

Firger v 85 D Realty LLC

2023 NY Slip Op 34016(U)

November 13, 2023

Supreme Court, New York County

Docket Number: Index No. 159773/2021

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

VIVIAN FIRGER,

Plaintiff,

- v -

85 D REALTY LLC, VICTORIA'S SECRET STORES, LLC,
THE CITY OF NEW YORK,

Defendants.

-----X

INDEX NO. 159773/2021

MOTION DATE 09/28/2023

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43

were read on this motion to VACATE/STRIKE - NOTE OF ISSUE.

In this negligence action, defendant Victoria’s Secret Stores, LLC (“Victoria’s Secret”) moves, pursuant to NYCRR §202.21, to vacate the note of issue on the grounds that the certificate of readiness incorrectly states that discovery is complete. In support of its motion, Victoria’s Secret observes that co-defendant 85 D Realty LLC (“85 D Realty”) has yet to respond to Victoria Secret’s February 18, 2022 discovery demands—i.e., (i) Demand for Names and Addresses of Witnesses; (ii) Demand for Expert Witness Disclosure; (iii) Demand for Insurance; (iv) Notice to Produce Photographs and Accident Reports; (v) Notice to Produce Signed Statements; and (vi) Demand for Discovery & Inspection of Electronically Stored Information (See NYSCEF Doc. No. 36). Victoria’s Secret also observes that expert discovery remains outstanding, and plaintiff’s independent medical examination reports have yet to be exchanged.

Victoria’s Secret also moves for an order, pursuant to CPLR §3124, compelling 85 D Realty to respond to its February 18, 2022 discovery demands. Plaintiff opposes the motion,

arguing that outstanding discovery between the defendants does not provide a basis to vacate the note of issue.

DISCUSSION

22 NYCRR §202.21(e) provides, in pertinent part, that:

Within 20 days after service of a note of issue and certificate of readiness, any party of the action or special proceeding may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect ... After such period ... no such motion shall be allowed except for good cause shown.

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]). In this case, Victoria’s Secret’s timely motion establishes that plaintiff’s September 18, 2023 note of issue (NYSCEF Doc. No. 25) incorrectly states that discovery is complete as it is undisputed that Victoria’s Secret’s February 18, 2022 discovery demands to 85 D Realty were outstanding at the time the note of issue was filed. The fact that outstanding discovery issues exist only as between the defendants does not support the filing of a note of issue representing that all discovery is complete (See e.g., Connor v Core Four Constr., 2020 NY Slip Op 34030[U], *3 [Sup Ct, NY County 2020]). Accordingly, Victoria’s Secret’s motion is granted and plaintiff’s note of issue and certificate of readiness are vacated and this matter is stricken from the trial calendar.

Victoria’s Secret’s motion to compel, pursuant to CPLR §3124, is also granted. 85 D Realty shall, within thirty days from the date of this decision and order, produce material responsive to Victoria’s Secret’s February 18, 2022 discovery demands—i.e., (i) Demand for Names and Addresses of Witnesses; (ii) Demand for Expert Witness Disclosure; (iii) Demand for Insurance;

(iv) Notice to Produce Photographs and Accident Reports; (v) Notice to Produce Signed Statements; and (vi) Demand for Discovery & Inspection of Electronically Stored Information (See NYSCEF Doc. No. 36).

Accordingly, it is

ORDERED that defendant Victoria's Secret Stores, LLC's motion to vacate the note of issue is granted; and it is further

ORDERED that the note of issue is hereby vacated and the case is stricken from the trial calendar; and it is further

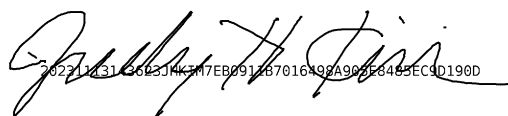
ORDERED that defendant Victoria's Secret Stores, LLC's motion to compel is granted to the extent that defendant 85 D Realty LLC shall produce material responsive to Victoria's Secret Stores, LLC's February 18, 2022 discovery demands (NYSCEF Doc. No. 36) within thirty days from the date of this decision and order; and it is further

ORDERED that counsel for Victoria's Secret Stores, LLC 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); and it is further

ORDERED the Clerk of the Court is directed to set this matter down for a status conference in the Differentiated Case Management Part on the next available date.

This constitutes the decision and order of the Court.



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11/13/2023

DATE

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

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE