

**New York Mar. & Gen. Ins. Co. v Clear Blue Ins. Co.**

2024 NY Slip Op 34455(U)

December 19, 2024

Supreme Court, New York County

Docket Number: Index No. 157838/2021

Judge: Arlene P. Bluth

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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. ARLENE P. BLUTH PART 14**

*Justice*

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NEW YORK MARINE AND GENERAL INSURANCE  
COMPANY, ATLANTIC PACIFIC DEVELOPMENT  
PARTNERS, LLP, NOBLE CONSTRUCTION GROUP, LLC,

Plaintiffs,

- v -

CLEAR BLUE INSURANCE COMPANY, TRAVELERS  
INDEMNITY COMPANY, BRAWN CONSTRUCTION, LLC,  
JEM CONTRACTING CORP.

Defendants.

-----X

**INDEX NO.** 157838/2021

**MOTION DATE** 12/18/2024

**MOTION SEQ. NO.** 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE.

Defendant JEM Contracting Corp.’s (“JEM”) motion to vacate the note of issue is denied.

**Background**

In this insurance dispute, on April 11, 2024, this Court so-ordered a discovery stipulation that contained two directives (NYSCEF Doc. No. 68). JEM was directed to send verified responses to interrogatories served by co-defendants and all depositions were to be completed by July 31, 2024 (*id.*).

In anticipation of the next conference scheduled for July 2024, the Court so-ordered another stipulation uploaded by the parties that contained only two items: 1) that all outstanding discovery be served within 40 days and 2) that copies of all primary and excess policies be provided within 30 days (NYSCEF Doc. No. 73). Notably, this stipulation omitted any specific mention of outstanding depositions in contrast to the previous order. This so-ordered stipulation

set another conference date for September 30, 2024 and warned that if nothing was uploaded by September 23, 2024, the Court might order that a note of issue be filed (*id.*).

No party uploaded anything by September 23, 2024 and so the Court issued an order directing that a note of issue be filed by October 1, 2024 (NYSCEF Doc. No. 74), a directive followed by plaintiffs (*see* NYSCEF Doc. No. 75 [note of issue]).

JEM now moves to strike the note of issue on the ground that there is remaining discovery. It contends that discovery in the underlying action (a Labor Law matter) is not complete. JEM argues that “For reasons unknown, neither plaintiff’s [sic] counsel nor any of the other parties advised the Court regarding the status of discovery by September 23, 2024. However, as referenced above, numerous defendant depositions remain outstanding, and discovery is not complete in the underlying action” (NYSCEF Doc. No. 77, ¶ 9).

In opposition, plaintiffs insist that JEM has had adequate time to complete discovery and that JEM failed to inform plaintiffs that it had any issues with discovery. They point out that they responded to JEM’s discovery demands in December 2022 and that JEM has failed to identify any issues with paper discovery. Plaintiffs also contend that remaining discovery in the underlying action is not a reason to delay this case.

JEM did not submit a reply.

## **Discussion**

The Court denies the motion. As an initial matter, the Court observes that the parties scheduled depositions on numerous occasions (*see* NYSCEF Doc. Nos. 50, [depositions to be done by October 4, 2023]; 55 [depositions to be done by March 15, 2024]; 58 [depositions to be done by June 1, 2024]). More important is the difference between the above-cited discovery stipulations in April 2024 and July 2024 (NYSCEF Doc. Nos. 68, 73). While depositions are

mentioned in the April order, they are wholly omitted from the second discovery stipulation. When a discovery item no longer appears in a subsequent discovery stipulation, it typically means that it was either completed or is no longer necessary. JEM signed the July 2024 discovery stipulation, which did not mention anything about depositions and then ignored the Court's directive to update the Court about discovery in anticipation of the September 2024 conference. In this Court view, this means that JEM waived its right to seek depositions.

JEM failed to seek whatever discovery it now claims is outstanding despite many, many opportunities. JEM did not ensure that depositions were mentioned in the July 2024 stipulation or bother to file a letter or a motion concerning outstanding discovery. Critically, JEM also did not make a prompt motion after the Court set a note of issue deadline; rather, it waited until after plaintiffs filed the note of issue.

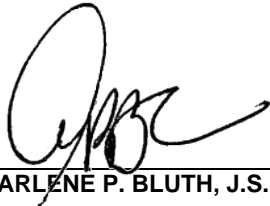
Moreover, JEM did not cite a rational excuse for its failure to pursue discovery. It claimed in opposition that no parties updated the Court by the September 23, 2024 deadline "For reasons unknown." Of course, this is not a reasonable justification. JEM was certainly capable of e-filing an update and it simply chose not to do so. That is why the Court then directed that a note of issue be filed.

The fact that there may be discovery outstanding in the underlying matter does not compel the Court to grant the instant motion. A review of that case reveals that a note of issue was filed on January 17, 2020 (*see* NYSCEF Doc. No. 50 in Index No. 151039/2017) and the matter has even appeared in the Early Settlement part. There is no reason to vacate the note of issue here where the underlying action has been "post-note of issue" for nearly five years.

Accordingly, it is hereby

ORDERED that defendant JEM Contracting Corp.’s motion to vacate the note of issue is denied.

12/19/2024  
DATE

  
ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE