

Juliao-Mazzilli v Filstein

2023 NY Slip Op 34102(U)

November 16, 2023

Supreme Court, New York County

Docket Number: Index No. 805378/2021

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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LILIANA JULIAO-MAZZILLI,

Plaintiff,

- v -

MARK FILSTEIN, M.D., MARK FILSTEIN, M.D., P.C., and
MARK FILSTEIN, M.D., PLLC,

Defendants.

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INDEX NO. 805378/2021

MOTION DATE 08/08/2023

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43

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 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. The plaintiff opposes the motion. The motion is granted to the extent that the note of issue and certificate of readiness are vacated, the parties shall conduct further discovery, including the deposition of the plaintiff and the plaintiff's production of all relevant authorizations and documentary discovery, and the motion is otherwise denied as academic.

In a preliminary conference order dated July 14, 2022, the court fixed deadlines for the parties' depositions, the plaintiff's provision of medical authorizations, and the production of documents. That order directed the parties submit a proposed compliance conference order on January 19, 2023, specifically noting that "[t]he Court shall provide plaintiff with fill-in PDF compliance conference order form. Plaintiff shall consult with defendants, complete form, and submit it to court at SFC-Part56-Clerk@nycourts.gov, in accordance with schedule set forth below. If parties cannot agree on terms of compliance conference order, they shall request a

compliance conference.” That order also set May 2, 2023 as the deadline for the filing of the note of issue. Notwithstanding these directives, and despite the fact that the plaintiff had yet to submit to a deposition or provide all required discovery items as of January 19, 2023, the parties never submitted a proposed compliance conference order, requested a compliance conference, or contacted the court in connection with any discovery issues by that date. Rather, the plaintiff filed a note of issue and certificate of readiness on May 1, 2023, incorrectly attesting that all discovery had been completed and that all prior case management orders had been complied with. It should go without saying that the deadline for filing a note of issue may always be extended by the court upon a proper showing (see CPLR 2004; *Ryskin v Corniel*, 181 AD3d 742, 743-744 [2d Dept 2020]), and the purpose of the issuance of compliance conference and status conference orders is precisely to provide new dates for the completion of outstanding disclosure and to extend the note of issue filing deadline where warranted. As this court previously has explained:

“[t]he plaintiffs evince a fundamental understanding of a note of issue filing deadline, as set forth in every discovery order issued by this court. Contrary to the plaintiffs’ interpretation, that deadline presumes and presupposes that discovery actually has been completed, and does not compel, let alone permit, a plaintiff to file a note of issue where discovery remains outstanding. In cases where discovery remains outstanding, and the note of issue filing deadline is approaching or has lapsed, the plaintiff simply needs to submit a proposed new discovery order setting forth proposed deadlines for the completion of outstanding discovery items, and the court will extend the note of issue filing deadline to account for the nature and extent of the discovery that remains”

(*Agaveva v Filstein*, 2023 NY Slip Op 33132[U], *2, 2023 NY Misc LEXIS 5421, *2-3 [Sup Ct, N.Y. County, Sep. 7, 2023] [Kelley, J.]).

A court may vacate a note of issue where, as here, it appears that a material fact set forth therein, i.e., the representation that discovery is complete, is incorrect (see 22 NYCRR 202.21[e]; *Rivers v Birnbaum*, 102 AD3d 26 [2d Dept 2012]; *Gomes v Valentine Realty LLC*, 32 AD3d 699 [1st Dept 2006]; *Herbert v Sivaco Wire Corp.*, 1 AD3d 144 [1st Dept 2003]). “[A] note of issue should be vacated when it is based upon a certificate of readiness that contains

erroneous facts” (*Cromer v Yellen*, 268 AD2d 381, 381 [1st Dept 2000]). Although the parties suggest that they might agree to conduct significant disclosure while the action remains on the trial calendar, 22 NYCRR 202.21(d) only permits post-note of issue disclosure where there are “special, unusual or extraordinary” circumstances. “[A]n agreement by the parties to conduct further discovery does not constitute a ‘special, unusual or extraordinary circumstance’” (*Armatys v Edwards*, 229 AD2d 906, 907 [4th Dept 1996]) permitting additional post-note of issue disclosure. Moreover, while a court may permit limited post-note of issue disclosure where only minor discovery remains outstanding, and there would be no prejudice to any party (*WVH Hous. Dev. Fund Corp. v Brooklyn Insulation & Soundproofing, Inc.*, 193 AD3d 523, 523 [1st Dept 2021]), that is not the case here, where party depositions have yet to be conducted.

Where a note of issue is stricken or vacated, the case reverts to pre-note of issue status (see *Tejeda v Dyal*, 83 AD3d 539, 540 [1st Dept 2011]; see also *Rodriguez v Big Ben Assoc. I*, 95 AD3d 1098, 1099 [2d Dept 2012]; *Gorski v St. John’s Episcopal Hosp.*, 36 AD3d 757, 757 [2d Dept 2007]). Where this occurs, the parties, as a general rule, are not barred from conducting additional disclosure (see *Vargas v Villa Josefa Realty Corp.*, 28 AD3d 389, 390 [1st Dept 2006]; *Reitman v St. Francis Hosp.*, 2 AD3d 429, 429-430 [2d Dept 2003]), and are not deemed to have waived the right to further discovery (see *Carte v Segall*, 134 AD2d 396, 397 [2d Dept 1987]). As such, the defendants 60-day deadline for making a summary judgment motion will start to run anew after the plaintiff files a new note of issue, and that branch of their motion requesting an extension of that deadline has been rendered academic.

Accordingly, it is,

ORDERED that the motion is granted to the extent that the note of issue and certificate of readiness are vacated, and the motion is otherwise denied as academic; and it is further,

ORDERED that the parties may conduct additional disclosure until February 16, 2024, including, but not limited to, the parties’ depositions, the service of post-deposition demands and responses, and the provision of appropriate medical authorizations, and the plaintiff shall file a

new note of issue on or before March 5, 2024, but only in the event that all discovery has been completed by that date, and, if all discovery has not been completed by that date, the plaintiff shall contact the court to schedule a compliance conference for the purpose of scheduling new discovery deadlines and extending the note of issue filing deadline; and it is further,

ORDERED that, within 15 days of the entry of this decision and order, the defendants shall serve a copy of this decision and order upon the Clerk of the General Clerk’s Office, which shall be effectuated 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 <https://www.nycourts.gov/LegacyPDFS/courts/1jd/supctmanh/Efil-protocol.pdf> (nycourts.gov), and, to comply with those procedures, the defendants shall upload this decision and order to the NYSCEF system under document title “SERVICE ON SUPREME COURT CLERK (GENL CLERK) W/COPY OF ORDER,” and the Trial Support Office shall thereupon amend the court records accordingly to reflect the vacatur of the note of issue.

This constitutes the Decision and Order of the court.

11/16/2023
DATE


JOHN J. KELLEY, 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