

Partow v Van Owners Purch. Bur., Inc.

2022 NY Slip Op 34734(U)

July 26, 2022

Supreme Court, Bronx County

Docket Number: Index No. 29770/2017E

Judge: Veronica G. Hummel

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, IAS PART 31**

PARDIS PARTOW,

Plaintiff,

-against-

VAN OWNERS PURCHASING BUREAU, INC., and
JUAN L. VILLAFANE,

Defendants.

Index No. 29770/2017E**HON. VERONICA G. HUMMEL, A.J.S.C.****DECISION AND ORDER****Mot. Seq. No. 4**

In accordance with CPLR 2219(a), the decision herein is made upon consideration of all of the papers filed by the parties in NYSCEF in support of and in opposition to the motion of defendants VAN OWNERS PURCHASING BUREAU, INC. and JUAN L. VILLAFANE [Mot. Seq. 4], made pursuant to 22 NYCRR 202.21(d) and CPLR 2004 and CPLR 3101 and 3124, seeking an order permitting defendants to seek post-note of issue discovery and compelling plaintiff to appear for further medical examination by defendants' expert.

This is a personal-injury action arising out of a two-vehicle accident that occurred six years ago on May 17, 2016. The action was commenced on October 14, 2017. Plaintiff served a verified Bill of Particulars on March 21, 2018. Plaintiff served a First Supplemental Bill of Particulars on March 19, 2019.

Defendants had plaintiff examined by an expert on March 20, 2019 .

Plaintiff filed the First Note of Issue, without a stipulation that discovery was completed, on March 21, 2019. On April 9, 2019, defendants moved to strike the First Note of Issue.

By court order dated June 7, 2019, the First Note of Issue was stricken. The order vacated a previous order of preclusion as against defendants, struck the First Note of Issue, directed defendants to serve a demand for a dental defense physical examination, and directed the parties to appear for depositions.

On July 9, 2019, plaintiff was examined by a second expert physician designated by defendants.

On August 9, 2019, one month later, plaintiff served a Second Supplemental Bill of Particulars. In this pleading, plaintiff alleged that plaintiff had undergone a new right hip

arthroscopic procedure and that there was now a need for further hip replacement (the August 2019 Injuries).

About one month later, on September 27, 2019, the court issued an order directing that plaintiff appear for further medical examination with regards to the August 2019 Injuries. Defendants were directed to notice the further medical examination of plaintiff with regards to the August 2019 Injuries within 21 days. No such notice was exchanged.

Thereafter, on October 23, 2019, plaintiff filed the Second Note of Issue. No motion to strike the Second Note of Issue was filed within the time frame set forth under the CPLR. Five months passed without action by defendants.

In March 2020, the pandemic lockdown occurred. The courts remained open remotely thereafter until May 2020, when in person court practice resumed.

On November 20, 2020, a year and two months after the court order permitting the additional defense physical examination with regards to the August 2019 Injuries, defendants attempted to schedule the further examination on December 17, 2020. Defendants again attempted to schedule the physical on December 29, 2020, to take place on January 21, 2021. Plaintiff refused to appear, asserting that the examination had been waived. Defendants did not file a motion.

Five months later, on May 18, 2021, defendants wrote to plaintiff requesting that the additional defense physical examination be scheduled. Defendants then waited another five months and wrote plaintiff once again requesting that the additional physical be scheduled and conducted in October 2021. This request was dated approximately two years after the filing of the Second Note of Issue. No motion practice resulted from plaintiff's continued refusal to appear.

Four months later, two and one half years after the filing of the Second Note of Issue, in February and March 2022, defendants again contacted plaintiff via email requesting that the additional physical examination be scheduled. During a telephone conversation on March 10, 2022, plaintiff refused to appear for the further physical arguing that the additional examination was waived and the demand to appear was untimely.

The court served a notice on the parties of a Pre-trial/Settlement Conference to take place on March 24, 2022. In the court notice, the court highlighted that the action has an old Note of

Issue. At was only thereafter, on March 23, 2022, just one day before the Pre-trial/Settlement Conference, that defendants finally moved for relief from plaintiff's refusal to appear for further examination.

Discussion

Procedurally, a party may seek post-note discovery in two ways. See, 22 NYCRR § 202.21 (e). First, a party may move to vacate the note of issue within 20 days of its service upon “showing in what respects the case is not ready for trial.” *Id.* Second, a party may move by motion, as here and argue that although “the motion is not timely, the party seeking relief must meet the more difficult standard of 22 NYCRR § 202.21(d), which requires the movant to demonstrate unusual or unanticipated circumstances and substantial prejudice.” *Reardon v. Macy's, Inc.*, 191 A.D.3d 712, 714 (2d Dep't 2021).

This court finds that defendants' motion to vacate the note of issue is untimely and, as set forth below, they failed to meet their burden to demonstrate unusual or anticipated circumstances which would warrant vacating the note of issue. It is well settled that “[a] lack of diligence in seeking discovery does not constitute” “unusual or unanticipated circumstances warranting vacatur of the note of issue.” *Colon v. Yen Ru Jin*, 45 A.D.3d 359, 359-360 (1st Dep't 2007).

As stated, defendants waived their right to conduct the additional physical examination of the injured plaintiff when they failed to move to vacate the note of issue within 20 days after service of the Second Note of Issue. see 22 NYCRR 202.21[e]; *James v. New York City Tr. Auth.*, 294 A.D.2d 471 (2d Dep't 2002). While the Supreme Court may, in its discretion, 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 here, defendants here fail to establish any unusual or unanticipated circumstances subsequent to the filing of the Second Note of Issue that would warrant the direction of an additional physical examination of the injured plaintiff over two years after the Second Note of Issue was filed. see 22 NYCRR 202.21[d]; *James v. New York City Tr. Auth.*, *supra*.

To the extent that defendants argue that the delay in scheduling the additional physical or moving to strike the Second Note of Issue was the result of the pandemic, defendants fail to submit

any evidence to support the allegation. Defendants do not explain: the failure to satisfy the directive of the September 2019 order to designate a physician within 21 days; the failure to schedule the additional physical examination in the five months before the pandemic struck in March 2020; and the failure to schedule the physical with an expert during 2020 or thereafter. In fact, there is no proof that any attempt was ever made to schedule the physical with an expert which resulted in said expert declining to perform the examination due to the pandemic.

Similarly, defendants' vague assertion that a motion was not filed and the examination was not scheduled over the last two plus years due to the illness of an attorney is unsupported by any factual proof. Movants fail to set forth any facts supporting the allegation or providing a timeline such as would justify defendants' inaction for years. Indeed, the record supports the conclusion that defendants were aware from the service of the Second Bill of Particulars that the August 2019 Injuries were relevant and at issue, and the additional physical examination based on those injuries was not performed, and yet they did not move for another chance to conduct the desired medical exam until the day before the scheduled court conference. Defendants' dilatory conduct does not give rise to the type of unusual circumstances that would warrant the relief that defendants seek. *See Jenkins v Riverbay Corporation*, 187 A.D.3d 543 (1st Dep't 2020); *Tokayer v. Kosher Sports*, 2022 WL 267786 (Supreme Court N.Y. County 2022); *City of New York v. Anton*, 169 A.D.3d 999 (2d Dep't 2019). Based on the scant submissions therefore, defendants' motion to compel an additional physical examination of the injured plaintiff must be denied. *Manzo v. City of New York*, 62 A.D.3d 964 (2d Dep't 2009).

Further, the court "need not address the second prong of the standard under 22 NYCRR § 202.21 (d), i.e., substantial prejudice to the movant, because the defendant has not established the first prong--that 'unusual or unanticipated circumstances' developed subsequent to the filing of the note of issue." *Audiovox Corp. v. Benyamini*, 265 A.D.2d 135, 140 (2d Dep't 2000). In any event, defendants may still present the medical records from plaintiff's additional procedure to the defense experts that have already examined plaintiff.

Finally, this case has an October 2019 Note of Issue. The matter is therefore appropriately referred to the STP part for trial.

The Court has considered the additional contentions of the parties not specifically addressed herein. To the extent that any relief requested by the parties was not addressed by the

Court, it is hereby denied.

Accordingly, it is hereby:

ORDERED the motion of defendants VAN OWNERS PURCHASING BUREAU, INC. and JUAN L. VILLAFANE [Mot. Seq.4], made pursuant to 22 NYCRR 202.21(d) and CPLR 2004 and CPLR 3101 and 3124, seeking an order permitting defendants to seek post-note of issue discovery and compelling plaintiff to appear for further medical examination by defendants' expert is denied; and it is further

ORDERED that the Clerk shall mark the motion [Mot. Seq. 4]) disposed in all Court records; and it is further

ORDERED that this action shall be transferred to the STP and removed from the inventory of Part 31.

This constitutes the decision and order of the Court.

Dated: July 26, 2022

Hon. s/Hon. Veronica G. Hummel/signed 07/26/2022
VERONICA G. HUMMEL, A.J.S.C.

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- 1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
 - 2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
 - 3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE

FIDUCIARY APPOINTMENT

REFEREE APPOINTMENT

CONVERT TO ELECTRONIC FILING

EDIT CAPTION

**TRANSFER TO STP PART AND REMOVE FROM THE INVENTORY OF
PART 31**