposes the motion. The defendant Richard L. Mueller, M.D., submits an attorney's affirmation supporting Sanghi's motion. The motion is granted to the extent that the note of issue and certificate of readiness is vacate, and the motion is otherwise denied.

CPLR 3101 provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." "The words 'material and necessary' as used in CPLR 3101(a) are 'to be interpreted liberally to require disclosure . . . of any facts bearing on the controversy' (*Allen v Crowell-Collier Pub. Co.*,

21 NY2d 403, 406 [1968])” (*Matter of Steam Pipe Explosion at 41st Sts & Lexington Ave.*, 127 AD3d 554, 555 [1st Dept 2015]).

The plaintiff has made a claim for future loss of earnings in the sum of \$400,000 per year for 10 years and has asserted that the defendants’ malpractice rendered him unable to work in his profession as a dermatologist. In a negligence action, where a self-employed plaintiff seeks money damages for loss of earnings, a defendant is entitled to discovery of the plaintiff’s tax returns (*see Scholte v Agway, Inc.*, 152 AD2d 928, 929 [4th Dept 1989]; *Lane v D’Angelos*, 108 AD2d 727, 728 [2d Dept 1985]). The defendants demanded that the plaintiff provide them with personal and business tax returns from 2016 to the present or other documentation supporting his claims. He nonetheless has failed to provide them with proof of special damages or any documentation regarding alleged loss of earnings, any documentation to support a claim for loss of earnings, any personal or business tax returns, any documents relating to the closing of his own medical practice, or any documentation regarding alleged lost opportunities for employment allegedly caused by the defendants’ malpractice. The responses that the plaintiff did serve upon the defendants were wholly insufficient to satisfy his discovery obligations with respect to the production of tax records and proof of lost wages.

Contrary to the plaintiff’s contention, the defendants’ alleged failure to provide him with authorization forms for his signature that would release his tax returns does not excuse his obligation to obtain those records and produce them for the defendants. As explained on the IRS’s web site, as of July 1, 2019, the IRS eliminated the third-party mailing option from Form 4506 (Request for Copy of Tax Return), Form 4506-T (Request for Transcript of Tax Return), and Form 4506-EZ (Short Form Request for Individual Tax Return Transcript). Both the IRS and the Treasury Inspector General for Tax Administration determined that the mail option presented a risk to sensitive taxpayer information. Hence, as of that date, upon a request by a taxpayer, tax returns and transcripts will be mailed only to the taxpayer’s address of record. IRS Form 13873-R now includes a check-off box that informs a third-party addressee that it will not

process any request to send it returns and transcripts, and cannot provide the reasons for its determination not to process the request (*see generally* 26 CFR 601.702[d][1], 26 CFR 301.9000-1-301.9000-6).

In addition, the plaintiff has yet to appear for an independent medical examination. CPLR 3121 provides that a defendant in a personal injury action may request or demand that the injured plaintiff submit to a physical examination (*see Ditroia v Buck-Haskin*, 99 AD3d 854, 854 [2d Dept 2012]; *see generally Martinez v Pinard*, 160 AD3d 440, 441 [1st Dept 2018]).

A court may vacate a note of issue where, as here, it appears that a material fact set forth therein, i.e., the representation that discovery is complete, is incorrect (*see* 22 NYCRR 202.21[e]; *Ruiz v Park Gramercy Owners Corp.*, 182 AD3d 471, 471 [1st Dept 2020]; *Rivers v Birnbaum*, 102 AD3d 26 [2d Dept 2012]; *Gomes v Valentine Realty LLC*, 32 AD3d 699 [1st Dept 2006]; *Herbert v Sivaco Wire Corp.*, 1 AD3d 144 [1st Dept 2003]; *Savino v Lewittes*, 160 AD2d 176, 177 [1st Dept 1990]). Where a note of issue is stricken or vacated, the case reverts to pre-note of issue status (*see Tejeda v Dyal*, 83 AD3d 539, 540 [1st Dept 2011]; *see also Rodriguez v Big Ben Assoc. I*, 95 AD3d 1098, 1099 [2d Dept 2012]; *Gorski v St. John's Episcopal Hosp.*, 36 AD3d 757, 757 [2d Dept 2007]). When this occurs, the parties, as a general rule, are not barred from conducting additional disclosure (*see Vargas v Villa Josefa Realty Corp.*, 28 AD3d 389, 390 [1st Dept 2006]; *Reitman v St. Francis Hosp.*, 2 AD3d 429, 429-430 [2d Dept 2003]), and are not deemed to have waived the right to further discovery (*see Carte v Segall*, 134 AD2d 396, 397 [2d Dept 1987]). Hence

Sanghi's request for the imposition of sanctions upon the plaintiff must be denied. Under most circumstances, including those obtaining in this action, a motion pursuant to CPLR 3126 to impose sanctions for the willful failure to make disclosure must be made prior to the filing of the note of issue and certificate of readiness since, by that filing, a party represents that all discovery has been completed and that there are no outstanding discovery requests (*see Flanagan v Wolff*, 136 AD3d 739, 741 [2d Dept 2016]). The failure to make such a motion prior

to the filing of the note of issue and certificate of readiness is deemed a waiver of any contention that an adverse party has failed to meet his or her disclosure obligations (*see id.*; *K-F/X Rentals & Equip., LLC v FC Yonkers Assoc., LLC*, 131 AD3d 945, 946 [2d Dept 2015]; *Marte v City of New York*, 102 AD3d 557, 558 [1st Dept 2013]; *Rivera-Irby v City of New York*, 71 AD3d 482, 482 [1st Dept 2010]).

On May 31, 2022, Sanghi made a timely motion for summary judgment. Hence, his request to extend his deadline for making such a motion has been rendered academic.

In light of the foregoing, it is

ORDERED that the motion is granted to the extent that the note of issue and certificate of readiness are vacated, and the motion is otherwise denied; and it is further,

ORDERED that, on or before July 26, 2022, the plaintiff shall provide the defendants with proof of lost earnings and other claimed special damages, including copies of his personal and business tax returns for tax years 2016 through 2021; and it is further,

ORDERED that, on or before July 26, 2022, the defendants shall schedule and conduct an independent medical examination of the plaintiff, who shall appear for that independent medical examination on the date scheduled by the defendants; and it is further,

ORDERED that the plaintiff's failure to provide the defendants with the documentation described above by July 26, 2022 shall constitute a waiver of his claim for loss of earnings; and it is further,

ORDERED that the defendants' failure to schedule and conduct an independent medical examination of the plaintiff on or before July 26, 2022 shall constitute a waiver of their right to conduct such an examination, and the plaintiff's failure to submit to such an examination in the event that the defendants timely schedule it may subject him to preclusion of evidence of physical injuries at trial; and it is further,

ORDERED that the plaintiff shall file a new note of issue after the discovery directed by this order is completed, but not later than August 31, 2022.

This constitutes the Decision and Order of the court.

6/24/2022

DATE



CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE