

Scott v Leventhal

2021 NY Slip Op 32389(U)

October 29, 2021

Supreme Court, New York County

Docket Number: Index No. 656211/2017

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DEBRA JAMES

PART 59

Justice

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PATRICIA SCOTT, AS EXECUTRIX OF THE ESTATE OF
PATRICK FLEMING,

Plaintiff,

INDEX NO. 656211/2017MOTION DATE 10/20/2020MOTION SEQ. NO. 012 014

- v -

JASON LEVENTHAL and LEVENTHAL LAW GROUP, P.C.,

Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 012) 222, 223, 224, 225,
226, 227, 228

were read on this motion to/for

VACATE/STRIKE - NOTE OF ISSUE/JURYThe following e-filed documents, listed by NYSCEF document number (Motion 014) 290, 291, 292, 293,
294, 295, 296, 297, 298, 299, 300, 301, 302, 303

were read on this motion to/for

REARGUMENT/RECONSIDERATIONORDER

Upon the foregoing documents, it is

ORDERED that the motion of plaintiff for leave to reargue her motion for summary judgment and defendants' cross motion for summary judgment (motion sequence number 014) is denied; and it is further

ORDERED that the motion to vacate the note of issue (motion sequence number 012) pursuant to 22 NYCRR § 202.21(e) 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 seventy-five (75) days from service of a copy of this order with notice of entry; and it is further

ORDERED that on November 29, 2021, counsel are directed to post on NYSCEF a proposed Status Conference Order and proposed competing Status Conferences Orders setting forth the date that plaintiff shall produce (or has produced) to defendants a signed, before a notary public, copy of her examination before trial and post deposition documents, in the form of an affidavit of plaintiff, signed before a notary public; and it is further

ORDERED that, within fifteen (15) days from service of a copy of this order with notice of 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), 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, within twenty (20) days from completion of discovery as hereinabove directed, the 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 no fee shall be imposed), to which shall be attached a copy of this order; and it is further

ORDERED that such 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).

DECISION

Plaintiff does not disagree that she had not produced a copy of her deposition transcript, signed before a notary public at the time she filed her Note of Issue. Nor had she responded to defendants post deposition notice for the production of documents. Moreover, while clearly there would be no pediatric care records for plaintiff's adult son, plaintiff attorney's letter is otherwise non-responsive to defendants' notice for post deposition discovery. For example, his statement that certain documents demanded are irrelevant is inapposite, as irrelevancy is the standard for admissibility of evidence. Whether a document is "material and necessary to the resolution of the issues", a lower standard, governs the question of what evidence is discoverable. See Allen v Crowell-Collier Publishing Company, 21 NY2d 403, 405-406 (1968). Furthermore, as plaintiff's attorney has no personal knowledge of the facts of the underlying claims of negligence and assault against the City of New York, his statement is non-evidentiary. Therefore, in order to comply with defendants' post deposition discovery

demand, plaintiff's counsel shall submit an affidavit, signed by his client, that states her knowledge, if any, of which hotel and/or construction company employed her son and the names of medical providers who treated, and administered medication, if any, to her son, for the injuries she alleges he suffered as a result of the assault. Certainly, such records would be relevant to pain and suffering and diminution of plaintiff decedent's enjoyment of life, inter alia, portion of plaintiff's claim for damages.

As a material fact in the certificate of readiness was incorrect, the note of issue must be vacated. See Vargas v Villa Josefa Realty Corp. 28 AD3d 389 (1st Dept 2006).

Debra A. James
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<u>10/29/2021</u> DATE		<u>DEBRA JAMES, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE