Neman v Radnay

2025 NY Slip Op 31488(U)

March 28, 2025

Supreme Court, New York County

Docket Number: Index No. 805341/2021

Judge: John J. Kelley

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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JANET NEMAN,

Plaintiff,

- v -

CRAIG S. RADNAY, M.D., and SAINT FRANCIS HOSPITAL,

Defendants.

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INDEX NO. 805341/2021

MOTION DATE 12/20/2024

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46

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 based on alleged departures from good and accepted practice and lack of informed consent, the defendants move pursuant to 22 NYCRR 202.21(e) to vacate the note of issue and certificate of readiness, and pursuant to CPLR 2004 to extend their time for moving for summary judgment. Although the plaintiff does not oppose the motion, the motion is granted only to the extent that, (a) while the action remains on the trial calendar, the plaintiff shall, on or before May 8. 2025, provide the defendants with authorizations permitting them to obtain her medical and other records from Hospital for Special Surgery, Dr. Michael Cohen, North Shore Medicine, CVS Pharmacy, Colony, Memorial Sloan Kettering Cancer Center, North Shore University Hospital, Long Island Jewish Medical Center, Equinox, the physical therapist that the plaintiff treated with on East 64th Street in Manhattan, Dr. Dillon, and the plaintiff's current treating neurologist, and (b) the deadline for the defendants to move for summary judgment is extended until July 31, 2025. The motion is otherwise denied. The plaintiff's failure to provide those authorizations by May 8, 2025, shall, upon the submission of an affirmation by the defendants' attorney attesting that those authorizations have yet to be

provided by that date, result in the note of issue being stricken, and may result in the imposition of other sanctions.

On January 19, 2024, the defendants served a demand that the plaintiff provide them with authorizations permitting them to obtain her medical, therapy, pharmacy, and exercise training records from the aforementioned medical providers, physical therapy providers, pharmacies, and commercial gyms. In four status conference orders, respectively dated February 8, 2024, March 13, 2024, May 3, 2024, and July 8, 2024, this court directed her to provide those authorizations to the defendants. Even though she had yet to do so, she nonetheless served and filed a note of issue and certificate of readiness on October 30, 2024.

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]). 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 Samuelsen 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.

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 have 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]).

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 motion which, had it been fully 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 July 31, 2025.

Accordingly, it is,

ORDERED that the defendants' motion is granted only to the extent that, (a) on or before May 8, 2025, and while the action remains on the trial calendar, the plaintiff shall provide the defendants with authorizations permitting them to obtain her medical, therapy, pharmacy, and exercise records from Hospital for Special Surgery, Dr. Michael Cohen, North Shore Medicine, CVS Pharmacy, Colony, Memorial Sloan Kettering Cancer Center, North Shore University Hospital, Long Island Jewish Medical Center, Equinox, the physical therapist that the plaintiff treated with on East 64th Street in Manhattan, Dr. Dillon, and the plaintiff's current

treating neurologist, and (b) the defendants' deadline for moving for summary judgment is extended until July 31, 2025, and the motion is otherwise denied.

This constitutes the Decision and Order of the court.

3/28/2025
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE