SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 9
NASSAU COUNTY

FLORENCE WEISS and PHILIP WEISS,

Plaintiff(s),

-against-

HARVEY S. FINKELSTEIN, M.D., PAIN CARE OF LONG ISLAND, IRA WEG, M.D., and SOUTH SHORE INTERNAL MEDICINE ASSOCIATES, P.C.,

Defendant(s).

ORIGINAL RETURN DATE:06/27/06
SUBMISSION DATE: 06/27/06
INDEX No.: 14989/04

MOTION SEQUENCE #1

The following papers read on this motion:

Notice of Motion.....	1
Answering Papers.....	2

Motion by defendants, Harvey S. Finkelstein, M.D., and Pain Care of Long Island, for an order vacating the Note of Issue and Certificate of Readiness in this action, compelling plaintiffs to comply with outstanding discovery demands and extending the time in which to make dispositive motions until 60 days after completion of discovery, is denied.

Plaintiffs bring this action to recover damages for alleged medical malpractice committed by defendants. A certification order was issued by the undersigned and received by counsel for all parties on April 13, 2006. On the same date, a side stipulation was signed by counsel, which stated that plaintiffs agreed to advise defendants as to whether their son would be available for deposition and to comply with outstanding demands for authorizations. Defendants now argue that plaintiffs have not complied with the outstanding discovery demands, and as such insist that the note of issue must be vacated and that plaintiffs must be compelled to respond to outstanding discovery demands.

Where a party moves to vacate the note of issue within twenty days following service of same, 22 NYCRR 202.21(e) provides that the court may grant vacatur upon a showing that the case is not ready for trial and a material fact in the certificate of readiness is incorrect (see, *Perla v. Wilson*, 287 AD2d 606 [2d Dep't., 2001]; *Audiovox Corp. v Benyamini,* 265 AD2d 135 [2d Dep't., 2000]; 22 NYCRR 202.21[e]).

The note of issue is dated May 4, 2006. Defendants' motion was served on May 19, 2006 and was thus made within twenty days of service of the note of issue (see, CPLR §2211). Accordingly, defendants' motion to vacate the note of issue is properly brought pursuant to 22 NYCRR 202.21(e).

Defendants assert that this action is not trial ready because plaintiffs have not complied with discovery demands set forth in the April 13, 2006 side stipulation and a subsequent letter by defense counsel on same date.

A disclosure timetable was first directed by the Preliminary Conference Order of the court dated May 17, 2005 in which the "end date for all disclosure" was fixed at January 14, 2006 pursuant to the designation of this action as "standard" under the timetable designation requirements of 22 NYCRR 202.12(b).

At the compliance conference held on October 6, 2005, the standardized "Compliance Conference Order - Final Order" (form M-3531) was utilized to identify all remaining disclosure and to again establish a schedule for timely completion. The standardized final paragraph of the Compliance Conference Order provides as follows:

> "Failure to comply as directed by the certification conference date to be held before the undersigned on _____ will result in appropriate sanctions including preclusion/striking pleadings, etc."

December 13, 2005 was inserted in the blank space provided for the certification conference.

On December 13, 2005, it became clear that disclosure would not be complete in advance of the January 14, 2006 deadline. It is the policy of this Part to entertain reasonable applications to change a timetable designation as permitted by 22 NYCRR 202.12(c)(2) where, as here, a more generous timetable designation remains available, to wit, "complex".

Accordingly, and in lieu of hearing oral application on December 13, 2005 for sanctions as permitted by the October 6, 2005 Compliance Conference Order, the court changed the designation of this action from "standard" to "complex" by short form order dated December 13, 2005. This afforded all parties an extension of their certification deadline from January 14, 2006 to April 14, 2006.

Despite the extension, and the appearance of the parties for additional conferences on February 21, 2006, March 13, 2006 and April 13, 2006, disclosure was not completed.

April 13, 2006 is only one day before the last available date for timely certifying this action as trial ready. As previously noted, this action was certified by the undersigned as trial ready on that date. April 13, 2006 is also the same date the parties entered into the side stipulation which forms the predicate for this motion. That stipulation was not so ordered by the undersigned.

It is also the policy of this Part when certifying an action as trial ready to so order stipulations entered into simultaneously with certification when counsel build in the penalty further for non-compliance. Such a so ordered stipulation is, in effect, a conditional order of the court and avoids post-certification disclosure issues such as that which occurred here. If the parties cannot otherwise stipulate to the consequences of non-compliance with disclosure that remains outstanding despite certification, it is the further policy of this Part to hear oral application at that time for "appropriate sanctions including preclusion/striking pleadings, etc." (see Compliance Conference Order). This too allows for meaningful resolution of outstanding disclosure issues.

As movants failed to avail themselves of either court sanctioned method designed to meaningfully resolve outstanding disclosure prior to affirmative court certification of the action as trial ready, and instead opted for the expediency of a simple side stipulation, movants will not now be heard to complain and are deemed to have waived entitlement to court redress.

Vacatur of the note of issue and other disclosure related relief is accordingly denied.

Additionally, defendants' motion to extend the time in which to make dispositive motions until 60 days after completion of discovery is denied. An extension of the time to file a motion for summary judgment requires a showing of "good cause" (see, CPLR §3212[a]; *Brill v. City of New York*, 2 NY3d 648 [2004]). "'Good cause' in CPLR §3212[a] requires a showing of good cause for the delay in making the motion - - a satisfactory explanation for the untimeliness ..." (*Id.*). As defendants fail to establish why they should not be considered complicit in the failure to timely obtain the disclosure they still seek and further fail to establish how the outstanding disclosure impeded, in a material way, their ability to timely move for summary judgment, their request for an extension the time to move is denied.

This decision constitutes the order of the court.

Dated: 8-1-06

HON THOMAS P. PHELAN

J.S.C.

ENTERED

AUG 03 2006

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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