

Gibbs v City of New York

2023 NY Slip Op 32891(U)

August 21, 2023

Supreme Court, New York County

Docket Number: Index No. 156157/2019

Judge: Judy H. Kim

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This opinion is uncorrected and not selected for official publication.

filed letters demanding outstanding medical authorizations from plaintiff (See NYSCEF Doc. Nos. 10 and 11).

In a so-ordered stipulation dated November 23, 2021, the parties stipulated that all paper discovery was complete and set defendant's deposition for January 13, 2022 (NYSCEF Doc. No. 11). That so-ordered stipulation further contemplated that the note of issue could be filed immediately after defendant's deposition but in any event was to be filed no later than March 1, 2022 (Id.).

On March 31, 2023—thirteen months after the note of issue deadline—plaintiff filed a note of issue and certificate of readiness certifying this action as ready for trial (NYSCEF Doc. No. 12 [Note of Issue]). The City states that after this note of issue was filed, it engaged in email communications with plaintiff's counsel in an effort to schedule a post-note of issue IME, but that these negotiations were unsuccessful. In a letter dated April 13, 2023, the City also demanded that plaintiff produce certain medical authorizations which remained outstanding. On May 3, 2023 and May 10, 2023, plaintiff responded to these demands, though the City asserts in reply that this response was incomplete.

On April 20, 2023, the City filed the instant motion seeking an order: (a) vacating the Note of Issue; (b) compelling plaintiff to provide outstanding discovery and appear for an IME—arguing that it would be prejudiced if this matter were to proceed to trial without such an IME; and (c) extending the deadline to file summary judgment motions for an additional ninety days due to the pendency of the instant motion. Plaintiff opposes the motion, arguing that the City's motion is frivolous because plaintiff has already provided responses to the City's discovery demands and has agreed to appear for an IME.

DISCUSSION

The Court denies that branch of the City's motion which seeks to vacate the note of issue. 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]). Here, the record reflects that, pursuant to the so-ordered stipulation of the parties dated November 23, 2021, the parties agreed that discovery was complete barring the City's deposition. The fact that the parties' current course of conduct indicates that certain medical authorizations from plaintiff remained outstanding does not establish that plaintiff's representation in the certificate of readiness was knowingly inaccurate such that vacatur is warranted. Similarly, the Court cannot fault plaintiff's representation in the certificate of readiness that the IME had been waived where the City not only failed to designate plaintiff's IME within sixty days from the date of her deposition but apparently failed to make any efforts to designate or hold this IME until the note of issue was filed.

Notwithstanding the foregoing, however, that branch of the City's motion to compel plaintiff to produce medical authorizations outlined in the City's motion (See NYSCEF Doc. No. 14 [Harris Affirm. at ¶13]) and to appear for an IME is granted. "Trial 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 & Auto Repair Servs., 149 AD3d 442, 443 [1st Dept 2017]). Here, the City's defense would be prejudiced should it be required to proceed to trial without an IME of plaintiff while, by contrast, plaintiff has failed to point to any prejudice to her resulting from such an IME being held (See May v Am. Red Cross, 282 AD2d 285 [1st Dept 2001]; see also Hickey v City of New York, 159 AD3d 511 [1st Dept 2018]) and, indeed, has already consented to produce the discovery sought and appear for an IME

(NYSCEF Doc. No. 31 [Goldfarb Affirm. in Opp. at ¶4]). In light of the foregoing, that branch of the City's motion which seeks a further extension of the deadline for dispositive motions is granted and hereby extended to December 11, 2023.

Accordingly, 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 plaintiff to produce authorizations sought in the City's demand of April 13, 2023 and appear for an independent medical examination is granted; and it is further

ORDERED that all HIPAA-compliant written authorizations for medical treatment plaintiff received in connection with this incident that have not already been provided, including providers identified in paragraph 13 of the City's supporting affirmation (NYSCEF Doc No. 14), shall be provided to the City within twenty days of the date of this decision and order; and it is further

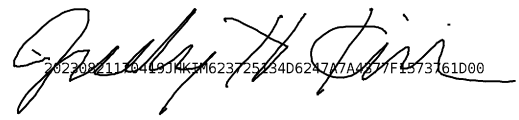
ORDERED that, within twenty days from the date of this decision and order, the City of New York is directed to notice an IME of plaintiff and said IME is to be held within sixty days of the date of the notice; and it is further

ORDERED that the City of New York shall exchange IME reports within thirty days from the date of plaintiff's IME; and it is further

ORDERED that counsel for the City of New York shall serve a copy of this decision and order, with notice of entry, upon plaintiff 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 ten days of the date of this decision and order; and it is further

ORDERED that such service upon the Clerk of the Court and 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 this court's website at the address www.nycourts.gov/suptctmanh).

This constitutes the decision and order of the Court.



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8/21/2023
DATE

HON. JUDY H. KIM, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: