

Aboussleman v Staten Is. Rapid Tr. Operating Auth.
2020 NY Slip Op 31586(U)
April 22, 2020
Supreme Court, Richmond County
Docket Number: 151192/2017
Judge: Thomas P. Aliotta
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: PART TR-2

-----X
DIANE ABOUSSLEMAN, as the Executrix of
the Estate of CHARLES ABOUSSLEMAN, and
DIANE ABOUSSLEMAN, Individually,

DECISION AND ORDER

Index No.: 151192/2017
Motion No.: 005 and 006

Plaintiff,

-against-

STATEN ISLAND RAPID TRANSIT
OPERATING AUTHORITY,

Defendants.
-----X

Recitation, as required by CPLR 2219(a) of the following papers numbered "1" through
"8" were considered on the motions fully submitted on February 7, 2020:

	Papers Numbered
(MS_005) Plaintiff's Notice of Motion, Affirmation and Exhibits to amend notice of claim and second supplemental verified bill of particulars (NYSCEF DOC. NO. 113-124).....	1, 2
Defendant's Affirmation in Opposition (NYSCEF DOC. NO. 133)	3
Plaintiff's Reply Affirmation (NYSCEF DOC. NO. 135-136)	4
(MS_006) Plaintiff's Notice of Motion, Affirmation and Exhibits to renew and reargue (NYSCEF DOC. 125-132)	5, 6
Defendant's Affirmation in Opposition (NYSCEF DOC. NO. 134)	7
Plaintiff's Reply Affirmation (NYSCEF DOC. NO. 137-138)	8

Upon the foregoing papers, plaintiff's motion for leave to amend the Notice of Claim *nunc pro tunc* and serve a Second Supplemental Bill of Particulars (MS_005) and motion to reargue this Court's Order dated December 19, 2019 (MS_006) are decided as follows:

This is an action for personal injuries sustained by decedent on a train operated by defendant. It is alleged that decedent entered the train, but before having an opportunity to sit, the train suddenly and abruptly accelerated at a high rate of speed, causing him to fall and sustain a laceration to his forehead.

PROCEDURAL HISTORY

By an Order dated December 19, 2019, this Court granted defendant's motion to strike certain portions of plaintiff's second supplemental verified bill of particulars (NYSCEF 119). Plaintiff has simultaneously served a separate motion to reargue this Order (MS_006), which was jointly argued with this motion since both are based upon this prior order. For the sake of clarity, all references to NYSCEF unless otherwise noted refer to the documents annexed to the underlying motion (MS_004). The decedent's attorneys filed a Notice of Claim dated October 10, 2016, wherein the following injuries were claimed (NYSCEF 75, Ex. A):

- Laceration to his forehead
- Pain, discomfort to his head
- Chronic and severe headaches
- Concussion
- Post-concussion syndrome
- Dizziness
- Light-headed
- Loss of blood

Permanent scarring and disfigurement - forehead

Sutures to forehead

Ecchymosis and bruising - eyes/nose/face

The notice of claim also alleged that the enumerated injuries were “not complete or exhaustive” as of October 10, 2016. As to liability, the notice of claim further alleged that defendant had violated “various procedures, rules and regulations regarding the acceleration of the subject train” and “that they operated the subject train in violation of the rules, regulations and procedures.” After commencing this action, plaintiff served a verified bill of particulars dated October 23, 2017, setting forth the following additional injuries not initially included in the Notice of Claim (NYSCEF 77, Ex. C):

Aggravation and exacerbation of metal plate in head, requiring surgical intervention [5/15/2017 – See Operative Report attached to NYSCEF 107, Pltf. Ex. “I”]

Infection to metal plate in head, requiring surgical intervention [7/31/2017 - See Operative Report attached to NYSCEF 107, Pltf. Ex. “I”]

The summons and complaint (NYSCEF 76, Deft. Ex. “B”) and initial bill of particulars (NYSCEF 77) repeated the same verbiage as to statutory violations. Mr. Abousselman was deposed on April 10, 2018 (NYSCEF DOC. 100 – Deft. Ex. “B”). Based upon Mr. Abousselman’s testimony that he was attributing his recent brain surgeries to the accident, defendant notified plaintiff by letter dated April 11, 2018 that an independent medical examination could not be scheduled until such time as it received copies of plaintiff’s medical records in accordance with 22 NYCRR 202.17 [b] and a supplemental bill of particulars.

Thereafter, the first supplemental verified bill of particulars (NYSCEF 79) was served on April 26, 2018 setting forth the further additional injuries:

Cranioplasty

Complete scalp reconstruction with fasciocutaneous flaps and skin graft

Infected hardware in brain

Left frontal lobectomy

Craniectomy

Wash-out and debridement

Fasciocutaneous flap

Left cranioplasty wound dehiscence

Infected cranioplasty

Left frontal parietal cranial vault defect

Cranioplasty using custom design plate and complex scalp closure

Left cranial skull defect

Removal of left cranioplasty, complex plastic closures with rotational flap

No objection or rejection of this supplemental bill was served by defendant and on May 3, 2018, the parties entered into a So-Ordered Stipulation wherein the parties agreed, *inter alia*, that defendant had the right to seek a further deposition upon receipt of the further medical records. On October 4, 2018, all parties advised the Court that the independent medical examinations were conducted, and the case could be certified for trial at the next compliance conference that was scheduled for November 15, 2018 (NYSCEF DOC. 36). However, Mr. Abousselman passed away on October 23, 2018. The Executrix of his estate was subsequently appointed and substituted as the plaintiff in this action. The Note of Issue was filed

on March 28, 2019, but updated trial authorizations were not simultaneously served therewith.

On June 28, 2019, plaintiff served a second supplemental verified bill of particulars (NYSCEF 80 - Def. Ex. "F"). This second supplemental verified bill of particulars added allegations of negligence and statutory violations which were not contained in the notice of claim. Plaintiff alleges the following:

- in that the defendants failed to comply with their own rules and regulations by failing to keep the doors open for at least ten (10) seconds prior to departing the train station
- in that the defendants exceeded the allowable "jerk rate" by sudden and excessive acceleration
- in that the defendants failed to observe the plaintiff decedent's disability and failed to provide additional time for Mr. Aboussleman to secure himself on the subject train before accelerating from the train station (NYSCEF 80, pp. 3-4)
- in that the defendants failed to comply with and/or violated various national standards, rules and regulations, including, but not limited to, U.S. Common Carrier Law Regulation 47 U.S.C. Part I;
- U.S. Occupational Safety & Health Act (OSHA) 29 U.S.C. § 654, (a) and (b); MTA rules and regulations (Revised 2003) - Chapter 8 Rule 8.08, Chapter 9 Rule 9.01(c), Chapter 9 Rule 9.01(I), Chapter 9 Rule 9.02(b) and 9.02(c);
- said rules and regulations requiring ten (10) second dwell time;
- keeping proper lookout and precautions for the patrons for safety requiring precaution and safety in operating the train, not exceeding the "jerk rate" by excessive acceleration;
- requiring managers to be responsible for supervising and overseeing the safety rules and regulations, required by the MTA;
- American Public Transit Association (APTA) Standards and Practices, Washington, D.C., 2004 – APTA RT-S-OP-013-03 (authorized 9/28/03), Operating Practices – federal standards requiring all employees to receive sufficient training to provide the highest level of safety for the public;

- National Transportation Research Board establishing National Industry Standard of Care of 15 second dwell time and requiring conductor to make visual observations of passengers boarding the train and making appropriate announcement that the train doors are closing (NYSCEF 80, pp. 3-4) (NYSCEF 80, pp. 5-6)

By a letter dated July 1, 2019, defendant's trial counsel rejected plaintiff's second supplemental verified bill of particulars. Additionally, defendant's trial counsel demanded updated trial authorizations signed by the Administratrix of decedent's estate. Defendant also claimed that some authorizations were never provided prior to the Note of Issue and the few that were provided, were invalid. Plaintiff responded to this letter, as well as two subsequent letters, on July 2, 2019, August 12, 2019 and August 23, 2019 (NYSCEF 106, Def. Ex. "H").¹ Plaintiff advised trial counsel that the trial authorizations were provided to the attorney of record on June 28, 2019 since he had not received a notice of trial counsel or consent to change of attorneys (NYSCEF 105, Ex. "G"). The trial authorizations were signed by the Estate representative and authorized the release of records to the Richmond County Subpoenaed Record Room.

THE COURT'S DECISION DATED DECEMBER 19, 2019

Defendants' then moved to strike plaintiff's new theories of liability and injuries, vacating the note of issue and compelling updated trial authorizations. The Court denied that portion of defendant's motion to strike the supplemental verified bill of particulars dated April 11, 2018 and to vacate the note of issue. In dicta, the Court noted that "plaintiff never served a motion to amend the notice of claim, together with a physician's affidavit, to increase the dollar value of the damages (see *Portnow v. Shelter Rock Public Library*, 125 AD2d 382, 383 [2d Dept. 1986]). The physician's affidavit is required for an increase in the ad damnum clause despite the

¹ The two subsequent letters were not attached to either defendant's underlying moving papers or plaintiff's opposition thereto.

fact same is not required to supplement the bill of particulars (*Portnow v. Shelter Rock Public Library, supra* and *Gisondi v. Town of Harrison*, 16 AD2d 929 [2d Dept. 1962]). Accordingly, the value of plaintiff's damages remains capped at \$250,000.00" (page 8, NYSCEF DOC. NO. 119, Ex. E, MS_005).

However, this Court granted that branch of defendant's motion to strike plaintiff's second supplemental verified bill of particulars on the issue of liability as it was served in violation of CPLR 3403 [b] (p. 8-9, NYSCEF DOC. NO. 119, Ex. E, MS_005). Specifically, this Court held that,

Plaintiff was required to supplement the verified bill of particulars as to statutory and regulatory violations within 30 days of the completion of discovery (*Kwang Sik Kim v. A & K Plastic Products, Inc., supra*). The parties completed discovery as early as October 4, 2018, but no later than March 21, 2019 when this action was certified for trial.² Once the note of issue is filed, plaintiff was required to seek leave of Court to supplement the bill of particulars and the notice of claim to add statutory violations that amplified the pleadings (see *Dowd v. City of New York*, 40 AD3d 908, 911-912 [2d Dept. 2007]).³ Therefore, plaintiff's second supplemental verified bill of particulars is stricken in its entirety and plaintiff is precluding from offering evidence at the time of trial as to the statutes, rules, regulations and ordinances contained therein (*cf. Kwang Sik Kim v. A & K Plastic Products, Inc. and Dowd v. City of New York, supra*; and CPLR 3043 [b]). Plaintiff's reliance on *Balsamo v. City of the New York*, 287 AD2d 22 [2d Dept. 2001] and *Foley v. City of New York*, 43 AD3d 702 [1st Dept. 2007] is unpersuasive. Unlike the facts of the case at bar, the plaintiffs in *Balsamo* and *Foley* moved *prior* to the conclusion of discovery to supplement and/or amend their respective General Municipal Law § 205-e claims with additional predicate statutory violations in accordance with CPLR § 3043 [b].

Even if the second supplemental verified bill of particulars was timely, the allegation that plaintiff should have been afforded additional time to board the train substantially alters the theory of negligence in the notice of claim after the expiration of the statute of limitations (*cf. Dowd v. City of New York, supra*), i.e.

² The Certification Order is undated. However, the Court takes judicial notice of the fact that Case Management reflects that the certification conference was held on March 21, 2019 and the order was subsequently uploaded to NYSCEF on March 25, 2019.

³ The procedural history in *Dowd* is recited in the Appellant's Brief (2006 WL 4498785). In response to defendant's motion for summary judgment, plaintiff served a post note of issue cross-motion to supplement or amend the bill of particulars to include an additional Industrial Code violation (2006 WL 4498785 at pp. 11-12).

plaintiff was owed “a special duty of protection” or different standard of care than the public at large due to a disability (see *Peta-Gaye Blackstock v. Board of Education*, 84 AD3d 524 [1st Dept. 2011]). The notice of claim is silent as to plaintiff’s alleged disability and absent this factual predicate for this special relationship in the notice of claim (*Puella v. City of New York*, 118 AD3d 492 [1st Dept. 2014]), this separate and distinct theory of negligence and related statutory violations are stricken on this additional ground (*Clare-Hollo v. Finger Lakes Ambulance EMS, Inc.* and *Semprini v. Village of Southampton, supra*).

DISCUSSION

A claim against a municipality has the added hurdle of serving a notice of claim prior to the commencement of a lawsuit. The intended purpose of a notice of claim is to provide information to a municipal defendant so that it “can conduct a proper investigation and assess the merits of the claim while the information is still readily available” (*Se Dae Yang v. New York City Health and Hospitals Corporation*, 140 AD3d 1051, 1052 [2d Dept. 2016] [*internal citations omitted*]). Therefore, the notice of claim must adequately apprise the defendant that the claim would seek to impose liability under a cognizable theory of recovery, but a claimant need not “state a precise cause of action *in haec verba* (*Steins v. Village of Garden City*, 127 AD3d 957, 959 [2d Dept. 2015]).

Likewise, the summons and complaint may also contain general allegations and verbiage that the defendant violated applicable statutes, ordinances, rules and regulations, and will not be precluded from offering evidence at the time of trial provided a supplemental bill of particulars is served within 30 days after the completion of discovery and prior to the filing of the note of issue (*Liga v. Long Island Rail Road*, 129 AD2d 566, 566 [2d Dept. 1987]; *Kwang Sik Kim v. A & K Plastic Products, Inc.*, 133 AD2d 219 [2d Dept. 1987] and CPLR 3043 [b]). Once the note of issue is filed, a plaintiff must seek leave of Court to supplement the bill of particulars and the notice of claim to add statutory violations that amplify the pleadings (see *Dowd v. City of New*

York, 40 AD3d 908, 911-912 [2d Dept. 2007]).⁴ The post note of issue restriction on this right is codified in CPLR 3043 [b] which allows a party to “serve a supplemental bill of particulars only with respect to claims of continuing special damages and disabilities without leave of court at any time, but not less than thirty days prior to trial. Provided however no new cause of action may be alleged or new injury claimed” (CPLR 3043 [b], emphasis in italics added).

Further, “a plaintiff may not use a bill of particulars or supplemental bill of particulars to assert new theories of liability against a municipal defendant if such theories were not raised in the plaintiff’s notice of claim” (*Clare-Hollo v. Finger Lakes Ambulance EMS, Inc.*, 99 AD 3d 1201, citing, *Semprini v. Village of Southampton*, 48 AD3d 544). To assert an additional cause of action or theory of liability, plaintiff must seek leave of Court to serve an amended or late notice of claim prior to the expiration of the one-year and ninety day statute of limitations (See generally, (*Semprini v. Village of Southampton*, 48 AD3d 543, 544 [2d Dept. 2012] and *Clare-Hollo v. Finger Lakes Ambulance EMS, Inc.*, 99 AD 3d 1199, 1201 [4th Dept. 2012]).

The timing of an application to increase the *ad damnum* clause differs from an application to amend the notice of claim as to additional causes of actions or theories of liability. Such an application may be brought after the expiration of the statute of limitations (*Gisondi v. Town of Harrison*, 16 AD2d 929, 930 [2d Dept. 1962] reversing 220 N.Y.S.2d 105 [Sup. Ct. 1961]). In *Gisondi*, the trial Court denied plaintiff’s application for leave to amend the *ad damnum* clause in the notice of claim two years after filing the notice of trial. The Appellate Court reversed and held that,

With respect to plaintiff’s motion to increase their demand for money damages, it appears that since the commencement of the action (which in this case was

⁴ The procedural history in *Dowd* is recited in the Appellant’s Brief (2006 WL 4498785). In response to defendant’s motion for summary judgment, plaintiff served a post note of issue cross-motion to supplement or amend the bill of particulars to include an additional Industrial Code violation (2006 WL 4498785 at pp. 11-12).

required to be commenced within one year) the infant plaintiff exhibited an excessive tendency to scar; that two of three operations to excise hypertrophic scars were performed after the complaint was served; and, according to the affidavit of plaintiffs' physician, that additional operative procedures may become necessary for the purpose of adding skin to permit the infant's proper growth and development. Under the circumstances it was error to refuse to permit plaintiffs to increase their original demand for damages (*Id.*; and see *Loomis v. Civetta Corinno Construction Corp.*, 54 NY2d 18 [1981]).

Both a motion to amend prior to trial and a motion to conform the pleadings during or after trial, must be supported evidence in admissible form (*Loomis v. Civetta Corinno Construction Corp.* and *Best v. New York City Transit Authority, supra.*; and see *Perricone v. The City of New York*, 96 AD2d 531, 532 [2d Dept. 1983]). The Court may not grant such an application if defendant is prejudiced by the proposed amendment to the *ad damnum* clause, i.e., that the defendant has been hindered in the preparation of the defense or preventing from taking some measure in support of thereof (*Loomis v. Civetta Corinno Construction Corp.*, 54 NY2d 23-24; and see *Best v. New York City Transit Authority*, 88 AD2d 579 [2d Dept. 1982]). "However, prejudice is not to be found, ipso facto in the belatedness of the amendment or in the mere exposure of the defendant to greater liability" (*Dolan v. Garden City Union Free School District*, 113 AD2d 781, 785 [2d Dept. 1985], *citing*, *Loomis v. Civetta Corinno Constr. Corp.*, *supra*, 54 NY2d 23).

**MOTION FOR LEAVE TO AMEND THE NOTICE
OF CLAIM AND SERVE TO SERVE A SECOND SUPPLEMENTAL
VERIFIED BILL OF PARTICULARS (MS005)**

From the outset, the Court clarifies its prior decision with respect to plaintiff's *ad damnum* clause. At the time of the defendant's underlying motion to strike the second supplemental verified bill of particulars, plaintiff had not moved this Court for an order to amend the notice of claim based upon the physician's affirmation annexed to the expert exchange. Defendant in support of the underlying motion to strike the second supplemental verified bill of

particulars referenced that the *ad damnum* clause in the notice of claim was in the amount of \$250,000.00 and did not include a claim of aggravation or exacerbation of a pre-existing injury (Def't. Affirmation in Opposition to the underlying motion, NYSCEF DOC. NO. 74, ¶3, 17-18).⁵ Plaintiff overlooked this argument and did not address it in the written opposition to the underlying motion. Therefore, absent a cross-motion to amend the notice of claim, the doctor's affirmation could not be considered in opposition to the underlying motion. Further, the Court did not decide as to its evidentiary weight on the issue of causation and the *ad damnum* clause. Therefore, this Court addressed defendant's vague argument in dicta that the amount of the *ad damnum* clause could not be a factor in its decision since absent a motion to amend, the amount of damages recoverable remained in the amount of \$250,000.00.

Here, defendants have not established that their defense has been hindered with respect to plaintiff's request to increase the *ad damnum* clause after the expiration of the statute of limitations and filing of the note of issue (*Loomis v. Civetta Corinno Construction Corp.*, 54 NY2d 23-24 and *Gisondi v. Town of Harrison*, 16 AD2d 930). Defendants conducted all examinations before trial and independent medical examinations prior to Mr. Abousselman's death. More specifically, a further deposition and medical examination were conducted after the service of the April 26, 2018 supplemental verified bill of particulars putting defendants on notice of the claim of exacerbation of decedent's pre-existing condition. Defendants were afforded a full and fair opportunity to assess the true extent of decedent's injuries (*Best v. New York City Transit Authority*, *supra*) and retain an expert as to causation since plaintiff served an expert exchange on March 25, 2019 (NYSCEF #52, #107 MS_004] and #118 MS_005]). The

⁵ During oral argument [on the record] of the underlying motion, defendant further argued in support of the motion to strike the second supplemental verified bill of particulars that plaintiff's recent settlement demand far exceeded his *ad damnum* clause.

Court accepts in lieu of the affidavit of merit, decedent's deposition transcript attesting to the exacerbation of his pre-existing condition. Accordingly, plaintiff's motion to increase the *ad damnum* clause to \$3,000,000.00 is granted.

However, that branch of plaintiff's motion to amend the notice of claim and serve a second verified bill of particulars as to statutory violations is granted in part and denied in part as follows (MS_005):

In the discretion of the Court, plaintiff may serve the second supplemental verified bill of particulars as to the following allegations:

- in that the defendants failed to comply with their own rules and regulations by failing to keep the doors open for at least ten (10) seconds prior to departing the train station
- in that the defendants exceeded the allowable "jerk rate" by sudden and excessive acceleration
- said rules and regulations requiring ten (10) second dwell time;
- keeping proper lookout and precautions for the patrons for safety requiring precaution and safety in operating the train, not exceeding the "jerk rate" by excessive acceleration; and
- National Transportation Research Board establishing National Industry Standard of Care of 15 second dwell time and requiring conductor to make visual observations of passengers boarding the train and making appropriate announcement that the train doors are closing.

The American Public Transportation Board's Standards and Practices are non-mandatory guidelines and recommendations that are insufficient to establish a standard of care (*Daniels v. New York City Transit Authority*, 171 AD3d 601, 602 [1st Dept. 2019]). However, an expert opinion regarding "generally accepted" standards promulgated by such an association coupled with relevant community standards at the relevant time, can constitute some evidence of negligence and may establish a standard of care to aid the trier of fact to determine whether

NYCTA violated one of their own policies (*Id.*). Here, with respect to American Public Transit Association (APTA) Standards and Practices, Washington, D.C., 2004 – APTA RT-S-OP-013-03 (authorized 9/28/03), plaintiff has not submitted to this Court either a copy of the standards or an expert opinion as to the applicability of this section. The same is true with respect to MTA rules and regulations (Revised 2003) - Chapter 8 Rule 8.08, Chapter 9 Rule 9.01(c), Chapter 9 Rule 9.01(I), Chapter 9 Rule 9.02(b) and 9.02(c) and additionally with respect to U.S. Common Carrier Law Regulation 47 U.S.C. Part I, the statute is voluminous, and plaintiff has not specified which sections are being relied upon. The Court cannot determine if these allegations are supported by the facts of this action. Therefore, not only was the service of the second supplemental verified bill of particulars untimely as to these allegations, plaintiff has failed to meet his burden of proof for this Court to grant leave at this time.

The allegation that defendants failed to observe the plaintiff decedent's disability and failed to provide additional time for plaintiff to secure himself on the subject train before accelerating from the train station is barred by the statute of limitations (*Clare-Hollo v. Finger Lakes Ambulance EMS, Inc.*, 99 AD 3d 1201, citing, *Semprini v. Village of Southampton*, 48 AD3d 544). It is well settled that plaintiff may not utilize General Municipal 50-e to amend the notice of claim to add an additional theory of negligence (see *Dixon v. Village of Spring Valley*, 6 AD2d 489, 490 [2d Dept. 2004] and *Bryant v. City of New York*, 188 AD2d 445, 446 [2d Dept. 1992]). Plaintiff's notice of claim contained no allegations, express or implied, that he was disabled and required a different standard of care for people with disabilities (*Davis v. City of New York*, 153 AD3d 658, 661 [2d Dept. 2017]). The testimony given by plaintiff cannot be used to amend or substantively change the nature of the claim or theory of liability in the notice of claim (*Davis v. City of New York*, at pp. 660-661).

Irrespective of the lack of any reference to decedent's disability in the initial notice of claim, the testimony of the conductor, Kamesha Scott (NYSCEF 122:pp.12-13, 31, MS_005), and the engineer, Scott Kramer (NYSCEF 121:pp. 32-33, MS_005), does not establish whether either observed decedent walking with a cane at the time of the accident and, therefore, should have afforded him additional time to embark the train in accordance with her custom and practice. The testimony also does not establish whether Ms. Scott observed the decedent's presence at the time of the accident or merely acknowledged same while watching the surveillance video produced during the depositions. Therefore, the allegations regarding the 15 second dwell time may be supplemented in accordance with the deposition testimony without any reference to decedent's alleged disability. Defendant will not be prejudiced by this supplemental allegation in that their expert has evaluated and expressed an opinion with respect to this particular allegation (NYSCEF 131, MS_006).

Finally, irrespective of CPLR 3043 [b], the proposed violation of U.S. Occupational Safety & Health Act (OSHA) 29 U.S.C. § 654, (a) and (b) is patently without merit since "a cause of action predicated on the alleged violation of OSHA regulations can only be maintained against a plaintiff's employer" since "OSHA governs employee/employer relationships, and thus OSHA regulations do not impose a specific statutory duty on parties other than a plaintiff's employer" (*Gallagher v. 109-02 Development LLC*, 137 AD3d 1073, 1075 [2d Dept. 2016]). Here, Mr. Abousselman was not an employee of defendant.

**MOTION TO REARGUE THIS COURT'S
ORDER DATED DECEMBER 19, 2019 (MS006)**

Based upon foregoing, plaintiff's motion to reargue is denied.

Accordingly, it is hereby

Abousselman v. SIRTOA
Index No.: 151192/2017
Page 14 of 15

ORDERED, that plaintiff's motion for leave to amend the Notice of Claim *nunc pro tunc* to increase the ad damnum clause to \$3,000,000.00 is granted; and it is further

ORDERED, that plaintiff's motion for leave to amend the Notice of Claim *nunc pro tunc* and serve the second supplemental verified bill of particulars to include statutory violations and additional allegations of negligence is granted only to the following extent:

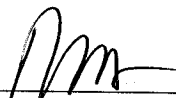
- in that the defendants failed to comply with their own rules and regulations by failing to keep the doors open for at least ten (10) seconds prior to departing the train station
- in that the defendants exceeded the allowable "jerk rate" by sudden and excessive acceleration
- said rules and regulations requiring ten (10) second dwell time;
- keeping proper lookout and precautions for the patrons for safety requiring precaution and safety in operating the train, not exceeding the "jerk rate" by excessive acceleration; and
- National Transportation Research Board establishing National Industry Standard of Care of 15 second dwell time and requiring conductor to make visual observations of passengers boarding the train and making appropriate announcement that the train doors are closing; and it is further

ORDERED, that plaintiff's motion for leave to amend the Notice of Claim *nunc pro tun* and serve the second supplemental verified bill of particulars as to the remaining proposed allegations is denied in all other respects.

This constitutes the decision and order of the Court.

Dated: April 22, 2020

ENTER:



HON. THOMAS P. ALIOTTA, J.S.C.