

Moazen v California Pizza Kitchen, Inc.

2016 NY Slip Op 31031(U)

February 10, 2016

Supreme Court, New York County

Docket Number: 155504/14

Judge: Donna M. Mills

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

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LALEH MOAZEN,

Plaintiff,

Index No. 155504/14

-against-

CALIFORNIA PIZZA KITCHEN, INC.,

Defendant.

-----X

Mills, J.:

In motion sequence number 001, defendant California Pizza Kitchen, Inc. moves, pursuant to 22 NYCRR 202.21, to strike/vacate plaintiff Laleh Moazen's note of issue and certificate of readiness due to outstanding discovery, and to extend the time to serve and file a note of issue and certificate of readiness. Defendant also moves, pursuant CPLR 3126 and 3124, to preclude plaintiff from offering any evidence at trial relating to any items of discovery which have been demanded, and for which plaintiff has failed to provide any authorization or response, and to compel plaintiff to produce all outstanding discovery within a date certain or be automatically precluded.

Background

This action was commenced on June 4, 2014 by the filing of a summons and verified complaint (affirmation of Cathleen Kelly Rebar, exhibit A). On July 11, 2014, defendant filed its verified answer (*id.*, exhibit B). On July 16, 2015, this court issued a status conference order (July 2015 Order), which

directed plaintiff to respond to defendant's discovery demands of May 26, 2015 and July 13, 2015 within 30 days, and to file a note of issue by November 11, 2015 (affirmation of Cathleen Kelly Rebar, exhibit E). The July 2015 Order also directed defendant to complete an independent medical examination (IME) of plaintiff by August 31, 2015 (*id.*).

On August 4, 2015, defendant's counsel wrote a letter to plaintiff's counsel confirming that the parties agreed to postpone plaintiff's IME due to settlement negotiations (reply affirmation of Cathleen Kelly Rebar, exhibit A). The letter further stated that counsel would schedule a date for an IME in advance of trial if negotiations failed, and that a postponement was not a waiver of defendant's right to conduct an IME (*id.*). The next day, on August 5, 2015, plaintiff filed a note of issue, certifying readiness for trial (affirmation of Cathleen Kelly Rebar, exhibit D).

Defendant now moves (1) to strike/vacate the note of issue and certificate of readiness; (2) to preclude plaintiff from offering any evidence at trial relating to any items of discovery which have been demanded, and for which plaintiff has failed to provide; and (3) to compel plaintiff to produce all outstanding discovery or be automatically precluded.

Analysis

Defendant acknowledges receipt of plaintiff's authorizations

for her various employments. Defendant also acknowledges that outstanding depositions of non party witnesses do not preclude the filing of a note of issue; thus, these issues are moot for the purposes of this motion. The only remaining issue, therefore, is whether the note of issue should be vacated to allow defendant to conduct an IME of plaintiff.

Plaintiff argues that defendant waived an IME, as the July 2015 Order directed that such be conducted by August 31, 2015. Defendant argues that it did not waive its right to conduct an IME, because it was agreed upon by the parties to postpone an IME of plaintiff pending settlement negotiations.

Regardless of whether there was an agreement to postpone an IME, pursuant to the July 2015 Order, defendant had until August 31, 2015 to conduct such exam. Plaintiff, nevertheless, went ahead and filed a note of issue and certificate of readiness on August 4, 2015, approximately 3 ½ weeks before the court-ordered deadline. Thus, plaintiff's certificate of readiness was incorrect, and the note of issue was filed prematurely (see *Tomaino v 209 E. 84 St. Corp.*, 68 AD3d 527, 528-529 [1st Dept 2009]). Further, as there is evidence that the parties did agree upon a postponement of the IME due to ongoing settlement negotiations, the court finds that it would be in fairness to vacate the note of issue and certificate of readiness. Thus, the note of issue is vacated and defendant is ordered to conduct an

IME of plaintiff, which will complete discovery in this matter, within 45 days from the date hereof. Within 15 days from the completion of discovery, as herein ordered, plaintiff shall place this action on the trial calendar by filing a new note of issue and statement of readiness and payment of the fee thereof.

Accordingly, it is

ORDERED that the motion is granted, and the note of issue is vacated and the case is stricken from the trial calendar; and it is further

ORDERED that defendant shall be permitted to conduct an independent medical examination of plaintiff, provided that such is completed within 45 days from the date hereof; and it is further

ORDERED that the parties shall appear for a conference in Room 574, 111 Centre Street, on May 18, 2016 at 9:30

AM/PM; and it is further

ORDERED that, within 15 days from the entry of this order, movant shall serve a copy of this order with notice of entry on all parties and upon the Clerk of the Trial Support Office (Room 158), who is hereby directed to strike the case from the trial calendar and make all required notifications thereof in the records of the court; and it is further

ORDERED that, within 15 days from completion of discovery as herein above directed, plaintiff shall cause the action to be

placed upon the trial calendar by filing a new note of issue and statement of readiness and payment of the fee thereof.

Dated: February 10, 2016

Enter:

Donna M. Miller

J.S.C.