Flynn v Dean
2019 NY Slip Op 34776(U)
February 8, 2019
Supreme Court, Nassau County
Docket Number: Index No. 600444/17
Judge: Jeffrey S. Brown
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

----------X	**TRIAL/IAS PART 12**
SHARON FLYNN,	
Plaintiffs,	**INDEX # 600444/17**
-against-	**Mot. Seq. 4**
	Mot. Date 8.30.18
ANGELINE DEAN,	**Submit Date 2.5.19**
Defendants.	
----------X	

The following papers were read on this motion: Papers Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed.....	79-86
Answering Affidavit, Exhibits Annexed.....	X
Reply Affidavit, Exhibits Annexed.....	63
Supplemental Submissions.....	92, 93

Defendant moves (1) pursuant to 22 NYCRR 202.21(e) to vacate the note of issue and certificate of readiness filed in this action on the grounds that the statement of readiness is incorrect, (2) pursuant to CPLR 3212(a) for an order extending defendants' time to move for summary judgment, and (3) pursuant to CPLR 3124 and 3126(2) directing the plaintiff to comply with outstanding discovery, including certain new authorizations and responses to notices for supplemental discovery and inspection dated January 22, 2018 and a preclusionary order for failure to comply.

This is a personal injury action arising from a motor vehicle accident that occurred in January of 2017. The case was certified on February 1, 2018 and an accompanying stipulation indicated that the plaintiff would hold off on filing the note of issue until outstanding discovery, including responses to the January 22, 2018 notice for discovery and inspection, had been provided. A note of issue and certificate of readiness were filed on August 10, 2018. The certificate of readiness indicated "7. [d]iscovery proceedings now known to be necessary [are] completed" and "8. [t]here are no outstanding requests for discovery." The matter is presently on the trial calendar for February 13, 2019.

By order dated August 24, 2018, this court denied defendants' prior motion to require plaintiff to pay a "no show" fee for failure to appear for a designated neurological examination, finding insufficient evidence that the plaintiff acted willfully. Other aspects of that motion had been resolved by stipulation of the parties.

Indeed, the parties entered into a stipulation dated July 12, 2018 whereby it was agreed that the plaintiff would provide authorizations for records relating to a post accident MRI and treatment by her breast specialist, plaintiff agreed to waive a claim of permanent injury to the breasts, plaintiff agreed to submit for in camera review her gynecological treatment records from the date of the accident to the date of the stipulation to ascertain relevant complaints of breast pain, injury, or treatment. Further, the plaintiff's time to file a note of issue was extended to August 10, 2018, subject to a further extension if necessary.

Plaintiff thereafter filed a note of issue and this motion to vacate followed. Defendant seeks the following items of discovery or, in the event that the plaintiff fails to comply, an order precluding the plaintiff from offering any evidence or testimony at the time trial in support of her liability and damages claims. Defendants point out that because this is a motor vehicle accident, the requested disclosure will be highly relevant to the question of whether plaintiff's injuries satisfy the Insurance Law threshold. In particular, defendant seeks:

A. New authorizations for:

(1) GEICO; and

(2) Stand UP MRI of Carle Place

B. Responses to defendant's supplemental notice for discovery and inspection dated January 22, 2018, specifically:

(1) Authorization for CVS Pharmacy with box 9a initialed;

(2) Authorization for Empire Government Insurance including Membership ID number;

(3) Authorization for plaintiff's gynecologist - per the July 12, 2018 stipulation plaintiff was to provide these records to the court for an in camera inspection;

(4) Authorization for Long Island Radiology;

(5) Authorization for the doctor seen in Garden City for prior neck and back problems;

(6) Authorization for the chiropractor seen in Franklin Square;

(7) Authorization for the MRI Facility where the prior MRI of the plaintiff's spine was taken; and

(8) Authorization for Karate Academy.

Where a party moves to vacate the note of issue within twenty days following service of the same, 22 NYCRR 202.21(e) provides that the court may grant vacatur upon a showing that the case is not ready for trial and a material fact in the certificate of readiness is incorrect (*see, Perla v. Wilson,* 287 AD2d 606 [2d Dept 2001]; *Audiovox Corp. v Benyamini*, 265 AD2d 135, [2d Dept 2000]; 22 NYCRR 202.21 [e]).

Fundamentally, "'[t]he Supreme Court has broad discretion in making determinations concerning matters of disclosure, including the nature and degree of the penalty to be imposed under CPLR 3126' (*Arpino v. F.J.F. & Sons Elec. Co., Inc.,* 102 A.D.3d 201, 209 [2012][citation omitted]). 'Before a court invokes the drastic remedy of striking a pleading, or even of precluding evidence, there must be a clear showing that the failure to comply with court-ordered discovery was willful and contumacious' (*Zakhidov v. Boulevard Tenants Corp.,* 96 A.D.3d 737, 739; *see Arpino v F.J.F. & Sons Elec. Co., Inc.,*102 A.D.3d at 210; *Commisso v. Orshan,* 85 A.D.3d 845)." (*Neenan v Quinton*, 110 AD3d 967 [2d Dept 2013]).

Following the filing of this motion on August 20, 2018, the court held several conferences in an attempt to resolve the outstanding issues before trial in this action. Defendant acknowledges that a number of items have been received and are no longer a subject of this motion. Nonetheless, although the parties, through counsel, have made efforts to negotiate the necessary items of discovery and to facilitate compliance, significant discovery still remains.

The court notes the defendant's request for a "HIPAA compliant authorization, including Membership Identification Number" for "records from Empire Government Insurance" is, as a starting point, quite broad. Nonetheless, plaintiff unequivocally testified that she had previous testing and treatment for a back injury some years ago but was unable to recall the prior treating physicians for related injuries. The court has not identified a formal objection to this request and, as a result, the request stands.

Accordingly, given the present posture of the case, the court has no choice but to vacate the note of issue and strike the certificate of readiness and to order the plaintiff to provide the following items of discovery:

(1) plaintiff shall obtain records from CVS pharmacy for the period from the date of the accident, January 3, 2017 to the present and submit the same to the court for in camera review;

(2) plaintiff shall obtain records from Empire Plan/United Healthcare for the period from January 1, 2006 to the present and submit the same to the court for in camera review. To the extent that records do not extend back to 2006, plaintiff shall provide defense counsel with the

relevant correspondence so indicating; and

(3) plaintiff shall obtain records from her gynecologist's office for the period from the date of the accident, January 3, 2017 to the present and submit the same for in camera review.

For these reasons, it is hereby

ORDERED, that the plaintiff's note of issue and certificate of readiness are vacated and this action is struck from the trial calendar; any motion for summary judgment shall be served 90 days after the filing of a valid note of issue in this action; and it is further

ORDERED, that the plaintiffs shall provide the limited discovery outlined above within 20 days of service of a copy of this order with notice of entry; and it is further

ORDERED, that the parties are to appear for a certification conference in Part 11 of this courthouse on **April 1, 2019 at 9:30 a.m.**

This constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
February 8, 2019

ENTER:

HON. JEFFREY S. BROWN
J.S.C.

ENTERED
FEB 20 2019
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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