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| Saldana v Park Tysen Assoc., LLC |
| 2020 NY Slip Op 33983(U) |
| December 4, 2020 |
| Supreme Court, New York County |
| Docket Number: 158157/2017 |
| Judge: Frank P. Nervo |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART IV

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IVONNY KARINA SALDANA,

Plaintiff,

-against-

PARK TYSEN ASSOCIATES, LLC, STOP AND SHOP
II CORP., STOP & SHOP and PAUL BERGMAN

Defendants.
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DECISION AND ORDER

Index Number

158157/2017

Mot. Seq. 002

HON. FRANK P. NERVO, J.S.C.

Defendants seek an order striking the note of issue (NOI), compelling plaintiff to respond to their notice for “Discovery and Inspection” and “Notice to Produce Metadata,” compelling the deposition of non-party witness(es), extending various deadlines, and staying the trial of this matter. Plaintiff opposes contending that that all discovery is complete in that defendants waived their right to depose the non-party witness, and plaintiff has otherwise provided all discovery sought by defendants. Plaintiff, therefore, contends the motion is moot.

The instant motion violates the Court’s Part Rules which require applications to vacate a NOI be brought by order to show cause (Part 4 Rules Supreme Court – New York County Dedicated Trial Division, Justice Frank P. Nervo “*Note of Issue*.” A party may seek to vacate a prematurely filed note of issue only by order to show cause returnable in this Part, on notice to all counsel, within 20 days from the service of a copy of the note of issue, pursuant to 22 NYCRR 202.21[e]). As relevant to this motion, 22 NYCRR 202.21[e] provides:

Within 20 days after service of a note of issue and certificate of readiness, any party to the action or special proceeding may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect.

Notwithstanding, and in consideration of the impact of COVID-19, the Court will not deny the motion on this basis. The parties are, however, reminded of the Part Rules.

A party may not seek additional discovery after the note of issue has been filed, absent “special, unusual or extraordinary circumstances” (*Goldsmith v. Howmedica, Inc.*, 158 AD2d 335, 336 [1st Dept 1990]; *see also Grant v Wainer*, 179 AD2d 364 [1st Dept 1992]). Where a party has demonstrated a lack of diligence in seeking discovery, the court need not grant a request to vacate the note of issue (*Nikqi v. Dedona Contracting Corp.*, 117 AD3d 620 [1st Dept 2014]; *Colon v. Yen Ru Jin*, 45 AD3d 359 [1st Dept 2007]).

Movants contend that Plaintiff has not appeared for an independent medical examination (IME), as required. Plaintiff argues that an IME was held, and the parties are awaiting the report. Although plaintiff has not provided the date of the IME, movants do not refute or address this in their reply. Therefore, the claim is deemed abandoned (*see e.g. Krupnick v. NBC Universal, Inc.*, 37 Misc.3d 1219[a] [Sup Ct, NY County 2010] [Sherwood, J.]). Consequently, the Court will not vacate the NOI on this basis.

Movants further contend that the NOI should be vacated based upon plaintiff's failure to adequately respond to their demands seeking electronic copies of photos of the accident scene utilized at depositions. Plaintiff argues that her response is adequate, as she has provided physical copies of the photographs annexed to her response. Although the Court is cognizant of the importance of metadata in discovery (*Harry Weiss Inc., v. Moskowitz*, 106 AD3d 668 [1st Dept 2013]; *Tener v. Cremer*, 89 AD3d 75 [1st Dept 2011] *see generally Irwin v. Onondaga County Resource Recovery Agency*, 72 AD3d 314 [4th Dept 2010]), movants have not provided a basis for their demand of metadata, nor any authority in support of their claimed entitlement of same under these circumstances (*see generally* affirmation in support and affirmation in reply – NYSCEF Doc. Nos. 41 & 56). The Court will not compel disclosure of material in the absence of a basis for same.

Plaintiff's response to defendants' April 2020 demand, which seeks contact information for a non-party witness, is plainly deficient. Plaintiff's response states that this information is, "to be provided" (*see* NYSCEF Doc. No. 54). Plaintiff cannot now claim that defendants have waived the deposition of this nonparty witness when plaintiff has not provided defendants with the requisite information for defendants to schedule the non-party witness' deposition. Despite plaintiff's contention otherwise, outstanding discovery provides a basis for vacating a note of issue (*see e.g. Goldsmith v. Howmedica, Inc., supra; see also Kent Realty LLC v. Danica Group, LLC*, 102 AD3d 927 [2d Dept 2013] vacating note of issue due to outstanding deposition of non-party witness). The Court does not find "special, unusual or extraordinary circumstances" which warrant allowing post-note of issue discovery, in contravention of the Part Rules

(*id.*; see Part 4 Rules Supreme Court – New York County Dedicated Trial Division, Justice Frank P. Nervo).

Accordingly, it is

ORDERED that the motion is granted to the extent below, and otherwise denied; and it is further ¹

ORDERED that the note of issue filed on September 22, 2020 is vacated; and it is further

ORDERED that plaintiff shall provide the contact information sought in defendants' April 17, 2020 demand within 7 days of notice of entry of this decision and order; and it is further

ORDERED that defendants shall serve a subpoena, if any, for the non-party witness within 20 days of receipt of the witness' contact information from plaintiff; and it is further ²

ORDERED that non-party depositions shall be completed by February 15, 2020 and shall occur either in-person or via electronic means; and it is further

¹ This Decision and Order is without prejudice to any further application seeking to compel disclosure upon a particularized basis.

² This Decision and Order does not compel any non-party witness to appear for a deposition, as that is not before the Court at this time. Should any party seek to enforce a subpoena, they must do so upon further application.

ORDERED that post-deposition demands shall be served within 20 days of deposition and responses thereto shall be served within 20 days of receipt of demand; and it is further

ORDERED that defendants shall serve a copy of the IME report within 30 days of notice of entry of this decision and order; and it is further

ORDERED that the end date for all disclosure is April 2, 2021; and it is further

ORDERED that plaintiff shall file a note of issue by April 16, 2021; and it is further

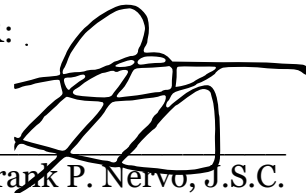
ORDERED that the failure to provide the witness' contact information, the IME report, or responses to post-deposition demands, if any, and as ordered herein, may result in sanctions, including but not limited to the striking of pleadings or preclusion of evidence, pursuant to CPLR § 3126, upon further application; and it is further

ORDERED that the failure to timely serve post-deposition demands shall result in waiver of same, absent Court order.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: December 4, 2020

ENTER: .



Hon. Frank P. Nervo, J.S.C.