

**Zepeda v JSD Contr. Group Corp.**

2023 NY Slip Op 31265(U)

April 19, 2023

Supreme Court, New York County

Docket Number: Index No. 651207/2021

Judge: Arlene P. Bluth

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART 14

*Justice*

-----X

YILMER JOSE HERNANDEZ ZEPEDA,

Plaintiff,

- v -

JSD CONTRACTING GROUP CORP., LDJ CONTRACTING  
GROUP INC., LUIS DE JESUS DOE, DEBORAH DE  
JESUS, LUIS CARDONA DOE, HUMBERTO DOE

Defendants.

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INDEX NO. 651207/2021

MOTION DATE 04/13/2023

MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE.

Defendants' motion to strike the note of issue is denied.

**Background**

Plaintiff brings this case concerning alleged violations of New York's Labor Law arising out of his employment for them. He insists that he did not receive minimum wage for the hours he worked nor did he receive his due compensation (including overtime pay).

On September 13, 2022, this Court issued an order directing that a note of issue be filed by September 30, 2022 (NYSCEF Doc. No. 26). The Court observed that the parties' previous conference order required all depositions to be completed by June 11, 2022, they had not uploaded anything by the September 12, 2023 deadline, and so the Court assumed that discovery was complete.

That same day, the parties, apparently realizing they had ignored the Court's deadline, attempted to upload an untimely proposed stipulation that showed that depositions still had not

been completed and set a deadline of September 30, 2023 to finish them. The parties then uploaded another stipulation a few weeks later that extended the parties' deadline to do depositions, once again, to October 14, 2022.

The Court declined to sign these stipulations because it showed the parties had ignored the prior Court-ordered deadlines and they had made little to no progress on discovery for many months. No note of issue was filed by September 30, 2022 or by the parties' proposed new deadline of October 31, 2022 (NYSCEF Doc. No. 32). In fact, nothing happened in the case, at least as reflected on NYSCEF, until March 8, 2023 when plaintiff filed a note of issue.

Defendants now move to strike the note of issue. They complain about various discovery deficiencies from plaintiff, including the fact that certain text messages were not produced with the related metadata. Defendants also stress that plaintiff admitted at his deposition that he did not have any text messages about his employment for defendants nor did he review responses to interrogatories that were verified by him.

Defendants claim that they received certain documents after plaintiff's deposition and did not get the chance to question him about these documents. They claim they assumed plaintiff had abandoned this case by not filing the note of issue until six months after the deadline.

In opposition, plaintiff claims he served all responses to defendants' demands and argues that defendants never sent a deficiency letter detailing any issues with discovery. He insists defendants never even sent a copy of the deposition transcript for plaintiff to sign. Plaintiff insists he was forced to file the note of issue to keep it on the Court's calendar.

Defendants complain in reply that the opposition from plaintiff was untimely and that plaintiff never asked for an adjournment.

## Discussion

The Court denies the motion. Defendants failed to meet their prima facie burden to strike the note of issue. The record shows that depositions were completed and defendants did not sufficiently explain what items remain outstanding. Defendants submitted no evidence of their efforts to formally demand discovery, such as a deficiency letter, a letter to the Court requesting a conference or a discovery motion. In other words, defendants did not take any meaningful steps to resolve these alleged deficiencies until after plaintiff filed the note of issue, which was not filed until nearly six months after the deadline.

The Court also observes that defendants did not raise any of these issues in prior conference stipulations—the parties' stipulation dated September 13, 2022 mentions nothing about outstanding discovery issues. And they did not raise it in the September 29, 2022 stipulation (NYSCEF Doc. No. 32), which simply lists that depositions have to be completed. However, defendants attached emails to this motion that suggest there was some sort of dispute prior to this stipulation. One email dated September 28, 2022, from counsel for defendants, contends that he was contemplating filing a motion (NYSCEF Doc. No. 44 at 2). But no motion was made and the issues were not reflected in the parties' stipulation entered into the following day.

Defendants had more than enough time to make the appropriate requests for Court intervention. It seems that defendants, as indicated in their papers, thought that plaintiff had simply abandoned this case and chose to do nothing. They did nothing affirmative to dispose of this case. Defendants could have utilized the procedures under CPLR 3126 to seek a dismissal for want of prosecution, but they did not. Unless there is an order, judgment, or stipulation to end an action, the case is still alive.

And so, now, the Court is faced with defendants' complaints about a few discrete discovery matters that they were obligated to raise months and months ago without any legitimate justification for the delay. There is no reason offered for why defendants did nothing, particularly where they assert that plaintiff manipulated or changed certain documents.

Although not dispositive, the Court also accepts plaintiff's untimely opposition because defendants had a chance to reply. Plaintiff contends he has responded to discovery demands in this opposition. Rather than submit a substantive reply to plaintiff's short (five and a half page) opposition), defendants decided to offer a two-page reply based solely on procedural issues.

### **Summary**

The record before this Court is replete with instances of both parties ignoring Court-ordered deadlines and choosing, for whatever reason, to let this case drag on and on. Plaintiff waited until six months after the deadline to file the note of issue and never made a motion for an extension. Contrary to plaintiff's contention that he was forced to file the note of issue, the fact is that the parties submitted a stipulation in April 2022 indicating that there were only a few discovery items left outstanding. Then, they ignored the Court-ordered deadline to update the Court in September 2022 (five months later) and so the Court set a note of issue deadline. Instead of working together to finish discovery or asking the Court for intervention where appropriate, both parties blame each other for the delays.

Because this is a motion to strike the note of issue, however, it was defendants' burden to justify that relief. Defendants failed to meet that burden because they did not give an explanation as to why they did not preserve their now-claimed issues in prior stipulations and why they never made a motion, or even sought a conference, in the last six months. To ignore a

case and only take the other side seriously after the note of issue is filed does not meet a burden to strike the note of issue.

Accordingly, it is hereby

ORDERED that defendants' motion to strike the note of issue is denied.

4/19/2023

DATE



ARLENE P. BLUTH, J.S.C.

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