

Barreto v Downtown NYC Owner, LLC

2025 NY Slip Op 32670(U)

July 21, 2025

Supreme Court, New York County

Docket Number: Index No. 150302/2020

Judge: Arlene P. Bluth

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

-----X

WILMAN BOSKOVICH BARRETO,
Plaintiff,

INDEX NO. 150302/2020

MOTION DATE 07/08/2025

MOTION SEQ. NO. 001

- v -

DOWNTOWN NYC OWNER, LLC,
Defendant.

**DECISION + ORDER ON
MOTION**

-----X

DOWNTOWN NYC OWNER, LLC
Plaintiff,

Third-Party
Index No. 595622/2021

-against-

EUROTECH CONSTRUCTION CORP. NATIONAL
ACOUSTICS LLC,
Defendant.

-----X

NATIONAL ACOUSTICS LLC,
Third-Party Plaintiff,

-against

ISLAND TAPING INC.,
Third-Party Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 161

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

Third-party defendant National Acoustics LLC (“National Acoustics”)’s motion and third-party defendant Island Taping Inc. (“Island Taping”) cross-motion to vacate the note of issue is denied.

Background

In this Labor Law action, plaintiff contends that he fell from scaffolding. This action was commenced on January 9, 2020 and National Acoustics was brought into the action via a third-party complaint dated July 8, 2021. The parties have held numerous conferences over the years. Prior the most recent conference scheduled for late April 2025, the parties ignored a Court deadline to provide an update about the status of discovery. The Court observed that all discovery deadlines set in prior conference orders had passed and ordered that a note of issue be filed by May 9, 2025 (NYSCEF Doc. No. 86). Plaintiff then filed the note of issue and this motion followed.

National Acoustics claims that discovery is outstanding and therefore the note of issue should be vacated. Its counsel insists that the note of issue was filed prematurely and that he emailed counsel for plaintiff insisting that discovery was owed. National Acoustics admits that after sending over an additional request for discovery on May 12, 2025, plaintiff responded immediately that day including authorizations for plaintiff's records. It claims that it is still seeking records from third-party defendant Island Taping , a HIPAA complaint authorization for plaintiff's pain management doctor, another deposition of plaintiff and the non-party deposition of plaintiff's wife on the ground that she accompanied him to a back surgery in September 2024.

Island Taping cross-moves to strike the note of issue. It claims that it served National Acoustics with a discovery demand on January 29, 2024 and that it emailed National Acoustics on May 8, 2025 requesting a response. Island Taping points out that National Acoustics admitted in its moving papers that it has still not responded and is apparently "working on a response."

Plaintiff opposes the instant motion on the ground that he has responded to outstanding discovery. He points out he served a response to National Acoustics' outstanding demands and

that the recent supplemental bill of particulars merely amplifies the pleadings by identifying specific Industrial Code subsections. Plaintiff argues that the time to process authorizations and the disclosure of an economic report are not a proper basis to strike the note of issue. He also insists that his partner was identified at two of his prior depositions in December 2022 and June 2023 and so National Acoustics' sudden claim to take her deposition is without merit.

In reply, National Acoustics contends that vacatur is necessary given the current posture of this case as plaintiff turned over responses right before the note of issue deadline and it is entitled to seek discovery. It claims that it wants to depose plaintiff for a fourth time about the responses served by plaintiff on May 9, 2025.

Discussion

“While a note of issue will generally be stricken if the case is not ready for trial, the motion to strike can be denied where the parties had sufficient time to complete discovery” (*Lisa I. v Manikas*, 188 AD3d 1369, 1371, 135 NYS3d 192) [3d Dept 2020] [internal quotations and citation omitted]).

As an initial matter, National Acoustics did not address why it made no effort to extend the deadline following the Court's April 22, 2025 order that set a note of issue deadline. Of course, that order was precipitated by the fact that no party updated the Court. National Acoustics could have abided by the court rules and requirements clearly set forth in prior orders and updated the court that it was waiting for outstanding discovery or demanded a conference. Instead, it did nothing; it completely ignored the requirement to advise the court of discovery issues and now bizarrely faults plaintiff for complying with a Court-ordered deadline.

Turning to the merits, the fact that plaintiff served a supplemental bill of particulars that identified certain Industrial Code sections is not a basis to strike the note of issue. “[A] llegations

of Code violations merely amplify and elaborate upon facts and theories already set forth in the original bill of particulars and raise no new theory of liability” (*Noetzell v Park Ave. Hall Hous. Dev. Fund Corp.*, 271 AD2d 231, 232 [1st Dept 2000] [observing that adding Industrial Code sections did not require leave of Court]). The fact is that there is no unfair surprise to any party here as this supplemental bill of particulars did not change plaintiff’s theory of the case in any way.

Similarly, the reference to the economist’s report is not a basis to vacate the note of issue. Of course, plaintiff had no obligation to produce an expert witness for a deposition under the CPLR. In fact, as plaintiff points out, the First Department permitted an expert economist’s report to be used at trial even though it was disclosed only two weeks prior (*Banks v City of New York*, 92 AD3d 591, 939 NYS2d 39 [1st Dept 2012]). This case is a long way away from trial and so there is no reason to strike the note of issue on that ground.

National Acoustics’ concerns about processing authorizations is also not an adequate justification to grant its motion. The fact is that parties often seek medical authorizations throughout a case, including after the note of issue is filed. If this were a basis to strike a note of issue, one wonders how any personal injury case could ever proceed to trial.

National Acoustics’ request for a fourth deposition is denied. The supplemental bill of particulars described above is not a basis to order another deposition. The Court observes that plaintiff’s verified bill of particulars issued five years ago (NYSCEF Doc. No. 118) raises numerous Industrial Code sections. In other words, this is not case in which plaintiff has suddenly changed his entire theory of the case after filing the note of issue.

The demand for the deposition of plaintiff’s partner is also denied. National Acoustics claims that it wants this deposition because she allegedly accompanied plaintiff to an additional

surgery in September 2024. It is unclear to this Court how this testimony of a non-party (plaintiff's partner does not have a claim here) would have any bearing on any issue in this case. There is no indication that plaintiff's partner has any medical training or ability to opine about the surgery or plaintiff's recovery. Simply put, a significant other accompanying a partner to a surgery does not, on this record, make them a witness capable of offering relevant testimony. And the fact is that National Acoustics did not timely seek this deposition. It admits in reply that it found out she accompanied plaintiff to the subject surgery in March 2025. But there is no indication it ever sent a deposition notice to this non-party witness or ever pursued this possible deposition until after the note of issue was filed.

The Court, however, requires both National Acoustics and Island Taping to respond to the outstanding demands between these parties on or before August 1, 2025. These demands have been pending for long enough and so this should be more than enough time to complete a response.

And, to be clear, plaintiff must promptly execute authorizations where appropriate as this matter proceeds to trial.

Summary

It is unclear to this Court whether National Acoustics' and Island Taping's strategy is to indefinitely delay this matter. But this Court must ensure that cases proceed to resolution even where parties seem disinterested in promptly seeking allegedly important discovery. After the parties ignored a Court deadline, this Court issued a clear and unambiguous order to file a note of issue within a few weeks. That should have encouraged the parties, and particularly National Acoustics and Island Taping, to focus on this matter. They could have finished discovery or made a proper application to this Court for an extension of the deadline. Instead, they allowed

the deadline to remain and for plaintiff to file the note of issue despite apparently knowing full well that they wanted some discovery. Of course, plaintiff immediately responded once National Acoustics demanded additional information.

The implication from this record is that movants did not take the Court’s deadlines (to update the court pre-conference or the note of issue) seriously, that they thought the orders were mere suggestions or that they thought they could delay the case more by letting the note of issue be filed and then move to vacate it. The fact is both National Acoustics and Island Taping had ample opportunity to pursue discovery. In any event, plaintiff properly responded and the additional demands (the further depositions) are not relevant or proper.

The Court declines to extend the deadline for summary judgment motions in any way. 120 days is more than enough time to file an appropriate dispositive motion.

Accordingly, it is hereby

ORDERED that the motion by National Acoustics and the cross-motion by Island Taping are both denied except that they must respond to each other’s outstanding discovery demand by August 1, 2025.

7/21/2025
DATE


ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: