Jasinowski v 5-43 Ventures, LLC
2023 NY Slip Op 34706(U)
August 11, 2023
Supreme Court, Queens County
Docket Number: Index No. 700772/2018
Judge: Maurice E. Muir
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Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY

Present: HONORABLE MAURICE E. MUIR
Justice

TOMAS JASINOWSKI and ANNA DM DMOCHOWSKA,

Plaintiff,

-against-

5-43 VENTURES, LLC, SOLARIUM CONDOMINIUM and EDUARDO M. PIETA,

Defendants.

EDUARO M. PIETA,

Third Party Plaintiff,

-against-

STANLEY CIEPLAK and SC RESTORATION CORP.,

Third Party Defendants.

IAS Part - 42

Index No.: 700772/2018

Motion Date: 5/4/23

Motion Cal. No. 17

Motion Seq. No. 5

The following electronically filed ("EF") documents read on this motion by Solarium Condominium ("Solarium" or "movant") for an order: (1) pursuant to 22 NYCCRR § 202.21(e), vacating the Note of Issue and striking this action from the trial calendar because Plaintiff failed to provide responses to any post-deposition discovery demands and because Codefendant has yet to respond to Defendant's post deposition demand, (2) pursuant to CPLR § 3124, compelling Plaintiff to respond by a date certain or be precluded from offering any evidence at trial on the issue of damages, (3) together with such other and further relief as this Court deems just and proper. Moreover, Eduaro M. Pieta ("Mr. Pieta") cross moves for an order: (a) pursuant to 22 NYCRR § 202.21(e) striking the above-captioned matter from the trial calendar and vacating the

Note of Issue filed herein, upon the ground that the action is not ready for trial, and all preliminary proceedings have not been completed based upon outstanding discovery including, but not limited to, medical discovery, including HIPPA compliant authorizations; (b) pursuant to CPLR § 3212(a), extending the parties' time to move for summary judgment until ninety (90) days after the completion of all outstanding discovery; and (d) granting such other and further relief as to this Court deems just and proper.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Service..............................	EF 088 - 97
Notice of Cross Motion-Affirmation...	EF 098 - 99
Affirmation in Opposition..	EF 100
Affirmation in Reply-Service...	EF 101 - 102

Upon the foregoing papers it is ordered that the motion and cross-motion are combined herein for disposition, and determined as follows:

This is an action to recover damages for personal injuries Tomas Jasionowski ("Mr. Jasionowski" or "plaintiff") allegedly sustained at a construction site –in violation of New York State Labor Law §§§ 200, 240 and 241(6). In particular, the plaintiff alleges that on October 3, 2015, he was caused to sustain personal injuries while performing construction work at 548 47th Road, Unit 1A, Long Island City, New York also known as 550 47th Road, Townhouse 1A, Long Island City, New York ("subject premises"). As a result, on January 17, 2018, plaintiff commenced the instant action; and on May 4, 2018, issue was joined. Thereafter, the parties engaged in extensive discover. Moreover, on April 8, 2022, this court vacated the plaintiff's note of issue and certificate of readiness for trial ("note of issue"). Thereafter, on March 10, 2023, the plaintiff re-filed his note of issue. Notwithstanding the same, the defendants seek the above-described relief.

However, Solarium's affirmation of good faith is insufficient to show that counsel conferred with plaintiff's counsel in a good faith effort to resolve those issues raised by the instant motion. The affirmation required by the court's rules 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" (see 22 NYCRR § 202.7[c]; *Starzyk v. Heslinga*, 177 AD3d 624 [2d Dept 2019]). Upon the failure to satisfy this requirement, denial of the motion is warranted. (*Bronstein v. Charm City Housing, LLC*, 175 AD3d 454 [2d Dept 2019]; *Roye v. Gelberg*, 172 AD3d 1260 [2d Dept 2019]; *Encalada v.*

Riverside Retail, LLC, 175 AD3d 467 [2d Dept. 2019]; *Winter v. ESRT Empire State Bldg., LLC*, 201 AD3d 842 [2d Dept 2022]; *see also Steele v. Samaritan Found, Inc.*, 208 AD3d 1265 [2d Dept 2022]).

Furthermore, pursuant to the Uniform Rules for Trial Courts § 202.21[e]) it states in relevant part that "[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." 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* 22 NYCRR § 202.21[e]; *Slovney v. Nasso,* 153 AD3d 962 [2d Dept 2017]; *Rizzo v. Balish & Friedman,* 153 AD3d 869 [2d Dept 2017]; *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 court does not find that vacatur of the note of issue is warranted, especially in light of the tremendous backlog as a result of the COVID-19 pandemic: The parties will be afforded sufficient time to complete discovery (e.g., obtaining up-dated trial authorizations) before the Trial Scheduling Part ("TSP") conference. (*Cioffi v. S.M. Foods, Inc.*, 178 AD3d 1003 [2d Dept 2019]; *Umana v. Tower East Condominium*, 208 AD3d 710 [2d Dept 2022]).

Lastly, as previously discussed, co-defendant Eduardo M. Pieta cross motion is improper. It is well settled that a cross motion is an improper vehicle for seeking affirmative relief from a nonmoving party (i.e., plaintiff). (*Mango v. Long Is. Jewish-Hillside Med. Ctr.,* 123 AD2d 843 [2d Dept 1986]; *see* CPLR § 2215; *Asiedu v. Lieberman*, 142 AD3d 858, 858 [1st Dept 2016]; *Sanchez v. Metro Bldrs. Corp.*, 136 AD3d 783, 785 [2d Dept 2016]; *Kershaw v. Hospital for Special Surgery*, 114 AD3d 75, 88 [1st Dept 2013]; *Fuller v. Westchester County Health Care Corp.*, 32 AD3d 896 [2d Dept 2006]; *Terio v. Spodek*, 25 AD3d 781, 785 [2d Dept 2006]; *Gaines v. Shell-Mar Foods, Inc.*, 21AD3d 986, 987-988 [2d Dept 2005]).

Accordingly, it is hereby

ORDERED that Solarium Condominium's motion to vacate the Notice of Issue and Certificate of Readiness for Trial and to strike this action from the trial calendar, pursuant to 22 NYCRR § 202.21(e), is denied; and it is further,

ORDERED that plaintiff shall provide the defendants with all HIPAA-compliant authorizations, if not already provided, on or before October 31, 2023; and it is further,

ORDERED that Eduardo M. Pieta's cross motion is denied in its entirety; and it is further,

ORDERED that any other requested relief not expressly addressed herein has nonetheless been considered by this Court and is hereby denied; and it is further,

ORDERED that plaintiff shall serve, via certified mail and NYSCEF, a copy of this Order with Notice of Entry upon all parties on or before September 5, 2023.

The foregoing constitutes the decision and order of the court.

Dated: August 11, 2023
Long Island City, New York

MAURICE E. MUIR, J.S.C.