

Mondragon v Trustees of Columbia Univ.

2024 NY Slip Op 32054(U)

June 17, 2024

Supreme Court, New York County

Docket Number: Index No. 158808/2016

Judge: Eric Schumacher

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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. ERIC SCHUMACHER PART 23M

Justice

-----X

ADAN MONDRAGON,	INDEX NO. <u>158808/2016</u>
Plaintiff,	MOTION DATE <u>06/17/2024</u>
MOTION SEQ. NO. <u>005</u>	

- v -

THE TRUSTEES OF COLUMBIA UNIVERSITY et al.,

**DECISION + ORDER ON
MOTION**

Defendants.

(and a third-party action)

-----X

NYSCEF doc nos. 180-196, 201, 206, 209, 211-213, and 215 were read on motion seq. no. 005 to vacate the note of issue.

Motion by third-party defendant Absolute Plumbing & Heating Corp. (hereinafter Absolute) for an order pursuant to CPLR 3124 and 22 NYCRR § 202.21(e) striking this action from the trial calendar, vacating the note of issue, and directing further discovery granted in part.

BACKGROUND

Plaintiff commenced this action on October 19, 2016, by filing the summons and complaint (see NYSCEF doc no. 1).

The prior motion court conferenced this case from approximately June 2017 (see NYSCEF doc no. 20) to December 2019 (see NYSCEF doc no. 51). On December 17, 2019, the last status conference before plaintiff filed the note of issue, the prior motion court issued a conference order stating that “[a]bsent good cause shown, any discovery issues not raised herein will be deemed waived” (id. at 2).

On November 12, 2021, plaintiff filed the note of issue and the certificate of readiness for trial (see NYSCEF doc no. 128). The certificate of readiness for trial states that “[t]here are no outstanding requests for discovery”, that “[d]iscovery proceedings now known to be necessary completed”, and that “[t]he case is ready for trial” (id. at 2).

In early 2023, court administration reassigned the case to this court.

As is relevant here, on February 9, 2024, this court filed its decision and order on the motion and cross motion in seq. no. 002. That decision, in part, granted plaintiff leave to supplement its bill of particulars to allege a violation of 12 NYCRR §§ 23-3.3(k)(1)(ii), 23-1.7(e)(2), and 23-2.1(a)(1) as predicates to the Labor Law § 241(6) cause of action (see NYSCEF doc no. 153).

On March 13, 2024, Absolute filed this motion pursuant to CPLR 3124 and 22 NYCRR § 202.21(e) for an order striking this action from the trial calendar, vacating the note of issue, and directing further discovery (see NYSCEF doc no. 180).

Absolute argues that, after the note of issue was filed, plaintiff was involved in a motor vehicle accident (see affirmation of Lucas ¶¶ 5-6). Separately Absolute argues that, after the note of issue was filed, plaintiff disclosed a third supplemental bill of particulars (see id. ¶ 7). Absolute further argues that, on or about June 5, 2023, in response to learning of the motor vehicle accident, Absolute served plaintiff with a demand for copies of salient medical records (see id. ¶ 6). Absolute further argues that plaintiff's counsel has failed to provide them with appropriate authorizations that would allow Absolute to obtain records related to their June 5, 2023 demand (see id. ¶ 8). Absolute further argues that, without a fair opportunity to conduct a further EBT and a further IME of plaintiff as to the issues raised in the third supplemental bill of particulars, Absolute will be prejudiced if compelled to proceed to trial (see id. ¶ 11). Absolute further argues that this court's February 9, 2024 decision and order allowed plaintiff to assert new claims under certain industrial code sections, and that they are entitled to further discovery concerning those code sections (see id. ¶ 9).

In support of the motion Absolute annexes the third supplemental bill of particulars which sets forth the following injuries and procedures not previously set forth in any prior bills of particulars: (1) disc herniation at C5-C6; (2) disc herniation at C6-C7; (3) cervical radiculopathy; and (4) cervical stenosis (see id., exhibit E).

On May 15, 2024, plaintiff filed its opposition to the motion (see NYSCEF doc no. 211). Plaintiff annexes to its opposition a copy of its May 8, 2024 Supplemental Response to Demand for Authorizations (see affirmation of Laskin ¶ 3). Plaintiff states that they have no objection to a further EBT of plaintiff provided that the EBT is limited to the injuries claimed in the third supplemental bill of particulars "and an on or before date is ordered" (id. ¶ 4). Plaintiff argues that the demand for a further IME of plaintiff should be denied as Absolute can have any films and records obtained in response to their demands reviewed by and commented on by the physicians previously disclosed who may supplement their prior reports (see id. ¶ 5). Plaintiff further argues that "[t]his case has been pending for over eight years, and there exists no rational basis for further delaying a trial" (id. ¶ 2). Plaintiff's opposition papers are silent as to Absolute's request for further discovery concerning any newly alleged industrial code sections.

On May 23, 2024, Absolute filed a reply affirmation in further support of the motion reiterating the arguments made in the moving papers (see NYSCEF doc no. 215).

DISCUSSION

Preliminarily, plaintiff concedes in the opposition papers that Absolute is entitled to a limited EBT of plaintiff as to the issues raised in the third supplemental bill of particulars. Plaintiff has also provided the sought-after authorizations in the opposition papers. In reply, Absolute does not dispute that the authorizations provided are adequate nor that the scope of the proposed EBT is sufficient. It would have been for Absolute to raise such issues in the reply papers and this has not been done. As such, the court will direct the further EBT of plaintiff.

Further as the court permitted plaintiff to allege violations of 12 NYCRR §§ 23-3.3(k)(1)(ii), 23-1.7(e)(2), and 23-2.1(a)(1) in its February 9, 2024 decision and order, and plaintiff has failed to oppose this issue, the court will permit Absolute to serve a discovery demand as to those three industrial code sections as directed herein. The court will further permit Absolute to depose plaintiff as to those industrial code sections at the further EBT of plaintiff.

As to the note of issue, Absolute's motion to vacate is untimely. Pursuant to 22 NYCRR § 202.21(e), any party to an action may move to vacate the note of issue within 20 days after service of the note of issue and certificate of readiness. Here, plaintiff filed the note of issue on November 12, 2021. Absolute filed this motion on March 13, 2024, over two years after the filing of the note of issue. As such, the motion is untimely.

Yet the court finds that Absolute is entitled to a further, limited IME of plaintiff as Absolute has demonstrated that unusual or unanticipated circumstances developed after the note of issue was filed. A court may grant post-note discovery where a party demonstrates that unusual or unanticipated circumstances developed after the note of issue was filed (see 22 NYCRR § 202.21[d]; IO Experience Design LLC v C & A Mktg. Inc., 220 AD3d 444, 445 [1st Dept 2023]; Diamond v WWP Off., LLC, 202 AD3d 503 [1st Dept 2022]). "A lack of diligence in seeking discovery does not constitute unusual or unanticipated circumstances warranting post-note of issue discovery" (Partow v Van Owners Purch. Bur., Inc., 213 AD3d 578, 578 [1st Dept 2023]; see also Shulman v ZFX, Inc., 184 AD3d 546, 546 [1st Dept 2020]).

Here, plaintiff has raised for the first time certain injuries and procedures long after the note of issue was filed. These injuries and procedures, purported to be caused by the accident giving rise to this lawsuit, have not been addressed by Absolute's expert. Absolute having not had an opportunity to investigate these new claims for damages, Absolute would be prejudiced at trial without being able to conduct an IME limited to the new injuries and procedures set forth in the third supplemental bill of particulars. Thus, the court finds that Absolute has demonstrated that unusual or unanticipated circumstances developed after the note of issue was filed. As such, Absolute is entitled to a further IME of plaintiff as to the injuries and procedures raised in the third supplemental bill of particulars.

Concordantly, the court declines to vacate the note of issue. The Appellate Division, First Department has indicated a preference for keeping cases on the calendar instead of delaying a trial where the movant fails to show that they would be prejudiced by the case remaining on the calendar while limited post-note discovery is completed (see Linares v City of New York, 198 AD3d 417, 417-18 [1st Dept 2021]; Pickering v Union 15 Rest. Corp., 107 AD3d 450, 450-51 [1st Dept 2013]). Here, Absolute has failed to demonstrate how they would be prejudiced by the case remaining on the calendar while completing the limited further IME and EBT of plaintiff and limited discovery as to the newly alleged industrial code sections. As such, the case will remain on the calendar.

CONCLUSION

Accordingly, it is

ORDERED that the motion is granted in part to the extent that it is

ORDERED that Absolute shall serve a discovery demand as to 12 NYCRR §§ 23-3.3(k)(1)(ii), 23-1.7(e)(2), and 23-2.1(a)(1) on or before June 30, 2024, and plaintiff shall respond on or before July 14, 2024, else such discovery is deemed waived; and it is further

ORDERED that Absolute shall serve a notice of further EBT as to the issues raised in the June 15, 2023 third supplemental bill of particulars and 12 NYCRR §§ 23-3.3(k)(1)(ii), 23-1.7(e)(2), and 23-2.1(a)(1), only, to be held no later than September 30, 2024, on plaintiff on or before July 28, 2024, else the further EBT is waived; and it is further

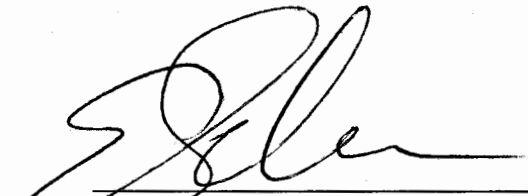
ORDERED that Absolute shall serve a notice of further IME as to the issues raised in the June 15, 2023 third supplemental bill of particulars, only, to be held no later than August 16, 2024, on plaintiff on or before June 30, 2024, else the further IME is waived; and it is further

ORDERED that, within five days of entry, plaintiff shall serve a copy of this order with notice of entry on Absolute, and Absolute shall serve a copy of this order with notice of entry on plaintiff.

The foregoing constitutes the decision and order of the court.

6/17/2024

DATE


ERIC SCHUMACHER, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> GRANTED IN PART
	<input type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE