

<b>Tahari v Bliss Direct Inc.</b>
2019 NY Slip Op 30741(U)
March 18, 2019
Supreme Court, New York County
Docket Number: 152189/2016
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46

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RORY TAHARI,

Index No. 152189/2016

Plaintiff

- against -

DECISION AND ORDER

BLISS DIRECT INC., BLISS WORLD LLC,  
and STEINER MANAGEMENT SERVICES, LLC  
d/b/a STEINER LEISURE LIMITED,

Defendants

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LUCY BILLINGS, J.S.C.:

Plaintiff sues defendants for negligently performing a laser hair reduction procedure that caused burns and permanent scars and discoloration on her legs. Defendants move to amend their answers to include the affirmative defense that plaintiff released defendants from liability for her claims in this action, C.P.L.R. § 3025(b), and, based on that added affirmative defense, move for summary judgment dismissing her claims. C.P.L.R. § 3212(b).

The proposed amended answer by defendants Bliss Direct Inc. and Bliss World LLC alleges that "Plaintiff has waived rights to pursue this action by execution of a voluntary and knowing release," but this answer is only signed by defendants' attorney. Aff. in Supp. of Kristen Fusco Ex. E ¶ 23. The proposed amended answer by defendant Steiner Management Services, LLC, alleges the identical defense and is verified and signed, but again only by defendants' attorney. Nothing supporting defendants' motion, the

claimed release forms executed by plaintiff, her complaint or bill of particulars, or the affirmation by defendants' attorney, indicates that their attorney observed plaintiff's execution of the release or is personally familiar with her signature or the circumstances surrounding her execution of the release, so as to authenticate it. B & H Florida Notes LLC v. Ashkenasi, 149 A.D.3d 401, 403 n.2 (1st Dep't 2017); AO Asset Mgt. LLC v. Levine, 128 A.D.3d 620, 621 (1st Dep't 2015); IRB-Brasil Resseguros S.A. v. Portobello Intl. Ltd., 84 A.D.3d 637, 638 (1st Dep't 2011); Bermudez v. Ruiz, 185 A.D.2d 212, 214 (1st Dep't 1992).

Moreover, even were the release or waiver forms authenticated, the copies defendants present are so illegible as to obscure any understanding of the forms' content and fail to establish that the forms do in fact waive plaintiff's claims against defendants or release them from liability for her claims. E.g., BP A.C. Corp. v. One Beacon Ins. Group, 8 N.Y.3d 708, 716 (2007); Shanmugam v. SCI Eng'g, P.C., 122 A.D.3d 437, 438 (1st Dep't 2014); Williams v. Esor Realty Co., 117 A.D.3d 480, 481 (1st Dep't 2014); Mancuso v. J & Velco Co., L.P., 58 A.D.3d 577, 578 (1st Dep't 2009). Therefore defendants nowhere show that plaintiff unequivocally expressed her intent to relieve defendants from liability for personal injuries she sustained due to defendants' negligence and consequently that there is any merit in their proposed defense.

Only in reply do defendants impermissibly attempt

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authentication of the claimed release and present a more legible copy. See Enjoy Realty Corp. v. Van Wagner Communications, LLC, 22 N.Y.3d 413, 422-23 (2013); Amtrust-NP SFR Venture, LLC v. Vazquez, 140 A.D.3d 541, 541-42 (1st Dep't 2016); Allstate Flooring Distribs., L.P. v. MD Floors, LLC, 131 A.D.3d 134, 135-36 (1st Dep't 2015); Scafe v. Schindler El. Corp., 111 A.D.3d 556, 556 (1st Dep't 2013). Defendants refer to plaintiff's deposition testimony acknowledging that she "filled out . . . paperwork" given to her before the laser hair reduction procedure. Reply Aff. of Kristen Fusco ¶ 10. Again, however, defendants offer only their attorney's hearsay rendition, not the transcript of plaintiff's actual testimony. Ironically, defendants demonstrate an obvious opportunity to authenticate plaintiff's signature on the claimed release through her deposition testimony, but their attorney's own account that plaintiff merely acknowledged completing "paperwork," not the specific document on which defendants rely, demonstrates defendants' failure to take advantage of that opportunity. Although one of defendants' employees authenticates a more legible copy of the claimed release as a complete and accurate copy of the original, like defendants' attorney, he fails to indicate that he observed plaintiff's execution of the original or is personally familiar with her signature or the circumstances surrounding her execution of the document.


Even were the defense meritorious, defendants also fail to show the absence of prejudice from their delay in interposing

this defense. Plaintiff may have been aware that she signed a release or waiver, if in fact she did, but she was unaware that defendants intended to rely on any such document until after disclosure concluded. This delay foreclosed any opportunity for her to inquire into defendants' evidence of such critical issues as the circumstances surrounding her execution of such a document, whether the copy she executed was legible, and its contents.

During disclosure, when plaintiff requested any parties' statements in defendants' possession, custody, or control, defendants responded that there were no such statements, except any in plaintiff's medical records or identified during disclosure, and do not now contend that the release or waiver was part of her medical records or came to light during further disclosure. Consequently, plaintiff filed a note of issue without any additional disclosure concerning a release, waiver, or other statement by her.

For all the reasons explained above, the court denies defendants' motion to amend their answers to include the affirmative defense that plaintiff released defendants from liability for her claims in this action, C.P.L.R. § 3025(b), and for summary judgment dismissing her claims based on a release. C.P.L.R. § 3212(b).

DATED: March 18, 2019



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LUCY BILLINGS, J.S.C.