

Agaveva v Filstein

2023 NY Slip Op 33132(U)

September 7, 2023

Supreme Court, New York County

Docket Number: Index No. 805396/2018

Judge: John J. Kelley

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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. JOHN J. KELLEY PART 56M

Justice

-----X

ALONA AGAEVA and ELKHAN AGEV,
Plaintiffs,

- v -

MARK FILSTEIN, M.D., and "JOHN DOE,"
Defendants.

-----X

INDEX NO. 805396/2018
MOTION DATE 05/17/2023
MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 70, 71, 72

were read on this motion to/for

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

In this action to recover damages for medical malpractice, the defendant Mark Filstein, M.D., moves pursuant to 22 NYCRR 202.21(e) to vacate the note of issue, and thereupon pursuant to CPLR 3124 to compel the plaintiff to provide authorizations permitting him to obtain the records of hospitals, physicians, health care providers, and pharmacies that provided care, treatment, or pharmaceuticals to the plaintiff Alona Agaeva in connection with certain medical conditions. The plaintiffs oppose the motion, and cross-move pursuant to CPLR 3124 to compel the defendants to respond to post-deposition requests for documents that had been identified during Filstein’s deposition. The motion and cross motion are denied.

Filstein seeks to vacate the note of issue on the ground that, on the date when the plaintiffs filed the note of issue, the plaintiffs had yet to provide him with all of the authorizations that he had sought. The plaintiffs conceded that the authorizations were outstanding. They further admitted that Filstein himself had yet to provide them with documents requested at Filstein’s deposition, and that they were “only following the Court directive in placing this matter

on the trial calendar at the designated date.” While this motion was pending, the court, in a status conference order dated June 8, 2023, directed that, on or before July 24, 2023, the plaintiff was to provide Filstein with the authorizations and outstanding items of discovery enumerated in this court’s September 29, 2022 and February 1, 2023 discovery conference orders, and as identified in Filstein’s November 4, 2022, December 12, 2022, and March 13, 2023 correspondence. In that order, the court was not asked to address any outstanding discovery items that Filstein purportedly owed to the plaintiffs, presumably because that dispute had been resolved.

The plaintiffs evince a fundamental understanding of a note of issue filing deadline, as set forth in every discovery order issued by this court. Contrary to the plaintiffs’ interpretation, that deadline presumes and presupposes that discovery actually has been completed, and does not compel, let alone permit, a plaintiff to file a note of issue where discovery remains outstanding. In cases where discovery remains outstanding, and the note of issue filing deadline is approaching or has lapsed, the plaintiff simply needs to submit a proposed new discovery order setting forth proposed deadlines for the completion of outstanding discovery items, and the court will extend the note of issue filing deadline to account for the nature and extent of the discovery that remains. Under the circumstances of this case, however, the court concludes that it is appropriate to leave the case on the trial calendar while the parties complete the limited outstanding discovery that they have identified.

A court may vacate a note of issue where it appears that a material fact set forth therein, i.e., the representation that discovery is complete, is incorrect (see 22 NYCRR 202.21[e]; *Rivers v Birnbaum*, 102 AD3d 26 [2d Dept 2012]; *Gomes v Valentine Realty LLC*, 32 AD3d 699 [1st Dept 2006]; *Herbert v Sivaco Wire Corp.*, 1 AD3d 144 [1st Dept 2003]). Nonetheless, where discovery is nearly completed, “[a] court, in its discretion, may allow post-note of issue discovery without vacating the note of issue as long as prejudice to either party would not result” (*WVH Hous. Dev. Fund Corp. v Brooklyn Insulation & Soundproofing, Inc.*, 193 AD3d 523, 523 [1st

Dept 2021]; see *Samuelson v Wollman Rink Operations, LLC*, 196 AD3d 408, 408-409 [1st Dept 2021] [permitting defendant to conduct IME while action remained on the trial calendar]). The court concludes that there would be no prejudice to any party in permitting the plaintiffs to provide the subject authorizations, if not already done so, while the action remains on the trial calendar. This is particularly apt here, where the court already had provided them with a July 24, 2023 deadline for the production of those authorizations. With respect to the plaintiffs' request for production of outstanding documents related to the February 22, 2018 rhinoplasty performed by Filstein upon the plaintiff Alona Agaeva, as requested in post-deposition demands dated February 17, 2021, the plaintiffs have waived any further opportunity to demand them by failing to request that they be addressed in this court's June 8, 2023 status conference order.

In light of the fact that (a) Filstein's deadline for making a summary judgment motion subsequent to the filing of the note of issue (see CPLR 3212[a]) already has expired during the pendency of this motion which, had it been successful, would have restored the action to pre-note of issue status and thereupon negated the deadline, and (b) the instant motion relates to a dispute over outstanding discovery, he has shown good cause for extending that deadline here (see *Brill v City of New York*, 2 NY3d 648 [2004]; *Gonzalez v 98 Mag Leasing Corp.*, 95 NY2d 124 [2000]; *Cooper v Hodge*, 13 AD3d 1111 [4th Dept 2004]).

Accordingly, it is

ORDERED that the motion to vacate the note of issue is denied and, on or before October 6, 2023, the plaintiffs shall provide the defendant Mark Filstein, M.D., with all requested authorizations, to the extent not already provided, while the action remains on the trial calendar; and it is further,

ORDERED that the plaintiff's cross motion to compel discovery is denied; and it is further,

ORDERED that, on the court's own motion, the deadline for the defendant Mark Filstein, M.D., to move for summary judgment is extend until November 30, 2023.

This constitutes the Decision and Order of the court.

9/7/2023
DATE



JOHN J. KELLEY, J.S.C.

MOTION:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
APPLICATION:	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER	
CROSS MOTION:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE
APPLICATION:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE