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

PRESENT: MANUEL J. MENDEZ *Justice* **PART** 13

IN RE: NEW YORK CITY ASBESTOS LITIGATION
MICHAEL ROSEN,

Plaintiff(s),

- against -

BALTIMORE AIRCOIL COMPANY, INC., *et al.*,

Defendants.

INDEX NO. 190392/2018

MOTION DATE 7/31/2019

MOTION SEQ. NO. 006

MOTION CAL. NO. ____

The following papers, numbered 1 to 6 were read on this motion to vacate the NOI by VWR International, Inc.:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4-5
Replying Affidavits	6

Cross-Motion: Yes X No

FOR THE FOLLOWING REASON(S):

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Upon a reading of the foregoing cited papers, it is Ordered that defendant VWR International, Inc.'s (hereinafter, "VWR") motion for an Order vacating the Note of Issue pursuant to NYCRR § 202.21(e), is denied.

This action was commenced by the filing of a Summons and Complaint on October 15, 2018. Plaintiff, Michael Rosen alleges that he developed mesothelioma due to asbestos exposure from, among other things, his work with asbestos-containing laboratory equipment while training to become a pathologist. Mr. Rosen was deposed over the course of three days between December 4-6, 2018 (see Aff. in Opp., Exhibit A, excerpts). Prior counsel for VWR appeared at all three days of the depositions, and conducted cross-examination, comprising 62 transcript pages (Aff. in Opp., Exh. A at 4, 153, 335-97, 404). Therein, Mr. Rosen identified VWR as a source of asbestos-containing lab equipment he used and was exposed to at various universities and laboratories (Aff. in Opp., Exh. A at 39, 44, 47, 49, 56, 59-60, 103, 107, 169-71, 182, 206-16, 234-35, 335-97, 472-73). He specifically stated that VWR and Fisher Scientific were the two brands of asbestos-containing gloves and pads he used at the Medical College of Virginia when he was studying for his Ph.D. in clinical biochemistry between 1974-1978 (Aff. in Opp., Exh. A at 53, 56-60). He further testified that these brands were his only sources of asbestos exposure at the Medical College of Virginia (Aff. in Opp., Exh. A at 60).

In approximately April 2019, defendant Fisher Scientific identified a fact witness, Doris Lipscomb, related solely to Mr. Rosen's exposure at the Medical College of Virginia, and provided an affidavit which, for the first time, identified Baxter (i.e., Scientific Products) as a general supplier to the Medical College of Virginia (see Aff. in Opp., Exhibit B). VWR was also identified therein (Id.), which conforms to Mr. Rosen's testimony.

On May 6, 2019, VWR changed counsel and a notice was filed to NYSCEF (NYSCEF Doc. #91). Plaintiff filed a Notice of Issue on May 23, 2019 (see Aff. in Opp., Exhibit C). Notably, since Ms. Lipscomb was a defense fact witness, on May 31, 2019, plaintiff also noticed her deposition for June 14, 2019, to be conducted at her home in Powhatan, Virginia, and the Notice was amended on June 7, 2019 (*see* Aff. in Opp., Exhs. D & E, respectively). VWR objected to this deposition, claiming that its new counsel did not have proper notice of it. The Special Master held that, under the totality of the circumstances (including the advanced age of the 95-year-old witness) the deposition should proceed, and if VWR had any issue as to prejudice, it could advise thereafter (Aff in Opp., Exhibit F).

VWR noticed its intent to appeal the recommendation under the CMO (*id.*). On June 11, 2019, VWR filed its appeal to this Court and sought a temporary restraining order staying the deposition pending the appeal (see Aff. in Opp., Exhibit G, Mot. Seq. #004). After oral argument, this Court denied the TRO and issued a decision: (1) the deposition would proceed on June 14, 2019; (2) VWR and its co-defendants should cross-examine the witness; and (3) if VWR, after an investigation, determines that it needs to re-depose the witness, it would have until June 28, 2019 to do so (Aff. in Opp., Exhibit H).

At her deposition, Ms. Lipscomb testified that between 1975 and 1991 she worked in the Purchasing Department of Virginia Commonwealth University (VCU), of which the Medical College of Virginia is a part (Aff. in Opp., Exhibit I at 8-9, 16). She stated that the Medical College was under contract to purchase lab equipment from Fisher Scientific, Scientific Products [i.e., Baxter], and VWR (Aff in Opp., Exh I at 10). She testified that she ordered lab equipment generally for "all the labs in the academic division," and could not say what products were purchased for any specific biochemistry lab (Aff in Opp., Exh I at 26, 30-31).

VWR cross-examined Ms. Lipscomb (Aff. in Opp., Exh I at 15-21) but it has, thus far, made no request to re-depose her. On June 25, 2019, plaintiffs agreed to dismiss Baxter in an Unopposed Summary Judgment Motion because Ms. Lipscomb's testimony was only general in nature, addressed to the Medical College as a whole, and Mr. Rosen did not identify Baxter in his specific lab (Aff in Opp., Exhibit J). Fisher, however, objected to the dismissal and Baxter responded (see Aff in Opp., Exhibits K & L). The Special Master indicated that a hearing would be held as to whether Baxter should be dismissed via a USJM, but that this case would proceed to trial (Aff. in Opp., Exhibit M).

Defendant now moves to vacate the Note of Issue, arguing that substantial discovery remains to be done in this case. More specifically, defendant argues that it needs more time to investigate Ms. Lipscomb's attestation to the purported existence of a contract between VWR and the Medical College of Virginia (Aff. in Opp., Exh I at 10). Defendant further contends that there is an ongoing discovery dispute between co-defendants Baxter and Fisher Scientific in the wake of Ms. Lipscomb's deposition and that, therefore, this case is not trial ready.

Plaintiff opposes the motion, claiming that there is no basis to vacate the Note of Issue. Plaintiff maintains that the standard for vacating a note of issue is not met by the arguments and evidence defendant puts forth. For instance,

plaintiff argues that nothing unusual or unanticipated arose during Ms. Lipscomb's deposition. Plaintiff further claims that VWR's vague contention that there is unspecified outstanding discovery remaining to be done does not satisfy the standard for vacating the Note of Issue. Lastly, plaintiff contends that to the extent VWR must perform further discovery, it has plenty of time to do so because the case currently has no trial date and, based on the court's current trial schedule, it will not receive one for many months.

"Where a party timely moves to vacate a note of issue (within twenty (20) days after service of a note of issue and certificate of readiness), 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 AD 3d 389, 390, 815 NYS 2d 30 [1st Dept 2006]; 22 NYCRR § 202.21[e]). 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 (*Ortiz v Arias*, 285 AD 2d 390, 727 NYS 2d 879 [1st Dept 2001]). 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 (*Schroeder v IESI N.Y. Corp.*, 24 AD3d 180, 805 NYS 2d 79 [1st Dept 2005]; 22 NYCRR 202.21[d]).

Here, VWR has not properly shown why any of the discovery which may remain is extensive enough to merit vacating the Note of Issue (*see Ortiz v Arias, supra*). Rather, VWR simply argues that more time is needed to complete discovery before allowing the case to go forward without elaborating on how much time would be needed for it to address its remaining discovery concerns (*see e.g.* VWR's motion papers). Thus, VWR fails to show that any discovery that remains to be completed is "extensive" in nature (*see Ortiz v Arias, supra*). Similarly, VWR fails to elaborate on why circumstances might be such that post-note of issue discovery would be warranted. This is to say that VWR simply does not show how "unusual or unanticipated" circumstances have arisen or how "substantial prejudice" would result if post-note of issue discovery were not ordered (*see Schroeder v IESI N.Y. Corp., supra*).

"[T]he NYCAL Coordinating Justice has the authority under Uniform Rules for Trial Courts (22 NYCRR) §202.69 to issue a CMO or modify an existing CMO, after consultation with counsel, that sets forth procedural protocols for the NYCAL that do not strictly conform with the CPLR so long as those protocols do not deprive a party of its right to due process" (Matter of N.Y.C. Asbestos Litig., 2018 NY Slip Op 02020, ¶ 1, 159 AD 3d 576 (App. Div.) "Due process requires that a defendant be provided with an opportunity to conduct discovery and establish a defense with respect to this" (*Heller v Louis Provenzano, Inc.*, 303 AD 2d 20, 23, 756 NYS 2d 26 [1st Dept 2003]). The NYCAL CMO states "[w]here necessary, discovery shall continue after the filing of a note of issue pursuant to the Uniform Rules for the New York State Trial Courts §202.21(d) upon directive of the Court or the Special Master. Except as set forth in Section XI.D below, or upon consent of the parties, absent extraordinary circumstances no further discovery shall be allowed ten days before a firm date to select a jury in a trial-ready case." (NYCAL

CMO § IX[O]). The CMO, designed to eliminate transaction costs, allows post-note of issue discovery as it comports with 22 NYCRR § 202.21(d) (Matter of N.Y.C. Asbestos Litig., 2014 NY Slip Op 33525(U) (Sup. Ct.)).

Given how the CMO allows for discovery to continue at least until 10 days prior to the date of trial, there will be enough time for VWR to resolve any remaining discovery concerns before that time. Defendant's motion to vacate the Note of Issue is denied.

Accordingly, it is ORDERED, that defendant VWR International, Inc.'s motion for an Order vacating the Note of Issue pursuant to NYCRR § 202.21(e), is denied.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: July 31, 2019

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION x NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE