Mori v Riomar Corp.
2023 NY Slip Op 32691(U)
August 4, 2023
Supreme Court, New York County
Docket Number: Index No. 154687/2020
Judge: David B. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID B. COHEN** **PART 58**

Justice

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HENRY MORI,

Plaintiff,

- v -

RIOMAR CORP., MARTHA SILVA FRANSA, KANA RESTAURANT, D/B/A KANA, D/B/A KANA TAPAS BAR AND RESTAURANT, ARMANDO OROFINA, ALEJANDRO VEGA, ANDRES VEGA, JOHN DOE

Defendant.

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INDEX NO. 154687/2020

MOTION SEQ. NO. 005 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 161, 165, 166, 167, 168

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE/JURY DEMAND/FROM TRIAL CALENDAR.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 153, 154, 155, 156, 157, 158, 159, 160, 162, 163, 164, 169, 170

were read on this motion to/for DISCOVERY.

In this intentional tort and negligence action, defendants Riomar Corp., Kana Restaurant, doing business as Kana and as Kana Tapas Bar and Restaurant, Armando Orofina, Alejandro Vega, and Andres Vega (defendants-movants) move, pursuant to 22 NYCRR 202.21(e), to vacate the note of issue (Seq. 005). Plaintiff opposes the motion, and cross-moves, pursuant to CPLR 3103, for an order limiting the scope of any subsequent independent medical examinations (IMEs). Defendants-movants also move, pursuant to CPLR 3124, to compel plaintiff to attend an additional deposition (Seq. 006), which plaintiff opposes.

I. Factual and Procedural Background

Plaintiff commenced this action in June 2020 after he was allegedly injured when he was assaulted by employees of defendant Kana Restaurant (NYSCEF Doc No. 1). Defendants-

movants joined issue with their answer dated August 7, 2020, denying any allegations of wrongdoing and asserting various affirmative defenses (Doc No. 11). During the course of discovery, a conference with the Court was scheduled for April 11, 2023.

The morning of the conference, plaintiff filed a note of issue and certificate of readiness, indicating that there were no outstanding requests for discovery and that discovery was complete (Doc No. 125). After arriving for the conference, prior to the arrival of opposing counsel, plaintiff's counsel attempted to submit a stipulation cancelling the conference. He indicated to the Court that the note of issue had been filed, and went so far as to sign the stipulation on behalf of opposing counsel. Moments later, counsel for defendants-movants arrived and explained that he never consented to cancelling the conference or to having plaintiff's counsel sign his name.

At the conference, a dispute arose over whether plaintiff's note of issue filing was premature and whether discovery was complete. Defendants-movants sought to have plaintiff voluntarily withdraw the note of issue so that the remaining discovery could be completed. Plaintiff refused and this motion ensued. Defendants-movants now move to vacate the note of issue (Seq. 005) (Doc Nos. 126-127). Plaintiff opposes the motion, and cross-moves for a protective order limiting the scope of any IMEs, if the note of issue is vacated (Doc Nos. 137-138). Defendants-movants oppose the cross motion, and move separately for an order compelling plaintiff to appear for an additional deposition (Doc Nos. 147, 153-154), which plaintiff opposes (Doc No. 163).

II. Legal Analysis and Conclusions

A. Motion to Vacate the Note of Issue (Seq. 005)

Defendants-movants contend that the note of issue must be vacated because discovery was incomplete at the time plaintiff filed it. They assert that, among other things, three IMEs and two

nonparty depositions are still pending. Plaintiff argues in opposition that defendants-movants waived their right to conduct IMEs and nonparty depositions because they waited too long to schedule them. In reply, defendants-movants maintain that they did not waive any right to conduct IMEs or nonparty depositions.

"A note of issue should be vacated when it is based upon a certificate of readiness which contains an erroneous fact, such as that discovery has been completed" (*Ruiz v Park Gramercy Owners Corp.*, 182 AD3d 471, 471 [1st Dept 2020] [internal quotation marks, brackets, and citations omitted]; *see Vargas v Villa Josefa Realty Corp.*, 28 AD3d 389, 390 [1st Dept 2006] ["(A party) need show only that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of (22 NYCRR 202.21[e]) in some respect" (internal quotation marks and citations omitted)]).

Here, plaintiff's certificate of readiness indicated that all discovery was complete. However, at the time the certificate was filed, plaintiff's IMEs and multiple nonparty depositions were still outstanding. Therefore, the note of issue must be vacated since the certificate of readiness contains incorrect material (*see Landusco v Open Loop NYC*, 188 AD3d 464, 465 [1st Dept 2020] [affirming vacatur of note of issue where certificate of readiness incorrectly indicated, among other things, that discovery was complete]; *Perez v Kone*, 166 AD3d 555, 555 [1st Dept 2018] [upholding vacatur of note of issue because certificate of readiness contained incorrect material by stating discovery complete when deposition and physical examinations outstanding]).

B. Cross-Motion for Protective Order (Seq. 005)

Plaintiff contends that a protective order is warranted because defendants-movants provided improper notices of IME, and that the three IMEs noticed by defendants-movants — one neurological, one psychiatric, and one neuropsychological — are punitive. Defendants-movants

argue in opposition that each IME is warranted because the injuries alleged by plaintiff put all of these conditions into controversy.

"Where a plaintiff puts [his or] her physical [or mental] condition at issue, the defendants may require that [he or] she submit to an IME by a physician retained by defendant for that purpose" (*Markel v Pure Power Boot Camp, Inc.*, 171 AD3d 28, 29 [1st Dept 2019]; *accord Pettinato v EQR-Rivertower, LLC*, 213 AD3d 46, 50 [1st Dept 2023]), and "[t]here is no restriction in CPLR 3121 limiting the number of examinations to which a party may be subjected" (*Young v Kalow*, 214 AD2d 559, 559 [2d Dept 1995]). However, "the court must balance the desire for the plaintiff to be examined safely and free from pain against the need for the defendant to determine facts in the interest of truth" (*Pettinato*, 213 AD3d at 51). The plaintiff, as the party opposing the IMEs, must make a prima facie showing that an IME "is potentially harmful or poses a serious threat to [his or] her health" (*id.*).

A review of plaintiff's bill of particulars demonstrates that he put his physical and mental condition at issue, given his claims of headaches, psychological injury, and emotional injury. Further, he fails to show that these IMEs will be harmful to his health, and he provides no authority to support his conclusory statement that appearing for these examinations is punitive. Thus, he has not satisfied his burden of showing why defendants-movants are not entitled to these examinations (*see Heary v Hibit*, 138 AD3d 1385, 1386 [4th Dept 2016] [granting orthopedic IME of plaintiff after she submitted to neurological IME because "her claimed injuries were both neurological and orthopedic"]).

Plaintiff's contention that defendants-movants provided improper notices of IME is unavailing. Although plaintiff is correct that such notices must "'specify the time, which shall be not less than twenty days after service of the notice, and the conditions and scope of the

examination'" (*Rivera v Quadrum 38, LLC*, 73 Misc3d 1219[A], *1 [Sup Ct, NY County 2021], quoting CPLR 3121 [a]), plaintiff failed to include the notices of IME in support of his cross motion, and, therefore, this Court in unable to determine that they were deficient in stating the date, time, conditions, and scope of the IME (*cf. Rivera*, 73 Misc3d 1219[A] at *1 [granting protective order vacating notice of IME because notice did not include specifics of IME to be conducted]).

C. Motion to Compel an Additional Deposition of Plaintiff (Seq. 006)

Defendants-movants contend that they are entitled to an additional deposition of plaintiff because he refused to answer several questions about his monthly rent during his initial deposition after being directed not to answer by his attorney. Alternatively, they contend that plaintiff should at least be required to answer interrogatories related to that question. Plaintiff argues in opposition that he should not have to answer that question because it is "irrelevant" and "intrusive." In reply, defendants-movants assert that information about plaintiff's rent is material and necessary.

"[T]he evidentiary scope of an examination before trial is at least as broad as that applicable at the trial itself" (*Orner v Mount Sinai Hosp.*, 305 AD2d 307, 309 [1st Dept 2003]). During such examinations, "questions should be freely permitted unless a question is clearly violative of a witness' constitutional rights, or of some privilege recognized in law, or is palpably irrelevant" (*Barber v BPS Venture, Inc.*, 31 AD3d 897, 897 [3d Dept 2006]; *accord Kaye v Tee Bar Corp.*, 151 AD3d 1530, 1531 [3d Dept 2017]).

At plaintiff's deposition, he refused to answer a question regarding the amount of rent he paid for his apartment, after being directed not to answer by his attorney. Defendants-movants, however, fail to demonstrate how plaintiff's monthly rent is relevant to his claims for lost wages. Defendants-movants are already in possession of information related to his earning and income,

as well as his tax records; and plaintiff's rent is irrelevant to the wages he allegedly lost due to his injuries. Therefore, defendants-movants' motion to compel plaintiff to appear for an additional deposition or, alternatively, to respond to specific interrogatories about his rent, is denied (*cf. Bolos v Staten Is. Hosp.*, 217 AD3d 643, 644 [2d Dept 1995] [granting further deposition of plaintiff, limited in scope, after her counsel prevented her from answering basic factual questions about her medical history]).

Accordingly, it is hereby:

ORDERED that the motion by defendants Riomar Corp., Kana Restaurant, doing business as Kana and as Kana Tapas Bar and Restaurant, Armando Orofina, Alejandro Vega, and Andres Vega to vacate the note of issue (Seq. 005) is granted; and it is further

ORDERED that the note of issue is vacated and the case is stricken from the trial calendar; and it is further

ORDERED that plaintiff's cross-motion for a protective order limiting the scope of any independent medical examinations (Seq. 005) is denied; and it is further

ORDERED that the motion by defendants Riomar Corp., Kana Restaurant, doing business as Kana and as Kana Tapas Bar and Restaurant, Armando Orofina, Alejandro Vega, and Andres Vega for an order compelling plaintiff to appear for an additional deposition (Seq. 006) is denied; and it is further

ORDERED that, within 15 days from the entry of this order, defendants Riomar Corp., Kana Restaurant, doing business as Kana and as Kana Tapas Bar and Restaurant, Armando Orofina, Alejandro Vega, and Andres Vega shall serve a copy of this order with notice of entry on all parties and upon the Clerk of the General Clerk's Office, who is hereby directed to strike the

case from the trial calendar and make all required notations thereof in the records of the court; and it is further

ORDERED that such 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)].

ORDERED that the parties shall appear for an in-person status conference at 71 Thomas Street, Room 305, on August 29, 2023, at 10:00a.m.

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8/4/2023		DAVID B. COHEN, J.S.C.
DATE		

CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION			
	[ ] GRANTED	[ ] DENIED	[X] GRANTED IN PART		[ ] OTHER	
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER			
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN		[ ] FIDUCIARY APPOINTMENT		[ ] REFERENCE	