

**Yankiver v New York City Tr. Auth.**

2023 NY Slip Op 34134(U)

November 15, 2023

Supreme Court, New York County

Docket Number: Index No. 155379/2022

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. 155379/2022

RUTH YANKIVER,

MOTION SEQ. NO. 001

Plaintiff,

- v -

DECISION + ORDER ON MOTION

NEW YORK CITY TRANSIT AUTHORITY, JOHN DOE

Defendants.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 30, 31, 32, 33, 34, 35

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 is granted and the Plaintiff's cross-motion to compel discovery is granted in part.

This personal injury matter arises out of a January 5, 2022 incident, in which the Plaintiff alleges to have sustained injury while a passenger on a public bus owned/operated by the Defendant, near the intersection of 86th Street and York Avenue in Manhattan.

Upon a review of the record, the parties were to submit a proposed Preliminary Conference Order on consent as per Part 21 rules by December 6, 2022. The Preliminary Conference Order was not submitted at that time. It was thereafter to be submitted to Part 21 by April 27, 2023. However, although the parties apparently efiled the proposed Preliminary Conference Order, the proposed Order was never submitted to the Court as required per Part 21 rules. Thus, no Note of Issue date was imposed by Order of this Court. On August 8, 2023, the Plaintiff filed the Note of Issue, certifying that all discovery was complete (NYSCEF Doc. 8).

The Defendants now move by notice of motion seeking to vacate the Note of Issue and to strike this matter from the trial calendar asserting that the Certificate of Readiness was erroneous when filed as significant discovery was outstanding.

Upon review, it appears that the Plaintiff appeared for a deposition in this matter on June 1, 2023 and that the Defendants proceeded with that deposition despite not having received all of

the Plaintiff's relevant medical records, reserving their right to a further deposition upon the receipt of such records. It also appears that at least nine separate authorizations for the release of various medical records were requested at the Plaintiff's deposition. (NYSCEF Doc. 20). Additionally, on the day the Note of Issue was filed, the Plaintiff also served a Supplemental Bill of Particulars, alleging that that the Plaintiff underwent an unspecified "Lumbar spine procedure" on August 3, 2023 (NYSCEF Doc. 19). The Defendants argue that they never waived receipt of medical records nor the IME and that they are entitled to the Plaintiff's medical records regarding the recent procedure, a further deposition of the Plaintiff on the issue of damages and an independent medical examination ("IME").

The Plaintiff's cross motion seeks to compel the further deposition of the Plaintiff and the Plaintiff's IME, or deem them waived. The Plaintiff objects to vacating the Note of Issue.

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]). Here, when the Note of Issue and Certificate of Readiness was filed, the Plaintiff certified that all discovery was complete and that the IME(s) and medical exchanges were waived.

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 an IME would be necessary at the time the Note of Issue was filed. Moreover, there is no indication that the Plaintiff ever attempted to schedule same prior to filing the Note of Issue. Further, upon a review of the record, there is no evidence whatsoever that the Defendants waived their receipt of the Plaintiff's medical records or conducting any IME(s). It is clear from the Plaintiff's initial deposition that significant medical records were outstanding as of June 1, 2023, and the Plaintiff has not made any showing that the authorizations (which were outstanding at the time of the deposition) were subsequently provided to the Defendants. However, even if such authorizations had been immediately provided to the Defendants following the June 1, 2023 deposition, this Court is hard-pressed to believe that the Defendants would have then had sufficient time to obtain the outstanding records from the providers and designate experts to conduct the IME(s), prior to the Plaintiff filing the Note of Issue just two months later on August 3, 2023.

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.

In light of the outstanding discovery related to the Plaintiff's damages, the Defendants are directed to serve the Plaintiff with a demand regarding any outstanding medical records and authorizations by December 15, 2023. The Plaintiff is directed to respond to such demand within 30 days of receipt. Plaintiff is to provide copies of any of the requested medical records it maintains in addition to the duly executed HIPAA authorizations.

The Plaintiff's cross-motion to compel the outstanding discovery is granted to the following limited extent, but is otherwise denied. The parties are directed to schedule a mutually convenient date for the further deposition of the Plaintiff, to be conducted by January 31, 2024. The further deposition shall be limited to damages related to the records that were outstanding and requested at the time of the June 1, 2023 deposition, as well as the Plaintiff's recent August 3, 2023 lumbar procedure. The Defendants are also directed to designate any IME physicians within 30 days of the completion of the Plaintiff's further deposition, and the Plaintiff's IMEs are to be held within 60 days of the designation. The IME is not limited to the recent August 3, 2023 lumbar procedure as this Court specifically finds that the Defendants did not waive their right to conduct IMEs.

Additionally, as the parties have not entered into a Compliance Conference Order, the parties are hereby directed to submit a proposed Compliance Conference Order on consent as per Part 21 rules on or by December 11, 2023, setting forth the dates for the completion of discovery (as set forth herein) as well as any additional outstanding discovery not addressed in this motion. A Note of Issue date will be provided by the Court at that time.

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 Plaintiff's cross-motion is granted in part to the limited extent that the further deposition of the Plaintiff is to be conducted by January 31, 2024 and that the Plaintiff's IMEs are to be designated within 30 days of the completion of the Plaintiff's further deposition and are to be held within 60 days of designation, the Plaintiff's cross-motion is otherwise denied; 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, December 11, 2023, setting forth a date for the completion of the discovery set forth herein as well as any additional outstanding discovery not addressed in this motion, at which time, a Note of Issue date will be provided; and it is further

ORDERED that, within 20 days from the entry of this order, the Defendants 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)].

11/15/2023

DATE

CHECK ONE:

CASE DISPOSED  
GRANTED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

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