Broadley v Matros
2018 NY Slip Op 31384(U)
June 27, 2018
Supreme Court, New York County
Docket Number: 805220/14
Judge: Joan A. Madden

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

PRESENT:HON. JOAN A. MADDEN PART 11

Justice

EDMUND BROADLEY,

Plaintiff,

INDEX NO. 805220/14
MOTION DATE:

- v -

MOTION SEQ. NO. 004

EVAN MATROS, M.D.,

Defendant,

The following papers, numbered 1 to _____ were read on this motion to

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Plaintiff, appearing *pro se*, moves to vacate the note of issue and certificate of readiness filed by his former attorney. Defendant opposes the motion, which is denied for the reasons below.

This is an action for medical malpractice and lack of informed consent. Plaintiff's Bill of Particulars alleges that "the anterolateral thigh ("ALT") flap reconstruction surgery performed by [defendant] at Memorial Sloan-Kettering Cancer Center (hereinafter"Memorial") on January 31, 2012 immediately following a radical resection of plaintiff's left groin synovial sarcoma was contraindicated, unnecessary, and improperly performed." Plaintiff also asserts a claim for lack of informed consent "in that he would not have agreed to any surgical procedure on his leg that in any way posed a threat to his mobility." Plaintiff also alleges that defendant failed to ensure that a "specifically requested type of urinary catheter" be used during the ALT flap surgical reconstruction.

Note of issue was filed on August 30, 2016. Defendant filed a motion for summary judgment on May 16, 2017.[1] The motion was submitted unopposed. Counsel for plaintiff then made a motion to withdraw as counsel. Before permitting counsel to withdraw, in its interim order dated October 12, 2017, the court required plaintiff's counsel, on or before October 30, 2017, to submit to the court:

1. An affirmation for in-camera inspection delineating his attempts to retain an expert and providing identifying information as to the experts he contacted, including their names, specialities, locations and affiliations; and

2. Subpoenas (at plaintiff's request) for (I) the operation manual for Memorial, (ii) any letters exchanged between plaintiff and the Memorial patient representative, together with any internal Memorial documents that were generated with respect to plaintiff's letters and/or communications with the patient representative, and (iii) defendant Dr. Matros' work schedule for the day before, the day of, and the day after plaintiff's surgery.

After plaintiff's counsel complied with the interim order, and submitted the documents and the subpoenas to be so-ordered by the court, the court permitted him to withdraw.

Plaintiff now seeks to vacate the note of issue pursuant to 22 NYRCC § 202.21(d) on the ground that "unusual and unanticipated circumstances" have developed since the filing of the note of issue and certificate of readiness the warrant further pre-trial proceedings to prevent substantial prejudice to plaintiff, and pursuant to 22 NYCRR § 202.21(e) on the grounds that "numerous material facts in the certificate of readiness are incorrect" and as discovery was conducted by defendant after the note of issue was filed.

In support of his argument as to existence of "unusual and unanticipated

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[1]The court extended defendant's time to move for summary judgment so that defendant could conduct a non-party deposition.

circumstances" plaintiff argues, *inter alia*, that defendant has failed to provide specific documents as directed in preliminary conference and compliance conference orders or to adequately respond to plaintiff's second amended combined demands for discovery and inspection ("second demand"). Plaintiff also argues that his attorney did not pursue discovery as requested by plaintiff.

Defendant opposes the motion, asserting that plaintiff has failed to demonstrate "unusual or anticipated circumstances" since all discovery ordered has been provided, including certified records from Memorial, and that plaintiff's working relationship with his former attorney and his former attorney's purported lack of diligence in pursuing discovery does not constitute an unusual or unanticipated circumstance. In addition, defendant argues that plaintiff has not demonstrated substantial prejudice, since all discovery, with the exception of a non-party deposition of plaintiff's friend which was permitted by the court, was complete at the time note of issue was filed.

Under Section 202.21(d), a court may grant permission to conduct further pre-trial discovery"[w]here unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice, the court, upon motion supported by affidavit, may grant permission to conduct such necessary proceedings." In this case, plaintiff has not made the necessary factual showing of "special, unusual or extraordinary circumstances" such that would warrant further pre-trial discovery nor does he show that the note of issue should be vacated on this ground. Grant v. Wainer, 179 AD2d 364, 365 (1st Dept 1992)(internal citations and quotations omitted).

While plaintiff points to various discovery which defendant allegedly failed to produce, defendant provides proof that the discovery was provided, including a certified copy of plaintiff's records from Memorial, and copies of billing records. With respect to plaintiff's request for "correspondence" such request was addressed in the court's interim order which required plaintiff's counsel to provide subpoenas for "any letters exchanged between plaintiff and the Memorial patient representative, together with any internal Memorial documents that were

generated with respect to plaintiff's letters and/or communications with the patient representative."

As for plaintiff's assertions that defendant's response to plaintiff's second demand was improper, the record shows that the sufficiency of such response was raised by plaintiff's former counsel and addressed by Justice Alice Schlesinger (who was previously assigned to this action) at a compliance conference held on December 2, 2015, by requiring defendant to provide a certification that medical records produced from Memorial were made and maintained in the ordinary course of business by Memorial.

As to plaintiff's argument that his former attorney did not properly prosecute the action, including by obtaining all material discovery, the circumstances here, where the court signed subpoenas for limited discovery,[2] do not constitute an unusual or unanticipated circumstances so as to provide a basis for vacating of the note of issue or permitting unlimited discovery. See Scheoeder v. IESI NY Corp, 24 AD3d 180, 181 (1st Dept 2005)(defendants' substitution of attorneys, which occurred after the filing of the note of issue in this case [do not], constitute the necessary "unusual or unanticipated circumstances" under [22 NYCRR 202.21(d), citing Ward v. City of Rensselaer, 106 AD2d 719, 721 (3d Dept 1984) ("fact that defendants have new counsel, who wish to prepare the case in a different manner than prior counsel, does not present unusual or unanticipated conditions").

As for plaintiff's motion to vacate the note of issue on the ground that the material facts in the certificate of readiness are incorrect, the court notes that such motion is untimely as it was not made within 20 days of service of the note of issue and certificate of readiness. See NYCRR

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[2]In motion sequence 006, the court denied, with one limited exception, non-party Memorial's motion to quash the subpoenas for limited discovery and found that plaintiff's counsel's withdrawal constituted unusual or unanticipated circumstances justifying limited discovery. That determination is distinguishable from the issues on this motion, which seeks vacatur of the note of issue and unlimited discovery.

§ 202.21(e)(providing, *inter alia*, that "[w]ithin 20 days after service of a note of issue and certificate of readiness, any party to the action may move to vacate the note of issue... if it appears that a material fact in the certificate of readiness is incorrect"). In any event, the court finds that plaintiff did not demonstrate that a material fact in the note of issue was incorrect since, as noted above, discovery was complete, except for the non-party deposition permitted by the court. See Bundhoo v. Wendy's, 152 AD3d 734, 737 (2d Dept 2017)(trial court properly denied that part of defendants' motion seeking to vacate the note of issue four months after it had been served, including on the ground that a material fact in the certificate of readiness was incorrect where the motion was untimely and defendants did not demonstrate that the material fact was incorrect).

Finally, that defendant conducted a non-party deposition with court permission after the note of issue was filed does not provide a ground for vacating the note of issue particularly as plaintiff has shown no resultant prejudice.

In view of the above, it is

ORDERED that plaintiff's motion to vacate the note of issue is denied; and it is further

ORDERED that the pre-trial conference in this action shall be held on August 30, 2018 at 11:00 am in Part 11, room 351, 60 Centre Street, New York, NY.

Dated: June 27, 2018

J.S.C.

HON. JOAN A. MADDEN
J.S.C.

Check One: [ ] FINAL DISPOSITION [x] NON-FINAL DISPOSITION