

**De Oliveira v Ahern Painting Contrs., Inc.**

2023 NY Slip Op 33241(U)

September 18, 2023

Supreme Court, New York County

Docket Number: Index No. 150574/2021

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. 150574/2021

JEFERSON DE OLIVEIRA,

MOTION SEQ. NO. 001 002

Plaintiff,

- v -

AHERN PAINTING CONTRACTORS, INC., TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY,

DECISION + ORDER ON MOTION

Defendants.

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AHERN PAINTING CONTRACTORS, INC., TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY

Third-Party Index No. 595039/2022

Third-Party Plaintiffs,

-against-

CHAMPION PAINTING SPECIALTY SERVICES CORP.

Third-Party Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 121, 122, 123, 124, 125, 126

were read on this motion to/for

STRIKE CASE FROM CALENDAR

The following e-filed documents, listed by NYSCEF document number (Motion 002) 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 118, 119, 120, 127

were read on this motion to/for

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

Upon the foregoing documents, and after conferencing this matter with the Court, Defendants/Third-Party Plaintiff's AHERN PAINTING CONTRACTORS, INC., TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY and METROPOLITAN TRANSPORTATION AUTHORITY's ("TRIBOROUGH") motion to vacate the note of issue (Motion Seq. 1) and the Third-Party Defendant's CHAMPION PAINTING SPECIALTY

SERVICES CORP.'s ("CHAMPION") motion to vacate the note of issue (Motion Seq. 2) are granted.

By notice of motion, TRIBOROUGH and CHAMPION move to vacate the Note of Issue, asserting that the Certificate of Readiness was erroneous as significant discovery was outstanding at the time the Note of Issue was filed on May 31, 2023 (NYSCEF Doc. 66). Specifically, that three days prior to filing the Note of Issue, the Plaintiff served a further Supplemental Bill of Particulars, dated May 26, 2023 (NYSCEF Doc. 76), wherein, it was alleged for the first time that the Plaintiff had recently undergone a two-level fusion and discectomy cervical surgery on May 15, 2023. The movants allege that as the Plaintiff had only just served the Supplemental Bill of Particulars, the Certificate of Readiness was erroneous as it was clear that necessary discovery concerning the recent surgery had not been conducted. As the Plaintiff was deposed on October 18, 2022, the movants had not had the opportunity to depose the Plaintiff concerning the cervical surgery, nor was an independent medical examination ("IME") conducted related to this procedure. Plaintiff acknowledges that the movants are entitled to a further deposition and IME related to the May 15, 2023 cervical spine surgery.

Therefore, to the extent not already done, the Plaintiff is directed to provide the movants with the medical records Plaintiff maintains related to the May 15, 2023 cervical spine surgery, as well as any pre-operative and post-operative treatment and care, including any diagnostic testing and physical therapy. The Plaintiff is also directed to provide authorizations permitting the release of such records to the movants. The records and authorizations are to be provided by October 6, 2023. The Plaintiff is also directed to appear for a further deposition concerning the May 15, 2023 cervical spine surgery and related treatment by November 30, 2023. The movants are directed to designate the physician for the IME related to the cervical spine surgery by December 31, 2023 and the exam is to be held by February 29, 2024.

Additionally, CHAMPION argues that the Note of Issue should be vacated as Plaintiff only identified and produced an affidavit from alleged witness Olvy Marte after the Note of Issue was filed, and in response to TRIBOROUGH's pending summary judgment motion, Motion Seq. 3. Both TRIBOROUGH and CHAMPION argue that that they are entitled to a non-party deposition of Olvy Marte, especially in light of the post note-of issue disclosure of the witness. The parties further advise the Court that Olvy Marte resides in Rhode Island, and that setting up a commission for the deposition may be necessary. The movants argue that as the Plaintiff did not previously

identify Olvy Marte as a witness, at the Plaintiff's further deposition the movants should be entitled to inquire about their connection/relationship. Although the Plaintiff argues that the movants were aware of Olvy Marte as being a CHAMPION employee at the subject project, there does not appear to be anything in the record/previously exchanged discovery which clearly identifies Olvy Marte as a witness concerning this incident. In light of the Plaintiff's significant reliance upon the affidavit of Olvy Marte in connection with Motion Seq. 3, and as it is clear that the witness was not identified by the Plaintiff until the movant's summary judgment motion was filed, the non-party deposition of Olvy Marte is material and necessary to the movants' defense in this matter. Therefore, the parties are directed to work together in order to schedule and conduct the deposition of Olvy Marte. If a commission is necessary, the parties are directed to begin such process by October 6, 2023 and to conduct the deposition by December 31, 2023. Moreover, at the Plaintiff's further deposition, questions are permitted regarding the Plaintiff's knowledge of/relationship with non-party witness of Olvy Marte.

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]; *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 Note of Issue and Certificate of Readiness were filed by Plaintiff. The Plaintiff's Certificate of Readiness contained erroneous facts, as it was clear that a further deposition and IME would be necessary at the time the Note of Issue was filed. Moreover, upon a review of the record, Olvy Marte signed his affidavit in connection with Motion Seq. 3 on May 26, 2023, prior to the filing of the Note of Issue. Given that this witness had not formally been disclosed by the Plaintiff prior to the affidavit having been served, the Court finds that it would have been reasonable to assume that parties would want to conduct a non-party deposition of this witness. Finally, this Court is not optimistic that the parties would be able to expeditiously accomplish this outstanding discovery, and any potential additional discovery that may be indicated following the further deposition of the Plaintiff and the non-party deposition of Olvy Marte, while this matter remains on the trial calendar. Therefore, the Note of Issue must be vacated and the matter stricken from the trial calendar to allow for the aforementioned discovery to be conducted.

Accordingly, it is hereby

ORDERED that TRIBOROUGH and CHAMPION's respective motions to vacate the Note of Issue are 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 Status Conference Order on consent as per Part 21 Rules on, or before, October 6, 2023, setting forth a date for the completion of the discovery set forth above, with all discovery being complete by February 29, 2024, at which time, a Note of Issue date will be provided; 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)].

9/18/2023  
DATE

CHECK ONE:  CASE DISPOSED  GRANTED  DENIED

APPLICATION:  SETTLE ORDER  NON-FINAL DISPOSITION  GRANTED IN PART  OTHER

CHECK IF APPROPRIATE:  INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE

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