

Cherveny v Jeffrey S. Rauch, D.C., P.C.

2020 NY Slip Op 35715(U)

May 18, 2020

Supreme Court, Queens County

Docket Number: Index No. 706095/2018

Judge: Maurice E. Muir

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Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

FILED

**5/21/2020
9:11 AM**

Present: HONORABLE MAURICE E. MUIR
Justice

**COUNTY CLERK
QUEENS COUNTY**

GREY CHERVENY,

IAS Part - 42

Plaintiff,

Index No.: 706095/2018

-against-

Motion Date: 3/5/20

JEFFREY S. RAUCH, D.C., P.C; JEFFREY S.
RAUCH, D.C. d/b/a REGO PARK HEALTHCARE
ALLIANCE; JEFFREY S. RAUCH, D.C.,
INDIVIDUALLY; JTECH MEDICAL
MANUFACTURER’S d/b/a JTECH MEDICAL;
and ERIK GROBERG,

Motion Cal. No. 3

Motion Seq. No. 2

Defendants.

The following electronically filed documents read on this motion by Jtech Medical Manufacturers d/b/a Jtech Medical (“Jtech”) and Erik Groberg (“Mr. Groberg”) (collectively, the “defendants”), which seeks the following relief: (a) vacate the notice of issue and certificate of readiness for trial (“NOI”); (b) compel the independent medical examination (“IME”) of Grey Cherveny (“Mr. Cherveny” or “plaintiff”); (c) compel the deposition of co-defendant, Jeffrey S. Rausch, D.C.; (d) permit the non-party deposition of eyewitnesses including Dr. Thomas Dow; (e) compel plaintiff to respond to its discovery demands; and (f) and extend the defendants’ time to move for summary judgment.

	Papers
	<u>Numbered</u>
Notice of Motion-Affirmation-Exhibits-Service.....	EF 38 – 47
Affirmation in Partial Opposition-Exhibits.....	EF 48 – 49
Amended Notice of Motion.....	EF 51

Upon the foregoing papers, it is ordered that this motion is determined as follows:

This is an action to recover damages for personal injuries Mr. Chervenky allegedly sustained during a demonstration of an Inclinometer ROM Muscle Testing Instruction. As a result, on or about April 19, 2018, he commenced the instant action against Jeffrey S. Rauch, D.C. P.C., Jeffrey S. Rauch, D.C. d/b/a Rego Park Healthcare Alliance, Jeffrey S. Rauch, D.C. d/b/a Chiro Care of NY. and Jeffrey S. Rauch, D.C., individually (“collectively “Rauch”), Jtech and Mr. Groberg. On July 6, 2018, issue was joined, wherein the co-defendants Jtech and Groberg interposed an answer.

On January 22, 2020, the defendants filed the instant motion for the above-described relief, wherein they argue that the plaintiff has not appeared for either an examination before trial (“EBT”) or IME. Moreover, their demands for medical authorizations are outstanding. As a result, the defendants contend that the plaintiff’s NOI is false, and that it must be vacated and the action stricken from the trial calendar. In partial opposition, the attorney for Rauch argues that the defendants are not entitled to depose Rauch because, the plaintiff discontinued the case against him; and Jtech’s cross-claims are dismissed by operating of law.

It is well settled that parties to litigation are entitled to “full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof” (CPLR § 3101(a)). This provision has been liberally construed to require disclosure “of any facts bearing on the controversy which will assist [the parties’] preparation for trial by sharpening the issues and reducing delay and prolixity” (*Allen v. Crowell-Collier Public Co.*, 21 NY2d 403 [1963]). Here, however, the affirmation of good faith submitted by defendants is insufficient to show that counsel conferred with the parties’ attorney in a good faith effort to resolve those issues raised by the motion. The affirmation required by the court rule must indicate “the time, place and nature of the consultation and the issues discussed and any resolution, or shall indicate good cause why no such conferral with counsel for opposing parties was held. Upon the failure to satisfy this requirement, denial of the motion is warranted. (22 NYCRR § 202.7[c]; *Murphy v. County of Suffolk*, 115 AD3d 820 [2d Dept 2014]; *Natoli v. Milazzo*, 65 AD3d 1309 [2d Dept 2009]; *Cestaro v. Chin*, 20 AD3d 500 [2d Dept 2005]; *Deutsch v. Grunwald*, 110 AD3d 949 [2d Dept 2013].)

Additionally, pursuant to CPLR § 3101(a)(4), a party may obtain discovery from a nonparty in possession of material and necessary evidence, so long as the nonparty is apprised of the circumstances or reasons requiring disclosure. The notice requirement of CPLR § 3101(a)(4) “obligates the subpoenaing party to state, either on the face of the subpoena or in a notice

accompanying it, ‘the circumstances or reasons such disclosure is sought or required’” (*Matter of Kapon v. Koch*, 23 NY3d 32 [2014], quoting CPLR § 3101(a)(4); *see Velez v. Hunts Point Multi-Serv. Ctr., Inc.*, 29 AD3d 104 [1st Dept 2006]). “After the subpoenaing party has established compliance with the CPLR § 3101(a)(4) notice requirement, disclosure from a nonparty requires no more than a showing that the requested information is relevant to the prosecution or defense of the action” (*Bianchi v. Galster Mgt. Corp.*, 131 AD3d [2d Dept 2015]). Despite the fact that plaintiff discontinued the instant action against Rauch, the defendants are still entitled to depose Rauch as a non-party witness, without leave of court, pursuant to CPLR § 3101(a)(4) and CPLR § 3106(b). However, as discussed above, a party seeking to depose a non-party witness requires service of a subpoena and notice that states “the circumstances or reasons such disclosure is sought or required.” (*DiBuono v. Abbey, LLC*, 163 AD3d 524 [2d Dept 2018]; *Cioffi v. S.M. Foods, Inc.*, 178 AD3d 1003 [2d Dept 2019]). Here the plaintiff failed to serve said subpoena and notice upon any of the non-party witness (i.e., Mr. Rausch, Dr. Thomas Dow). As such, the defendants’ motion to compel the deposition of the non-party witnesses must be denied.

However, that branch of defendants’ motion to vacate the NOI must be granted. Pursuant to the Uniform Rules for Trial Courts, “[w]ithin 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” (Uniform Rules for Trial Courts § 202.21[e]). A statement in a certificate of readiness to the effect that all pretrial discovery has been completed is a material fact, and where that statement is incorrect, the note of issue should be vacated (*see Cioffi v. S.M. Foods, Inc.*, 178 AD3d 1003 [2d Dept 2019]; citing *Barrett v. New York City Health & Hosps. Corp.*, 150 AD3d 949 [2d Dept 2017]; cf. *Slovney v. Nasso*, 153 AD3d 962 [2d Dept 2017]; *Rizzo v. Balish & Friedman*, 153 AD3d 869 [2d Dept 2018]; *see also Gallo v. SCG Select Carrier Group, LP*, 91 AD3d 714 [2d Dept 2012]; *Bundhoo v. Wendy’s*, 152 AD3d 734 [2d Dept 2017]). Here, the defendants made a clear showing that discovery is not complete and that the case is not ready for trial. In fact, the plaintiff has not appeared for either an EBT or IME. Thus, the court must vacate the NOI and strike the action from the trial calendar.

Accordingly, it is hereby

ORDERED that branch of the defendants' motion to vacate the Notice of Issue and Certificate of Readiness for Trial, pursuant to 22 NYCRR § 202.21(e), is granted without opposition; and it is further,

ORDERED that branch of the defendants' motion to vacate the notice of issue and certificate of readiness for trial is granted and this matter shall be stricken from the trial calendar; and it is further,

ORDERED that branch of defendants' motion to extend its time to move for summary judgment, pursuant to CPLR § 3212, is denied as moot; and it is further,

ORDERED that branch of defendants' motion to permit the deposition of the non-party witnesses is denied; and it is further,

ORDERED that branch of defendants' motion to compel discovery, pursuant to CPLR § 3124, is denied; and it is further,

ORDERED that defendants shall serve a copy of this decision and order with notice of entry upon parties and the clerk of this court on or before August 31, 2020.

The foregoing constitutes the decision and order of the court.

Dated: May 18, 2020


MAURICE E. MUIR, J.S.C

FILED

**5/21/2020
9:11 AM**

**COUNTY CLERK
QUEENS COUNTY**