

**Ray v Hartl**

2023 NY Slip Op 34098(U)

November 16, 2023

Supreme Court, New York County

Docket Number: Index No. 805329/2016

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*

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GREGORY RAY and KATHLEEN RAY,

Plaintiffs,

- v -

ROGER HARTL, M.D., ROGER HARTL, M.D., PLLC, WEILL  
CORNELL NEUROLOGICAL SURGERY, NEW YORK-  
PRESBYTERIAN/WEILL CORNELL, and NEW YORK-  
PRESBYTERIAN HOSPITAL

Defendants.

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**INDEX NO.** 805329/2016

**MOTION DATE** 08/08/2023

**MOTION SEQ. NO.** 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58

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 defendants Roger Hartl, M.D., Weill Cornell Neurological Surgery, New-York Presbyterian/Weill Cornell Medical Center, and New York-Presbyterian Hospital (collectively the movants) move pursuant to 22 NYCRR 202.21(e) to vacate the note of issue and certificate of readiness and, if that branch of the motion is denied, for an extension of time within which to move for summary judgment.

Although the plaintiffs do not oppose the motion, the motion is granted only to the extent that, on or before December 18, 2023, and while the action remains on the trial calendar, the plaintiffs shall respond to the movants' April 5, 2023 and May 24, 2023 demands for authorizations, and the movants' deadline to move for summary judgment is extended until February 14, 2024. The motion is otherwise denied.

In its most recent status conference order, dated July 11, 2022, the court directed that the plaintiffs' deadline for deposing nonparty witness Elayna Rubens, M.D., was October 28, 2022, and it fixed the note of issue filing deadline for May 31, 2023. On April 5, 2023 and May

24, 2023, the movants served demands for further medical authorizations upon the plaintiffs. Although the plaintiffs had yet to subpoena Dr. Rubens for a deposition by May 31, 2023, and had yet to respond to the outstanding demands for authorizations, they nonetheless filed the note of issue on June 1, 2023, attesting that all discovery had been completed.

Inasmuch as the plaintiffs filed the note of issue only one day beyond the deadline set forth in the July 11, 2022 status conference order, the court will deem the filing to be timely nunc pro tunc (see CPLR 2004). By filing the note of issue, however, the plaintiffs certified that disclosure was complete, and waived the right to any further discovery (see *Matter of New York City Asbestos Litigation*, 193 AD3d 559, 559 [1st Dept 2021], *Melcher v City of New York*, 38 AD3d 376, 377 [1st Dept 2007]; *Gray v Crouse-Irving Mem. Hosp., Inc.*, 107 AD2d 1038, 1039 [4th Dept 1985]). They thus have waived the right to depose Dr. Rubens, particularly in light of the fact that they never sought a judicial extension of the October 28, 2022 deadline for deposing her.

The movants' attorney asserted that, although the plaintiffs never formally requested an extension of time within which to depose Dr. Rubens, the plaintiffs had expressed a desire for additional time in order to obtain an open commission to depose Dr. Rubens in Massachusetts, where she now lives. Although Mass. Gen. Laws, ch. 233, § 45, provides for the use of an open commission procedure for depositions of Massachusetts residents in foreign-state court proceedings, it also permits the deposition to be taken before a Massachusetts justice of the peace or notary public, without the necessity of the appointment of a commissioner by the forum state court. Thus, although Massachusetts has not adopted the Uniform Interstate Discovery and Deposition Act, which would have provided for an even more expedited procedure for securing the testimony of a Massachusetts resident in a foreign-state action, it has created a procedure that is at least somewhat more expedited than the open commission procedure. Inasmuch as the plaintiffs never attempted to subpoena Dr. Rubens in Massachusetts to give testimony before a Massachusetts justice of the peace or notary public, let alone move this

court for the issuance of an open commission, the plaintiffs' mere expression of a desire to depose Dr. Rubens, almost one year after the lapse of the deadline for doing so, is insufficient to overcome the waiver of that right that was effectuated by their filing of the note of issue.

Nonetheless, where, as here, 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, inasmuch as the only items of discovery that the plaintiffs remain obligated to provide are responses to the movants' April 5, 2023 and May 24, 2023 demands for authorizations, the plaintiffs shall respond to those demands on or before December 18, 2023, while the action remains on the trial calendar.

In light of the fact that (a) the movants' deadline for making a summary judgment motion subsequent to the filing of the note of issue (see CPLR 3212[a]) already had 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, they have 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]). The court thus extends the movants' deadline for making a summary judgment until February 14, 2024.

Accordingly, it is

ORDERED that the motion is granted, without opposition, to the extent that, on or before December 18, 2023, and while the action remains on the trial calendar, the plaintiffs shall respond to the movants' April 5, 2023 and May 24, 2023 demands for authorizations, and the deadline for the defendants Roger Hartl, M.D., Weill Cornell Neurological Surgery, New-York

Presbyterian/Weill Cornell Medical Center, and New York-Presbyterian Hospital to move for summary judgment is extended until February 14, 2024, and the motion is otherwise denied.

This constitutes the Decision and Order of the court.

JOHN J. KELLEY, J.S.C.

11/16/2023  
DATE

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