

**Alvarez v 513 W. 26th Realty, LLC**

2025 NY Slip Op 30753(U)

February 25, 2025

Supreme Court, New York County

Docket Number: Index No. 150516/2019

Judge: Verna L. Saunders

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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. VERNA L. SAUNDERS, JSC PART 36**  
*Justice*

-----X  
INDEX NO. 150516/2019  
MOTION SEQ. NO. 005  
JONATHAN CRUZ ALVAREZ and BIANCA MARIE CRUZ  
RAMIREZ,  
Plaintiffs,

- v -

**DECISION + ORDER ON  
MOTION**

513 WEST 26TH REALTY, LLC and INTEGRITY  
CONTRACTING, INC.,  
Defendants.

-----X  
513 WEST 26TH REALTY, LLC and INTEGRITY  
CONTRACTING, INC.,  
Third-Party Plaintiffs,

Third-Party  
Index No. 595683/2019

-against-

SC CONTRACTING MANAGEMENT CORP.,  
ENVIRONMENTALLY CONSCIOUS BUILDING INC., and  
ENVIRONMENTALLY CONSTRUCTION CORP.  
Third-Party Defendants.

-----X  
The following e-filed documents, listed by NYSCEF document number (Motion 005) 221, 222, 223, 224, 225, 226,  
227, 228, 229, 230, 231, 232, 233, 234, 235

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE.

The facts of this case are found in the court’s Decision and Order dated April 10, 2024. The salient facts pertinent to the instant motion are as follows. This action stems from an accident on November 16, 2018, where plaintiff allegedly slipped on water and snow while delivering plywood to the fifth floor of a construction project at the premises located at 525 West 26<sup>th</sup> Street, New York, NY. Here, third-party defendant Environmentally Construction Corp. (hereinafter, “ECC”) moves the court for an order, pursuant to 22 NYCRR § 202.21(e), to vacate the note of issue filed by plaintiffs, or, in the alternative, allow for post-note of issue discovery. Plaintiffs served a verified bill of particulars on August 12, 2019, and a supplemental verified bill of particulars on July 20, 2021. According to ECC, plaintiff Jonathan Cruz Alvarez (hereinafter, “Alvarez”) testified at his deposition on March 14, 2022, that he obtained a Class E “for hire” driver’s license and was working for Uber and Lyft. On August 28, 2024, more than fifteen (15) months after filing the note of issue, argues ECC, plaintiffs served a second supplemental verified bill of particulars wherein Alvarez claimed, for the first time, a total economic loss of \$6,221,146.00 for loss of income and for future medical care. ECC contends that the second supplemental bill of particulars contains new information that is inconsistent with what was disclosed during discovery, for example, that Alvarez is no longer working. Thus, plaintiffs maintain that the note of issue should be vacated. Alvarez should be deposed again,

contends ECC, because his lost wages claim and any claim on future medical needs was limited by his return to work. In the alternative, should the court decline to vacate the note of issue, ECC posits that the court should allow defendants to further depose Alvarez and require him to submit to an independent vocational exam by a specialist chosen by defendants (NYSCEF Doc. No. 222, *Kenny affirmation in support of motion to vacate*).

Defendants/third-party plaintiffs 513 West 26<sup>th</sup> Realty LLC (hereinafter, “513”) and Integrity Contracting, Inc. (hereinafter, “Integrity”) adopt ECC’s arguments advanced above and add that the parties engaged in a series of telephone conversations and e-mail exchanges on August 29, 2024, during which a good-faith effort was attempted to negotiate for post-note of issue discovery without the need for motion practice (NYSCEF Doc. No. 227, *513 and Integrity affirmation in support of motion to vacate*). In support of the motion, 513 and Integrity attach a copy of the e-mail exchanges between the parties wherein they attempted resolve the post-note of issue discovery (NYSCEF Doc. No. 228, *communication between the parties*).

In opposition, plaintiffs contend that the second supplemental verified bill of particulars dated August 28, 2024, does not allege new injury but merely particularizes continuing claims of lost earnings and the need for future medical treatment, all of which were previously alleged. Plaintiffs assert that ECC’s motion should be denied for failure to accompany its motion with an affirmation of good faith in accordance with 22 NYCRR § 202.7(c). Next, plaintiffs set forth that Alvarez’s deposition testimony, when taken in conjunction with the allegations contained in the bill of particulars demonstrate that the additional deposition requested is unwarranted because the parties have been on notice of Alvarez’s inability to return to work due to the injuries sustained as a result of the construction accident. Hence, the total economic loss claimed in the second supplemental verified bill of particulars does not constitute unusual or unanticipated circumstances that developed subsequent to the filing of the note of issue as required by 22 NYCRR § 202.7(d), to entitle defendants to an additional deposition. Also, plaintiffs assert that the relief sought herein should be denied because the information sought should have been requested before the filing of the note of issue (NYSCEF Doc. No. 229, *Kusz affirmation in opposition*).

In reply, ECC contends that the parties met, attempted to resolve the dispute without motion practice and therefore, the instant motion complies with the requirements of 22 NYCRR § 202.7(c) and indicates the time, place and nature of the consultation and the issues discussed to attempt to resolve the issues raised in the motion. Also, ECC asserts that Alvarez will not suffer prejudice if he appears for an additional deposition and submits to an independent vocational exam, especially as there is currently no date set for trial or a pretrial settlement conference (NYSCEF Doc. No. 234, *Kenny reply affirmation*).

513 and Integrity also submit a reply paper, wherein they maintain that the second supplemental bill of particulars does not address any earnings from Alvarez’s work with Uber or any other employer since his accident. Given that the total economic loss of \$6,221,146.00 for loss of income and for future medical care is vastly more than what was initially claimed in his original bill of particulars — in excess of \$2 million, 513 and Integrity argue that the new claim does not constitute a mere particularization of plaintiff’s existing claim and an additional deposition is warranted. They also argue that discovery revealed that Alvarez’s economic loss

claim was limited by his return to work and as such, the vocational examination was not necessary at the time. As such, this motion arises not for a lack of diligence in seeking discovery in the first instance, posit 513 and Integrity (NYSCEF Doc. No. 235, *affirmation in reply*).

In its discretion, the court may grant permission to conduct additional discovery after the filing of a note of issue and certificate of readiness, where the moving party demonstrates that “unusual or unanticipated circumstances” developed subsequent to the filing requiring additional pretrial proceedings to prevent substantial prejudice (22 NYCRR § 202.21[d]; see *Esteva v Catsimatidis*, 4 AD3d 210, 210 [1st Dept 2004]). 22 NYCRR § 202.7(a) provides, in pertinent part, that when filing a motion, an attorney must submit “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.” Furthermore, “[t]he affirmation of the good faith effort to resolve the issues raised by the motion 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]).

As a preliminary matter, the court finds plaintiffs’ argument that movants failed to comply with the good-faith provisions of 22 NYCRR § 202.7(c) unavailing. A review of the record demonstrates that defendants’ counsels described efforts made to resolve this dispute in their affirmation in support of defendants’ motion (see *Lehrman v Lehrman*, 211 AD3d 582, 583 [1st Dept 2022]). As relevant to the motion, defendants attached a copy of e-mail correspondence between the parties demonstrating that efforts were made to resolve the issue raised. Therefore, the court shall consider the instant motion.

Here, the motion seeking post note of issue discovery of Alvarez is granted. Post-note of issue discovery is appropriate especially where, as here, Alvarez is claiming a total economic loss of \$6,221,146.00 in the second supplemental bill of particulars, a quantum which is approximately more than twice the amount claimed in the original bill of particulars. Movants have demonstrated that the total economic loss of \$6,221,146.00 in the supplemental bill of particulars served post-note of issue constitutes “unusual or unanticipated circumstances” that require additional disclosure to prevent substantial injustice to the party seeking discovery (see *McKee v Ford Motor Co.*, 2018 NY Slip Op 51340[U], \*4 [Sup Ct, NY County 2018]). Although Alvarez testified at his deposition that he had been driving for Lyft and delivering food as an Uber driver, the second supplemental bill of particulars does not address whether the earnings from this employment impacted the future economic loss claim. It is well-settled that “[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” (see *WVH Hous. Dev. Fund Corp. v Brooklyn Insulation & Soundproofing, Inc.*, 193 AD3d 523, 523 [1st Dept 2021]). Movants have demonstrated, to the court’s satisfaction, that no prejudice will be occasioned if Alvarez appears for an additional deposition limited to two (2) hours and submits to an independent vocational exam, especially as there is currently no date set for trial or a pretrial settlement conference. However, “movants failed to demonstrate that vacating the note of issue and certificate of readiness is necessary, given the limited additional discovery required” (*Lewis v Verizon N.Y. Inc.*, 199 AD3d 572, 573 [1st Dept 2021]). All other arguments have been considered and are either without merit or need not be addressed. Accordingly, it is hereby

**ORDERED** that the branch of the motion seeking to compel Jonathan Cruz Alvarez to be deposed concerning his total economic loss claim and to submit to an independent vocational exam by a specialist chosen by defendants and third-party defendants is granted; and it is further

**ORDERED** that the branch of the motion seeking to vacate the Note of Issue is denied; and it is further

**ORDERED** that within forty-five (45) days after this decision and order is uploaded to NYSCEF, Jonathan Cruz Alvarez shall appear for a deposition of no more than two (2) hours with defendants and third-party defendants and shall submit to an independent vocational exam by a specialist chosen by defendants and third-party defendants; and it is further

**ORDERED** that within twenty (20) days after this decision and order is uploaded to NYSCEF, counsels for Environmentally Construction Corp., 513 West 26<sup>th</sup> Realty LLC and Integrity Contracting, Inc. shall serve a copy of this decision and order, with a notice of entry, upon all parties.

This constitutes the decision and order of this court.

February 25, 2025

  
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HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART