

<b>Cioffi v S.M. Foods, Inc.</b>
2018 NY Slip Op 33661(U)
October 15, 2018
Supreme Court, Westchester County
Docket Number: 55391/2011
Judge: Joan B. Lefkowitz
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER - COMPLIANCE PART

-----X  
FREDERICK M. CIOFFI and ELISABETTA CIOFFI,

Plaintiffs,

-against-

S.M. FOODS, INC., GFI BOSTON, LLC,  
ATLANTA FOODS INTERNATIONAL,  
RUSSELL McCALL'S INC., RUSSELL McCALL'S INC. d/b/a  
SHEILA MARIE FOODS, SHEILA MARIE IMPORTS,  
DOUG JAY, RYDER TRUCK RENTAL, INC.,  
PLM TRAILER LEASING and DANIEL E. BURKE,

Defendants.

-----X  
S.M. FOODS, INC., GFI BOSTON, LLC, PLM TRAILER  
LEASING and DANIEL BURKE,

Third-Party Plaintiffs,

-against-

VILLAGE OF TUCKAHOE and VINCENT PINTO,

Third-Party Defendants.

-----X  
RUSSELL McCALL'S INC. d/b/a/ ATLANTA FOODS  
INTERNATIONAL,

Second Third-Party Plaintiff,

-against-

VILLAGE OF TUCKAHOE and VINCENT PINTO,

Second Third-Party Defendants.

-----X  
LEFKOWITZ, J.

**DECISION & ORDER**

**Index No. 55391/2011**  
**Return Date: Oct. 15, 2018**  
**Seq. No. 52**

The following papers were read on plaintiffs' motion for an order determining that all

other parties to this action are not entitled to any additional discovery of injuries incurred by plaintiff Frederick M. Cioffi (hereinafter “Mr. Cioffi”), but in the event this court finds that discovery is warranted, an order vacating the note of issue, and for such other and further relief as this court deems just and proper.

- Order to Show Cause dated September 11, 2018; Affirmation in Support; Exhibits A-O; 02-03; corrected B
- Village Defendants’ Affirmation in Opposition; Exhibit A-C
- Atlanta Foods Defendants’ Affirmation in Opposition; Exhibit A
- SM Foods Defendants’ Amended Affirmation in Opposition; Exhibit A

Upon the foregoing papers and proceedings held on October 15, 2018, this motion is determined as follows:

On September 21, 2015, a note of issue was filed in this matter by plaintiffs pursuant to this court’s directive. At that time they asserted that they were doing so under duress. By decision and order dated October 21, 2016, the Appellate Division, Second Judicial Department (hereinafter “the Appellate Division”), granted those respective branches of a motion and a cross motion seeking to stay all proceedings in this action only to the extent that the trial in this action was stayed pending the hearing and determination of certain appeals and cross appeals. Those determinations are still pending.

By letter dated June 28, 2016, plaintiffs’ counsel advised all other counsel in this matter that knee replacement surgery was scheduled for Mr. Cioffi in late September or early October, 2016, and two to three months later, it was expected that Mr. Cioffi would undergo a multilevel spinal fusion. On August 30, 2017, plaintiff Frederick Cioffi underwent knee replacement surgery.

Pursuant to cover letters dated October 3, 2017, and November 3, 2017, plaintiffs’ counsel provided various authorizations relating to the knee replacement procedure. By notice dated July 16, 2018, plaintiffs’ counsel advised all other counsel that Mr. Cioffi was available for physical examination and required other counsel to submit names of physicians who would conduct the examination within five days of their receipt of this notice.

By letter dated July 19, 2018, counsel for third-party defendants/second third-party defendants, Village of Tuckahoe and Vincent Pinto (hereinafter “the Village defendants”) advised that further discovery was stayed due to the multiple appeals pending but reserved the right to a further examination should this matter proceed back on this court’s calendar. Counsel further advised that the Village defendants had not received updated medicals and authorizations for Mr. Cioffi’s continuing care or further particularizations as to his injuries and damages.

By letter dated July 23, 2018, plaintiffs’ counsel advised this court that he had provided records, authorizations, and a notice of availability for a further physical examination, to all other parties, pertaining to Mr. Cioffi’s knee replacement surgery. Plaintiffs’ counsel contended that counsel for the Village defendants had improperly put off their examination. He asked this court to direct any party desiring to physically examine Mr. Cioffi to do so within 60 days, or have that

right deemed waived.

On or about July 27, 2018, plaintiffs supplemented their bill of particulars adding the knee replacement surgery and other ongoing normal treatment of his injuries.

Presently plaintiffs move for an order determining that the other parties have waived their right to conduct discovery regarding Mr. Cioffi's knee replacement surgery and note that they have provided updated authorizations and records on an ongoing basis. Plaintiffs assert that all parties in this case have known for years that Mr. Cioffi would undergo a knee replacement. Plaintiffs argue that no other party complied with CPLR 3121 in conducting an examination, in requesting discovery, or in seeking a deposition.

Plaintiffs argue that the other parties are not entitled to any additional physical examination. They note that Mr. Cioffi previously had been examined, and the knee replacement surgery was a natural sequelae of his prior injuries and was articulated as being necessary as early as 2012. They argue that nonetheless, in the interest of comity and good faith, they permitted a further examination of Mr. Cioffi and all other parties failed to act.

Plaintiffs argue that counsel for the Village defendants improperly advised this court that the proceedings in this case were stayed by the Appellate Division. Plaintiffs argue that the Appellate Division only stayed the trial of this action during the pendency of the appeals. Plaintiffs request that, in the event this court determines that defendants have not waived their right to conduct discovery, it vacate the note of issue to allow discovery. Plaintiffs argue that should additional discovery be directed, it should be limited to an additional medical examination and no further deposition should be required of Mr. Cioffi who has been deposed four to five times already on medical issues alone.

The Village defendants oppose this motion. They assert that plaintiffs were improperly offering discovery when the note of issue had been filed. The Village defendants note that plaintiffs earlier had advised that Mr. Cioffi was contemplating back surgery so they were waiting for all surgeries to be completed before conducting another physical examination. They assert that it was as of August 17, 2018, at the conference held on that day, that plaintiffs advised that no further surgery was anticipated. They also assert that at this conference plaintiffs insisted that discovery go forward within a couple of weeks and did not take the position at that time that discovery was waived. The Village defendants suggest that after the appeals are decided, whatever parties are remaining in the case can expeditiously work to coordinate a follow up physical examination or deposition based upon Mr. Cioffi's evolving medicals. They suggest that in the meanwhile there be an exchange of necessary authorizations.

Defendants/second third-party plaintiffs, Atlanta Foods International, Russell McCall's, Inc., and Doug Jay<sup>1</sup> (hereinafter "the Atlanta Foods defendants") also oppose this motion. They contend that there has been no waiver of the right to further discovery. They assert that at the conference held on August 17, 2018, plaintiffs' counsel initially agreed to provide further discovery but changed his position when the parties were unable to agree to his proposed

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<sup>1</sup>Doug Jay is a named defendant only.

truncated discovery schedule. They also contend that further discovery is necessary particularly in light of Mr. Cioffi’s most recent surgery but that it can be completed while this case remains on the trial calendar. Their counsel asserts that it was recently substituted as counsel in this matter and any authorizations provided to prior counsel cannot be processed by their office.

Defendants/third-party plaintiffs, S.M. Foods, Inc., GFI Boston, L.L.C., PLM Trailer Leasing, Daniel Burke, and Ryder Truck Rental, Inc.<sup>2</sup> (hereinafter “the SM Foods defendants”) also oppose this motion. They note that although plaintiffs initially advised them in 2016 that Mr. Cioffi was intending to have surgeries, no surgery occurred until 2017 and in fact, contrary to plaintiffs’ earlier indications, only one surgery occurred, not two. The SM Foods defendants further note that plaintiffs waited nearly a year after the surgery was conducted before serving a supplemental bill of particulars. The SM Foods defendants note that at the conference on August 17, 2018, plaintiffs’ counsel agreed to provide additional discovery only to reverse his position when all counsel could not agree to a timetable for the physical examination and a deposition satisfactory to plaintiffs’ counsel.

The SM Foods defendants assert that plaintiffs served what is effectively an amended bill of particulars alleging a new injury without leave of court. They argue that the supplemental bill of particulars should be considered a nullity. They argue that, in any event, insofar as this supplemental bill of particulars, alleging the knee replacement surgery, was served on August 22, 2018, there could be no waiver of discovery regarding that surgery before that date. They argue that should this court vacate the note of issue it should do so only to the extent of permitting additional discovery relating to the allegations in the supplemental bill of particulars.

As a preliminary matter this court notes that as a result of the Appellate Division decision and order dated October 21, 2016, only the trial in this action was stayed pending the hearing and determination of certain appeals and cross appeals which determinations are still pending. That is not a bar here to vacating the note of issue if proper.

Upon a careful review of the record on this motion and in consideration of the parties’ arguments, it cannot be said that any party here waived its right to further discovery regarding Mr. Cioffi’s knee replacement surgery. The parties opposing this motion convincingly argue: (1) that based on plaintiffs’ representations they were waiting for all surgeries to be completed before pursuing their rights to any further discovery and that it wasn’t clear until August 17, 2018, that no further surgery was anticipated; and/or (2) that despite plaintiffs’ offer to provide further discovery, further discovery was improper while a note of issue was in place.

The note of issue states that discovery proceedings now known to be necessary were completed. “The purpose of a note of issue and certificate of readiness is to assure that cases which appear on the court’s trial calendar are, in fact, ready for trial” (*Tirado v Miller*, 75 AD3d 153 [2d Dept 2010]). Once the note of issue has been filed and discovery presumably completed, the applicable standards for allowing additional discovery and vacating the note of issue are governed by the Uniform Rules for Trial Courts [22 NYCRR] § 202.21(d)-(e). Pursuant to § 202.21(d), “[w]here unusual or unanticipated circumstances develop subsequent to the filing of

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<sup>2</sup>Ryder Truck Rental Inc., is a named defendant only.

the note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice, the court ... may grant permission to conduct such necessary proceedings" (see *Portilla v Law Offices of Arcia & Flanagan*, 125 AD3d 956 [2d Dept 2015]). Section 202.21 (e) provides that if more than 20 days has elapsed since the filing of the note of issue, good cause must be shown to warrant an order vacating the note of issue.

In this matter, good cause has been shown warranting an order vacating the note of issue. Plaintiffs disclosed to the other parties that Mr. Cioffi had knee replacement surgery on August 30, 2017, almost two years after the note of issue was filed. In order to prevent substantial prejudice to the parties, the note of issue shall be vacated and the certificate of readiness shall be stricken in order that additional discovery may be conducted pertaining to Mr. Cioffi's knee replacement surgery on August 30, 2017.

All other arguments raised and evidence submitted by the parties to this cross motion have been considered by this court notwithstanding the specific absence of reference thereto.

Accordingly, it is:

ORDERED that the branch of plaintiffs' motion seeking an order vacating the note of issue and striking the certificate of readiness is granted for the limited purpose of permitting further discovery only pertaining to the knee replacement surgery conducted on plaintiff Frederick M. Cioffi, on August 30, 2017; and it is further

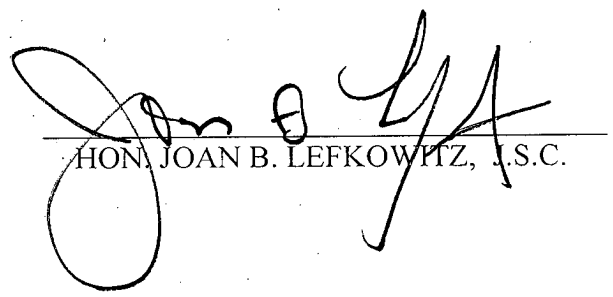
ORDERED that all other branches of plaintiffs' motion are denied; and it is further

ORDERED that all parties are directed to appear in the Compliance Conference Part on October 25, 2018, at 9:30 a.m. to schedule further discovery that is necessary relating solely to the surgery performed on August 30, 2017; and it is further,

ORDERED that plaintiffs are directed to serve all parties in this matter with a copy of this order with notice of entry within five (5) days of entry.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York  
October 15, 2018

  
HON. JOAN B. LEFKOWITZ, J.S.C.