

<b>Agard v 745 Gates Hous. Dev. Funds Corp.</b>
2021 NY Slip Op 30197(U)
January 14, 2021
Supreme Court, Kings County
Docket Number: 510830/18
Judge: Lawrence S. Knipel
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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 14<sup>th</sup> day of January, 2021.

PRESENT:

HON. LAWRENCE KNIPEL,

Justice.

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ALTHEA AGARD,

Plaintiff,

- against -

Index No. 510830/18

745 GATES HOUSING DEVELOPMENT FUNDS CORPORATION and METROPCS NEW YORK, LLC,

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_

111-115

Opposing Affidavits (Affirmations) \_\_\_\_\_

117-118

Reply Affidavits (Affirmations) \_\_\_\_\_

120

Upon the foregoing papers in this slip-and-fall personal injury action, defendant 745 Gates Housing Development Fund Corporation (Gates) moves (in motion sequence [mot. seq.] six) for an order, pursuant to CPLR 2221, granting it leave to reargue its prior motion to vacate the note of issue and compel discovery, which sought the further deposition of plaintiff Althea Agard (Agard) regarding newly alleged injuries in her supplemental bill of particulars and, upon reargument, directing that Agard appear for a further deposition regarding "her prior lawsuit and her post-deposition disclosures."

On February 20, 2020, Gates moved for an order vacating the note of issue and certificate of readiness on the ground that discovery is not yet complete, removing the action from the trial calendar and compelling Agard to appear for a further deposition regarding the injuries alleged in her post-deposition supplemental bill of particulars and medical disclosures. This court issued an August 12, 2020 order (the August 2020 Discovery Order), which provides:

“Defendant’s motion to vacate the note of issue is decided as follows: Case to remain on trial calendar. The motion, filed [o]n February 20, 2020, seeks vacatur on the note of issue for plaintiff’s failure to respond to D&I and to appear for IME. Plaintiff, in opposition dated March 10, 2020, provided discovery responses and was willing and able to appear for IME, however such attendance may have been delayed during the NY Pause period. Defendant has not replied to indicate that any issues with completing the outstanding discovery remain. Accordingly, IME to extent not done to be held by 10/15/20.”

Gates now seeks an order granting it leave to reargue its prior discovery motion on the ground that the court “overlooked” its request for a further deposition of Agard. Gates reasserts that it never had an opportunity to question Agard regarding knee injuries that she identified for the first time in her post-deposition supplemental bill of particulars and additional disclosures for medical providers. Gates asserts that “[i]n reviewing the Court’s decision, it appears that the Court did not realize that the issue of plaintiff’s continued/further deposition remained outstanding.” In addition, Gates seeks an order compelling Agard to disclose the settlement amount she received in a prior lawsuit

regarding a motor vehicle accident.

Agard, in opposition, asserts that Gates' motion "simply makes the same points as argued previously and there is nothing to suggest that Your Honor overlooked anything." Agard's counsel further argues that Agard's initial bill of particulars (served prior to her deposition) alleged spine and bilateral knee injuries and "the defense had every opportunity to question Ms. Agard about those injuries . . ." Agard's counsel asserts that Agard's supplemental bill of particulars "merely provides more specification of those spine and bilateral knee injuries . . ." Agard's counsel also asserts that Agard "already testified extensively about th[e] prior accident at her deposition."

Gates, in reply, asserts that "[p]ost-deposition, plaintiff's counsel produced nine authorizations for records . . ." and "also served a Supplemental Bill of Particulars wherein plaintiff now claimed ACL tears in her knees" that were "diagnosed by two providers that plaintiff did not disclose in her deposition testimony or any pre-deposition disclosure." Gates asserts that it was deprived "of the ability to question plaintiff about what doctor or doctors referred her to these facilities, what she did after visiting them [and] whether she went for any physical therapy after visiting them . . ." While Gates agrees that Agard's knee injury was generally disclosed prior to her deposition, it contends that "the authorizations served along with plaintiff's Supplemental Bill of Particulars demonstrate that her new allegations were based upon previously undisclosed treatment which [it] should be permitted to probe at a further deposition."

“A motion for leave to reargue shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion” (CPLR 2221[d] [2]). Here, leave to reargue is warranted, since this court overlooked that branch of Gates’ prior motion that sought a further deposition of Agard regarding the medical care she received for ACL tears in her knees from medical providers who she identified for the first time in her post-deposition supplemental bill of particulars and medical authorizations. Accordingly, it is

**ORDERED** that Gates’ motion (in mot. seq. six) for leave to reargue is granted, and, upon reargument, Agard is ordered to appear (virtually by Zoom or other online video conference) for a further deposition on or before February 28, 2021, only regarding the treatment of ACL tears in her knees by medical providers who were identified for the first time in Agard’s post-deposition supplemental bill of particulars and authorizations. The motion is otherwise denied.

This constitutes the decision and order of the court.

E N T E R,

J. S. C. 