

**Mohammed v Delta Air Lines, Inc.**

2010 NY Slip Op 33945(U)

July 21, 2010

Supreme Court, Bronx County

Docket Number: 020670/2010

Judge: Lucindo Suarez

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This opinion is uncorrected and not selected for official publication.

L.W

PART 19

Case Disposed	<input checked="" type="checkbox"/>
Settle Order	<input type="checkbox"/>
Schedule Appearance	<input type="checkbox"/>

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX:

-----X

MOHAMMED, ZALINA, et ano

Index N°. 020670/2010

- against -

Hon. LUCINDO SUAREZ,

DELTA AIR LINES, INC., et al

Justice.

-----X

The following papers numbered 1 to 13 read on this motion, DISMISSAL

Noticed on MARCH 24, 2010 and duly submitted as No. 2 on the Motion Calendar of MAY 2, 2010

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1, 2, 3	
Answering Affidavit and Exhibits	4, 5	
Replying Affidavit and Exhibits	6, 7, 8, 9	
Sur-replying Affidavit and Exhibits	10, 11, 12, 13	
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers, defendants' motion to dismiss is granted per the annexed decision and order.

Dated: July 21, 2010

Hon.

LUCINDO SUAREZ, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: I.A.S. PART 19

-----X

ZALINA MOHAMMED and SHERIFF MOHAMMED,

Plaintiffs,

- against -

DELTA AIR LINES, INC., COMMAND SECURITY  
CORPORATION, JENNIFER MILLS, and JANE DOE,

Defendants.

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DECISION AND ORDER

Index No. 20670/2010

PRESENT: Hon. Lucindo Suarez

Upon the Order to Show Cause signed March 24, 2010 and the affirmation of defendants Delta Air Lines, Inc., Command Security Corporation and Jennifer Mills and exhibits submitted in support thereof; the affirmation in opposition dated April 9, 2010 of plaintiffs Zalina Mohammed and Sheriff Mohammed and the exhibits annexed thereto; the reply affirmation dated April 21, 2010 of defendants and the exhibits annexed thereto; the supplemental reply affirmation dated April 30, 2010 of defendants and the exhibit annexed thereto; the sur reply affirmation in opposition dated May 3, 2010 of plaintiffs and the exhibit annexed thereto; the supplemental sur reply affirmation in opposition dated May 7, 2010 of plaintiffs and the exhibit annexed thereto; and due deliberation; the court finds:

Plaintiffs bring the instant action against defendants Delta Air Lines, Inc. ("Delta"), Command Security Corporation ("Command"), Jennifer Mills ("Mills"), and "Jane Doe" for personal injuries sustained by Zalina Mohammed on January 19, 2008 in Terminal 3 of John F. Kennedy International Airport. Plaintiff alleges that, while being transported in a wheelchair by Mills, she sustained injuries to her right foot when Mills "crashed" and "repeatedly bashed" plaintiff into a door that was being closed by "Jane Doe," an unknown employee of Command.

Plaintiff had previously brought an action in this county against defendants Delta, Command,

Mills, and the Port Authority of New York and New Jersey ("Port Authority") for the same incident and for the same injury. In that action, plaintiff alleged that, while being transported in a wheelchair, she sustained injuries to her right foot when she was pushed into a door. That action resulted in a unanimous verdict for defendants as to liability after a jury trial before the Hon. Kenneth L. Thompson, Jr. The trial ended on February 2, 2010, and the clerk of the court entered judgment in favor of defendants on April 14, 2010.<sup>1</sup>

Plaintiff commenced the instant action by filing a summons and complaint on February 8, 2010. Plaintiff served the summons and complaint upon Delta via service upon the Secretary of State on February 11, 2010, upon Command via personal service on February 17, 2010, and upon Mills via personal service on February 18, 2010. Plaintiff served a supplemental summons and amended verified complaint upon defendants via U.S. mail on February 18, 2010.

Defendants now move to dismiss this action pursuant to CPLR §§ 3211(a)(5) and (e), stating that the action is barred under *res judicata* and collateral estoppel, as all claims arising out of the incident are barred as having already been litigated.

Plaintiffs contest that the instant motion is untimely, as CPLR § 3211(d) provides that a pre-answer motion to dismiss may be made at any time before service of a responsive pleading is required. *See* CPLR § 3211(e). While an amended complaint serves to supercede the original pleading, a supplemental complaint does not supercede the original pleading. *See Gindi v. Intertrade Int'l Ltd.*, 12 Misc.3d 1182A, 824 N.Y.S.2d 762 (App. Term. 1st Dep't 2006). Here, plaintiff served defendants with an amended verified complaint on or about February 18, 2010, pursuant to CPLR § 312-a. That section deems service complete when a defendant acknowledges receipt, and provides thirty (30) days for a defendant to return the acknowledgment. A defendant then has an additional twenty (20) days to

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<sup>1</sup> Plaintiff's action against the Port Authority and Delta had been dismissed before trial.

answer. As plaintiff served the amended complaint on or about February 18, 2010, defendants' motion is timely.

"Once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." *O'Brien v. Syracuse*, 54 N.Y.2d 353, 357, 429 N.E.2d 1158, 1160 (1981). Furthermore, a "final determination in a prior action is subsequently binding not only as to the parties to that lawsuit but also those in privity with them." *Prospect Owners Corp. v. Tudor Realty Services Corp.*, 260 A.D.2d 299, 300, 689 N.Y.S.2d 55, 56 (1st Dep't 1999). Here, plaintiff commenced a second action arising out of the same incident after a jury rendered a verdict in defendant's favor. All of plaintiffs' present claims arose out of the same incident for which plaintiff had sued previously.

Similarly, collateral estoppel bars the relitigation of an issue that was clearly raised and fully litigated in a prior proceeding. *See Weiss v. Manfredi*, 83, N.Y.2d 974, 639 N.E.2d 1122 (1994). Plaintiff asserted the identical causes of action in the amended verified complaint filed in the prior action and in a proposed second amended verified complaint submitted with an application to amend her complaint. The motion to amend, though, was denied in a decision and order dated November 19, 2009. Thus, plaintiff was afforded the opportunity to fully litigate those issues. *See Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d 449, 482 N.E.2d 63 (1985). Moreover, any additional claims that plaintiff could have asserted in the prior action arising out of the incident are also barred. *Reilly v. Reid*, 45 N.Y.2d 24, 379 N.E.2d 172 (1978)

Plaintiffs also contend that defendants' counsel has violated the Code of Professional Responsibility EC 5-1, 5-14 and 5-15, that preclude counsel from representation of multiple clients with conflicting interests. However, it should be noted that in the prior action, Delta agreed to a substitution of counsel, based on an indemnification agreement between Delta and Command. Further plaintiffs cite

no caselaw supporting the proposition that a conflict of interest between defendants exists in the instant action.

Finally, the court declines to impose sanctions.

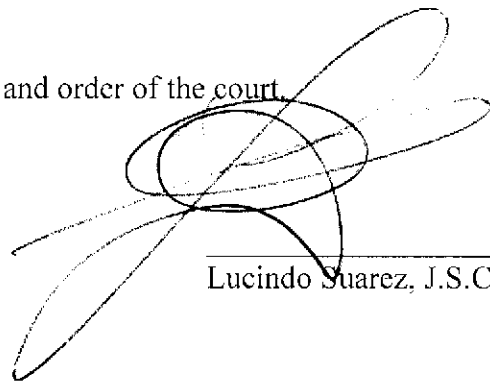
Accordingly, it is

ORDERED, that the motion of defendants Delta Air Lines, Inc., Command Security Corporation, and Jennifer Mills, is granted; and it is further

ORDERED, that the clerk of the court is directed to enter judgment in favor of defendants Delta Air Lines, Inc., Command Security Corporation, and Jennifer Mills dismissing plaintiffs' complaint against them.

This constitutes the decision and order of the court.

Dated: July 21, 2010



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Lucindo Suarez, J.S.C.