Meisels v Raptis
2017 NY Slip Op 32221(U)
October 18, 2017
Supreme Court, Kings County
Docket Number: 15719/12
Judge: Michelle Weston
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 3 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 320 Jay Street, Brooklyn, New York, on the 18th day of October, 2017.

PRESENT:

HON. MICHELLE WESTON,
Justice.

----------X

RACHEL MEISELS, as parent and natural guardian of M.M. and RACHEL MEISELS, individually,

Plaintiffs,

DECISION & ORDER

- against -

Index No. 15719/12

THEODORIS RAPTIS, MD, ROMAINE SCHUBERT, MD, MYRIAM GERMAIN, MD AND LOUISDON PIERRE, MD,

Defendants.

----------X

The following papers numbered 1 to 4 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2
Opposing Affidavits (Affirmations) and Memorandum of Law	3
Reply Affidavits (Affirmations)	4

Upon the foregoing papers, defendants Theodoris Raptis, MD, Myriam Germain, MD and Louisdon Pierre, MD move for an order (1) pursuant to 22 NYCRR 202.21, striking plaintiffs' note of issue dated August 22, 2016, or (2) extending defendants' time to file for summary judgment. By separate motion, defendant Romaine Schubert, MD seeks the same relief, in addition to an order compelling plaintiffs to provide outstanding discovery pursuant to CPLR §§ 3126 and 3124.

Plaintiffs commenced this medical malpractice action, alleging that defendants failed to timely diagnose and treat Herpes Encephalitis in the then two-year-old infant plaintiff, causing infant plaintiff to suffer from developmental delays. After issue was joined and discovery was ongoing, the case had been marked off the calendar. By a compliance conference order dated July 19, 2016, the case was restored to active status and the date for filing the note of issue was extended to February 3, 2017.

On August 22, 2016, plaintiffs filed a note of issue with a certificate of readiness. Plaintiffs also filed an affidavit of service, indicating that defendants' attorneys were served with the note of issue and certificate of readiness at their office addresses by regular mail on August 19, 2016. Although defendants do not challenge the validity of the affidavit of service, they maintain that, for some unexplained reason, they never received the note of issue. Defendants contend that it was not until March 2017 that they first learned the note of issue had been filed when they were notified that the case had been scheduled for a pre-trial conference. To support their claim that they never received the note of issue, defendants cite to the fact that discovery remained ongoing, even after the note of issue had been filed, and that they immediately informed plaintiffs' counsel that they did not receive the note of issue. On this basis, defendants ask that the note of issue be vacated or, alternatively, that their time to file a summary judgment motion be extended. The Court denies defendants' motions for the following reasons.

A party may move to vacate a note of issue "[w]ithin 20 days after service of a

note of issue * * * upon affidavit showing in what respects the case is not ready for trial" (22 NYCRR 202.21[e]). Upon such showing, "the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect" (id.). When a motion to vacate the note of issue is not timely made, the moving party has the added burden of showing good cause. Specifically, the movant must demonstrate that additional discovery is necessary because of the development of "unusual or unanticipated circumstances" subsequent to the filing of the note of issue (Jacobs v Johnston, 97 AD3d 538 [2d Dept. 2012]; Audiovox Corp. v Benyamini 265 AD2d 135, 138-140 [2d Dept. 2000]). In meeting this added burden, the moving party must also show that additional discovery is necessary to prevent substantial prejudice (see Singh v City of New York, 68 AD3d 1096 [2d Dept. 2009]; Audiovox Corp. v Benyamini, 265 AD2d at 138). "The common thread in the cases allowing further discovery is some occurrence after the filing of the note of issue that is not in the control of the party seeking further discovery and which causes actual rather than potential prejudice" (Audiovox Corp. v Benyamini, 265 AD2d at 140).

Here, the court concludes that defendants have not demonstrated good cause sufficient to excuse the untimeliness of their motion. Although defendants maintain they never received the note of issue, they do not challenge plaintiff's affidavit of service, which is prima facie proof of delivery of the note of issue by mail (see Board of

Managers of Foundry at Washington Park Condominium v Foundry Development Co., Inc., 111 AD3d 776, 777 [2d Dept. 2013]; Engel v Lichterman, 95 AD2d 536, 538 [2d Dept. 1983], aff'd. sub nom. Engel by Engel v Lichterman, 62 NY2d 943 [1984]). Since the instant motions were served well over 20 days after service of the note of issue, defendants are not only required to show that the case is not ready for trial, but that additional discovery is necessary because "unusual or unanticipated circumstances" have arisen since the filing of the note of issue. Defendants have shown neither. Nothing in the demands that were sent to plaintiff post note of issue suggests that the information sought was the result of some "unusual or unanticipated" circumstance beyond defendants' control, such as a new alleged injury or a dramatic change in an existing injury (see Audiovox Corp. v Benyamini, 265 AD2d at 138-140, citing Schenk v Maloney, 266 AD2d 199 [2d Dept. 1999]). To the contrary, the information sought was part of a continuing demand for routine information post note of issue, such as updated authorizations and information on Medicaid liens. To the extent defendants contend that infant plaintiff's scheduled surgery involving a percutaneous right heel hamstring lengthening is an "unusual or unanticipated" circumstance, the Court disagrees. Such surgery, even if performed, is not evidence of an unexpected new injury or a dramatic change in an existing injury, and has no bearing on the issue of liability in this case. Since defendants identify no "unusual or unanticipated" circumstances that developed following the filing of the note of issue, and demonstrate no substantial, actual prejudice

that would arise if further discovery is not permitted, their application to vacate the note of issue is denied.

The Court also denies defendants' alternative request for an extension of time within which to move for summary judgment. CPLR 3212(a) provides that a summary judgment motion must be filed no later than 120 days following the filing of the note of issue. This statutory deadline is strictly enforced and can only be extended upon a showing of good cause (see Brill v City of New York, 2 NY3d 648, 652 [2004]). Whether good cause exists is a matter committed to the court's discretion and requires a showing of a "satisfactory explanation for the untimeliness – rather than simply permitting meritorious, nonprejudicial filings, however tardy" (id. at 652).

While "[s]ignificant outstanding discovery may, in certain circumstances, constitute good cause for the delay in making a motion for summary judgment," defendants cite to no significant discovery that is outstanding in this case (Tower Insurance Company of New York v Razy Associates, 37 AD3d 702, 703 [2d Dept. 2007]; see Kung v Zheng, 73 AD3d 862 [2d Dept. 2010]). All depositions have been completed and, as noted, any remaining discovery has no bearing on the issue of liability (compare Parker v LIJMC-Satellite Dialysis Facility, 92 AD3d 740, 741 [2d Dept. 2012] [reversing the denial of third-party defendant's unopposed motion for an extension of time to move for summary judgment, where third-party defendant had yet to receive any discovery by the court-imposed deadline for summary judgment]; Gonzalez ex rel. Gonzalez v 98 Mag

Leasing Corp., 95 NY2d 124, 129 [2000] [good cause existed to entertain summary judgment motion, where depositions of eyewitnesses to accident remained outstanding]).

Finally, defendants' claim that they never received the note of issue does not constitute good cause, especially where the note of issue was filed with the court, along with proof of service, and defendants do not deny service or otherwise rebut the presumption of service (see Azcona v Salem, 49 AD3d 343 [1st Dept. 2008] [defendants' counsel's assertion that he did not receive a copy of the note of issue is insufficient to rebut the presumption of service created by plaintiff's affidavit of service, and does not constitute good cause to excuse defendants' late summary judgment motion]; compare Cibener v City of New York, 268 AD2d 334 [1st Dept. 2000] [good cause existed to extend time to make a motion for summary judgment, where defendant was never served with the note of issue, plaintiff offered no proof of service, and no copy of the note of issue was on record]).

Accordingly, defendants' motions are denied in their entirety.

This constitutes the decision and order of the court. Defendants Theodoris Raptis, MD, Myriam Germain, MD and Louisdon Pierre, MD are directed to serve a copy of this decision and order on all parties.

E N T E R,

Michelle Weston

J. S. C.

Hon. Michelle Weston