

Schneider v New York City Tr. Auth.

2023 NY Slip Op 33003(U)

August 28, 2023

Supreme Court, New York County

Docket Number: Index No. 152049/2022

Judge: Denise M. Dominguez

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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. DENISE M DOMINGUEZ PART 21

Justice

INDEX NO. 152049/2022

RICHARD SCHNEIDER,

MOTION SEQ. NO. 002

Plaintiff,

- v -

NEW YORK CITY TRANSIT AUTHORITY, JOHN DOE A
FICTITIOUS NAME INTENDED TO BE THE OPERATOR OF
DEFENDANTS BUS

DECISION + ORDER ON
MOTION

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 16, 17, 18, 19, 20, 21, 22, 23,
24, 25, 26, 27, 28, 29, 30, 31, 32

were read on this motion to/for

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

Upon the foregoing documents, the Defendants' motion to vacate the note of issue or
alternatively, to compel discovery from the Plaintiff is denied without prejudice in part and granted
in part.

This personal injury action arises out of an August 30, 2021 incident in which it is alleged
that the Plaintiff RICHARD SCHNEIDER sustained injury when the Defendants' bus made a
sudden stop as it was traveling along Broadway, at or near its intersection with West 106th Street
in Manhattan.

As per the August 30, 2022 Preliminary Conference Order, a Compliance Conference was
to be submitted as per Part 21 Rules on January 27, 2023 and the note of issue was to be filed on
July 27, 2023. The Compliance Conference was not submitted on January 27, 2023 and the
Plaintiff instead filed the note of issue on February 3, 2023. The Defendants timely moved to
vacate the note of issue, alleging that discovery remained outstanding, including material and
necessary medical records related to similar prior injuries sustained by the Plaintiff, as well as the
independent medical examination(s) ("IME"). The Defendants also seek additional time to file
dispositive motions.

Pursuant to 22 NYCRR 202.21(e), the note of issue may be vacated when the certificate of readiness is erroneous and asserts that discovery is complete when it is not. (*See Ortiz v Arias*, 285 A.D.2d 390, 727 N.Y.S.2d 879 [1st Dept 2001]). Specifically, it has been found that where the certificate of readiness contains erroneous facts, such as reflecting that either the IMEs have been waived or completed when neither is accurate, same violates 22 NYCRR 202.21 and vacating the note of issue is appropriate. (*See Cromer v. Yellen*, 268 A.D.2d 381, 702 N.Y.S.2d 277 [1st Dept 2000]). However, courts also have discretion to allow post-note of issue discovery without vacating the note of issue where neither party would be prejudiced, and where it is clear that post-note of discovery may be necessary. (*see Cuprill v. Citywide Towing & Auto Repair Servs.*, 149 A.D.3d 442, 49 N.Y.S.3d 624 [1st Dept 2017]; *Dominguez v. Manhattan & Bronx Surface Transit Operating Auth.*, 168 A.D.2d 376, 562 N.Y.S.2d 694 [1st Dept 1990]).

Here, the Defendants have not shown that they will be substantially prejudiced if post-note of discovery is permitted to continue while the case remains on the trial calendar. No trial date has yet to be set in this matter, nor does there appear to be a pending pre-trial conference currently scheduled. The Defendants also have a summary judgment motion pending regarding liability. Thus, the parties would not be prejudiced if this matter were to remain on the trial calendar while the limited additional discovery related to the Plaintiff's injuries and damages is completed. Therefore, that branch of the motion which seeks to vacate the note of issue is denied without prejudice.

The Defendants assert that there is necessary outstanding discovery concerning the Plaintiff's prior hip injury, femur fracture, hypoxemic respiratory failure/lung condition and ulcer. It also appears that the Defendants have sought to obtain the outstanding discovery from the Plaintiff for some time. (NYSCEF Doc. 24).

The Plaintiff's position that the IME(s) had been waived is unavailing as it is clear that the Defendants requested and continued to seek relevant medical records concerning the Plaintiff's prior injuries which the Defendants maintain are relevant and necessary for conducting any IME(s) related to the Plaintiff's injuries and complaints. The Plaintiff does not submit any response to that aspect of the motion which concerning the outstanding medical treatment records related prior injuries and conditions other than to assert that all discovery demands were responded to. (NYSCEF Doc. 26).

Upon review, the Plaintiff's bill of particulars alleges various injuries to the right knee and tibia. The bill of particulars also alleges joint stiffness and muscle weakness (particular body parts not identified) as well as difficulty with bearing weight, difficulty walking, antalgic gait and difficulty standing for extended periods of time. (NYSCEF Doc. 23). Accordingly, given the injuries and complaints alleged, the records related to the Plaintiff's prior femur fracture and hip injuries would be relevant to the present claims and are necessary to the Defendants defense of this action. (*see Villanueva v. J.T. Magen & Co. Inc.*, 216 A.D.3d 604, 190 N.Y.S.3d 320 [1st Dept 2023]; *Brito v. Gomez*, 33 N.Y.3d 1126, 131 N.E.3d 904 [2019]). Thus, the Plaintiff is directed to provide the Defendants copies of any and all medical records related to the Plaintiff's prior right femur fracture and prior hip injuries, including, but not limited to, ambulance call sheets, treatment records and diagnostic imaging. The Plaintiff is also directed to provide the Defendants duly executed authorizations permitting the Defendants to obtain such records. The Plaintiff is directed to provide and/or exchange same by September 22, 2023.

It is also clear that such records are relevant and necessary for conducting any IME(s) related to the Plaintiff's alleged right knee and tibia injuries/complaints. Therefore, the Defendants are directed to designate the physician(s) to conduct the IME(s) by October 6, 2023 and such IMEs are to be conducted by December 31, 2023 with the reports to be exchanged within 30 days of the completion of the IME.

As the Defendants have not shown how the Plaintiff's treatment concerning his hypoxemic respiratory failure/lung condition and ulcer are material and necessary at this time, that branch of the Defendants' motion which seeks such records and/or an IME concerning these conditions is denied without prejudice.

The Defendants also seek an extension by which to file a summary judgment motion. To the extent that this branch of the motion seeks an extension as to a summary judgment motion concerning liability for the subject accident, the Defendants have not shown how the outstanding discovery is necessary for the filing of such a motion and the Plaintiff opposes such an extension. Moreover, the parties have already filed summary judgment motions regarding liability (Motion Seq. 3). However, upon a review of the record, the outstanding discovery addressed in this Order appears necessary and relevant for pursuing a summary judgment motion as to whether the Plaintiff's injuries satisfy New York Insurance Law §5102(d). Therefore, the parties may file

dispositive motions pursuant to New York Insurance Law §5102(d) within 60 days of the exchange of the IME report(s).

Accordingly, it is hereby

ORDERED that the Defendants' motion to vacate the note of issue is denied without prejudice; and it is further

ORDERED that the note of issue is not vacated, and that the case shall remain on the trial calendar; and it is further

ORDERED that the Defendants' motion to compel further discovery is granted to the limited extent that the Plaintiff is directed to provide the Defendants the medical records and authorizations concerning the prior right femur fracture and hip injuries, as set forth above, by September 22, 2023; and it is further

ORDERED that the Defendants are to designate IME physician(s) by October 6, 2023 and such exams shall be held by December 31, 2023; and it is further

ORDERED that dispositive motions pursuant to New York Insurance Law §5102(d) may be filed 60 days following the exchange of the IME report(s); and it is further

ORDERED that no adjournments of the above are permitted absent Court approval; 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, 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 such 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)].

Any requested relief not expressly addressed herein has nonetheless been considered by the Court and is hereby expressly denied.

8/28/2023
DATE

HON. DENISE M. DOMINGUEZ
DENISE M. DOMINGUEZ, J.S.C.
J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	