

Grayson v New York City Tr. Auth.

2023 NY Slip Op 33004(U)

August 29, 2023

Supreme Court, New York County

Docket Number: Index No. 152499/2012

Judge: Denise M. Dominguez

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DENISE M DOMINGUEZ PART 21

Justice

-----X INDEX NO. 152499/2012

SHELBY GRAYSON,

MOTION SEQ. NO. 005

Plaintiff,

- v -

NEW YORK CITY TRANSIT AUTHORITY, BENJAMIN CLIFFORD

DECISION + ORDER ON MOTION

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 005) 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88

were read on this motion to/for STRIKE CASE FROM CALENDAR

Upon the foregoing documents, the Defendants' motion to strike the Plaintiff's supplemental bill of particulars, or alternatively to vacate the note of issue and compel additional discovery from the Plaintiff is denied without prejudice in part and granted in part.

As per the police report, this personal injury action arises out of an August 17, 2011 incident in which it is alleged that the Plaintiff, SHELBY GRAYSON, was apparently proceeding in the bike lane at the intersection of West 43rd Street and 12th Avenue in Manhattan, when the Plaintiff and the Defendants' bus came into contact. (NYCSEF Doc. 11).

The Plaintiff filed the note of issue in this matter on April 1, 2019 (NYSCEF Doc. 66). Upon a review of the record, it appears that multiple settlement conferences were held both prior to and following the COVID-19 pandemic. However, it does not appear that there is a current trial date in this matter.

Over three and a half years after the note of issue was filed, the Plaintiff served a supplemental bill of particulars, dated November 17, 2022 alleging various bilateral knee injuries and surgery for the first time (NYSCEF Doc. 70, 50). Following receipt of the supplemental bill of particulars, the Defendants filed the within motion essentially arguing that supplemental bill of particulars should be struck as it is in fact an "amended" not a supplemental bill of particulars.

Specifically, the Defendants argue that the initial bill of particulars makes no mention of any left knee injury or need for surgery and although the initial bill of particulars mentioned an aggravation of pre-existing arthritis of the right knee, there was no prior claim related to any specific injury or need for surgery. The Plaintiff opposes and argues that the initial bill of particulars did in fact include claims related to both the left knee (aggravation of a pre-existing, asymptomatic degenerative condition of left femorotibial compartment osteoarthritis) and the right knee (aggravation of a pre-existing arthritis of the right knee). (NYSCEF Doc. 50, 72).

Pursuant to CPLR 3043(b), “[a] party may serve a supplemental bill of particulars with respect to claims of continuing special damages and disabilities without leave of court at any time... provided however that no new cause of action may be alleged.” A “supplemental” bill of particulars is one where the claims asserted are alleging a continuation of special damages and/or consequences of the injuries set forth in the initial bill of particulars. (*See Shahid v. New York City Health & Hosps. Corp.*, 47 A.D.3d 798, 850 N.Y.S.2d 521 [1st Dept 2008]). Upon review, the claims asserted in the November 17, 2022 supplemental bill of particulars appear to be a continuation of previously alleged injuries and/or complaints related to the bilateral knees. It also appears that the Plaintiff periodically exchanged various authorizations and medical records related to treatment for the knees during the course of discovery. Therefore, that branch of the motion which seeks to strike the supplemental bill of particulars is denied.

Although the within motion was filed well after the 20 day timeline pursuant to 22 NYCRR §202.21(d), a “late” motion to vacate the note of issue may be entertained where “good cause” is shown and “unusual or unanticipated circumstances and substantial prejudice” is established. (*Taylor v. Enter. FM Tr.*, 214 A.D.3d 493, 494, 183 N.Y.S.3d 742 [1st Dept 2023]). Here, the Defendants had “good cause” for filing the motion to vacate the note of issue “late” in light of the recent post note of issue surgery.

Pursuant to 22 NYCRR §202.21(e), the note of issue may be vacated when the certificate of readiness is erroneous and asserts that discovery is complete when it is not. (*See Ortiz v Arias*, 285 A.D.2d 390, 727 N.Y.S.2d 879 [1st Dept 2001]; *Pua v. Lam*, 155 A.D.3d 487, 63 N.Y.S.3d 859 [1st Dept 2017]). At this time, there is no indication that the certificate of readiness was erroneous when filed as the recent knee surgery was conducted well after the filing of the note of issue. (*see Samuelsen v. Wollman Rink Operations LLC*, 196 A.D.3d 408, 408, 151 N.Y.S.3d 41 [1st Dept 2021]).

However, it is clear that post-note discovery is necessary concerning the recent knee surgery and that such discovery will not prejudice either party. (*see Cuprill v. Citywide Towing & Auto Repair Servs.*, 149 A.D.3d 442, 49 N.Y.S.3d 624 [1st Dept 2017]; *Dominguez v. Manhattan & Bronx Surface Transit Operating Auth.*, 168 A.D.2d 376, 376–77, 562 N.Y.S.2d 694 [1st Dept 1990]). The Defendants have not shown that they will be substantially prejudiced if post-note of discovery is permitted to continue while the case remains on the trial calendar. As no trial date has yet to be set in this matter, the parties would not be prejudiced if this matter were to remain on the trial calendar while the limited additional discovery related to the claims in the supplemental bill of particulars is conducted.

Therefore, in light of the recent bilateral knee treatment, the Plaintiff is directed to provide the following by September 22, 2023, if not already provided:

- The medical records and duly executed authorization with proper power of attorney permitting the release of such records from Lenox Hill Hospital related to the September 29, 2022 bilateral knee replacement surgery.
- The medical records and duly executed authorization with proper power of attorney permitting the release of such records related to any treatment provided to the knees from the time of the Plaintiff's initial deposition in 2015 to the present, including, but limited to pre or post operative care, diagnostic imagery, hospitalization(s), physical therapy, orthopedic treatment.
- The medical records and duly executed authorizations with proper power of attorney permitting the release of such records from Dr. Michael Bronson, Dr. Elias Kassapidis, Dr. Shawn Anthony, Dr. Helen Chang and Dr. Jason Oh.

Additionally, if not already provided, in light of the claims of the aggravation of the asymptomatic degenerative condition of left knee femorotibial compartment osteoarthritis, and the aggravation of a pre-existing arthritis of the right knee, the Plaintiff is also directed to provide the medical records and duly executed authorization permitting the release of such records related to treatment concerning these pre-existing conditions by September 22, 2023. Further, in light of the time that has passed since the note of issue was filed, the Plaintiff is also directed to provide "fresh" duly executed authorization with proper power of attorney for all medical providers previously exchanged by September 22, 2023, if not already recently provided.

The Plaintiff is directed to appear for a further deposition limited to the newly alleged claims in the November 17, 2022 supplemental bill of particulars. The deposition shall be conducted by October 31, 2023. The Plaintiff is also directed to appear for a further independent medical examination(s) ("IME") related to the newly alleged claims in the November 17, 2022

supplemental bill of particulars. The Defendants are directed to designate a physician to conduct the IMEs by October 31, 2023 and the examination shall be conducted by December 31, 2023.

Accordingly, it is hereby

ORDERED that the Defendants' motion to strike the November 17, 2022 supplemental bill of particulars is denied; and it is further

ORDERED that the Defendants' motion to vacate the note of issue is denied without prejudice and with leave to re-file if the additional discovery is not complied with; and it is further

ORDERED that the note of issue is not vacated, and that the case shall remain on the trial calendar; and it is further

ORDERED that the Defendants' motion to compel further discovery is granted to the extent that the Plaintiff is directed to provide the Defendants the medical records and authorizations, and appear for a further deposition as set forth above; and it is further

ORDERED that the Defendants are to designate IME physician(s) by October 31, 2023 and such exams shall be held by December 31, 2023; and it is further

ORDERED that no adjournments of the above are permitted absent Court approval; and it is further

ORDERED that, within 15 days from the entry of this order, movant shall serve a copy of this order with notice of entry on all parties and upon the Clerk of the General Clerk's Office, who is hereby directed to strike the case from the trial calendar and make all required notations thereof in the records of the court; and it is further

ORDERED that such upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk*

Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website)].

Any requested relief not expressly addressed herein has nonetheless been considered by the Court and is hereby expressly denied.

8/29/2023
DATE



DENISE M DOMINGUEZ, J.S.C.

HON. DENISE M. DOMINGUEZ

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	GRANTED IN PART	<input checked="" type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>			
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN						