

**Escobedo v Circle Line Sightseeing Yachts, Inc.**

2023 NY Slip Op 34163(U)

November 27, 2023

Supreme Court, New York County

Docket Number: Index No. 160365/2020

Judge: Lisa S. Headley

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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. LISA S. HEADLEY **PART** **28M**

*Justice*

-----X

PRISCILLA ESCOBEDO,

Plaintiff,

- v -

CIRCLE LINE SIGHTSEEING YACHTS, INC., NERVOUS,  
INC.

Defendant.

-----X

**INDEX NO.** 160365/2020

**MOTION DATE** 04/20/2023

**MOTION SEQ. NO.** 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 94, 95, 96, 97, 98, 99, 102, 103, 104, 105, 106, 108, 109

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE/JURY  
DEMAND/FROM TRIAL CALENDAR.

Defendants, Circle Line - Sightseeing Yachts, Inc. i/s/h/a Circle Line Sightseeing Yachts, INC. (hereinafter “Circle Line”) and Nervous, Inc. (“Nervous”) (hereinafter collectively the “Defendants”) filed this motion, pursuant to 22 N.Y.C.R.R. §202.21(e), to vacate Plaintiff’s Note of Issue and Certificate of Readiness; pursuant to CPLR §3126(3), to strike Plaintiff’s Complaint; pursuant to CPLR §3126(2), to preclude Plaintiff from offering evidence and testimony based on failure to serve complete discovery responses; and pursuant to CPLR §3124, to compel the service of responses to Defendants’ outstanding discovery demands and authorizations, by a date certain. Plaintiff, Priscilla Escobedo (“Plaintiff”), filed opposition. Defendants, Circle Line and Nervous, filed affirmations in reply.

**Background**

This action stems from an alleged slip and fall accident that occurred on or about July 27, 2019, in the restroom of a boat operated by Circle Line, which was chartered by defendant Nervous. In the complaint, the plaintiff alleges that as a result of the incident, she sustained serious injuries.

### **Defendant Circle Line's Affirmation in Support**

In support of the instant motion, Defendant Circle Line contends that on March 16, 2021, Defendant Circle Line served Plaintiff's counsel with its Demand for Verified Bill of Particulars, a demand for Plaintiff to specify each person Plaintiff expects to call as an expert witness at trial along with the qualifications of each expert; all medical and therapy records concerning the alleged injuries, and completed, signed, and notarized HIPAA authorizations. Defendant Circle Line asserts to date that the Plaintiff has yet to provide Defendant with any expert witness disclosures, current/updated medical and/or therapy records, or valid authorizations for Plaintiff's employment records for all employers Plaintiff has worked for since the date of the alleged accident that occurred on July 27, 2019.

Furthermore, Defendant Circle Line argues Plaintiff failed to provide the outstanding new unrestricted United Healthcare authorizations and failed to adhere to the Court's Preliminary Conference Orders directing the Plaintiff to serve medical reports and authorization for Plaintiff's employment records. Therefore, the defendant argues that this Court should grant Defendant Circle's motion to vacate/strike Plaintiff's Note of Issue.

### **Defendant Nervous' Affirmation in Support**

In support of the instant motion, Defendant Nervous argues, *inter alia*, Plaintiff's response to Defendant Nervous' combined demands remain outstanding, Plaintiff's purported responses to the Combined Demands of Nervous were sent before Nervous had made such demands and were not in fact responsive to any demand made by Nervous and defendant contends that Plaintiff has yet to reply to Nervous' combined demands.

Moreover, Defendant Nervous asserts on March 31, 2023, Plaintiff filed a Note of Issue and Certificate of Readiness and Plaintiff represented to the Court the following: 1) that there are no outstanding requests for discovery; 2) there has been compliance with any order issued pursuant to the pre-calendar rules; and 3) the case is ready for trial. Lastly, Defendant Nervous declares discovery is not complete because there are outstanding requests for discovery, including but not limited to, Plaintiff's response to Nervous' Combined Demands. In this motion, Defendant Nervous argues Plaintiff's purported responses to their Combined Demands were sent before Defendant Nervous had made such demands, therefore the Court should grant the instant motion to vacate/strike the Plaintiff's Note of Issue.

### **Plaintiff's Affirmation in Opposition**

#### **NERVOUS, INC.'s COMBINED DEMANDS**

In opposition to the instant motion, Plaintiff argues, *inter alia*, that she has not acted willfully or in bad faith regarding the submission of discovery requested by Defendant Nervous. More specifically Plaintiff asserts Plaintiff has complied with Defendant Nervous Inc's Combined Demands, but Defendants are entitled to either interrogatories or depositions, not both; and the various demands by Defendant Nervous are disguised as interrogatories. Furthermore, Defendant Nervous' claims lack merit since they fail to state which demands are outstanding. Therefore, the Court should reject this claim.

#### **CIRCLE LINE's DEMANDS**

Plaintiff argues she has complied with demands for medical reports and treatment authorizations and provided to Defendant Circle Line all relevant medical records with authorizations that remain valid through the conclusion of this matter. Furthermore, Plaintiff asserts there is no statutory imperative that requires a timeframe for Plaintiff to disclose up-to-date medical records for Plaintiff, who is still receiving treatment. Plaintiff contends Defendant Circle Line's demands for unrestricted authorization because it exceeds the scope of discovery, and Defendant Circle Line is only entitled to disclosure of records to the extent that they relate to the matter in controversy of this action.

Lastly, Plaintiff asserts Defendant Circle line seeks records that have never been demanded, such as medical records from: (i) Laboratory Corporation of America, (ii) Andrew Greenberg, (iii) Melissa Lefkowitz, or (iv) Anu George, and defendants have failed to demonstrate an entitlement to any additional records. Therefore, the Court should reject this claim.

### **Defendant Circle Line's Reply**

In reply, Defendant Circle Line produces a list of outstanding requests for discovery to date evidencing what Plaintiff has refused to provide and has not resolved the remaining numerous outstanding discovery issues. Defendant Circle Line argues Plaintiff has not acted in good faith as Plaintiff has repeatedly failed to provide significant outstanding discovery, and Plaintiff's claims that she has provided Defendants with all relevant medical records in her possession is misleading because Plaintiff has not provided any new/updated medical reports or treatment records from January 11, 2022, to present. Therefore, the court should grant the motion to vacate/strike the Note of Issue.

### **Defendant Nervous' Reply**

In reply, Defendant Nervous produced a list of outstanding requests for discovery to date that Plaintiff has refused to provide and argues Plaintiff has yet to respond to defendant Nervous' outstanding combined demands for documents. Defendant Nervous further argues Defendant is entitled to a complete written response, as well as a document production, and Defendant Nervous seeks the discovery and disclosure set forth in paragraphs 3 and 5 of Laina R. Boris' Affirmation in Reply dated July 10, 2023. (*See, NYSCEF Doc. No. 102*). For the reasons set forth herein, Defendant Nervous requests the Court grant the instant motion to vacate/strike the Note of Issue.

### **Discussion**

*CPLR §3124* provides that “[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response.” *CPLR §3124*. A party may move to compel further discovery under this provision when the movant demonstrates that it has made a “good faith effort to bring about a non-judicial resolution to any remaining discovery disputes.” *Barber v. Ford Motor Co.*, 250 A.D.2d 552, 553 (1st Dep’t 1998). A trial court is vested with broad discretion to supervise the discovery process, and its determinations in that respect will not be disturbed in the absence of demonstrated abuse. *See, Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker*, 1 A.D.3d 223 (1st Dep’t 2003).

Pursuant to 22 *N.Y.C.R.R. § 202.21(e)*, “[w]here a party timely moves to vacate a note of issue, it need show only that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of ... section [202.21] in some material respect.” *Vargas v. Villa Josefa Realty Corp.*, 28 A.D.3d 389 (1st Dep’t 2006); 22 *N.Y.C.R.R. § 202.21(e)*.

*CPLR §3126* states, in part, “if any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just.” *See, CPLR §3126*.

### **Preliminary Conference Orders**

The Court issued the Preliminary Conference Order dated September 20, 2021, in which Hon. Frank Nervo ordered the end date for all disclosures to be completed by May 20, 2022. Pursuant to the Order, the Plaintiff was directed to file the note of issue on or before May 27, 2022. (*See, NYSCEF Doc. No. 59*).

The September 20, 2021, Order was amended on August 16, 2022, and the parties mutually agreed to extend the end date for all disclosures to October 14, 2022. Pursuant to the Order, the Plaintiff was directed to file the note of issue on or before January 27, 2023. (*See, NYSCEF Doc No. 66*).

On December 6, 2022, after a virtual conference with all counsel present, the Preliminary Conference Order dated August 16, 2022, was amended to extend the end date for all disclosure to March 17, 2023. Pursuant to the Order, the Plaintiff was directed to file a note of issue by March 31, 2023. (*See, NYSCEF Doc. No. 70*).

### **The Parties' Letters to the Court Requesting Extension of NOI filing date**

On March 3, 2023, Defendant Nervous filed a letter to the Court and stated, *inter alia*, there remains outstanding disclosure issues and requested to extend the end date for disclosure for another 45 days. (*NYSCEF Doc. No. 71*)

On March 8, 2023, Plaintiff filed a letter stating that the demands were provided before the demands were made by Defendant Nervous. (*NYSCEF Doc. No. 72*)

On March 17, 2023, Defendant Circle Line filed a letter stating that the NOI issue date due on March 31, 2023, should be extended to May 16, 2023. (*NYSCEF Doc. No. 73*)

On March 31, 2023, plaintiff filed their Note of Issue indicating to the Court that the discovery proceedings now known to be necessary are complete, and there are no outstanding requests for discovery. (*See, NYSCEF Doc. No. 74*).

Before this Court is the motion to vacate the plaintiff's note of issue, and to compel discovery. On October 3, 2023, the Court held an oral argument on the instant motion by defendants Circle Line and Nervous to strike the plaintiff's complaint for failing to provide the repeated discovery demands. After a thorough review of the motion documents, and the arguments presented, this Court finds the defendants' arguments that Plaintiff did not provide Defendant Circle Line with any expert witness disclosures, current/updated medical and/or therapy records, valid authorizations for Plaintiff's employment records for all employers Plaintiff has worked for

since the date of the alleged accident, and the outstanding new unrestricted United Healthcare authorizations to be credible. However, the plaintiff has indicated that the responses to the demands were sent to the defendants, although prior to the service of the demands.

Accordingly, it is hereby

**ORDERED** that Defendants' Circle Line-Sightseeing Yachts, Inc. and Nervous, Inc.'s, motion pursuant to *22 N.Y.C.R.R. § 202.21(e)*, vacating Plaintiff's Note of Issue and Certificate of Readiness and striking this action from the trial calendar is GRANTED, in part and on the condition that the plaintiff is directed to respond to the outstanding demands within 60 days of the date of this Order; and it is further

**ORDERED** that Defendants' Circle Line-Sightseeing Yachts, Inc. and Nervous, Inc., motion pursuant to *CPLR § 3126(3)*, striking Plaintiff's Complaint for failing to comply with Defendants' discovery demands and this Court's Orders is DENIED; and it is further

**ORDERED** that Defendants' Circle Line-Sightseeing Yachts, Inc. and Nervous, Inc., motion pursuant *CPLR § 3126(2)*, precluding Plaintiff from offering evidence and testimony based on her failure to serve complete discovery responses, records, and authorizations is DENIED; and it is further

**ORDERED** that Defendants' Circle Line-Sightseeing Yachts, Inc. and Nervous, Inc., motion pursuant to *CPLR § 3124*, compelling the service of responses by Plaintiff is GRANTED and the Plaintiff is hereby compelled to provide the responses the outstanding demands, including, but not limited to the following demands within 60 days of this Order: (1) new unrestricted United health insurance records, (2) expert witness disclosures, (3) current/updated medical and/or therapy records, (4) valid authorizations for Plaintiff's employment records for all employers Plaintiff has worked for since the date of the alleged accident, (5) color photographs Plaintiff took of the alleged injuries, (6) cell phone numbers for Plaintiff's significant other, Marc Gagliano, cousin, Christopher Mondragon, friend, Karen Hoyos, and friend, Maria Pezzolla; and it is further

**ORDERED** that any discovery which plaintiff alleges was sent to defendants, the plaintiff shall resend that discovery that defendants state they do not have within 60 days of the date of this Order; and it is further

**ORDERED** that the Note of Issue may be vacated if the plaintiff fails to adhere to serving the responses to the outstanding demands within 60 days the date of this Order; and it is further

**ORDERED** that any requested relief sought not expressly addressed herein has nonetheless been considered.

This constitutes the Decision and Order of the Court.

  
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**LISA S. HEADLEY, J.S.C.**

**11/27/2023**

**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