



**Supreme Court of the State of New York
County of Kings
Civic Center at Montague Street
Brooklyn, NY 11201
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Fax Transmittal Sheet

Date: March 15, 2013

To: Gary Rosen, Esq.
From: Mary Griffith
Administrative Judge Lawrence Knipel's Chambers
Re: Javeed v 3619 Realty Corp., et al

Attached herewith, please find the captioned decision. Please forward a copy to your adversaries.

Number of pages including cover page 7. Please call (347) 296-1200 to confirm receipt of this fax.

Thanks.

At an IAS Term, Part 57 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 14th day of March, 2013

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

-----X

EJAZ JAVEED, an infant by his mother and natural guardian, TAHIRA PERVEEN and TAHIRA PERVEEN, individually,

Plaintiff,

- against -

Index No. 4950/05

3619 REALTY CORP., et al.,

Defendants.

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The following papers numbered 1 to 16 read herein:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1-3, 4-6, 7-9, 10-11
Opposing Affidavits (Affirmations) _____	12, 13, 14
Reply Affidavits (Affirmations) _____	15, 16
_____ Affidavit (Affirmation) _____	_____
Other Papers _____	_____

Upon the foregoing papers, defendants New Deal Realty Corp., VMR Builders Corp., Vincent Falcone, Michael Falcone, Robert Bruzzese, Meir Michael Solomon and Daniel "Dan" McLoud (the "New Deal defendants") move to compel plaintiffs Ejaz Javeed, an infant by his mother and natural guardian, Tahira Perveen and Tahira Perveen, individually

to “adequately respond” to the discovery demands served on plaintiffs on November 25, 2010. Plaintiffs move, by order to show cause, for an order 1) pursuant to CPLR 3126, striking the answer of the New Deal defendants for failure to produce witnesses for examinations before trial (EBTs) or, in the alternative, 2) precluding the New Deal defendants from offering any evidence as to liability at trial and 3) pursuant to CPLR 3214, compelling defendants N.Y. Lead Abatement Corp., Yosef “Yossi” Stern, Sheril Stern and David L. Rogatsky (the “N.Y. Lead defendants”) to comply with previously ordered discovery and produce said defendants for EBTs. Plaintiffs cross-move for an order 1) pursuant to CPLR 3216, striking the answers of both the New Deal defendants and the N.Y. Lead defendants unless said defendants serve responses to plaintiffs’ previously served discovery demands dated July 23, 2012 within five (5) days and produce Andrew Goodrich, P.E. for his EBT within ten (10) days. Plaintiffs moves for an order, pursuant to CPLR 2221, modifying the order of this court, dated July 5, 2012, to the extent that the order granted “one final extension” of the note of issue date to September 21, 2012, and extending plaintiffs’ time to file a note of issue to December 31, 2012.

On February 17, 2005, plaintiffs commenced this action against defendant 3619 Realty Corp. to recover damages for the alleged lead poisoning of infant plaintiff while residing in a dwelling located at 3619 15th Avenue in Brooklyn. At all relevant times, the building was owned by defendant 3619 Realty Corp. On October 26, 2010, plaintiffs commenced a second action against the New Deal defendants, alleging in essence that each

maintained some measure of control over the property, and against the N.Y. Lead defendants, alleging negligence in their performance of lead abatement services at the subject property. The second action was consolidated with the original action by order dated March 25, 2011 (Hon. Peter P. Sweeney, J.). The order vacated the note of issue filed in the prior action and directed that the parties appear in the Centralized Compliance Part (CCP) to expedite discovery. A subsequent CCP order, dated May 18, 2011, directed that the parties complete EBTs and independent medical examinations by dates certain and extended the time for plaintiff to file a note of issue until September 30, 2011. On or about September 13, 2011, plaintiffs brought a motion to extend the time to file a note of issue as there was discovery outstanding, including the EBT of plaintiff Perveen scheduled for September 19, 2011. The motion was resolved by the parties in CCP on October 4, 2011, resulting in an order directing that the note of issue be filed on or before February 6, 2012, that the EBT of Perveen be held on or before December 7, 2012, and that the EBTs of defendants be held on December 7, 2012 and December 8, 2012.*

Perveen did not appear for a deposition on December 7, 2012, prompting the New Deal defendants to move, by order to show cause, to dismiss plaintiffs' complaint. Plaintiffs cross-moved to strike the answer of the New Deal defendants for "willful and contumacious discovery abuse," sanctions and for an order deeming defendants' discovery waived by their purportedly improper actions. By order dated July 5, 2012, the court denied both motions,

*Presumably, the year of the deposition dates was intended to be 2011.

finding that neither movant had engaged in conduct warranting dismissal of pleadings. The court granted that part of plaintiffs' motion to extend the time to file a note of issue to the extent that "one final extension shall be granted," and directed that the note of issue be filed on or before September 21, 2012. The court further directed that the EBT of Perveen shall take place on July 16, 2012.

In compliance with this court's order, Perveen was produced for an EBT on July 16, 2012. On August 20, 2012, the New Deal defendants brought a motion seeking to compel plaintiffs to "adequately respond" to the discovery demands served upon plaintiffs on November 25, 2010. The New Deal defendants' motion was followed shortly by the order to show cause and cross motion of plaintiffs seeking to strike the answers of the New Deal defendants and N.Y. Lead defendants based on their failure to produce witnesses for EBTs and other documentary discovery, in addition to the New Deal defendants' failure to produce non-party Andrew Goodrich, P.E. for an EBT.

On September 14, 2012, plaintiffs moved by order to show cause to extend the time in which to file a note of issue or, alternatively, permit plaintiffs to continue discovery post note of issue. The court (Hon. Johnny Lee Baynes, J.) declined to sign the order to show cause, stating that the papers "do not address prior application." As a result of Justice Baynes' denial of the order to show cause, plaintiffs brought the instant motion "pursuant to CPLR 2221" seeking modification of the court's July 5, 2012 order to the extent that this

court deems the September 21, 2012 note of issue deadline “non-final” and further extends the note of issue to December 31, 2012.

Plaintiffs’ Motion for Modification of the July 5, 2012 Order

The court will first consider the motion of plaintiffs to “modify” the July 5, 2012 order to deem the note of issue deadline “non-final” and to extend the note of issue date. It must be noted that the motion practice giving rise to the July 5, 2012 order was itself in the context of numerous delays in conducting discovery. The order of this court dated July 5, 2012 stated that one final extension would be granted and explicitly directed that the note of issue be filed on or before September 21, 2012. Although plaintiffs brought an order to show cause one week before that final deadline, the order to show cause was not signed, the final deadline was not complied with, and plaintiffs were forced to make another motion to “modify” the July 5, 2012 order and ask for yet another extension to file a note of issue. While plaintiff Perveen was deposed within the time allotted in the July 5 order, plaintiffs’ counsel ignored defendants’ demands to depose the infant plaintiff and instead insisted that defendants be deposed. Time passed, no further depositions were held, and no application was granted to extend the final deadline before the final deadline passed. Not only have plaintiffs repeatedly delayed discovery proceedings, but they have inexcusable failed to proceed with discovery despite being cautioned that the extension granted to file the note of issue was “final.”

Accordingly, plaintiffs' motion to "modify" is denied, the application of defendants in their opposition papers to dismiss the action is granted, and the action is dismissed. The remainder of the motions are denied as academic.

The foregoing constitutes the decision and order of this court.

E N T E R

J. S. C.

**HON. LAWRENCE KNIPEL
SUPREME COURT JUSTICE**