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

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IRIZARRY, VENUS,

Plaintiff,

-against-

THE CITY OF RYE, JOHN B. COUCH, ELIZABETH C. FORSTMANN, PEACHWAVE, "ABC CORPORATION" and "ABC PARTNERSHIP" (the aforesaid names being fictitious and their true names being unknown),

Defendants.

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DECISION & ORDER
Index No. 59923/2017
Motion Date: Nov. 25, 2019

Seq. No. 5

LEFKOWITZ, J.

The following papers were read on this motion (sequence number 5) by defendant the City of Rye for an order, pursuant to Uniform Rule 202.21(e) and 22 NYCRR 202.21 (d) of the Uniform Rules of the New York State Trial Court vacating the note of issue and certificate of readiness and striking the case from the trial calendar; and compelling plaintiff to appear for a physical examination; and staying a trial of this action until discovery is completed:

Order to Show Cause – Affirmation in Support - Exhibits A-F
Affirmation in Opposition - Affidavit in Opposition - Exhibits A-C

Upon the foregoing papers and upon the proceedings held on November 25, 2019, the motion is determined as follows:

This is an action for personal injuries stemming from an alleged slip and fall on snow and ice in the vicinity of Purchase Street in the City of Rye on February 10, 2017. Plaintiff commenced the action by filing a summons and verified complaint on June 30, 2017. On August 2, 2017, defendant Rosado Frozen Yogurt LLC i/s/h/a Peachwave filed an answer[1]. On October 27, 2017, defendant the City of Rye filed its answer.

After a preliminary conference and subsequent multiple compliance conferences, a trial readiness referee report dated November 7, 2018 was so-ordered and entered on November 8, 2018 (Lefkowitz, J.). On November 16, 2018, plaintiff filed a note of issue and certificate of readiness. Almost one year later, on October 7, 2019, the parties appeared and defendant the City of Rye requested a briefing schedule to file the instant motion. Plaintiff opposes the motion.

[1] Defendants John B. Couch and Elizabeth C. Forstmann have never appeared in this action and the claims against defendant Peachwave were dismissed by motion practice.

Contentions of the parties

Defendant the City of Rye argues that the note of issue and certificate of readiness should be vacated in order to compel plaintiff to appear for an examination before trial. Defendant submits that it never realized that plaintiff had not appeared for her examination before trial before the case was certified as trial ready. Defendant argues that "due to an unusual set of circumstances beyond the control of defense counsel", defense counsel was under the impression that plaintiff had appeared for her physical examination because the doctor that defendant designated never charged a "no-show" fee. Defendant further argues that it never agreed to waive the physical examination of plaintiff and that plaintiff's counsel has agreed to produce the plaintiff for an examination by Dr. Wiener, which was scheduled on November 6, 2019. Defendant further submits that plaintiff's counsel also believed that plaintiff had appeared for her physical examination when the parties appeared at their certification conference and advised the referee that all discovery herein had been completed.

Plaintiff opposes the motion. Plaintiff argues that both parties were under the impression that plaintiff had in fact appeared for her physical examination when they advised the Court at the certification conference that all discovery had been completed. Plaintiff further submits that the first time anyone became aware of the issue is when the parties appeared for an October 7, 2019 settlement conference, almost one year after the case had been certified. Additionally, plaintiff states that out of professional courtesy, plaintiff's counsel agreed to have plaintiff fly to New York, from where she now lives in Las Vegas, for one day to submit to a physical examination while this motion was pending. In plaintiff's opposition papers, plaintiff and her counsel recount the events of that day. Plaintiff states she flew to New York on the evening before November 6, 2019 and due to a cancelled appointment, her appointment was moved up from 2:00 p.m. to 11:30 a.m. Plaintiff had previously requested an earlier appointment due to a flight back to Las Vegas the same day. Plaintiff promptly appeared at the designated place and time, which was with Dr. Bradley D. Wiener, M.D. at 3626 East Tremont Avenue, Suite 202, Bronx, NY 10465[2]. When she arrived at this location, she was told that the actual appointment was in another office belonging to the same doctor. Plaintiff was then sent to another office located at 3226 East Tremont Avenue. When plaintiff arrived at this second location, she was told that this was also not the correct address. Plaintiff was then advised that, due to an error by defendant, she had been sent to the wrong location. She was then advised that her appointment was actually at 40 Exchange Place, 3rd Floor in Manhattan. Plaintiff states that she was upset by this error, but she nevertheless agreed to travel from the Bronx to downtown Manhattan to submit to the physical examination at the new location. She subsequently arrived at Exchange Place at 1:30 p.m., was asked to fill out paperwork and then waited an hour. She then went to the front desk to ask for assistance when she realized she was provided with incorrect paperwork to fill out. After waiting an hour and not being seen, she left for fear she would miss her flight back home to Las Vegas. Plaintiff stopped at her attorney's office to advise them of this situation and her attorney immediately contacted defense counsel's officer in order to try and resolve the situation. Plaintiff then agreed to return to the doctor's office as long as she was assured she would be seen right away in order not to miss her flight. Defense counsel attempted to get the doctor to see plaintiff, however the doctor refused.

[2] See copy of physical examination appointment letter filed to NYSCEF as Doc. No. 106.

Plaintiff contends that the physical examination should now be deemed waived as plaintiff appeared at three different locations, was treated rudely by the doctor's staff, waited an hour without being seen by the doctor, was provided the wrong paperwork and then the doctor refused to examine her if she returned to his office. Plaintiff's counsel further submits that plaintiff had her eleven month old baby with her while she was traveling to all three of these locations. Plaintiff further argues that if the court believes plaintiff should be required to return to New York to again appear for a physical examination, that defense counsel should bear the costs of her round-trip flight and that it should be arranged for a Friday as she cannot miss another day from work.

Analysis

Once the note of issue has been filed and discovery presumably completed, the applicable standard for allowing additional discovery is governed by 22 NYCRR 202.21[d][e]. If more than twenty days have elapsed since service of the note of issue and a moving party demonstrates unusual or unanticipated circumstances developed subsequent to the filing of the note of issue and certificate of readiness which require additional discovery to prevent substantial prejudice, the Court upon motion may grant permission to conduct further discovery (Uniform Rules for Trial Cts [22 NYCRR] §202.21[d]). It is incumbent on the parties to diligently pursue discovery and to comply with Court orders directing that discovery be completed. As noted by the Court of Appeals, "if the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity" (*see Kihl v Pfeffer*, 94 NY2d 118 [1999]; *see also Gibbs v St. Barnabas Hospital*, 16 NY3d 74 [2010]). Furthermore, the Court has broad discretion in the supervision of discovery and may exercise its discretion in denying an application to vacate a trial readiness order based upon its determination that, pursuant to numerous compliance conferences and defendants' failure to avail themselves of opportunities to seek this discovery, the additional discovery sought by defendants is waived (*Accent Collections, Inc. v Cappelli Enterprises*, 94 AD3d 1027 [2d Dept 2012]).

This court finds that defendant has waived its right to conduct plaintiff's physical examination by failing to complete one within the original deadlines set forth in the court's multiple discovery orders and then failing to move to vacate the note of issue within twenty days after the note of issue and certificate of readiness were served (see *Owen v Lester*, 79 AD3d 992 [2d Dept. 2010]; see also *Rodriguez v Sau Wo Lau*, 298 AD2d 376 [2d Dept. 2002]). Defendant admittedly did not verify whether plaintiff had in fact appeared for her physical examination before advising the Court at the certification conference that the physical examination had been completed. Defense counsel submits that he was instead relying on the receipt of a no-show fee from the doctor which would have alerted him that the physical examination had not been done. In addition, defendant did not realize this for almost an entire year after the note of issue was filed. Despite this, the parties agreed between themselves that plaintiff would travel to New York on November 6, 2019, while this motion was pending, to submit to a physical examination. As plaintiff and her counsel recount, she was sent to two Bronx locations and one Manhattan location, despite being provided a letter with a 3626 East Tremont Avenue, Bronx address and was ultimately not examined by the doctor. The Court finds that defendant's failure to complete plaintiff's physical examination by the court's deadlines before the filing of the note of issue, compounded by defendant's subsequent failure to ascertain for almost a year after the note of

issue was filed that a physical examination of plaintiff had never been done, can only be characterized as a waiver of the physical examination. As such, defendant has not demonstrated any unusual or unanticipated circumstances arising after the filing of the note of issue and certificate of readiness (see *Thevening v Jian Young Ye*, 297 AD2d 731 [2d Dept. 2002]). Accordingly, that branch of the motion seeking an order compelling plaintiff to appear for a physical examination is denied.

Based on the foregoing, defendant has made no compelling showing on this motion that the note of issue should be vacated. All discovery has been completed or has been waived and the matter is ready for trial.

All other arguments raised on this motion and evidence submitted by the parties in connection thereto, have been considered by this court, notwithstanding the specific absence of reference thereto.

Accordingly, it is

ORDERED that defendant the City of Rye's motion is denied in its entirety; and it is further

ORDERED that defendant the City of Rye shall serve a copy of this order with notice of entry on all parties within ten (10) days of entry; and it is further

ORDERED that the parties shall appear in the Settlement Conference Part, Room 1600, on January 7, 2020 at 9:15 a.m.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
November 25, 2019

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

cc:

All counsel by NYSCEF

Compliance Part Clerk
Settlement Part Clerk