

**Guerrero v New York Downtown Orthopaedic Assoc.  
of Manhattan**

2024 NY Slip Op 33830(U)

October 8, 2024

Supreme Court, New York County

Docket Number: Index No. 805126/2018

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*

-----X

ELIZABETH GUERRERO,

Plaintiff,

- v -

NEW YORK DOWNTOWN ORTHOPAEDIC ASSOCIATES  
OF MANHATTAN and NEW YORK DOWNTOWN  
ORTHOPAEDIC ASSOCIATES,

Defendants.

-----X

BIK ORTHOPEDICS, P.C. (doing business as NEW YORK  
DOWNTOWN ORTHOPAEDIC ASSOCIATES  
OF MANHATTAN and NEW YORK DOWNTOWN  
ORTHOPAEDIC ASSOCIATES),

Third-Party Plaintiffs,

-against-

ELIZABETH MELVIN, P.T., and WOJCIECH KARPINSKI,

Third-Party Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79

were read on this motion to/for PREFERENCE/X-MOTION TO VACATE NOTE OF ISSUE.

In this action to recover damages for medical malpractice, the plaintiff moves pursuant to CPLR 3403(b) for a trial preference based on the fact that this is a medical malpractice action (see CPLR 3403[a][5]). The defendants/third-party plaintiffs oppose the motion only to the extent that they argue that the case is not ready for trial, and they cross-move pursuant to 22 NYCRR 202.21(e) to vacate the note of issue and certificate of readiness. The motion is granted, and the cross motion is granted only to the extent that, while the action remains on the trial calendar, the plaintiff shall, on or before November 13, 2024, (a) provide the defendants/

third-party plaintiffs with authorizations permitting them to obtain her medical records from New York-Presbyterian Hospital, Orange Regional Medical Center, New York-Presbyterian Hospital-Lower Manhattan, City MD, Mt. Sinai-Beth Israel Hospital, Michael Rettig, Phillips Ambulatory Care Center, and any and all physical therapists who treated or operated upon the plaintiff for bilateral knee pain, and (b) voluntarily produce nonparty witness Gloryvette Esparra for a deposition. The cross motion is otherwise denied. The court extends the deadline for the defendants/third-party plaintiffs to move for summary judgment until January 10, 2025.

As relevant here, CPLR 3403(a) provides as follows:

“Preferred Cases. Civil cases shall be tried in the order in which notes of issue have been filed, but the following shall be entitled to a preference:

“5. an action to recover damages for medical, dental or podiatric malpractice.”

CPLR 3403(b) provides, in relevant part, that “[u]nless the court otherwise orders, notice of a motion for preference shall be served with the note of issue by the party serving the note of issue.” The plaintiff complied with that directive here, and thus is entitled to a trial preference. This court, which presides over a medical malpractice part, nonetheless notes that it controls its own trial calendar with respect to medical malpractice actions that had been assigned to it for pretrial purposes. Thus, although this action is entitled to a trial preference, the court will shortly contact the parties in any event to schedule an initial pretrial conference as part of its supervision of all medical malpractice actions assigned to it.

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. The court concludes, however, that there is no basis upon which the plaintiff may object to the outstanding demands for authorizations. CPLR 3101(a) calls for “full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof” (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 407 [1968] [internal quotation marks omitted]). Evidence is material if sought “in good faith for possible use as evidence-in-chief or rebuttal or for cross-examination” (*id.*). “[A]lthough a plaintiff who commences a personal injury action has waived the physician-patient privilege to the extent that his [or her] physical or mental condition is affirmatively placed in controversy . . . , the waiver of that privilege does not permit discovery of information involving unrelated illnesses and treatments” (*Bozek v Derkatz*, 55 AD3d 1311, 1312 [4th Dept 2008] [internal quotation marks omitted]; see *Barnes v Habuda*, 118 AD3d 1443, 1444 [4th Dept 2014]; *Felix v Lawrence Hosp. Ctr.*, 100 AD3d 470, 471 [1st Dept 2012]; *Elmore v 2720 Concourse Assoc., L.P.*, 50 AD3d 493 [1st Dept 2008]). The defendants/third-party plaintiffs, however satisfied their burden that the records for which they seek authorizations are relevant to the plaintiff’s claimed injuries (see *Budano v Gurdon*, 97 AD3d 497, 498 [1st Dept 2012]), which, although specifically arising from an alleged burn injury caused by the negligent application of an electrical stimulation device on her neck and upper back, also allegedly impaired her sleep, caused fatigue, disrupted her previous physical therapy regimen, and intensified her symptoms of cervical spine discogenic pain and discomfort.

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 their cross 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 January 10, 2025.

Accordingly, it is,

ORDERED that the plaintiff’s motion is granted, and the action shall have a trial preference; and it is further,

ORDERED that the defendants/third-party plaintiffs’ cross motion is granted only to the extent that, on or before November 13, 2024, and while the action remains on the trial calendar, the plaintiff shall (a) provide the defendants/third-party plaintiffs with authorizations permitting them to obtain her medical records from New York-Presbyterian Hospital, Orange Regional Medical Center, New York-Presbyterian Hospital-Lower Manhattan, City MD, Mt. Sinai-Beth Israel Hospital, Michael Rettig, Phillips Ambulatory Care Center, and any and all physical therapists who treated or operated upon the plaintiff for bilateral knee pain, and (b) voluntarily produce nonparty witness Gloryvette Esparra for a deposition, and the cross motion is otherwise denied; and it is further,

ORDERED that the defendants/third-party plaintiffs’ deadline for moving for summary judgment is extended until January 10, 2025.

This constitutes the Decision and Order of the court.

JOHN J. KELLEY, J.S.C.

10/8/2024

DATE

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