

Jones v Riverside Bldrs. Inc.
2022 NY Slip Op 33867(U)
November 16, 2022
Supreme Court, New York County
Docket Number: Index No. 150842/2019
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 14

JONES, GRACE Plaintiff, - v - RIVERSIDE BUILDERS INC., RIVERBANK APARTMENT CORP., THE ANDREWS ORGANIZATION, VILLA ART LLC. Defendant.	INDEX NO. <u>150842/2019</u> MOTION DATE <u>11/10/2022</u> MOTION SEQ. NO. <u>002</u> DECISION + ORDER ON MOTION
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HON. ARLENE P. BLUTH:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 95-111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 132 were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE.

Defendant Riverside Builders Inc.’s motion to strike the note of issue is denied.

However, discovery may continue, and defendant Villa Art LLC must honor its agreement to produce Scott Havelock for a deposition and plaintiff shall provide an authorization for the Allstate file.

Background

This action arises out of a claim for damages to plaintiff’s apartment after the ceiling above two of her bedrooms and the mechanical room collapsed. Plaintiff contends this collapse occurred as a result of the construction of a penthouse apartment directly above her apartment. Defendant Riverside Builders was the contractor working on the upstairs apartment and Villa Art was the owner of the cooperative shares and proprietary lessee of the upstairs apartment.

On July 26, 2022, counsel for defendant Villa Art, LLC agreed via email to all parties to supply a new witness for a deposition after the original witness claimed he was not on the premises

during the construction of his penthouse (NYSCEF Doc. No. 120). Additionally, on August 4, 2022, defendant Riverside Builders Inc. (“Riverside”) requested via letter that plaintiff supply an authorization for defendant to retrieve the full Allstate insurance claim file related to plaintiff’s claim for damages (NYSCEF Doc. No. 122). This letter was sent as a follow up to a production of documents that plaintiff sent Riverside at least a month prior.

Pursuant to this part’s rules, the parties were instructed to upload a discovery update by September 6, 2022; however, none of the parties filed a discovery stipulation or a letter detailing discovery disputes. Thus, on September 7, 2022, this Court ordered that a note of issue be filed by September 29, 2022 (NYSCEF Doc. No. 109). In compliance with this order, plaintiff filed a note of issue on September 21, 2022.

Riverside brings this motion to strike the note of issue claiming that plaintiff filed the note of issue while there was still outstanding discovery. Specifically, Riverside contends it did not receive the authorization to retrieve the insurance file from Allstate. Additionally, Riverside contends that Villa Art agreed to supply a new witness for a second deposition, but after the note of issue was filed, Villa Art rescinded its offer to produce Mr. Havelock.

In response, plaintiff claims that Riverside’s motion is untimely as it was filed more than 20 days after the note of issue. Plaintiff also claims it issued a subpoena to Allstate for the claim file in an attempt to comply with defendant’s demand. Finally, plaintiff contends that Riverside repeatedly failed to produce court-ordered discovery and did not bother to serve a demand for the discovery it now seeks within the 30-day timeframe laid out in the previous discovery stipulations.

In response, Riverside contends its motion is timely and any delay is due to Jewish holidays in early October. Riverside further claims that plaintiff does not refute that it failed to provide the

authorization for the claim file and that the other defendants, specifically Villa Art, LLC, do not oppose Riverside's motion.

Discussion

“Trial courts are authorized, as a matter of discretion, to permit post-note of issue discovery without vacating the note of issue, so long as neither party will be prejudiced” (*Cabrera v Abaev*, 150 AD3d 588, 588, 55 NYS3d 207 [1st Dept 2017] [internal quotations and citation omitted]).

The Court declines to strike the note of issue under these circumstances. Plaintiff's deposition took place more than a year ago, in October 2021. Riverside had over a year to request an authorization for the Allstate claim file and failed to do so until August of the following year (although plaintiff claims she has taken the necessary steps to procure the file). Moreover, all parties were directed to file a discovery update detailing any outstanding discovery disputes, and Riverside failed to upload anything by the Court's deadline. The Court was left to assume all discovery was completed and ordered the note of issue to be filed.

Riverside's request comes after repeatedly failing to produce documents requested by the other parties and failing to supply any workable dates for a deposition for months at a time (NYSCEF Doc. No. 106). This Court finds it wholly inappropriate to allow a defendant to stall the discovery process and delay a case only to request that a note of issue be stricken when that same defendant makes a belated request for purportedly outstanding discovery. Riverside had more than enough time to seek the instant discovery. It could have uploaded a discovery update as directed by this Court before the conference, which would have alerted the Court that discovery was outstanding, but Riverside did not bother to do that. It could have moved immediately after

receiving this Court's September 7th order directing that a note of issue be filed, but it didn't bother to do that, either. It could have made the instant motion right after the note of issue was filed, or the same day it served its jury demand on October 6th, but it did not do that, either. Instead, it waited until weeks after the note of issue was filed to finally pay attention to this case.

Given that plaintiff is attempting to comply with Riverside's demands and issued a subpoena for the claim file after the filing of this motion, there is no reason to strike the note of issue. However, because plaintiff does not seem to object to Riverside obtaining the Allstate file, the Court directs plaintiff to provide an authorization for the file by December 15, 2022 and, if Allstate provides the file, then Riverside must immediately provide whatever Allstate produced to all other parties. Unless the entire production (if any) is shared within ten days of receipt, nothing from the Allstate file can be used by Riverside at trial or on any motion.

As for Mr. Havelock, the Court thinks it is fair for Villa Art to honor its offer and produce him, especially because they originally produced someone who was unhelpful. However, to minimize scheduling issues, the Court directs counsel for Villa Art to provide, by December 8, 2022, three dates in January 2023 that Mr. Havelock can appear, and the parties will settle on one of those dates by December 15.

Accordingly, it is hereby


ORDERED that the defendant Riverside's motion to vacate the note of issue and strike the case from the trial calendar is denied; and it is further

ORDERED that plaintiff shall provide an authorization for the Allstate file to Riverside by December 15, 2022 and, if Allstate provides the file, then Riverside must provide whatever Allstate produced to all other parties within ten days of receipt and unless the entire production (if any) is

shared within that deadline, then nothing from the Allstate file can be used by Riverside at trial or on any motion; and it is further

ORDERED that, by December 8, 2022, the Court directs counsel for Villa Art to provide three dates in January 2023 that Mr. Havelock can appear, and the parties will settle on one of those dates by December 15, 2022.

11/16/2022
DATE


ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: