

Persaud v City of New York

2024 NY Slip Op 34740(U)

June 28, 2024

Supreme Court, Queens County

Docket Number: Index No. 710082/2019

Judge: Chereé A. Buggs

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**
Justice

IAS PART 30

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CAROLINE PERSAUD,

Index No.: 710082/2019

Plaintiff,

Motion

Date: May 6, 2024

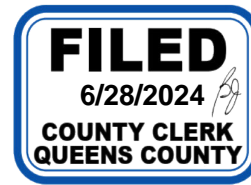
-against-

Motion Cal. No.: 21

CITY OF NEW YORK, NEW YORK CITY
TRANSIT AUTHORITY, METROPOLITAN
TRANSIT AUTHORITY, BRIARWOOD
REALTY LLC, BOARD OF MANAGERS OF
THE GREENBRIAR CONDOMINIUM, THE
GREENBRIAR CONDOMINIUM,

Motion Sequence No.: 4

Defendants.



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The following efile papers numbered 69-78, 94-99 submitted and considered on this motion by Defendants New York City Transit Authority and Metropolitan Transit Authority (hereinafter “Transit Defendants”) seeking an Order pursuant to CPLR 3124 and 3126 striking Plaintiff Caroline Persaud’s (hereinafter “Persaud”) complaint; or, in the alternative, pursuant to 22 NYCRR §202.21(3) striking Persaud’s Note of Issue and Certificate of Readiness and removing this action from the Trial Calendar on the grounds that all discovery has not been completed; pursuant to CPLR 3212(a) extending the time to move for summary judgment until 120 days from the date of completion of all outstanding discovery; pursuant to CPLR 3124 and 3126 compelling Persaud to provide discovery in this matter or in the alternative, precluding Persaud from offering any evidence at the trial of this action as to any subject, claim or issue for which discovery has not been completed.

Papers
Numbered

Notice of Motion-Affidavits-Exhibits.....	EF 69-78
Affirmation in Opposition-Affidavits-Exhibits.....	EF 94-97
Reply Affirmation-Affidavits-Exhibits.....	EF 98-99

Commencing the instant action with the filing of a summons and complaint on June 10, 2019, Persaud asserted in this personal injury case that she is seeking to recover damages for a trip and fall accident which it is alleged occurred on April 1, 2018. Persaud claimed that she was caused to trip and fall on a defective condition of the sidewalk at the Main Street and Manton Street bus stop located at or near the premises known as Lily White Laundromat, Inc., 85-15 Main Street, Suite #4, County of Queens, City and State of New York while exiting a bus she was a passenger on.

Persaud filed a Note of Issue and Certificate of Readiness on January 31, 2024. Transit Defendants now seek an Order pursuant to CPLR 3124 and 3126 striking Persaud's complaint, or alternative relief pursuant to 22 NYCRR §202.21(3) striking Persaud's Note of Issue and Certificate of Readiness and removing this action from the Trial Calendar on the grounds that all discovery has not been completed, as well as relief under CPLR 3212(a) to extend the time to move for summary judgment until 120 days from the date of completion of all outstanding discovery; and also to compel Plaintiff under CPLR 3124 and 3126 to provide discovery in this matter or preclude her from offering any evidence at the trial of this action as to any subject, claim or issue for which discovery has not been completed. Defendants allege the following discovery is still outstanding despite their good faith efforts to obtain the outstanding discovery:

- a full set of Persaud's medical records per 22 NYCRR §202.17(b);
- HIPAA and *Arons v. Jutkowitz* (9 NY3d 393) compliant (OCA Form No. 960) authorizations (with sections 9(a) and 9(b) completed and initialed, for "Preston Law Firm, 118A Jackson Avenue, Syosset, NY 11791" and for "Supreme Court, Kings County, (the Court notes this case is venued in Supreme Court, Queens County) Attn: Subpoenaed Records Room" that do not expire until the conclusion of litigation for the following: (i) all physicians, healthcare providers, and hospitals for the subject incident, including, but not limited to, Alexander Dolsky Physical Therapy, PC (and Dr. Alexander Dolsky); Dr. Matthew J. Tavroff; Dr. Mallikajurna D. Reddy; Flushing Primary Care Associates; Dr. Arnold Goldman; Hillcrest Radiology; NYU Langone Health; Dr. Ronald Schwinger; (ii) employment and/or attendance records for the period of two (2) years prior to the date of the accident to present; (iii) no-fault; (iv) diagnostic tests and films; (v) collateral Sources; (vi) W2 and/or tax returns for two (2) years prior to the date of the accident to present; (vii) EMS/ACR report; (viii) all medical providers for any medical treatment for at least three (3) years prior to the date of the accident, based upon plaintiff's claim for "loss of enjoyment of life; (ix) all physicians, healthcare providers, and hospitals concerning plaintiff's medical treatment and procedures prior to the subject incident, including, but not limited to, Peersaud's subsequent fall in August 2019, prior left knee surgery, and Dr. Frederick A. Pereira;
- a supplemental Bill of Particulars for items wherein the response was "to be provided" and/or "to be supplemented", including, without limitation, for "lost wages

and calculation of amount alleged, if any"(as per the Preliminary Conference Order dated February 5, 2020);

- a duly executed Statutory Hearing transcript;
- all authorizations and discovery as demanded in the NYCTA's letter dated April 8, 2021; and
- Persaud to appear for independent medical examinations (IME) by NYCTA designated physicians.

In opposition to the motion, Persaud claimed that discovery was now complete, and this motion was boilerplate in nature, and Defendants' counsel did not confer with Persaud's counsel in good faith prior to making this motion. Persaud alleged that all discovery demands enumerated in this motion were served on April 25, 2024. Therefore, the motion is now moot. Also, Persaud stated that Defendants' counsel claimed that he contacted Persaud's counsel on the date of the filing of the instant motion, which clearly does not indicate a good faith basis to make the motion under 22 NYCRR §202.7 (a)(2). Persaud consented to appearing for IME's.

In reply, Defendants' counsel stated that most of the authorizations recently provided by Persaud are either incomplete, defective, not HIPAA compliant or were executed by a paralegal without any authority to execute authorizations on behalf of Persaud, are not signed or notarized. The authorizations exchanged for Transit Defendants to obtain Persaud's employment records for two years prior to the accident were not provided; all authorizations for any medical treatment or procedures three years prior, specifically including her prior knee surgery with Dr. Frederick A. Pereira was not provided; a supplemental bill of particulars was not provided supplementing questions 20(a) and 20(b); a duly executed statutory hearing transcript was not provided; and, all authorizations and demands requested in Defendants' demand letter dated April 8, 2021 were still outstanding as well as Persaud's IME.

DISCUSSION

22 NYCRR §202.7 (a)(2) provides the following:

“no motion shall be filed with the court unless there have been served and filed with the motion papers ...(2) with respect to a motion relating to disclosure or a bill of particulars, an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion.”

22 NYCRR §202.21 titled “Note of issue and certificate of readiness” section (e) states the following:

(e) Vacating note of issue. Within 20 days after service of a note of issue and certificate of readiness, any party to the action or special proceeding may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect. However, the 20-day time limitation to make such motion shall not apply to tax assessment review proceedings. After such period, except in a tax assessment review proceeding, no such motion shall be allowed except for good cause shown. At any time, the court on its own motion may vacate a note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect. If the motion to vacate a note of issue is granted, a copy of the order vacating the note of issue shall be served upon the clerk of the trial court.

Notwithstanding the fact that this motion was filed on February 27, 2024, more than twenty days from the filing of the Note of Issue in this case, the Court finds discovery is still outstanding despite Court Orders and discovery demands. The Court also finds that Transit Defendants counsel was recently retained and was most likely in the process of reviewing the file prior to making the instant motion would account for the slight delay. Here, there are numerous authorizations, medical records and Persaud’s 50-h testimony, which are still outstanding, and without same, Transit Defendants are prejudiced from conducting meaningful IME’s. Without a full picture of Plaintiff’s prior injuries and subsequent injuries to the same body parts alleged to have been injured in this case, Transit Defendants are prejudiced in defending this action and also, there cannot be any meaningful settlement discussions to resolve this case prior to trial.

The Compliance Conference Orders of Hon. Mojgan Lancman dated August 6, 2021 and January 24, 2022, and the Compliance Conference Order of Hon. Tracy Catapano-Fox, June 6, 2022 stated therein in regards to filing a Note of Issue “a Note of Issue shall not be filed until the Court directs or the parties certify, via stipulation and/or Certification Order, that all discovery is complete... .” The Certificate of Readiness executed by Persaud’s counsel dated January 31, 2024 states that all physical examinations had been completed, all medical reports exchanged, and that all discovery was complete. The Certificate of Readiness therefore contained misstatements of material facts, thus, the filing of the note of issue was a nullity (*see* 22 NYCRR §202.21[e]; *Brown v Astoria Fed. Sav.*, 51 AD3d 961 [2d Dept 2008]). Persaud, by her own opposition papers admitted the failure to comply with discovery demands and Court Orders, partially complying with outstanding discovery by exchanging authorizations three months after filing the Note of Issue, however,

Defendants stated in reply papers that the discovery exchanged is still woefully deficient. Therefore, upon the Court’s consideration upon all papers submitted herein, it is

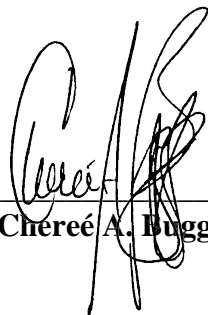
ORDERED, that the branch of Defendants’ motion seeking to vacate the Note of Issue and Certificate of Readiness is granted and the Note of Issue and Certificate of Readiness filed on January 31, 2024 are vacated; and it is further

ORDERED, that the branch of Defendants’ motion seeking to compel discovery is granted and Plaintiff is directed to provide all outstanding discovery as enumerated in Defendants’ reply papers within **thirty (30)** days of the date of this Order served with Notice of Entry; and it is further

ORDERED, that Plaintiff shall appear for her IME(s) with physicians designated by the Defendants within **ninety (90)** days of the date of this Order served with Notice of Entry. The IME report(s) shall be exchanged within **forty-five (45)** days after receipt by Defendants; and it is further

ORDERED, Plaintiff’s failure to comply with this Order may result in her preclusion from offering any testimony or evidence at the time of Trial or the striking of her complaint upon further application to the Court.

Dated: June 28, 2024



Hon. Chereé A. Buggs, JSC

