

Raynesh v New York City Tr. Auth.

2023 NY Slip Op 33591(U)

October 12, 2023

Supreme Court, New York County

Docket Number: Index No. 161884/2019

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

INDEX NO. 161884/2019

LARISA RAYNESH,

MOTION SEQ. NO. 002

Plaintiff,

- v -

NEW YORK CITY TRANSIT AUTHORITY, THE CITY OF NEW YORK

DECISION + ORDER ON MOTION

Defendants.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49

were read on this motion to/for

PRECLUDE

Upon the foregoing documents, and upon conferencing this matter with the Court, the Defendant NEW YORK CITY TRANSIT AUTHORITY's ("TRANSIT") motion to vacate the note of issue or alternatively, to compel discovery from the Plaintiff is denied without prejudice in part and granted in part.

This personal injury action arises out of an October 20, 2018 incident in which it is alleged that the Plaintiff LARISA RAYNESH was caused to trip over an alleged defective step while descending a staircase at the 181st Street subway station in Manhattan.

TRANSIT seeks to vacate the note of issue asserting that material and necessary discovery was outstanding at the time the note of issue was filed, or alternatively, to compel the Plaintiff to produce the outstanding medical records and appear for the IME.

As per the December 6, 2021 Preliminary Conference Order, which appears to be the only discovery conference that was held in this matter, 20 days prior to the IME, copies of medical records and authorizations permitting the release of same, concerning any hospital records, medical reports, pharmacy records and diagnostic films. (NYSCEF Doc. 25). It does not appear that a Compliance Conference Order was submitted on June 23, 2022 as directed in the Preliminary Conference Order.

TRANSIT alleges in its motion that it did not receive any medical records or authorizations permitting the release of the medical records prior to the filing of the note of issue and submits the Plaintiff's Response to Defendant's Discovery Demands wherein the Plaintiff advises that the authorizations for the release of medical records will be executed and returned once they are first supplied by the Defendants (NYSCEF Doc. 40). TRANSIT further argues that as it did not receive any of the Plaintiff's medical records, it was not able to conduct an independent medical examination ("IME"). In opposition, the Plaintiff argues that TRANSIT waived its right to an IME and that the Plaintiff was never advised by TRANSIT that the medical records were outstanding. However, the Plaintiff does not submit any evidence showing that the medical records were ever provided to TRANSIT before the note of issue was filed.

Pursuant to 22 NYCRR 202.21(e), the note of issue may be vacated when the certificate of readiness is erroneous and asserts that discovery is complete when it is not. (*See Ortiz v Arias*, 285 A.D.2d 390, 727 N.Y.S.2d 879 [1st Dept 2001]). Specifically, it has been found that where the certificate of readiness contains erroneous facts, such as reflecting that either the IMEs have been waived or completed when neither is accurate, same violates 22 NYCRR 202.21 and vacating the note of issue is appropriate. (*See Cromer v. Yellen*, 268 A.D.2d 381, 702 N.Y.S.2d 277 [1st Dept 2000]). However, courts also have discretion to allow post-note of issue discovery without vacating the note of issue where neither party would be prejudiced, and where it is clear that post-note of discovery may be necessary. (*see Cuprill v. Citywide Towing & Auto Repair Servs.*, 149 A.D.3d 442, 49 N.Y.S.3d 624 [1st Dept 2017]; *Dominguez v. Manhattan & Bronx Surface Transit Operating Auth.*, 168 A.D.2d 376, 562 N.Y.S.2d 694 [1st Dept 1990]).

Here, TRANSIT has not shown that it will be substantially prejudiced if post-note of discovery is permitted to continue while the case remains on the trial calendar. Although the Plaintiff was granted a trial preference due to her age (NYSCEF Doc. 50), no trial date has been set in this matter, nor does there appear to be a pending pre-trial conference currently scheduled. Thus, the parties would not be prejudiced if this matter were to remain on the trial calendar while the limited additional discovery related to the Plaintiff's injuries and damages is completed. Therefore, that branch of the motion which seeks to vacate the note of issue is denied without prejudice.

TRANSIT asserts that the Plaintiff's medical records are material and necessary in order to have an IME conducted related to the Plaintiff's alleged injuries. The Plaintiff's position that

the IME was waived is unavailing. The Plaintiff did not provide medical records in its response to TRANSIT's demand, and for some reason insisted that TRANSIT provide the Plaintiff with the authorizations. It is clear that the Defendants requested and continued to seek relevant medical records and corresponding authorizations as same was accounted for in the Preliminary Conference Order. It is unclear to this Court why the parties did not enter into a Compliance Conference Order on June 23, 2022, if they had done so, the outstanding discovery and resulting motion may not have been necessary.

Accordingly, upon a review of the record, the outstanding discovery addressed in this Order is material and necessary in order for the IME to be conducted. Therefore, the Plaintiff is directed to provide copies of all medical records it maintains by October 31, 2023, along with duly executed authorizations permitting the release of such records to TRANSIT. If not already designated, TRANSIT is directed to designate a physician to conduct the IME by October 31, 2023 and the Plaintiff is to appear for the IME by December 15, 2023. The IME report is to be exchanged by January 31, 2024.

Accordingly, it is hereby

ORDERED that the Defendants' motion to vacate the note of issue is denied without prejudice; and it is further

ORDERED that the note of issue is not vacated, and that the case shall remain on the trial calendar; and it is further

ORDERED that the Defendants' motion to compel further discovery is granted to the limited extent that the Plaintiff is directed to provide the Defendants all medical records and authorizations, as set forth above, by October 31, 2023; and it is further

ORDERED that the Defendants are to designate IME physician(s) by October 31, 2023 and such exams shall be held by December 15, 2023; and it is further

ORDERED that no adjournments of the above are permitted absent Court approval; and it is further

ORDERED that, within 15 days from the entry of this order, movant 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 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)].

Any requested relief not expressly addressed herein has nonetheless been considered by the Court and is hereby expressly denied.

10/12/2023
DATE

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

APPLICATION:

CHECK IF APPROPRIATE:

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
 REFERENCE


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