

Dempsey v Metropolitan Transp. Auth.

2023 NY Slip Op 33537(U)

October 11, 2023

Supreme Court, New York County

Docket Number: Index No. 150824/2019

Judge: Denise M. Dominguez

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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. DENISE M DOMINGUEZ PART 21

Justice

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INDEX NO. 150824/2019

LOUIS DEMPSEY, DEBRA DEMPSEY,

MOTION SEQ. NO. 001

Plaintiffs

- v -

METROPOLITAN TRANSPORTATION AUTHORITY, CITY OF NEW YORK, METROPOLITAN TRANSIT AUTHORITY (CAPITAL CONSTRUCTION COMPANY), METROPOLITAN TRANSPORTATION AUTHORITY CAPITAL CONSTRUCTION COMPANY, THE NEW YORK CITY TRANSIT AUTHORITY, TUTOR PERINI BUILDING CORP.

DECISION AND ORDER ON MOTION

Defendants

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 40, 41, 42, 43, 44, 45, 47, 48, 49, 50, 51

were read on this motion to/for EXTEND - TIME

For the reasons that follow, Plaintiff's motion seeking an extension of time to move for summary judgment, to strike Defendants' answers, and compel discovery is denied in part and granted in part. Defendants' cross motion to vacate the note of issue is granted.

This labor law action arises out of a construction site accident at Grand Central Terminal on July 5, 2018. Plaintiff, Louis Dempsey, an ironworker (employed by a non-party subcontractor to Defendants), alleges sustaining serious injuries resulting from improper hoisting. Plaintiff specifically alleges that he was injured when he was struck at the head, neck and right shoulder by a 2,000-pound steel tube being hoisted from the tracks. Plaintiff, Debra Dempsey as the spouse, sues for damages based on alleged lost support, services, love, companionship, affection, society, sexual relations, and solace of her husband.

Plaintiffs commenced this action on January 25, 2019. Defendants joined issue on or about March 5, 2019. By multiple orders by the court (J, Kalish) dated May 7, 2019, August 6, 2019, November 19, 2019, and February 18, 2020, the parties were directed to enter into a stipulation certifying that discovery was complete before filing the Note of Issue.

On March 8, 2023, as required by this Court, the parties submitted a joint proposed status conference order and selected May 31, 2023 as the date by when to file the Note of Issue. Based on the proposed order, Defendants were to provide Plaintiff with supplemental responses, a share link to a specific contract and respond to Plaintiff's request for written agreements. Further Plaintiff was to appear for an additional deposition on May 5, 2023, vocational rehabilitation on April 3, 2023, and attend another IME regarding Plaintiff's right shoulder on May 30, 2023.

It should also be noted that on March 8, 2023, nearly five years after the accident, Plaintiff filed a Supplemental Bill of Particulars alleging additional very serious injuries of cognitive deficits and traumatic brain injury. Plaintiff also filed a Notice of Medical Exchange providing various records and authorizations concerning medical treatment Plaintiff received on November 16, 2022 and on January 13, 2023. The proposed order also allowed Defendants to notice a neuropsychological examination based on the new injuries. It was so-ordered on March 13, 2023.

Without completing discovery, Plaintiff on May 31, 2023 filed the Note of Issue. On the same date, on May 31, 2023, Plaintiff filed this instant motion seeking an extension of time to file summary judgment motions. Plaintiff alleges that Defendants' have not complied with discovery and request that the time to file summary judgment should be measured from the time Defendant's submits all outstanding discovery rather than by the rules of this Court and as mandated by statute pursuant to CPLR 3212.

Defendants oppose the motion and cross-moved to strike Plaintiff' Note of Issue alleging that discovery is incomplete and that the Note of Issue was filed prematurely and without first obtaining leave of Court as per the Preliminary Conference Order.

Upon review, the Note of Issue filed on May 31, 2023 is defective. By Plaintiff's own acknowledgement, discovery is outstanding. Plaintiff asserts in the Certificate of Readiness, statement # 7 that all "discovery proceedings now known to be necessary are completed." Yet Plaintiff does not answer and leaves blank statement #8 that asks whether "there are no outstanding request for discovery." In the affirmation of compliance, Plaintiff explains that "all known discovery has been completed, except as outlined in the March 8, 2023, Status Conference Order and Plaintiff's pending discovery motion.

Also, as mandated by multiple orders including the governing preliminary conference Order by J. Kalish, a stipulation signed by all parties asserting that discovery is complete, was not submitted. Although the parties in the March 2023 Order consented to a specific date by when the

Note of Issue was to be filed, agreeing on a proposed future date is not the same as a stipulation by all parties that discovery is complete.

The purpose of filing a Note of Issue with a Certificate of Readiness is an attestation that the action is ready for trial (CPLR 202.21). Here significant and important discovery is outstanding from both sides. Not only contractual agreements that are necessary in assessing if any or all of the Defendants are liable but also Defendants are likely to want extensive discovery for purpose of establishing liability and damages regarding Plaintiff's recently disclosed injuries of cognitive deficits and traumatic brain injury. Accordingly, the matter is not ready for trial and the Note of Issue is vacated.

That branch of Plaintiffs' motion seeking to strike Defendants' answer is also denied as Plaintiffs have not demonstrated the high standard that Defendants willful, contumacious or in bad faith did not provide supplemental discovery responses as per the March 8, 2023 Status Conference Order was (*Scher v. Paramount Pictures Corp.*, 102 AD3d 471 [1st Dept 2013]; see *Pezhman v. Dep't of Educ. of City of New York*, 95 AD3d 625 [1st Dept 2012]).

As for that branch of the Plaintiffs' motion seeking to compel outstanding discovery, Defendants, are directed to provide their response to the March 8, 2023 Status Conference Order by December 1, 2023.

Additionally, as the Note of Issue has been vacated, the parties are directed to enter into a Status Conference Order as per Part 21 rules, on October 31, 2023 setting forth dates for the completion of discovery, whereby all outstanding discovery shall be completed by January 31, 2023, including any IMEs, supplemental discovery responses and any non-party depositions. A new Note of Issue date will be provided by the Court at that time.

Accordingly, it is hereby

ORDERED that the Defendants' cross-motion seeking to vacate the Note of Issue is granted and the Note of Issue is vacated; and it is further

ORDERED that the Plaintiffs' motion which seeks to extend the time for Plaintiffs to file dispositive motions is denied; and it is further

ORDERED that the Plaintiffs' motion which seeks to strike Defendants' answer is denied; and it is further

ORDERED that the Plaintiffs' motion to compel discovery is granted to the limited extent as set forth above and that the parties are directed to submit a Status Conference Order on consent as per Part 21 Rules on October 27, 2023; and it is further

ORDERED that, within 20 days from the entry of this order, Plaintiffs 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 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)].

10/11/2023
DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

- CASE DISPOSED
- GRANTED DENIED
- SETTLE ORDER
- INCLUDES TRANSFER/REASSIGN

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

- OTHER
- REFERENCE


HON. DENISE M. DOMINGUEZ
J.S.C.