

Sinera v City of New York

2011 NY Slip Op 33626(U)

August 31, 2011

Sup Ct, New York County

Docket Number: 104245/08

Judge: Michael D. Stallman

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 21

FATIMA SINERA, ROKIYA SINERA, MAHAMADOU SINERA
and NEUMAAISATOU SINERA, all under the age of 18 years
by their m/n/g CEESAY TANJA, and CEESAY TANJA,
Individually,

INDEX NO. 104245/08

MOTION DATE 7/5/11

MOTION SEQ. NO. 002

Plaintiffs,

- v -

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT
OF TRANSPORTATION, MTA NEW YORK CITY TRANSIT
AUTHORITY and METROPOLITAN TRANSPORTATION
AUTHORITY,

Defendants.

FILED

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The following papers, numbered 1 to 9 were read on this motion for leave to amend complaint; cross motion to dismiss; cross motion for leave to amend notice of claim

Notice of Motion; Affirmation — Exhibits A-K	No(s). <u>1; 2</u>
Notice of Cross Motion— Affirmation — Exhibits A-E	No(s). <u>3-4</u>
Notice of Cross Motion— Affirmation In Opposition to Cross Motion — Affirmation in Support of Plaintiffs' Cross Motion— Exhibit A	No(s). <u>5-7</u>
Reply to Plaintiffs' Cross Motion— Affirmation — Exhibits A-M	No(s). <u>8</u>
Reply Affirmation	No(s). <u>9</u>

Upon the foregoing papers, it is ordered that plaintiffs' motion for leave to amend the complaint herein is granted, and the amended complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that plaintiffs' cross motion for leave to amend the notice of claim is granted, and the amended notice of claim in the proposed form annexed as Exhibit A to plaintiff's cross motion shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the defendant shall serve an answer to the amended complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that defendants' cross motion to dismiss the action is denied; and it is further

ORDERED that the caption is hereby amended as follows:

(Continued . . .)

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FATIMA SINERA, ROKIYA SINERA, MAHAMADOU SINERA
and NEUMAAISATOU SINERA, all under the age of 18
years by their m/n/g CEESAY TANJA, and CEESAY TANJA,
Individually,

Plaintiffs,

- v -

MTA NEW YORK CITY TRANSIT AUTHORITY and
METROPOLITAN TRANSPORTATION AUTHORITY,

Defendants.

and it is further

ORDERED that movant shall serve a copy of this order upon the Clerk of the Court and the Clerk of the Trial Support Office, who are directed to mark their records to reflect the amended caption.

On this motion, plaintiffs Ceesay Tanja and her four children allege that, on July 27, 2007, at approximately 4:30 p.m., they were crossing the street in a crosswalk, at or near the intersection of Lenox Avenue with West 139th Street in Manhattan, when defendants' bus allegedly struck all of them. Ceesay Tanja is a named plaintiff in the caption of the summons and verified complaint, on behalf of her children and individually, but paragraph 15 of the verified complaint alleges only that the children were struck by defendants' bus.

The verified complaint asserts four causes of action against the City, the City's Department of Transportation, MTA New York City Transit Authority, and Metropolitan Transportation Authority, respectively. On June 30, 2009, plaintiffs discontinued the action as against the City of New York with prejudice, and agreed that the City was severed and deleted from the caption.

Plaintiffs filed the note of issue on October 23, 2009. The action was remanded to this Court from the Trial Part on February 14, 2011.

Plaintiffs now move for leave to amend the complaint, so as to plead four individual causes of action by plaintiff Ceesay Tanja and a derivative cause of action. The proposed amended complaint also reorganizes the existing causes of action. Instead of four cases of action by plaintiffs collectively, the proposed amended complaint asserts four causes of action for each individual plaintiff (five plaintiffs in total), plus an additional derivative cause of action by plaintiff Ceesay Tanja. Thus, the proposed amended complaint asserts 21 causes of action. (See Edelman Affirm., Ex K.)

Defendants oppose the motion and cross-move to dismiss the complaint, on the grounds that neither the complaint nor the notice of claim contains any allegations that support an individual cause of action by Ceesay Tanja, and on the grounds that the children did not suffer any serious injury within the meaning of Insurance Law § 5102 (d).

(Continued . . .)

Plaintiffs further cross-move to amend the notice of claim. Defendants oppose this cross motion. Defendants argue that plaintiffs should not be permitted to amend the notice of claim on the eve of trial, and that Ceesay Tanja's claimed injuries are a sham. Defendants contend that Ceesay Tanja stated to a paramedic at the scene of the accident that she was almost hit by a bus, i.e., she was not hit by defendants' bus.

"[General Municipal Law §] 50-e(6) provides that any 'mistake, omission, irregularity or defect made in good faith in the notice of claim required to be served by this section ... may be corrected, supplied or disregarded, as the case may be, in the discretion of the court, provided it shall appear that the other party was not prejudiced thereby.'"

(*Ramos v New York City Tr. Auth.*, 60 AD3d 517, 519 [1st Dept 2009].) Here, the Court agrees with plaintiffs that the original notice of claim alleges that Ceesay Tanja sustained injuries in her individual capacity, although other portions of the notice of claim might have created doubt. As defendants indicate, the caption of the notice of claim does not name Ceesay Tanja as a claimant in her individual capacity. Nevertheless, paragraph 3 of the original notice of claim unambiguously states, in pertinent part: "Said incident resulted in claimants, FATIMA SINERA, NEUMAAISATOU SINERA, ROKIYA SINERA, MAHAMADOU SINERA, all under the age of 18 years by their m/n/g CEESAY TANJA, CEESAY TANJA, *individually*, and sustaining severe and permanent personal injuries." (Edelman Affirm., Ex B. [emphasis supplied].)

The proposed amended notice of claim clarifies that Ceesay Tanja is also a claimant, by naming her individually in the caption of the notice of claim. It also sets forth the alleged injuries of each claimant, including Ceesay Tanja. (See Siegel Affirm., Ex A.) Defendants have not demonstrated prejudice. General Municipal Law § 50-e (6) permits amendments of mistakes, omissions, irregularities or defects made in good faith "at any time after the service of a notice of claim and at any stage of an action . . ." Therefore, plaintiffs' cross motion for leave to amend the notice of claim is granted.

Turning to plaintiffs' motion for leave to amend the complaint, "Leave to amend a pleading should be freely given as a matter of discretion in the absence of prejudice or surprise, although to conserve judicial resources, examination of the underlying merit of the proposed amendment is mandated." (*Zald Theatre Corp. v Sona Realty Co.*, 18 AD3d 352, 355 [1st Dept 2005][internal citations and quotation marks omitted].)

Here, defendants have not demonstrated that the proposed amended pleading will result in any prejudice or surprise. The bill of particulars alleges that Ceesay Tanja suffered personal injuries (Edelman Affirm., Ex E ¶ 10), and Ceesay Tanja testified at her deposition that the bus came into contact with her shoulder and her leg (Edelman Affirm., Ex I, at 26.) Ceesay Tanja also submitted to a medical examination by defendants' designated orthopedic surgeon. (Edelman Affirm., Ex J.) The inconsistencies between Ceesay Tanja's alleged statements to the paramedic and her deposition testimony do not establish that the proposed amendment is plainly lacking in merit.

Therefore, plaintiffs are granted leave to amend the complaint, with some exceptions. As discussed above, plaintiffs discontinued their action as against the City of New York with prejudice. Therefore, leave to amend should not be granted with respect to those causes of action against the City of New York and the Department of Transportation. Also, the proposed amended complaint

(Continued . . .)

alleges a derivative cause of action by plaintiff Ceesay Tanja. However, the amended notice of claim does not set forth allegations of a derivative claim. Therefore, plaintiffs are granted leave to amend, except as to the first, second, fifth, sixth, ninth, tenth, thirteenth, fourteenth, seventeenth, eighteenth, and twenty-first proposed causes of action.

Given that leave to amend the complaint and the notice of claim was granted, the branch of defendants' cross motion to dismiss the complaint on the ground that Ceesay Tanja pleaded no individual cause of action is denied. The branch of motion to dismiss the complaint on the ground that the infant plaintiffs did not suffer a serious injury within the meaning of Insurance Law § 5102(d) is denied. This branch of defendants' cross motion essentially seeks summary judgment, and the motion was made 18 months after plaintiffs filed the note of issue. This branch of defendants' motion is therefore denied as untimely. (Brill v City of New York, 2 NY3d 648 [2004].)

Finally, although plaintiffs agreed in the stipulation of discontinuance dated March 19, 2009 that the City of New York would be severed and deleted from the caption, the caption was apparently not amended. Accordingly, the Court hereby directs the caption to be amended accordingly.

Dated: 8/31/11
New York, New York


_____, J.S.C.
MICHAEL D. STALLMAN

- 1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
- 2. Check if appropriate:..... MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. Check if appropriate:..... SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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