

Frederick v City of New York
2022 NY Slip Op 33103(U)
September 13, 2022
Supreme Court, New York County
Docket Number: Index No. 157103/2019
Judge: Leslie A. Stroth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LESLIE A. STROTH PART **52**

Justice

-----X
MARLON J. FREDERICK, INDEX NO. 157103/2019
Plaintiff, MOTION DATE 07/06/2022
MOTION SEQ. NO. 004

- v -

THE CITY OF NEW YORK, POLICE OFFICER DAVIDSON
FLEARY, JOHN AND JANE DOES

**DECISION + ORDER ON
MOTION**

Defendant.
-----X

The following e-filed documents, listed by NYSCEF document number (Motion 004) 54, 55, 56, 57, 58, 59, 63, 64, 65, 66, 67, 68

were read on this motion to/for

VACATE/STRIKE - NOTE OF ISSUE/JURY
DEMAND/FROM TRIAL CALENDAR

Upon the foregoing papers, the motion by defendants the City of New York and Police Officer Davidson Fleary (the City) to vacate the Note of Issue and to compel discovery is granted, in part. In this action, plaintiff alleges that, while arresting him, officers of the New York Police Department (NYPD) caused injuries to his left wrist. The City moves pursuant to 22 NYCRR 202.21 (e) to vacate the Note of Issue (NOI) filed February 25, 2022, to compel plaintiff to appear for an independent medical examination (IME), and for a stay of the deadline to file the City's Motion for Summary Judgment during the pendency of the instant motion.

This is the City's second motion requesting such relief. On May 9, 2022 (Motion Seq. 002), the City's first motion was denied by this Court as procedurally defective, and the Court gave leave to re-file the motion if the parties were unable to resolve the issues by conference with the DCM Part. On May 26, 2022, the parties were present for a discovery conference, whereupon they were unable to agree to additional discovery. The instant motion ensued.

Under 22 NYCRR 202.21(e), the decision of whether to vacate a Note of Issue is left to the discretion of the trial court. Specifically, 22 NYCRR 202.21(e) states in relevant part:

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.

Alternatively, in the absence of prejudice, “[t]rial courts are authorized, as a matter of discretion, to permit post-note of issue discovery without vacating the note of issue.” *Cuprill v Citywide Towing and Auto Repair Services*, 149 AD3d 442, 443 (1st Dept 2017). Moreover, CPLR 2004 provides that a court may “extend the time fixed by any statute, rule or order for doing any act.” Additionally, pursuant to CPLR 2005, “the court shall not, as a matter of law, be precluded from exercising its discretion in the interests of justice to excuse delay or default resulting from law office failure.”

The City argues that plaintiff erroneously certified in the NOI that the City waived its right to conduct a medical examination of plaintiff. Although the City concedes that it did not timely designate an IME due to law office failure, it maintains that it did not intentionally waive its right to same. Instead, the City’s attorney affirms that it inadvertently failed to serve the notice for plaintiff’s IME, which it only discovered after plaintiff’s filing of the NOI. The City also details numerous good faith efforts to resolve this issue with plaintiff’s counsel. Notably, the City’s attorney affirms that he requested a stipulation to conduct an IME, notwithstanding that plaintiff had already filed the NOI, soon after the City’s counsel recognized its error.

In opposition, plaintiff argues that the City failed to appropriately designate plaintiff’s IME, despite several extensions to so do; that the City confirmed, without objection, that discovery in this matter is complete; that the City’s motion is untimely; and that there have been no unusual or unanticipated circumstances that have developed subsequent to the filing of the NOI.

At the outset, the Court notes that the City's motion is timely. The City made its first motion pursuant to 22 NYCRR 202.21(e) within 20 days of plaintiff's filing of the NOI, after which the Court gave leave to renew the motion upon conferencing the matter with the DCM Part. Further, the City correctly notes that it need not prove "unusual or unanticipated circumstances,"¹ but only need prove that a material fact in the certificate of readiness is incorrect. *See* 22 NYCRR 202.21(e).

Here, plaintiff claims that police officers of the NYPD caused significant injuries to his left wrist during plaintiff's arrest. The City avers that an IME is necessary to determine the cause and extent of the claimed injuries. If deprived of the opportunity to conduct plaintiff's IME, the City argues that it will face significant prejudice because its ability to mount a defense will be hampered. The Court agrees. However, the Court acknowledges that vacating the NOI would cause unnecessary delay to the plaintiff. As such, although the City is entitled to additional discovery, the Court declines to vacate the NOI. *See Cuprill v Citywide Towing and Auto Repair Services*, 149 AD3d 442, 443 (1st Dept 2017), *see also Cabrera v Abaev*, 150 AD3d 588, 588 (1st Dept 2017) (affirming trial court's grant of defendant's post-NOI motion to compel plaintiff to appear for independent medical examinations).

Accordingly, it is

ORDERED that defendants' motion to vacate the note of issue and strike the case from the trial calendar is denied, but the defendant shall be permitted to conduct an independent medical examination of plaintiff, provided that the examination is completed within 45 days from service of a copy of this order with notice of entry; and it is further

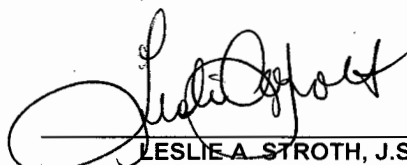
¹ While 22 NYCRR 202.21(d), requires a showing of "unanticipated circumstances," 22 NYCRR 202.21(e) does not.

ORDERED that plaintiff shall appear for such independent medical examination within said 45-day period on a date and at a time convenient to both sides.

This constitutes the decision and order of the Court.

9/13/2022

DATE


LESLIE A. STROTH, 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: