

Leon v Jopal at St. James LLC
2024 NY Slip Op 35662(U)
October 9, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 619639/2017
Judge: Thomas F. Whelan
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SHORT FORM ORDER

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CAL. No. 2022014570TSUPREME COURT - STATE OF NEW YORK
I.A.S. PART 36 - SUFFOLK COUNTY**P R E S E N T :**Hon. THOMAS F. WHELAN
Justice of the Supreme CourtMOTION DATE 5/16/24
ADJ. DATE _____
Mot. Seq. # 006 MotD-----X
JAN P. LEON, as Successor Executor of the
ESTATE OF JAN S. LEON, a/k/a JAN LEON,
and JENNIFER C. LEON, as Executor of the
ESTATE OF CAROL ANN LEON,

Plaintiffs,

- against -

JOPAL AT ST. JAMES LLC, s/h/a MILLS
POND NURSING AND REHABILITATION
CENTER,Defendant.
-----XWILLIAM J. UPTON, P.C.
Attorney for Plaintiffs
33 Beach Road
Northport, New York 11768LEWIS JOHS AVALLONE AVILES, LLP
Attorney for Defendant
1377 Motor Parkway, Suite 400
Islandia, New York 11749

Upon the following papers read on this motion for vacatur of the note of issue, etc.: Notice of Motion/Order to Show Cause and supporting papers by defendant, dated April 25, 2024; Answering Affidavits and supporting papers by plaintiffs, dated May 7, 2024; Replying Affidavits and supporting papers by defendant, dated May 15, 2024; it is

ORDERED that the motion by defendant Jopal at St. James LLC for an order vacating the note of issue, pursuant to CPLR § 3124 compelling plaintiff to provide all outstanding written discovery, extending the time to file a summary judgment motion to 120 days after the completion of discovery is denied in part and granted in part as set forth herein.

Carol Ann Leon, individually and as the executor of the estate of her late husband, Jan S. Leon, commenced this action allegedly arising out of the care and treatment rendered by defendant Jopal at St. James LLC, s/h/a Mills Pond Nursing and Rehabilitation Center, to him between December 15, 2014 and January 2, 2015. At a compliance conference held in this action on October 13, 2022, counsel for Carol Ann Leon and defendant stipulated that discovery was complete, and that the matter was ready for trial. Thereafter, on November 8, 2022, Carol Ann Leon filed a note of issue and certificate of readiness. Subsequently, by correspondence dated January 10, 2023, the court was advised of Carol Ann Leon's passing on December 26, 2022. Pursuant to order dated April 15, 2024, the court granted the motion by

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plaintiffs Jan P. Leon and Jennifer C. Leon for an order substituting Jennifer C. Leon, as executor of Carol Ann Leon's estate, as plaintiff in place of Carol Ann Leon in her individual capacity.

Defendant now moves for an order vacating the note of issue on the grounds that discovery is incomplete, and that the case is not ready for trial. In particular, defendant contends that Jennifer C. Leon has yet to be deposed, and that it has been unable to obtain records from Jan S. Leon's hospitalization at Stony Brook University Hospital (hereinafter SBUH) following his discharge from defendant's facility on January 2, 2015. Defendant further seeks an order compelling plaintiffs to produce Jennifer C. Leon for a deposition and "[c]opies of complete records of SBUH/[a] duly executed HIPAA-compliant authorization for SBUH." Finally, defendant seeks leave to extend its time to move for summary judgment. In support of its motion, defendant submits, *inter alia*, various correspondence between the parties' counsel.

In opposition, plaintiffs contend that their counsel offered to produce Jennifer Leon nearly four years ago, to which defense counsel declined, and that Jan P. Leon executed a new authorization which has been sent to opposing counsel. In support of their opposition, plaintiffs submit defense counsel's affirmation in partial opposition to a prior motion by William J. Upton, P.C., for, *inter alia*, an order substituting Jennifer C. Leon, as executor of Carol Ann Leon's estate, as plaintiff in place of Carol Ann Leon in her individual capacity, which was denied, without prejudice to renewal, as set forth in the order of this court dated November 22, 2023.

"A motion to vacate a note of issue generally may not be made more than 20 days after the note of issue has been served 'except for good cause shown' " (*Sullivan v R&J Mobility Serv., Inc.*, 214 AD3d 839, 841, 186 NYS3d 261, 263 [2d Dept 2023], quoting Uniform Rules for Trial Courts [22 NYCRR] § 202.21 [e]). To establish the requisite "good cause," the party seeking to vacate the note of issue must "demonstrate that unusual or unanticipated circumstances developed subsequent to the filing of the note of issue and certificate of readiness requiring additional pretrial proceedings to prevent substantial prejudice" (*C Castle Group Corp. v Herzfeld & Rubin, P.C.*, 211 AD3d 1006, 1007, 178 NYS3d 711, 712 [2d Dept 2022], quoting *Utica Mut. Ins. Co. v P.M.A. Corp.*, 34 AD3d 793, 794, 826 NYS2d 138, 139 [2d Dept 2006]; see 22 NYCRR 202.21 [d]; *Reardon v Macy's, Inc.*, 191 AD3d 712, 141 NYS3d 100 [2d Dept 2021]).

The Uniform Rules for Trial Courts (22 NYCRR) § 202.7 (a) further requires that a motion relating to disclosure must be supported by 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" (see *Bayview Loan Servicing, LLC v Evanson*, ___ AD3d ___, 2024 NY Slip Op 04367 [2d Dept 2024]; *Cyngiel v Krigsmann*, 224 AD3d 875, 206 NYS3d 659 [2d Dept 2024]). The affirmation of good faith "shall indicate the time, place and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held" (22 NYCRR 202.7 [c]; *Bayview Loan Servicing, LLC v Evanson*, ___ AD3d at ___, 2024 NY Slip Op 04367, *1; *Cyngiel v Krigsmann*, 224 AD3d at 877, 206 NYS3d at 662)

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Initially, the affirmation of good faith submitted by defendant lacks the details specified by the Uniform Rules for Trial Courts (22 NYCRR) § 202.7 (c). Nevertheless, even if the court were to overlook any deficiencies in the affirmation of good faith (*see e.g. Moran v Grand Slam Ventures, LLC*, 221 AD3d 994, 202 NYS3d 141, [2d Dept 2023]; *Capacity Group of NY, LLC v Duni*, 186 AD3d 1482, 131 NYS3d 373 [2d Dept 2020]; *Perez v Kone*, 166 AD3d 555, 86 NYS3d 726 [1st Dept 2018]), defendant failed to allege, let alone establish, that unusual or unanticipated circumstances developed after the note of issue was filed that require additional discovery to prevent substantial prejudice to it (*see Samaroo v New York City Tr. Auth.*, 229 AD3d 577, 214 NYS3d 784 [2d Dept 2024]; *Plenty v New York City Tr. Auth.*, 229 AD3d 571, 215 NYS3d 134; *Palmiero v 417 E. 9th St. Assoc., LLC*, 167 AD3d 472, 88 NYS3d 27 [1st Dept 2018]; *Ellis v Brookdale Hosp. Med. Ctr.*, 133 AD2d 806, 520 NYS2d 395 [2d Dept 1987]). As the instant motion was not made within 20 days after service of the note of issue (*see* 22 NYCRR 202.21 [e]), defendant was required “to demonstrate unusual or unanticipated circumstances” since the filing of the note of issue and “substantial prejudice” (*Plenty v New York City Tr. Auth.*, 229 AD3d at 573, 215 NYS3d at 137 [internal quotation marks omitted], quoting *Audiovox Corp. v Benyamini*, 265 AD2d 135, 138, 707 NYS2d 137, 139 [2d Dept 2000]; *Samaroo v New York City Tr. Auth.*, 229 AD3d at 580, 214 NYS3d at 786). Defendant, however, offers no explanation for its failure to depose Jennifer C. Leon prior to the filing of the note of issue other than claiming that she now is a party plaintiff. Moreover, based on the record, it unclear whether during the disclosure phase of this action, defense counsel was in receipt of an authorization for the release of the requested records, and, if so, what efforts, if any, were made to obtain those records. “A lack of diligence in seeking discovery does not constitute unusual or unanticipated circumstances warranting post-note of issue disclosure” (*Tirado v Miller*, 75 AD3d 153, 161, 901 NYS2d 358, 365 [2d Dept 2010]; *see City of New York v Anton*, 169 AD3d 999, 95 NYS3d 248 [2d Dept 2019]; *Eskenazi v Mackoul*, 92 AD3d 828, 939 NYS2d 484 [2d Dept 2012]). Further, plaintiffs, in opposition, claim that Jan P. Leon executed an authorization which has been sent to opposing counsel. Accordingly, the branch of defendant’s motion seeking to vacate the note of issue is denied, as is the branch of its motion seeking to compel disclosure.

However, defendant’s application for leave to extend its time to file a summary judgment motion is granted. “Pursuant to CPLR 3212 (a), courts have ‘considerable discretion to fix a deadline for filing summary judgment motions,’ so long as the deadline is not earlier than 30 days after filing the note of issue or (unless set by the court) later than 120 days after the filing of the note of issue, except with leave of court on good cause shown” (*Wittenberg v Long Island Power Authority*, 225 AD3d 730, 732, 207 NYS3d 145, 148 [2d Dept 2024] quoting *Kuyenova v. R & M Supermarket*, 215 AD3d 940, 941 [2023]).

Here, defendant has demonstrated good cause for extending its time to move for summary judgment (*Gonzalez v. 98 Mag Leasing Corp.*, 95 NY2d 124, 733 NE2d 203, 711 NYS2d 131 [2000]). The submissions reflect that plaintiff filed the Note of Issue on November 8, 2022. Thereafter, plaintiff Carol Ann Leon passed away on December 26, 2022. Accordingly, the case was stayed until the court (WHELAN, J.) issued an order substituting Jennifer C. Leon as executor of Carol Ann Leon’s estate, and lifting the stay. As such, defendant’s motion (sequence no. 006) was timely. In light of the fact that defendant had sufficient time to file a summary judgment motion while the within motion was

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pending, and plaintiff's counsel seemingly consented to extending defendant's time to file a motion for summary judgment, the court will permit defendant to file a motion for summary judgment within thirty (30) days of service of the within order with notice of entry.

Dated: _____

10/9/24


J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION