

Acies Group, LLC v Kirschenbaum
2020 NY Slip Op 33202(U)
September 30, 2020
Supreme Court, New York County
Docket Number: 150142/2018
Judge: Robert R. Reed
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ROBERT R. REED PART 43

Justice

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ACIES GROUP, LLC,

Plaintiff,

- v -

STEVEN KIRSCHENBAUM, 320 WEST 115TH REALTY,
LLC, ALL BUILDING CONSTRUCTION,

Defendant.

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INDEX NO. 150142/2018
MOTION DATE 10/31/2020
MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97

were read on this motion for VACATE/STRIKE - NOTE OF ISSUE/JURY
DEMAND/FROM TRIAL CALENDAR.

Upon the foregoing documents, it is ordered that this motion to vacate the note of issue and certificate of readiness, and to impose costs and sanctions for the frivolous filing of the note of issue, is granted in part and denied in part.

Defendants argue that the note of issue should be vacated because there remains outstanding discovery. In a January 23, 2020 status conference, the parties agreed that there was outstanding discovery and further agreed to a schedule by which discovery would be produced to all parties. The parties were directed to file the note of issue by July 24, 2020. On July 21, 2020, plaintiff's current counsel was substituted into the action. Counsel for defendant All Building Construction affirms that, on July 23, 2020, he sent an email to plaintiff's new counsel detailing the outstanding discovery and making new counsel aware that plaintiff's response to the discovery demands was still required. On July 24, 2020, plaintiff filed the note of issue certifying that there was no outstanding discovery and that plaintiff was ready to proceed to trial. The moving papers further show that multiple attempts were made to contact plaintiff to persuade

plaintiff to withdraw the note of issue. Nothing in the papers either in support of or opposition to this motion identifies any response by plaintiff to such attempts at the informal resolution of this particular dispute.

A court may vacate a note of issue where it appears that a material fact set forth therein, i.e., the representation that discovery is complete, is incorrect (*see* 22 NYCRR 202.21(e); *Rivers v Bimbaum*, 102 AD3d 26 [2nd Dept 2012]; *Gomes v Valentine Realty LLC*, 32 AD3d 699 [1st Dept 2006]; *Herbert v Sivaco Wire Corp.*, 1 AD3d 144 [1st Dept 2003]). Further, CPLR 3101 provides that “[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.” “The words ‘material and necessary’ as used in CPLR 3101(a) are ‘to be interpreted liberally to require disclosure ... of any facts bearing on the controversy’ (*Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406)” (*Matter of Steam Pipe Explosion at 41st Street and Lexington Avenue*, 127 AD3d 554, 555).

Discovery is not complete here, as it is uncontested that there remains outstanding written discovery and that depositions have yet to be conducted. Plaintiff’s certification in its filing of the note of issue that discovery was complete, therefore, was materially incorrect. Plaintiff’s opposition argues no more than that the court’s order of January 23, 2020 directed that the note of issue be filed by July 24, 2020. Such a rote argument is unavailing. Plaintiff offers no explanation for why, given the belated substitution of counsel, it did not seek an extension of the time to file the note of issue -- whether by informal request, by stipulation or by motion. Simply ignoring its discovery obligation was not an option. It is noteworthy that, before the note of issue was filed, defendants attempted to contact plaintiff to discuss the outstanding discovery and that plaintiff failed to respond. In addition, it appears that attempts to contact plaintiff regarding outstanding discovery were made even after the note of issue was filed, and that those attempts

too were met with no response. Plaintiff should have known and was made aware that discovery was not complete. Thus, plaintiff's filing of the note of issue -- representing that all discovery was complete and that this case was trial ready -- was improper.

22 NYCRR 130.1-1 authorizes this court, in its discretion, to award "costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct." Frivolous conduct can be defined in any of three manners: the conduct is completely without legal merit; or is undertaken primarily to delay or prolong the litigation or to harass or maliciously injure another; or it asserts material factual statements that are false (*see Levy v. Carol Mgmt. Corp.*, 260 AD2d 27, 33; *see also* 22 NYCRR 130.1-1[c]). Plaintiff's filing of the note of issue representing trial readiness while being aware of outstanding discovery meets the definition of frivolous conduct as employed in 22 NYCRR 130.1-1(c). Defendants never should have been required to interpose this motion simply to get plaintiff to comply with its discovery demands -- demands plaintiff was fully aware were outstanding. However, plaintiff's discovery failures and the substitution of plaintiff's counsel happened during the current ongoing public health emergency. Given such circumstances, the court, exercising its discretion, declines to award defendants their attorneys' fees and costs associated with having to make this motion. Should further discovery delays arise, the court may, upon a proper motion, revisit this issue.

Accordingly, it is

ORDERED that defendants' 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 plaintiff is to comply with all outstanding written discovery obligations within 21 days and shall present witnesses with personal knowledge of the issues in dispute herein for deposition within 45 days, or face the striking of the complaint; and it is further

ORDERED that the portion of the motion seeking an award of attorneys' fees and costs associated with making this motion is denied; and it is further

ORDERED that, within 20 days from 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 Trial Support Office (60 Centre Street, Room 158M), 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

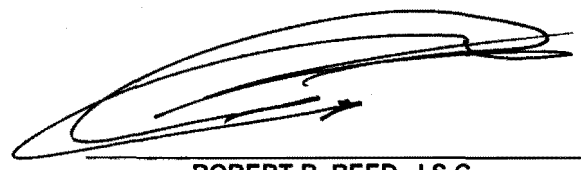
ORDERED that upon completion of discovery as hereinabove directed, plaintiff shall cause the action to be placed upon the trial calendar by the filing of a new note of issue and certificate of readiness (for which a fee shall be imposed), to which shall be attached a copy of this order [the plaintiff shall move to reinstate the note of issue as provided in Uniform Rule 202.21 (f)]; and it is further

ORDERED that such service upon the Clerk of the Trial Support 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/suptctmanh); and it is further

ORDERED that the new note of issue date is December 31, 2020; and it is further

ORDERED that counsel are directed to appear for a status conference to be held on November 18, 2020 at 10:30 a.m. via telephone.

This constitutes the Decision and Order of the court.



9/30/2020
DATE

ROBERT R. REED, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: