

Halabi v City of New York

2023 NY Slip Op 33190(U)

September 12, 2023

Supreme Court, New York County

Docket Number: Index No. 155116/2020

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

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INDEX NO. 155116/2020

NADA HALABI, MARWAN HALABI

MOTION SEQ. NO. 002

Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY TRANSIT
AUTHORITY,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53

were read on this motion to/for

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

Upon review of the above listed documents, Defendant NEW YORK CITY TRANSIT AUTHORITY's ("TRANSIT") motion to vacate the Note of Issue pursuant to 22 NYCRR 206.12 is granted.

This personal injury matter arises out of February 6, 2019 incident where the Plaintiff NADA HALABI alleges to have been injured while riding in a subway car on the N line. Plaintiff MARWAN HALABI has commenced a loss of consortium claim.

Upon a review of the record, although this action was commenced by the filing of the summons and complaint on July 2, 2020 (NYSCEF Doc. 1), the Preliminary Conference does not appear to have been held until June 17, 2022 (NYSCEF Doc. 27). This delay likely appears to have been due, at least in part, to the COVID-19 pandemic. As per the Preliminary Conference Order, the parties were to enter into a Compliance Conference Order on November 15, 2022 and the Plaintiff was to file the Note of Issue on or before May 19, 2023. However, the parties did not enter into and submit a Compliance Conference Order on November 15, 2022 and the Plaintiffs filed the Note of Issue (for the first time) on March 8, 2023 (NYSCEF Doc. 28). Therein, the Plaintiffs asserted in the Certificate of Readiness that all discovery had been completed and that the physical examinations of the Plaintiffs were waived. As significant discovery outstanding as

of March 8, 2023, including the depositions of all parties, the Defendants requested that the Plaintiffs withdraw the Note of Issue (NYSCEF Doc. 39). The Note of Issue was then withdrawn by stipulation (NYSCEF Doc. 31).

The Plaintiffs then filed the Note of Issue for the second time on May 21, 2023 (NYSCEF Doc. 32, which appears to be the same document as NYSCEF Doc. 28, but with the dates crossed out and updated) again asserting in the Certificate of Readiness that all discovery had been completed and that the physical examinations of the Plaintiffs were waived.

By notice of motion, TRANSIT moves to vacate the Note of Issue as significant discovery was outstanding at the time the Note of Issue was filed on May 21, 2023. Specifically, that neither Plaintiffs had appeared for their respective deposition and thus, their respective independent medical examinations (“IME”) could not yet be held, let alone noticed. Additionally, as the Plaintiffs had yet to appear for their deposition, the Defendants’ respective depositions had not yet been held. Moreover, as no party depositions had been conducted, the parties had not yet determined if any post-deposition discovery would be necessary. Finally, TRANSIT shows that the Defendants attempted to secure a voluntary withdraw of the Note of Issue from the Plaintiffs, for the second time, and that the Plaintiffs refused. (NYSCEF Doc. 35, 36, 42, 43, 44).

In opposition, Plaintiffs acknowledge that the May 21, 2023 Note of Issue was filed prior to the completion of any of the aforementioned outstanding discovery, but argue that the Note of Issue should not be vacated because there is only “little left to do” in order to complete discovery in this matter and that vacating was unnecessary the Plaintiffs deposition was to be held on July 19, 2023 (NYSCEF Doc. 46).

However, TRANSIT, in reply to Plaintiffs’ opposition, submits email correspondence between the parties that the deposition of the Plaintiffs was in fact scheduled for Monday July 17, 2023, not July 19, 2023. That when the Defendants attempted to confirm same with Plaintiffs via email correspondence on the prior business day, Friday, July 14, 2023, Plaintiffs did not respond to confirm the depositions until 9:25 p.m., hours after the close of business for both Defendants and that of any court reporter’s office necessary to conduct the depositions (NYSCEF Doc. 47, 48, 49, 50, 51, 52, 53).

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]; *Ah Bee Pua v. Lam*, 155 A.D.3d 487, 63 N.Y.S.3d

859 [1st Dept 2017]). 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]).

Upon review it is clear that significant discovery was outstanding at the time the May 21, 2023 Note of Issue and Certificate of Readiness were filed by Plaintiffs. It is also clear that the Plaintiffs were admittedly aware that such discovery was outstanding at the time the Note of Issue was filed, and instead of requesting an extension of time to file the Note of Issue, Plaintiffs simply, and prematurely, filed same.

Therefore, as the Plaintiffs' Certificate of Readiness admittedly contained erroneous facts, and as all party depositions and the Plaintiffs' respective IMEs remain outstanding, the Note of Issue must be vacated and the matter stricken from the trial calendar. In light of the outstanding discovery, and the parties outstanding Compliance Conference, the parties are directed to submit a Compliance Conference Order on consent, on or before, August 31, 2023, setting forth a schedule for the completion of all party depositions by October 31, 2023. Moreover, in light of the fact that the Note of Issue was filed twice by Plaintiffs when it admittedly premature to do so, the parties are directed to submit a stipulation to this Court affirming that discovery is completed before the Note of Issue is filed.

Accordingly, it is hereby

ORDERED that the 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 the parties are to submit a Compliance Conference Order on consent as per Part 21 Rules on, or before, August 31, 2023, at which time, a Note of Issue date will be provided; and it is further

ORDERED that the Note of Issue shall not be filed in this matter without the parties submitting a stipulation to this Court affirming that all discovery is complete; 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)].

9/12/2023

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

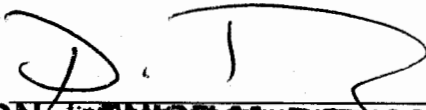
GRANTED IN PART

OTHER

SUBMIT ORDER

FIDUCIARY APPOINTMENT

REFERENCE


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