

Lanza v Delbalso

2018 NY Slip Op 33581(U)

June 19, 2018

Supreme Court, Nassau County

Docket Number: 7882/14

Judge: Antonio I. Brandveen

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ORIGINAL

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

JASON LANZA, an infant by his f/n/g,
WILFREDO LANZA and WILFREDO LANZA,
Individually,

TRIAL / IAS PART 31
NASSAU COUNTY

Index No. 7882/14

Motion Sequence No. 008, 009

Plaintiffs,

- against -

EDWARD DELBALSO, PETER TRIFOLI and
SUSAN TRIFOLI,

Defendants.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1, 2</u>
Answering Affidavits	<u>3, 4</u>
Replying Affidavits	<u>5</u>
Briefs: Plaintiff's / Petitioner's	<u> </u>
Defendant's / Respondent's	<u> </u>

The plaintiffs commenced this action on August 6, 2014, and Peter Trifoli, Susan Trifoli and Edward Delbalso subsequently served answers. The parties' depositions were subsequently held, and deposition transcripts were exchanged among the parties. Physicians performed medical examinations in the summer of 2015 notwithstanding a subsequent discovery dispute among the parties. This Court held a compliance conference on December 20, 2017, where the parties indicated discovery remained

outstanding. The Court ordered all outstanding discovery to be completed within 30 days, but despite that directive the infant plaintiff failed to appear for a scheduled neurological independent medical examination on February 8, 2018. The plaintiff's attorney subsequently filed the note of issue and certificate of readiness.

The defendants, Peter Trifoli and Susan Trifoli move (Sequence No. 008) for an order pursuant to 22 NYCRR § 202.21(3) vacating the note of issue and certificate of readiness, and striking the case from the trial calendar. Peter Trifoli and Susan Trifoli also move for an order pursuant to CPLR 3124 and 3126(2) directing the plaintiffs to comply with all outstanding discovery demands, or in the alternative precluding the plaintiffs from offering any evidence upon the trial of this personal injury action as to any subject on which outstanding discovery has not been completed. Peter Trifoli and Susan Trifoli further move for an order pursuant to CPLR 3212(a) extending their time to move for summary judgment until 90 days from the date of completion of all outstanding discovery and for such other and further relief as this Court deems just and proper.

The defendant, Edward Delbalso moves (Sequence No. 009) for an order pursuant to 22 NYCRR § 202.21(3) vacating the note of issue and certificate of readiness, and removing this matter from the trial calendar. Edward Delbalso asserts all discovery now known to be necessary has not been completed. Edward Delbalso also moves for an order pursuant to CPLR 3212(a) extending their time to move for summary judgment until 90 days from the date of completion of all outstanding discovery and for such other and

further relief as this Court deems just and proper.

The plaintiffs oppose both motions. The plaintiffs aver, even where a certificate of readiness contains a material fact that is incorrect or fails to comply with the requirements of 22 NYCRR § 202.21(3), it is not a requirement to vacate the note of issue. The plaintiffs aver, despite incomplete discovery, there has been sufficient or ample time for the defendants to complete disclosure. The plaintiffs assert they provided authorizations for medical records, medical records and information regarding the plaintiff infant's babysitter as requested by Peter Trifoli and Susan Trifoli. The plaintiffs contend Peter Trifoli and Susan Trifoli' motion is moot.

Peter Trifoli and Susan Trifoli reply to the plaintiffs' opposition. Peter Trifoli and Susan Trifoli point out the plaintiffs still have not complied with the defense post deposition demand dated November 1, 2017, for the contents of an archived file maintained by Rubia Rivera, the infant plaintiff's mother despite the plaintiffs' response dated October 15, 2017. Peter Trifoli and Susan Trifoli note the plaintiffs' attorney never objected to that defense discovery demand. Peter Trifoli and Susan Trifoli indicate, in the alternative, should the Court not vacate the note of issue, the plaintiffs should be directed to exchange the archived file maintained by Rubia Rivera, the infant plaintiff's mother within seven days of the service of the order resulting from this motion. Peter Trifoli and Susan Trifoli add, that should the plaintiffs fail to timely provide the archived file maintained by Rubia Rivera, the infant plaintiff's mother, additional sanctions are

warranted, such as dismissal of the action or preclusion. Peter Trifoli and Susan Trifoli comment that the plaintiffs did not oppose that branch of the defense motion which sought an extension of the summary judgment deadline, and observe the plaintiffs' discovery response dated March 12, 2018, contains an authorization for Julia McBride, a medical provider who was not previously identified by the plaintiffs.

The plaintiffs assert the Court should deny the motion by Edward Delbalso. The plaintiffs argue the note of issue should not be vacated due to the infant plaintiff's neurological independent medical examination. The plaintiffs insist the infant plaintiff is more than ready, willing and able to attend a neurological independent medical examination once the defendant or defendants schedule it.

The Court determines Peter Trifoli, Susan Trifoli and Edward Delbalso do not satisfy the burden for an order vacating the note of issue and the certificate of readiness, and striking this action from the Trial Calendar (22 NYCRR § 202.21; *see Ronel-Bennett, Inc. v. Consol. Edison Co. of New York*, 149 A.D.2d 678, 540 N.Y.S.2d 701 [2d Dept. 1989]). However, the Court determines Peter Trifoli, Susan Trifoli and Edward Delbalso satisfy the burden for a conditional order permitting Peter Trifoli, Susan Trifoli and Edward Delbalso to obtain discovery post filing of the note of issue, and directing the plaintiffs to respond to all of the demands by Peter Trifoli, Susan Trifoli and Edward Delbalso for discovery by a date certain with the failure to comply which would result in a self-executing order of preclusion (CPLR 3124 and 3126[2]). Peter Trifoli,

Susan Trifoli and Edward Delbalso provide a satisfactory showing, under these circumstances, to extend additional time within which to complete discovery and file motions for summary judgment (*see Naritssi v. Hussain*, 88 A.D.3d 860, 931 N.Y.S.2d 514 [2d Dept. 2011]). In opposition, the plaintiffs fail to show complete compliance with the defense discovery demands and court orders, or provide a reasonable excuse or an explanation for the defaults (*see Encarnacion v. Monier*, 81 A.D.3d 875, 917 N.Y.S.2d 875 [2d Dept. 2011]). Moreover, the plaintiffs do not show any opposition to the defendants' requests for additional time within which to complete discovery and file motions for summary judgment.

ORDERED that the branch of the motion by Peter Trifoli and Susan Trifoli (Sequence No. 008) is DENIED to vacate the note of issue and the certificate of readiness, and strike this action from the Trial Calendar, and it is also,

ORDERED that the branch of the motion by Edward Delbalso (Sequence No. 009) is DENIED to vacate the note of issue and the certificate of readiness, and strike this action from the Trial Calendar, and it is also,

ORDERED that the branch of the motion by Peter Trifoli and Susan Trifoli (Sequence No. 008) is GRANTED directing the plaintiffs to comply with all court orders, and to respond to the defendants' demands, and it is also,

ORDERED that the branch of the motion by Edward Delbalso (Sequence No. 009) is GRANTED directing the plaintiffs to comply with all court orders, and to respond to

[* 6]
the defendant's demands, and it is also,

ORDERED that the branch of the motion by Peter Trifoli and Susan Trifoli (Sequence No. 008) is **GRANTED** to preclude the plaintiffs from offering any evidence at the trial of this action as to any subject on which discovery has not been provided to the Peter Trifoli and Susan Trifoli unless the plaintiffs fully comply with the discovery demands the court orders within seven (7) days after service of a copy of this order with notice of entry by the attorney for Peter Trifoli and Susan Trifoli, and it is also,

ORDERED that the branch of the motion by Edward Delbalso (Sequence No. 009) is **GRANTED** to preclude the plaintiffs from offering any evidence at the trial of this action as to any subject on which discovery has not been provided to Edward Delbalso unless the plaintiffs fully comply with the discovery demands and court orders within seven (7) days after service of a copy of this order with notice of entry by the attorney for Edward Delbalso, and it is also,

ORDERED that the branch of the motion by Peter Trifoli and Susan Trifoli is **GRANTED** to extend Peter Trifoli and Susan Trifoli's time to move for summary judgment until 30 days from the date of completion of all outstanding discovery, and it is further,

ORDERED that the branch of the motion by Edward Delbalso (Sequence No. 009) is **GRANTED** to extend Edward Delbalso's time to move for summary judgment until 30 days from the date of completion of all outstanding discovery.

This decision will constitute the decision and order of the Court. All applications not specifically addressed are denied.

So ordered.

Dated: **June 19, 2018**

ENTER:



J. S. C.

NON FINAL DISPOSITION

ENTERED

JUN 21 2018

NASSAU COUNTY
COUNTY CLERK'S OFFICE