

**Shukurov v City of New York**

2023 NY Slip Op 32305(U)

July 10, 2023

Supreme Court, New York County

Docket Number: Index No. 152434/2020

Judge: Judy H. Kim

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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. JUDY H. KIM PART 05RCP

Justice

-----X

ISROIL SHUKUROV,

Plaintiff,

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT, ANDREW S. PIZZINO,

Defendants.

-----X

INDEX NO. 152434/2020

MOTION DATE 03/28/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36

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

Upon the foregoing documents, the motion by defendant the City of New York to vacate the Note of Issue is denied.

In this action, plaintiff seeks to recover for injuries allegedly sustained on October 1, 2019 in an automobile collision on 7th Avenue and West 45th Street, New York, New York between plaintiff and the New York City Police Department ("NYPD").

On or about July 20, 2020, plaintiff served a Bill of Particulars alleging, in pertinent part injuries: (1) tear of the lateral meniscus of the left knee; (2) tear of the medial meniscus of the left knee; (3) left knee synovitis and left knee sprain; (4) surgery to repair left knee injuries, which was performed on February 7, 2020 and consisted of arthroscopy, synovectomy, meniscectomy, lysis of adhesions, debridement and injection; (5) right shoulder anterior glenoid labrum tear; (6) tear of the medial meniscus of the right knee; (7) herniated disc at the L5-S1 level; (8) herniated disc at the C6-7 level.

Plaintiff was deposed on October 20, 2022 (NYSCEF Doc. No. 35).

On or about December 21, 2022, plaintiff served a Supplemental Bill of Particulars alleging the following injuries: (1) right shoulder tear of the inferior aspect of the anterior glenoid labrum; (2) right shoulder effusion; (3) right shoulder bursitis; (4) right shoulder synovitis and tenosynovitis; (5) arthroscopic surgery of the right shoulder under anesthesia on May 30, 2020, the surgery consisted of the following: extensive debridement superior, inferior labrum, lysis of adhesion, major synovectomy, major bursectomy, infiltration of intraarticular injection without ultrasound; (6) right knee tear of the posterior horn of the medial meniscus. Plaintiff then filed a Note of Issue on January 17, 2023.

The City now moves to vacate this Note of Issue on the grounds that plaintiff's certificate of readiness incorrectly states that discovery is complete and alternatively, moves, pursuant to CPLR §§3124 and 3126, to compel plaintiff to produce the outstanding discovery enumerated in the City's good faith letter, dated February 2, 2023 or, should plaintiff fail to do so, preclude plaintiff from offering any testimony or evidence of claimed injuries at the time of trial.

In support of its motion to vacate the Note of Issue, the City observes that documentary discovery remains outstanding, specifically: (1) medical records from Surgicore Surgical Center pertaining to the right shoulder; (2) employment records from Uber; (3) tax returns, W-2s and 1099 statements for 2017-2022; (4) medical records pertaining to a prior injuries resulting from plaintiff's accident in July 2019 as well as HIPAA authorizations for same; and (5) the non-privileged portion of the legal file of plaintiff's law firm which represented him in litigation arising from a prior accident in New York State Supreme Court, Kings County, under index number 512178/2019.

The City also argues that the Note of Issue must be vacated because plaintiff's Supplemental Bill of Particulars alleges new injuries not included in the original Bill of Particulars, and therefore the City is entitled to conduct a further EBT of plaintiff to those new items alleged in the Supplemental Bill of Particulars. The City further notes that plaintiff has not yet appeared for an IME.

Plaintiff opposes the motion, arguing that after the City filed its motion, plaintiff provided the documentary discovery requested by the defendants (See NYSCEF Doc. No. 34) and that the Supplemental Bill of Particulars does not require a further EBT as it only elaborates on injuries previously pled in plaintiff Bill of Particulars and testified to at his GML §50-h hearing and EBT. Plaintiff contends that the City has waived its right to an IME by failing to notice same within sixty days of plaintiff's deposition.

The City does not submit reply papers.

### DISCUSSION

As a general matter, “[a] note of issue should be vacated where it is based upon a certificate of readiness that incorrectly states that all discovery has been completed” (Matos v City of New York, 154 AD3d 532, 533 [1st Dept 2017] [internal citations and quotations omitted]). As the outstanding documentary discovery sought by the City has been produced, it does not present grounds for vacatur. In addition, contrary to the City's contention, a further EBT of the plaintiff is not warranted. The injuries set forth in the Supplemental Bill of Particulars provide further details of plaintiff's injuries set forth in the original Bill of Particulars or sequelae of same (See Tate v Colabello, 58 NY2d 84, 87 [1983]; see also Olivo v Nazario, 154 AD3d 624 [1st Dept 2017] [internal citations omitted]). In any event, defendant is not prejudiced by the Supplemental Bill of Particulars in light of the fact that plaintiff's IME has not taken place.

In light of the foregoing and regardless of any waiver, this Court exercises its discretion and permits defendant to conduct a post-Note of Issue IME while the case remains on the trial calendar. The Court finds that defendants would be prejudiced by the inability to conduct this IME while permitting same will not prejudice plaintiff (See Hickey v City of New York, 159 AD3d 511 [1st Dept 2018]). Moreover, this Court finds that defendant has not engaged in willful and contumacious tactics such that they have waived their right to such discovery (Id. citing Cespedes v Mike & Jac Trucking Corp., 305 AD2d 222 [1st Dept 2003]).

In light of the foregoing, it is

**ORDERED** that the branch of the City of New York's motion to vacate the Note of Issue is denied; and it is further

**ORDERED** that the branch of the City of New York's motion to compel is denied as moot; and it is further

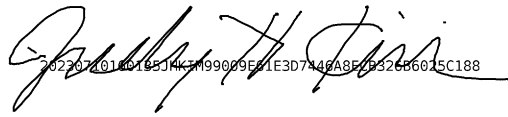
**ORDERED** that plaintiff is directed to appear for an independent medical examination within sixty days of the date of this decision and order at a date and time mutually agreeable to counsel for the parties; and it is further

**ORDERED** that counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, upon defendants as well as the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119) within fifteen days of the date of this decision and order; and it is further

**ORDERED** that service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website

at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

This constitutes the decision and order of the Court.



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7/10/2023

DATE

HON. JUDY H. KIM, 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