

Lik v City of New York

2023 NY Slip Op 33324(U)

September 26, 2023

Supreme Court, New York County

Docket Number: Index No. 161009/2017

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

SERVETA LIK,

Plaintiff,

- v -

THE CITY OF NEW YORK, TAHOR 26 OWNER LLC, 295
MADISON PROPERTY OWNER LLC, BPY MANAGEMENT
LLC, BSD 295 PROPERTY MANAGEMENT LLC, ERETZ
GROUP 26 LLC, STARBUCKS CORPORATION, GRAND
CENTRAL PARTNERSHIP, INC.,

Defendants.

-----X

THE CITY OF NEW YORK,

Third-Party Plaintiff,

-against-

GRAND CENTRAL DISTRICT MANAGEMENT
ASSOCIATION, INC.,

Third-Party Defendant.

-----X

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 596017/2021

The following e-filed documents, listed by NYSCEF document number (Motion 003) 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151 were read on this motion to VACATE - NOTE OF ISSUE.

Upon the foregoing documents, the motion by defendant the City of New York for an order vacating plaintiff's note of issue or, alternatively, compelling plaintiff to appear for an Independent Medical Examination ("IME") and to stay the parties' deadline to file summary judgment motions is granted to the limited extent set forth below.

In this action, plaintiff seeks to recover for injuries allegedly sustained on or about December 30, 2016 when plaintiff allegedly tripped and fell on the sidewalk at the southeast corner of Madison Avenue and 41st Street, New York, New York. On or about April 9, 2018, plaintiff served a Bill of Particulars detailing various injuries allegedly resulting from this fall.

On October 18, 2022, the Court issued a Status Conference Order directing, inter alia, that the City would designate plaintiff's IME by November 20, 2022 or be deemed to have waived same (NYSCEF Doc. No. 126). That same order directed plaintiff to file the note of issue by December 30, 2022. The City did not designate plaintiff's IME within this timeframe, although the City represents that on November 18, 2022, it advised plaintiff's counsel by email that the City was not waiving the IME and its IME provider was in the process of scheduling same, after which plaintiff would be notified of the IME date.

On December 20, 2022, plaintiff filed a note of issue certifying this action as ready for trial. Three days thereafter, the City contact counsel by letter and proposed that the parties stipulate to permit the City to conduct a post-note of issue IME. On January 5, 2023, the City's IME provider contacted plaintiff and informed plaintiff that the IME was scheduled for February 21, 2023. Plaintiff refused to appear.

The City now moves to vacate plaintiff's note of issue on the grounds that plaintiff's certificate of readiness incorrectly stated that discovery was complete when the City had yet to conduct plaintiff's IME. Alternatively, the City moves to compel plaintiff to appear for a post-note of issue IME, arguing that it would be prejudiced should it be unable to conduct same. Plaintiff opposes the motion, arguing that the City has waived its right to conduct an IME by its failure to timely designate same and therefore the certificate of readiness was correct. Plaintiff also observes that plaintiff has previously appeared for a physical examination designated by another (unnamed)

defendant on July 16, 2020 and argues that, as a result, no prejudice would result from the denial of the motion.

DISCUSSION

That branch of the City's motion which seeks to vacate the note of issue is denied. It is undisputed that at the time of its filing, the City had not scheduled an IME as directed by the Court and had, as a result, waived same pursuant to that self-executing order. Therefore, the representation in the certificate of readiness that discovery was complete was correct at that time.

That branch of the City's motion for a post-note of issue IME is granted, however. "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]). In this case, 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 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]). To the extent that the City waived its right to conduct this IME, the Court relieves this waiver in light of the City's ongoing good faith efforts to designate such IME and the absence of any prejudice to plaintiff (See e.g., Spano v Omni Eng'g, LLC, 69 AD3d 922, 923 [2d Dept 2010]; see also Wise v Blue, 289 AD2d 131, 131-132 [1st Dept 2001]).

Finally, that branch of the City's motion seeking an extension of time to move for summary judgment is denied as moot, as the City moved to dismiss this action pursuant to CPLR §§3211(a)(7) and 3212 on February 17, 2023.

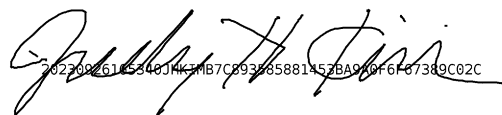
In light of the foregoing, it is

ORDERED that the City of New York's motion is granted to the limited extent that plaintiff is directed to appear for an independent medical examination within ninety days of the date of this decision and order, at a date and time mutually agreeable to counsel for the parties, and is otherwise denied; 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 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).

This constitutes the decision and order of the Court.



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9/26/2023
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: