

Pluta v L & L Holding Co., LLC
2020 NY Slip Op 31897(U)
June 17, 2020
Supreme Court, New York County
Docket Number: 156428/2018
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH **PART** IAS MOTION 14

Justice

-----X

JAMES PLUTA,

Plaintiff,

- V -

L & L HOLDING COMPANY, LLC, 425 PARK OWNER,
LLC, TISHMAN CONSTRUCTION CORPORATION

Defendant.

-----X

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20,
21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 42, 43, 44, 45, 46, 50
were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE.

The motion by defendants to strike the note of issue is granted.

Background

In this Labor Law case, defendants move to strike the note of issue and assert that various discovery was missing when plaintiff filed the note of issue, including plaintiff's appearance at IMEs, unlimited HIPAA-compliant authorizations, and a post-EBT demand.

In opposition, plaintiff emphasizes that there has been a tremendous amount of discovery already disclosed in this case and that plaintiff has appeared for three IMEs. Plaintiff attaches what it claims is a cover letter addressing defendants' concerns about outstanding discovery (NYSCEF Doc. No. 46).

In reply, defendants stress that when the note of issue was filed discovery was not complete, as evidenced by the fact that not all IMEs were completed. They insist that plaintiff

has still failed to provide authorizations for the Social Security Administration and Medicare (despite plaintiff testifying that he applied for social security benefits), HIPAA-compliant authorizations for Dr. White (concerning a 2003 car accident), authorizations for the IRS, Metal Trades Branch Pension Fund and his health insurance. Defendants also point out that because the IMEs were not done until after the current motion was filed, expert reports have not been written.

Discussion

The Court grants the motion. The fact is that plaintiff does not dispute that certain items are missing or that when it filed the note of issue not all of the IMEs and their accompanying reports were complete. Instead, plaintiff appears to claim that there has already been a lot of discovery exchanged and that satisfies its obligations.

Unfortunately, the record on this motion demonstrates that there are numerous items outstanding and the Court cannot overlook the fact that plaintiff essentially admitted that when he filed the note of issue, IMEs were not completed. In fact, plaintiff stated that he has appeared for three IMEs and “by the time this motion reaches your Honor’s desk, the final medical examination will be held” (NYSCEF Doc. No. 42). The note of issue filed by plaintiff on December 24, 2019 stated that all discovery had been completed and that no outstanding discovery requests remained (NYSCEF Doc. No. 15). Clearly, that was not true.

While a motion to strike a note of issue based on one or even two outstanding items might best be resolved by the parties without striking the note, the fact is that, here, defendants have identified many outstanding items and plaintiff does not offer sufficient opposition. It would be manifestly unfair to ignore these outstanding discovery requests and force defendants

to oppose plaintiff's pending motion for summary judgment (or make their own dispositive motion) under these circumstances. And pursuant to 22 NYCRR 202.21(e) the Court can vacate a note of issue if the "certificate of readiness is incorrect." There is no dispute that it was incorrect here. Plaintiff cannot ask for more discovery; defendants may.

Accordingly, it is hereby

ORDERED that the motion to vacate the note of issue is granted and the note of issue is vacated and the case is stricken from the trial calendar; and it is further

ORDERED that all further discovery in this matter shall be completed within 90 days from service of a copy of this order with notice of entry; and it is further

ORDERED that, within 15 days from the entry of this order, movant shall serve a copy of this order with notice of entry on all parties and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119), via e-filing ONLY, who is hereby directed to strike the case from the trial calendar and make all required notations thereof in the records of the court; and it is further

ORDERED that service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

Conference: September 15, 2020 at 10 a.m. The parties are encouraged to work together to resolve the outstanding discovery issues and they may request by e-filing a stipulation that they re-file the note of issue. They are directed to check the docket and part rules before the next

conference concerning whether the conference will be held virtually. The Court stresses that a new note of issue date will be picked at the next conference.



06/17/2020

DATE

CHECK ONE:

 X

CASE DISPOSED

 DENIED
 X

NON-FINAL DISPOSITION

 OTHER

APPLICATION:

GRANTED

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

 OTHER REFERENCE

ARLENE P. BLUTH, J.S.C.