

**Marder v Moore**

2024 NY Slip Op 32938(U)

August 19, 2024

Supreme Court, New York County

Docket Number: Index No. 805300/2021

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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ROBERT MARDER,

Plaintiff,

- v -

ERIC D. MOORE, M.D., COLISEUM SURGICAL &  
MEDICAL, P.C., and MOUNT SINAI WEST  
HOSPITAL,

Defendants.

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INDEX NO. 805300/2021

MOTION DATE 07/12/2024

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 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 move pursuant to 22 NYCRR 202.21(e) to vacate the note of issue and certificate of readiness, to compel the plaintiff to appear for a continued deposition, to respond to outstanding written discovery demands, and to appear for an independent medical examination (IME), and, if the branch of the motion seeking to vacate the note of issue is denied, for an extension of time within which to move for summary judgment. The plaintiff opposes the motion. The motion is granted only to the extent that, while the action remains on the trial calendar, (a) the plaintiff shall, on or before September 19, 2024, provide the defendants with documentation supporting his application for a Paycheck Protection Program (PPP) loan from the United States Small Business Administration, (b) should the defendants be so advised, the plaintiff shall, on or before October 4, 2024, submit to an IME and (c) the defendants' deadline to move for summary judgment is extended until October 23, 2024. The motion is otherwise denied.

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]). Here, the parties had submitted a proposed status conference order for the court's review and approval on July 19, 2023, but, because the parties only uploaded the order to NYSCEF, but did not email it to the court's Part Clerk (see Rule V[a] of Part 56 Part Rules), the court was not informed of the submission, and did not sign it. Had the court signed and issued that order, it would have extended the note of issue filing deadline. That said, 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]). Generally "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]).

The court notes that, while this motion was pending, the defendants conducted their third deposition of the plaintiff, in which they questioned him about his claim to recover for lost earnings. Hence, that issue may not now form a basis for vacating the note of issue.

The parties have not informed the court as to whether the defendants have conducted an IME of the plaintiff, or whether the plaintiff ultimately produced the documents supporting his application for PPP benefits. If so, discovery does indeed remain outstanding. If the defendants have yet to conduct an IME, they are entitled to do so, inasmuch as CPLR 3102(a) and 3121(a) afford the defendants with the right to conduct a physical examination of the plaintiff, who clearly has placed his physical condition in controversy (see generally *Andon v 302-304 Mott St. Assocs.*, 257 AD2d 37, 39-40 [1st Dept 1999]). Moreover, the court agrees with the defendants that the documentation supporting the plaintiff's application for PPP benefits, and not only the completed application form itself, is relevant to the extent of income that the plaintiff earned in the years immediately prior to the 2020 Covid-19 pandemic and, thus,

the extent of income that the plaintiff allegedly lost by virtue of the defendants' purported malpractice in June and July, 2021. Thus, the plaintiff must produce that documentation.

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]). Such an exercise of discretion is particularly apt in the instant action, where this court, as a dedicated medical malpractice part, controls its own trial calendar and the scheduling of jury selection in actions that have been assigned to it.

In light of the fact that (a) the defendants' 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 that deadline, and (b) the instant motion relates to a dispute over outstanding discovery, the defendants 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 deadline for making a summary judgment until October 23, 2024.

Accordingly, it is,

ORDERED that the defendants' motion is granted only to the extent that, while the action remains on the trial calendar, (a) the plaintiff, if he has yet to do so, shall, on or before September 19, 2024, provide the defendants with documentation supporting his application for a Paycheck Protection Program loan from the United States Small Business Administration, (b) if the defendants be so advised, the plaintiff, if he has yet to do so, shall, on or before October 4, 2024, submit to an independent medical examination, and (c) the defendants' deadline to move for summary judgment is extended until October 23, 2024, and the motion is otherwise denied.

This constitutes the Decision and Order of the court.

8/19/2024  
DATE



JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: