

**Cerda v City of New York**

2023 NY Slip Op 31222(U)

April 17, 2023

Supreme Court, New York County

Docket Number: Index No. 157376/2020

Judge: Nicholas W. Moyne

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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. NICHOLAS W. MOYNE PART 52**

*Justice*

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INDEX NO. 157376/2020

ARIEL TORRES CERDA,

MOTION DATE 01/03/2023

Plaintiff,

MOTION SEQ. NO. 001

- v -

THE CITY OF NEW YORK, NEW YORK CITY HOUSING  
AUTHORITY

**DECISION + ORDER ON  
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24, 25, 26, 27, 28

were read on this motion to/for

VACATE/STRIKE - NOTE OF ISSUE/JURY  
DEMAND/FROM TRIAL CALENDAR

Upon the foregoing documents, it is

Defendants, THE CITY OF NEW YORK and THE NEW YORK CITY HOUSING AUTHORITY ("the City") are moving pursuant to 22 NYCRR § 202.21(e) to vacate the Note of Issue and pursuant to CPLR §3126(2) to preclude the introduction of evidence of plaintiff's physical condition at trial. In the alternative, the City moves, pursuant to CPLR §3124, for an order compelling the plaintiff to appear for an Independent Medical Examination ("IME") and provide HIPAA Authorizations.

Background:

This is an action to recover damages for personal injuries allegedly sustained by plaintiff resulting from a trip and fall on the sidewalk. Plaintiff commenced this action by filing a Summons and Complaint on or about September 14, 2020, alleging one cause of action for negligence. An order, dated May 4, 2022, called for defendants to designate an IME within 45 days and to be held within 60 days. On or about October 20,

2022, a discovery stipulation was submitted to be so ordered that was silent as to scheduling medical examinations. However, this stipulation did designate that the Note of Issue ("NOI") be filed on or before December 14, 2022. After the conference, the parties were engaged in active settlement negotiations.

Plaintiff filed a Supplemental Verified Bill of Particulars on December 14, 2022, claiming the need for further surgical treatment of the spine, the details and costs of which would be provided upon receipt of current treatment records. On December 14, 2022, plaintiff filed the NOI and Certificate of Readiness and claimed that as the time frame in which defendants were to designate and hold their IME had passed, the defendants had waived their right to conduct IMEs of the plaintiff. Defendants allege that while settlement talks were ongoing, it was understood that medical examinations could be necessary if settlement was not achieved or if further treatment was alleged.

Discussion:

Defendants move within the 20-day time period, pursuant to 22 NYCRR § 202.21(e), to vacate the NOI and strike the case from the trial calendar. Defendants contend that the NOI should be vacated as the Certificate of Readiness contains erroneous facts and the case is not ready for trial. Defendants allege that vacatur is warranted in this case as the plaintiffs have misrepresented that discovery is complete as the plaintiff's Supplemental Verified Bill of Particulars was filed on the same day as their NOI and Certificate of Readiness and alleges the need for future surgery and medical expenses. Furthermore, defendants contend that plaintiff erroneously stated that medical examinations were waived (See *Cromer v Yellen*, 268 AD2d 381 [1st Dept 2000] [A note of issue may be vacated when it is based on a certificate of readiness that

contains incorrect facts such as physical examinations having been waived and all necessary discovery being completed]).

Plaintiff contends that pursuant to the order issued May 4, 2022, IMEs were to be designated within 45 days, and to be held within 60 days of that designation. Plaintiff further contends that defendants failed to designate or hold an IME and pursuant to the stipulation/order on October 20, 2022, defendants did not ask for an extension or express interest in an IME. Plaintiff asserts this would constitute waiver. Plaintiff filed the NOI on the proscribed date, December 14, 2022, and approximately eight months after defendants were ordered to designate and hold an IME.

Plaintiffs further allege that the Supplemental Bill of Particulars did not allege a new injury but alleges a need for a future revision surgery and expected costs that were plead in the Original Bill of Particulars. Therefore, plaintiff contends the NOI did not erroneously state discovery was complete or examinations were waived.

However, in the alternative to vacating, defendants request that the plaintiff be compelled to provide further discovery, pursuant to CPLR § 3124. Specifically, to compel plaintiff to appear for an IME, provide HIPAA and Arons-compliant authorizations, authorizations to obtain tax returns, application to the teacher retirement system, and HIPAA compliant authorizations regarding plaintiffs 2008 assault, 2011 motor vehicle accident, and fall in 2014-2015.

It has been established that "[t]rial 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" (*Cuprill v Citywide Towing and Auto Repair*

*Servs.*, 149 AD3d 442, 443 [1st Dep't 2017]; *Cabrera v Abaev*, 150 AD 3d 588, 588 [1st Dep't 2017]).

Absent prejudice to the plaintiff, a court, in their discretion and in the interest of justice, may permit a defendant to conduct a post-note IME despite their previous failure to do so (*May v American Red Cross*, 282 AD2d 285 (1st Dept 2001); see also *Roberson v Fordham Rent-A-Car Corp.*, 38 AD2d 535 [1st Dept 1971]). Here, despite their previous failure, preventing the defendants from conducting an IME would inhibit their ability to adequately assess damages and in defending the claim. Further, the plaintiff does not oppose appearing for an IME and will suffer no prejudice by granting the request to the extent that the court directs that an IME be held post Note of Issue. There is no need to vacate the NOI as the defendants will not be prejudiced by this case remaining on the trial calendar while IMEs are conducted. The filing of the NOI only impacts the timing for summary judgment motions and these motions are not dependent on proof of damages and/or the results of medical examinations.

In addition to the IME, defendants are requesting that plaintiff produce additional medical records and authorizations. Defendants assert that plaintiff filed the Supplemental Bill of Particulars on the same day as the NOI and the bill reads, “[t]he plaintiff is currently treating, and it is expected that the plaintiff will need revision surgery of his cervical spine. The details and costs of which will be provided upon receipt of the current treatment records. It is also expected that the plaintiff will incur future medical costs based on the permanence of his injuries. The specifics of which will be provided as they are tabulated” (NYSCEF No. 18).

However, in their opposition paper, plaintiff asserted that there was no new injury or body part claimed, and explicitly state that there are no new treatment providers, and no new procedure or new treatment has taken place. Plaintiffs claim that the future revision surgery and expected costs were plead in the original bill. Plaintiff additionally claims there is no need for new discovery as the defendants have all plaintiff's authorizations, which do not expire until the end of litigation and will allow them to obtain records until that time.

As defendants highlight, the language of the Supplemental Bill and the opposition papers are conflicting or otherwise unclear as to whether treatment is currently taking place. Defendants also note that the previous authorizations contain the name of the previous Corporation Counsel not the current, and medical providers request updated authorizations when there is a change.

Plaintiff has not alleged that providing the requested discovery would cause any prejudice as it would neither hinder the plaintiff in the preparation of the case nor prevent the plaintiff from taking some measure in support of plaintiff's position (*Kimso Apartments, LLC v Gandhi*, 24 NY3d 403, 411, 23 NE3d 1008, 1013 [2014]; quoting *Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23, 444 NYS2d 571, 429 NE2d 90 [1981]). Defendants have sufficiently demonstrated they would be prejudiced as a result of failure to provide the requested material, especially considering that the Supplemental Bill of Particulars was filed the same date as the NOI and contains ambiguous language. As the NOI will not be vacated, and the case will stay on the calendar, providing the requested documents would not delay the trial nor will it result in a substantial burden to plaintiff. Therefore, defendants' motion to compel plaintiff to

produce new authorizations is granted, limited to the discovery necessary and relevant to the alleged treatment and expenses in the Supplemental Bill of Particulars or conditional to the IME.

Conclusion:

Accordingly, it is hereby

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

ORDERED that the defendant's motion to compel is GRANTED; and it is further

ORDERED that defendant is permitted to hold an Independent Medical Examination of plaintiff provided it is completed within 90 days from service of a copy of this order with notice of entry; and it is further

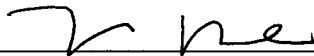
ORDERED that plaintiff shall appear for the Independent Medical Examination to be held at the provider designated by defendants within said 90-day period on a date and time convenient to both sides; and it is further

ORDERED that plaintiff shall produce to defendant the requested discovery in this matter within 30 days from service of a copy of this order with notice of entry.

ORDERED that the deadline for summary judgment motions remains 10 days after the filing of the Note of Issue absent good cause shown for an extension of time.

This constitutes the decision and order of the court.

4/17/2023  
DATE

  
HON. NICHOLAS W. MOYNE, A.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: