

Villezcas v 66 W. 84th St. Owners Corp.

2016 NY Slip Op 32465(U)

December 15, 2016

Supreme Court, New York County

Docket Number: 153932/2013

Judge: Manuel J. Mendez

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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: MANUEL J. MENDEZ
Justice

PART 13

EMMA VILLEZCAS
Plaintiff,

-against-

INDEX NO. 153932/2013
MOTION DATE 11/02/2016
MOTION SEQ. NO. 007
MOTION CAL. NO. _____

66 WEST 84TH STREET OWNERS CORP.,
66 WEST 84TH EQUITIES LLC, TIME EQUITIES, INC.,
TIME EQUITIES ASSOCIATES LLC., ES & DS, INC, and
KYROUS REALTY GROUP, INC.
Defendants.

66 WEST 84TH STREET OWNERS CORP.,
Third-Party Plaintiff,

Third-Party Index No. 590037/2014

-against-

N.Y.C. SUPER SERVICES, INC. and
TRINITY DEVELOPMENT GROUP, INC.,
Third-Party Defendants.

The following papers, numbered 1 to 19 were read on this motion to vacate the Note of Issue.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 3; 4 - 7; 8 - 10; 11 - 14</u>
Answering Affidavits — Exhibits _____	<u>15</u>
Replying Affidavits _____	<u>16; 17; 18; 19</u>

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that (1) Third-Party Defendant Trinity Development Group, Inc.'s (herein "Trinity") motion under Sequence No. 007, (2) Defendant/Third-Party Plaintiff 66 West 84th Street Owners Corp's (herein "Owners Corp") and Defendant Kyrour Realty Group Inc.'s (herein "Kyrour") motion under Sequence No. 008, (3) Defendants 66 West 84th Equities, LLC, Time Equities, Inc. and Time Equities Associates, LLC's (herein "the Equities Defendants") motion under Sequence No. 009, and (4) Third-Party Defendants N.Y.C. Super Services, Inc.'s (herein "N.Y.C. Super") motion under Sequence No. 10, to vacate the Note of Issue and Certificate of Readiness filed on June 16, 2016, are granted.

Plaintiff commenced this action by filing a Summons and Verified Complaint on April 30, 2013, alleging that she sustained personal injuries when she slipped and fell on a puddle of water in the lobby of 66 West 84th Street, New York, New York. Issue was joined (Mot. Seq. 7 Exh. B), and Kyrous filed a Third-Party Complaint on December 29, 2014, against Third-Party Defendants N.Y.C. Super and Trinity. (Mot. Seq. 7 Exh. C). Issue was joined by Trinity on July 6, 2015, and by N.Y.C. Super on October 5, 2015. (Mot. Seq. 7 Exh. D).

A Status Conference was held on April 20, 2016, setting forth a discovery schedule for remaining document production, depositions, any post-deposition demands, and an IME of Plaintiff. (Mot. Seq. 7 Exh. E). The next Status Conference was to be held on June 22, 2016, and the Note of Issue was to be filed by August 31, 2016. (Id.).

Plaintiff filed the Note of Issue and Certificate of Readiness on June 16, 2016. (Mot. Seq. 7 Exh. G).

Defendants Owners Corp, Kyrous, the Equities Defendants, and Third-Party Defendants N.Y.C. Super and Trinity now move to vacate the Note of Issue and Certificate of Readiness arguing that Plaintiff prematurely filed the Note of Issue knowing that there remained outstanding discovery. That the Defendants and Third-Party Defendants appeared for the Status Conference on June 22, 2016, unaware that the Plaintiff had appeared and left after advising the Court that the Note of Issue had been filed. All of the Movants contend that they attempted in good faith to request that the Plaintiff voluntarily withdraw the Note of Issue, but that Plaintiff did not.

Trinity contends that the remaining outstanding discovery includes the depositions of Kyrous, N.Y.C. Super, and Trinity, an IME of Plaintiff as noticed and designated by Trinity (Mot. Seq. 7 Exh. F), and responses to Trinity's post-deposition demand for authorizations (Id.). Trinity argues that this discovery is necessary for its defense and preparation for trial as to liability, damages, and the Plaintiff's physical condition.

Owners Corp and Kyrous contend that some of the outstanding depositions had been delayed due to a discovery motion they made against Trinity on May 24, 2016, which was subsequently withdrawn after receiving responses to their demands. (Mot. Seq. 8 Exhs. E & F). Owners Corp and Kyrous argue that the outstanding Third-Party depositions are important because one, or both, of these parties was responsible for handling the daily maintenance of the lobby area where Plaintiff alleges to have fallen.

The Equities Defendants and N.Y.C. Super contend that the remaining discovery was not waived. The Equities Defendants further argue that a further IME of Plaintiff still needs to be conducted, that the outstanding depositions are necessary, and that all parties have the right to serve post-deposition demands.

Plaintiff opposes the motion arguing that Owners Corp. delayed in commencing the Third-Party action, that the main action was well into the discovery process when the Third-Party action began, and that any delay in conducting discovery was due to the delay of the Third-Party action being commenced. That Plaintiff appeared for an IME on July 12, 2016 at the request of counsel for Owners Corp., that the Third-Party depositions were not conducted and not rescheduled, and that the failure of the depositions to proceed was not Plaintiff's fault. Plaintiff also argues that the outstanding discovery is based on the Third-Parties failure to litigate, that the parties had ample time to complete the discovery but did not, and that forcing the Plaintiff to wait for the Third-Party discovery to be completed would be unjust.

Defendants and Third-Party Defendants argue that there is no merit to Plaintiff's argument that the Third-Party action was belatedly commenced because the Plaintiff also filed a Second Amended Complaint on March 15, 2015. (Mot. Seq. 7 Exh. A). That Plaintiff never moved to sever the Third-Party action, and that Plaintiff never complained or objected to the discovery going forward at the two discovery conferences held after issue was joined by the Third-Party Defendants.

"Where a party timely moves to vacate a note of issue, it need show only that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of ... section [202.21] in some material respect" (Vargas v. Villa Josefa Realty Corp., 28 A.D.3d 389, 390, 815 N.Y.S.2d 30 [1st Dept., 2006]; see 22 NYCRR § 202.21 [e]).

Uniform Rule 202.21(e)(1) provides the vehicle for vacating a note of issue and striking a case from the trial calendar. A note of issue and certificate of readiness will be vacated where there is still extensive discovery to be completed or where the certificate of readiness erroneously states that all discovery is complete (see *Carte v. Segall*, 134 A.D. 2d 396, 520 N.Y.S. 2d 943 [2nd. Dept. 1987] note of issue vacated where extensive discovery yet to be completed); *Ortiz v. Arias*, 285 A.D. 2d 390, 727 N.Y.S. 2d 879 [1st. Dept. 2001], vacating note of issue that contained erroneous facts including incorrect statement that discovery had been completed or waived). Vacatur of the Note of Issue and Certificate of Readiness is proper where the defendants demonstrate "unusual or unanticipated" circumstances or "substantial prejudice" sufficient to warrant post-note of issue discovery (*Desario v. SL Green Management LLC*, 118 A.D.3d 520987 N.Y.S.2d 151, 152 [2nd Dept., 2014] citing to, *Schroeder v. IESI N.Y. Corp.*, 24 A.D.3d 180, 805 N.Y.S.2d 79 [1st Dept., 2005]; 22 NYCRR 202.21[d]).

Plaintiff prematurely filed the Note of Issue knowing that there was outstanding discovery in accordance with this Court's Status Conference Order dated April 20, 2016. Defendants and Third-Party Defendants are entitled to any of the outstanding discovery from Plaintiff, are entitled to the outstanding depositions, and are entitled to serve post-deposition demands, if any. Defendants and Third-Party Defendants did not waive their rights to the discovery sought, therefore all discovery is not complete. Plaintiff provides no evidence to the contrary.

Accordingly, it is hereby ORDERED that (1) Third-Party Defendant Trinity Development Group, Inc.'s (herein "Trinity") motion under Sequence No. 007, (2) Defendant/Third-Party Plaintiff 66 West 84th Street Owners Corp's (herein "Owners Corp") and Defendant Kyrous Realty Group Inc.'s (herein "Kyrous") motion under Sequence No. 008, (3) Defendants 66 West 84th Equities, LLC, Time Equities, Inc. and Time Equities Associates, LLC's (herein "the Equities Defendants") motion under Sequence No. 009, and (4) Third-Party Defendants N.Y.C. Super Services, Inc.'s (herein "N.Y.C. Super") motion under Sequence No. 10, to vacate the Note of Issue and Certificate of Readiness filed on June 16, 2016, are granted, and it is further,

ORDERED, that the Note of Issue is vacated, the action is stricken from the trial calendar, and restored to the calendar of this Court, and it is further,

ORDERED, that a copy of this Order with Notice of Entry be served upon all parties within 30 days from the date of entry of this Order, and it is further,

ORDERED, that a copy of this Order with Notice of Entry shall be served upon the General Clerk's Office Trial Support Clerk (Room 119) who is directed to restore this action to the pre-trial calendar of this Court, and it is further,

ORDERED, that the parties appear for a Compliance Conference in IAS Part 13 located at 71 Thomas St., Room 210, New York, New York 10013, on March 1, 2017, at 9:30 a.m.

ENTER:

Dated: December 15, 2016



MANUEL J. MENDEZ

J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST X REFERENCE