

**Crawford v Westley**

2022 NY Slip Op 32029(U)

January 13, 2022

Supreme Court, Suffolk County

Docket Number: Index No. 618291/2019

Judge: George M. Nolan

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SHORT FORM ORDER

INDEX No. 618291/2019  
CAL. No. 202100173MV

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 55 - SUFFOLK COUNTY

**PRESENT:**

Hon. GEORGE M. NOLAN  
Justice of the Supreme Court

MOTION DATE 7/22/21 (002)  
MOTION DATE 8/26/21 (003)  
ADJ. DATE 8/26/21  
Mot. Seq. # 002 MD  
Mot. Seq. # 003 MG

-----X  
TONIA L. CRAWFORD,

Plaintiff,

- against -

LYNN A. WESTLEY and PASQUALE P.  
CALIFANO,

Defendants.  
-----X

STEVEN D. DOLLINGER & ASSOCIATES  
Attorney for Plaintiff  
P.O. Box 369  
Huntington Station, New York 11746

RUSSO & GOULD, LLP  
Attorney for Defendant Westley  
33 Whitehall Street, 16th Floor  
New York New York 10004

JAMES G. BILELLO & ASSOCIATES  
Attorney for Defendant Califano  
100 Duffy Avenue, Suite 500  
Hicksville, New York 11801-3636

Upon the following papers read on these motions for summary judgment and vacate note of issue : Notice of Motion/ Order to Show Cause and supporting papers by defendant Westley, dated June 22, 2021 and August 12, 2021 ; Notice of Cross Motion and supporting papers \_\_\_; Answering Affidavits and supporting papers by plaintiff, dated August 6, 2021 and August 13, 2021; Replying Affidavits and supporting papers by defendant Westley, dated August 16, 2021 and August 17, 2021 ; Other \_\_\_; it is

**ORDERED** that the motions (#002 and #003) by defendant Lynn Westley hereby are consolidated for the purposes of this determination; and it is

**ORDERED** that the motion (#002) by defendant Lynn Westley seeking summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) is denied, without prejudice to renewal; and it is further

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**ORDERED** that the motion (#003) by defendant Lynn Westley for, inter alia, an order vacating the note of issue and certificate of readiness is granted.

Plaintiff Tonia Crawford commenced this action to recover damages for injuries she allegedly sustained as a result of a motor vehicle accident that occurred on the eastbound Long Island Expressway, near exit 59, in the Town of Islip on April 25, 2018. It is alleged that the accident occurred when the vehicle owned and operated by defendant Lynn Westley struck the rear of the vehicle owned and operated by defendant Pasquale Califano while it was stopped in traffic. As a result of the impact between the Westley and Califano vehicles, the Califano vehicle was pushed forward into the rear of the stopped vehicle owned and operated by plaintiff. Thereafter, defendant Califano moved, unopposed, for summary judgment dismissing the complaint against him on the grounds that he was not the proximate cause of the subject accident's occurrence. By order of this Court, dated June 7, 2021, the undersigned dismissed all claims against defendant Pasquale Califano.

Defendant Westley now moves for an order vacating the note of issue and striking the matter from the trial calendar, arguing the certificate of readiness contains a material defect since discovery is not complete. Specifically, defendant Westley asserts that, approximately five months after the filing of the note of issue, she learned that plaintiff was involved in a subsequent motor vehicle accident on October 29, 2020, which allegedly caused injury to the same body parts she alleged were injured in the subject accident, and that she immediately served notices for a further deposition and discovery and inspection, including a further independent medical examination, on July 30, 2021. However, defendant Westley states that plaintiff's counsel advised that she would not provide any additional discovery.

Plaintiff opposes the motion on the grounds that it is untimely, since the note of issue was filed approximately five month ago, that defense counsel signed the certificate of readiness stating that discovery was complete, and that defendant Westley failed to come forth with a legal or factual justification for vacating the note of issue. Plaintiff further contends that defendant Westley has failed to show that the injuries she sustained in the subsequent accident were the same as the ones alleged in the subject accident.

CPLR 3402 (a) provides that the note of issue may be filed at any time after issue is joined or 40 days after service of the summons irrespective of the joinder of issue, and must be accompanied by whatever date is required by the applicable rules of the court. The purpose of a note of issue and certificate of readiness is to assure that cases which appear on the court's trial calendar are, in fact, ready for trial (*Tirado v Miller*, 75 AD3d 153, 156, 901 NYS2d 358 [2d Dept 2010], quoting *Mazzara v Town of Pittsford*, 30 AD2d 634, 634, 290 NYS2d 435 [4th Dept 1968]). Moreover, a certificate of readiness certifies that all discovery is complete, waived or not required, and that the action is ready for trial (*see* Unified Rules for Trial Courts [22 NYCRR] § 202.21 [b]). The effect of a statement of readiness is to ordinarily foreclose further discovery (*see Tirado v Miller*, 75 AD3d 153, 901 NYS2d 358 [2d Dept 2010]).

Vacatur of the note of issue is governed by section 202.21 of the Uniform Rules for Trial Courts. This provision states, in pertinent part, that where a party timely moves, upon affidavit, to vacate the note of issue, the party only needs to show that "a material fact in the certificate of readiness is incorrect,

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or that the certificate of readiness fails to comply with the requirements of 22 NYCRR § 202.21 (e) in some material respect” (*Vargas v Villa Josefa Realty Corp.*, 28 AD3d 389, 390, 815 NYS2d 30 [1st Dept 2006]; see *Witherspoon v Surat Realty Corp.*, 82 AD3d 1087, 918 NYS2d 889 [2d Dept 2011]; *Shoop v Augst*, 305 AD2d 1016, 758 NYS2d 747 [4th Dept 2003]; *Aviles v 938 SCY Ltd.*, 283 AD2d 935, 725 NYS2d 256 [4th Dept 2001]; cf. *Audiovox Corp. v Benyamini*, 265 AD2d 135, 707 NYS2d 137 [2d Dept 2000]). Uniform Rules for Trial Courts (22 NYCRR) § 202.21 (d) also provides that “where unusual or unanticipated circumstances develop subsequent to the filing of the note of issue and certificate of readiness, which require additional pretrial proceedings to prevent substantial prejudice, the court, upon motion supported by an affidavit, may grant permission to a movant to conduct such necessary proceedings” (see *Audiovox Corp. v Benyamini*, *supra*; *Futersak v Brinen*, 265 AD2d 452, 697 NYS2d 89 [2d Dept 1999]; *Stella v Ahmed*, 223 AD2d 698, 637 NYS2d 472 [2d Dept 1996]).

Here, the Court’s computerized records show that the note of issue was filed on February 23, 2021, and since defendant Westley did not move within the requisite 20 days of the filing, she is required to show unusual or unanticipated circumstances developed subsequent to the filing of the note of issue requiring additional pre-trial proceedings to prevent substantial prejudice (see *Lopez v Retail Prop. Trust*, 84 AD3d 891, 921 NYS2d 906 [2d Dept 2011]; *Wigand v Modlin*, 82 AD3d 1213, 919 NYS2d 868 [2d Dept 2011]). In the instant circumstances, defendant Westley has established that unusual and unanticipated circumstances developed following the filing of the note of issue requiring additional pretrial proceedings to prevent substantial prejudice to her defense (see Uniform Rules for Trial Cts [22 NYCRR] 202.21 [e]; *Gelin v New York City Tr. Auth.*, 189 AD3d 789, 137 NYS3d 452 [2d Dept 2020]; *Singh v 244 W. 39<sup>th</sup> St. Realty, Inc.*, 65 AD3d 1325, 886 NYS2d 226 [2d Dept 2009]; *Karakostas v Avis Rent A Car Sys.*, 306 AD2d 381, 761 NYS2d 283 [2d Dept 2003]). Defendant Westley’s discovery, after the filing of the note of issue, and after plaintiff sat for her deposition and appeared for her independent medical examination, that she had been involved in a subsequent motor vehicle accident on October 29, 2020, as well as her refusal to respond to defendant Westley’s supplemental discovery demands regarding her injuries in the subsequent motor vehicle accident, constitutes unusual or unanticipated circumstances warranting further discovery (see *Jones v Seta*, 143 AD3d 482, 38 NYS3d 422 [1st Dept 2016]; *Stock v Morizzo*, 92 AD3d 672, 938 NYS2d 206 [2d Dept 2012]; *Sorrentino v Fedorczuk*, 85 AD3d 759, 925 NYS2d 510 [2d Dept 2011]; see also *Perla v Wilson*, 287 AD2d 606, 732 NYS2d 35 [2d Dept 2001]). Defendant Westley also is entitled to a supplemental deposition of plaintiff concerning the subsequent motor vehicle accident and related treatment, a response to the notice for discovery and inspection dated July 30, 2021, and a further physical examination of plaintiff regarding the injuries allegedly sustained in the motor vehicle accident on October 29, 2020.

Moreover, plaintiff has not shown that she will be severely prejudiced by having to provide defendant Westley with such discovery, since a trial date has not yet been assigned (see *Cabrera v Abaev*, *supra*; *Suarez v Shapiro Family Realty Assoc., LLC*, 149 AD3d 526, 53 NYS3d 23 [1st Dept 2017]; *Baulieu v Ardsley Assoc. L.P.*, 84 AD3d 666, 923 NYS2d 326 [1st Dept 2011]). CPLR 3101 (a) provides that “[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action.” The standard requires disclosure “of any facts bearing on the controversy which will assist in the preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason” (*Allen v Crowell-Collier Publihing Co.*, 21 NY2d 403, 406, 288

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NYS2d 449 [1968]; *Bustos v Lenox Hill Hosp.*, 29 AD3d 424, 425, 816 NYS2d 24 [1st Dept 2006]). Accordingly, defendant Westley's motion to vacate the note of issue is granted to the extent that defendant shall have 90 days from the entry date of the order to conduct any and all supplemental discovery, including but not limited to a further independent medical examination of plaintiff. The Court cautions all parties to cooperate regarding all further correspondence and discovery exchanges in this action.

Dated: January 13, 2022

  
\_\_\_\_\_  
J.S.C.

\_\_\_\_ FINAL DISPOSITION     X  NON-FINAL DISPOSITION