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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU - PART 15**

**Present: HON. WILLIAM R. LaMARCA  
Justice**

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**WILLIAM SCHNECKENBURGER,  
Plaintiff,**

**Motion Sequence #5  
Submitted April 21, 2009**

**-against-**

**INDEX NO: 10449/07**

**ROBIN S. MAYNARD, PAUL MACHESE, ROBERT  
LANDRY HENDRICKSON and THE MANHASSET-  
LAKEVILLE WATER DISTRICT,**

**Defendant.**

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**The following papers were read on this motion:**

<b>Notice of Motion.....</b>	<b>1</b>
<b>Affirmation in Opposition.....</b>	<b>2</b>
<b>Reply Affirmation.....</b>	<b>3</b>

**Requested Relief**

Defendant, ROBERT LANDRY HENDRICKSON (hereinafter referred to as "HENDRICKSON"), moves for an order, vacating the Note of Issue and Certificate of Readiness filed herein and striking this case from the trial calendar on the ground that discovery is not complete, and ordering a schedule for the completion of discovery. An Affidavit of Service reflects service of the instant motion on counsel for all parties, on February 27, 2009, but only counsel for plaintiff, WILLIAM SCHNECKENBURGER,

opposes the motion, which is determined as follows:

### **Background**

This is an action for personal injury arising from a trip and fall accident that occurred on January 2, 2007, when it is alleged that plaintiff, WILLIAM SCHNECKENBURGER, an elderly man, tripped on a curb box covering the emergency shut off valve which controls the water service provided by THE MANHASSET-LAKEVILLE WATER DISTRICT. Defendants, ROBIN MAYNARD and PAUL MACHESE, jointly own a building located at 47 Plandome Road in Manhasset, New York, where they operate a law office. Defendant HENDRICKSON owns the adjoining property located at 41 Plandome Road, where he conducts a veterinary practice. The two properties share a complete driveway where the curb box cover is located. Prior motions for summary judgment by MAYNARD, MACHESE and the WATER DISTRICT have been denied, and the case is presently scheduled for trial on July 15, 2009.

On the instant motion, counsel for HENDRICKSON states that the plaintiff filed a Note of Issue, on February 10, 2009, claiming that all discovery known to be necessary has been completed and the case is ready for trial. It is moving counsel's position that the case is not ready for trial as outstanding physicals, medical record authorizations and complete responses to outstanding discovery demands have not been completed. Counsel urges that the filing of the Note of Issue is premature and that striking the case from the trial calendar is appropriate.

In opposition to the motion, counsel for plaintiff points out that the motion is both procedurally and factually deficient in that it does not contain an affirmation of "good faith" pursuant to 22 NYCRR §202.7, and does not contain specifics as to what is outstanding.

Counsel for plaintiff asserts that all discovery has been provided and, at the Certification Conference, on November 18, 2008, all parties agreed to certify the case and that all discovery was complete. This is not accurate.

The Court notes that at the Certification Conference, notwithstanding certification, the parties entered into a side Stipulation wherein they agreed to a schedule to complete all outstanding discovery, as follows:

Plaintiff to provide to defendant Robert Landry Hendrickson with (sic) the following within 20 days:

1. Plaintiff to respond to defendant Silers & Ingers Notice of Discovery and Inspection dated June 5, 2008 to Hendrickson;
2. Plaintiff to respond to Notice for D&I dated 8/12/08;
3. Defendant Hendrickson reserves right to conduct orthopedic and neurologic IMEs, notice within 30 days or waived;
4. Defendant Hendrickson reserves right to conduct deposition of co-defendant Machese within 30 days or waived; ;
5. EBT of Daniel Klement to be held on 11/19/08 subject to subpoena;
6. Plaintiff to hold Note of Issue and not file until all discovery is complete, but w/in 90 days;
7. Defendant Hendrickson to provide sworn affidavit re requested documents in plaintiff's letter of 9/4/08 within 30 days.

#### The Law

22 NYCRR § 202.21 (e) in pertinent part grants the Court discretion, "[a]t any time", to vacate a Note of Issue if it appears that a material fact in the certificate of readiness is incorrect. Additionally, 22 NYCRR § 202.21(d) provides that "[w]here unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice, the court . . . may grant permission to conduct such necessary proceedings."

Discussion

After a careful reading of the submissions herein, it does not appear that circumstances require vacatur of the Note of Issue or striking the case from the trial calendar. The Certification Order of the Court, dated November 18 2008, directs that all parties shall provide upon request of another party additional authorizations for production of records maintained by health care providers and/or facilities which is an ongoing responsibility. Based on the record herein, it appears that plaintiff has provided the additional authorizations demanded by defendants, and that HENDRICKSON has waived additional physical examinations of plaintiff by failing to timely demand same. The Court concludes that striking of the Note of Issue is not warranted.

Conclusion

Accordingly, it is hereby

**ORDERED**, that defendant HENDRICKSON's motion to vacate the Note of Issue and to strike the case from the trial calendar is denied

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: July 9, 2009

WILLIAM R. LaMARCA, J.S.C.

**ENTERED**

JUL 15 2009

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**

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