

Ormsten v Kiop Merrick L.P.
2022 NY Slip Op 34326(U)
December 21, 2022
Supreme Court, New York County
Docket Number: Index No. 154119/2018
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

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MARION ORMSTEN, FRANK ORMSTEN,

Plaintiff,

- v -

KIOP MERRICK L.P., KIR MERRICK 028, LLC, KIMCO
INCOME OPERATING PARTNERSHIP, L.P., KIMCO
INCOME REIT, KIMCO REALTY CORPORATION, BEST
YET MARKET, INC., BEST MARKET OF MERRICK,
INC., BEST MARKET OF TRIBECA, INC., BEST YET
MARKET OF HARLEM, INC.

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 013) 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456

were read on this motion to/for STRIKE PLEADINGS.

**DECISION + ORDER ON
MOTION**

Defendants KIOP MERRICK L.P., KIR MERRICK 028, LLC, KIMCO INCOME OPERATING PARTNERSHIP, L.P., KIMCO INCOME REIT, KIMCO REALTY CORPORATION's (collectively, "Moving Defendants") motion to strike the bill of particulars and demand for surveillance material is granted in part and denied in part.

Discussion

In this trip and fall case at a supermarket, the Moving Defendants observe that plaintiffs served an initial bill of particulars on October 29, 2018 and a supplemental bill of particulars on November 29, 2019. They argue that these filings contained allegations of negligence and that the accident occurred due to a cracked and broken condition. Plaintiffs filed a note of issue on

June 10, 2022 and the Moving Defendants contend that they received a “Supplemental” Bill of Particulars on June 13, 2022 as well as a demand for surveillance material.

The Moving Defendants argue that this new bill of particulars contains new theories of negligence including that the defect was improperly painted and that these visual cues caused visual confusion, which then caused the plaintiff to trip and fall. The Moving Defendants also allege that two pages of brand-new statutes are cited, including the Americans with Disabilities Act, as well as provisions of various building and maintenance codes. They assert that plaintiff Marion Ormsten never mentioned anything about visual confusion at her deposition. The Moving Defendants seek to strike the new bill of particulars and the request for surveillance material.

In opposition, plaintiffs insist that the new bill of particulars does not contain new causes of action and merely amplified previous theories of liability. They insist that they timely served the bill of particulars on June 9, 2022 (before the note of issue was filed on June 10, 2022) and that their theory of liability always included defendants’ failure to properly mark the curb upon which plaintiff Ormsten tripped. Plaintiffs contend that the Moving Defendants’ entire motion rests on the notion that plaintiffs failed to timely serve the bill of particulars but they did serve it timely.

In reply, the Moving Defendants claim that, in the alternative, they want the chance to explore these new theories of liability in discovery and that the Court strike the note of issue.

Discussion

As an initial matter, the Court observes that the service of the supplemental bill of particulars was timely as service of the order is completed upon mailing (*Smith by Smith v Lefrak Org., Inc.*, 96 AD2d 859, 860, 465 NYS2d 777 [2d Dept 1983], *affd sub nom. Smith v Lefrak*

Org., Inc., 60 NY2d 828 [1983]). The Court recognizes that the envelope contains a marking indicating that the papers were mailed on June 10, 2022 (NYSCEF Doc. No. 414) the same day as the note of issue was filed.

The Court's next consideration must be whether the new bill of particulars is supplemental or an amendment. A comparison of the first two bills of particulars (NYSCEF Doc. No. 407) with the most recent bill of particulars (NYSCEF Doc. No. 412) reveals that it is clearly an amended bill of particulars. As the Moving Defendants point out, the most recent document cites a whole new cadre of codes and standards not previously raised before including the ADA, building and maintenance codes as well as a manual on traffic control devices for streets and highways (NYSCEF Doc. No. 412 at 2).

Moreover, the new bill of particulars alleges a brand-new theory of liability concerning visual confusion about the curb (*id.* at 4). As the Moving Defendants argue, this theory was not raised in the previous bills of particulars and it was not raised by plaintiff Ormsten at her deposition. And new injuries are alleged including a rotator cuff tear, osteoarthritis, and a much more serious chin laceration (the previous injury mentioned a .5 cm laceration while the new injury claims it was 1 cm and involved stiches). Plaintiffs also cite additional special damages as well as additional medical providers for those damages.

The question, then, is whether to strike this bill of particulars or strike the note of issue so that the Moving Defendants may question plaintiff Ormsten about these new issues. "Leave to amend a bill of particulars is ordinarily freely given in the absence of prejudice or surprise, unless the amendment is sought on the eve of trial" (*Alvarado v Beth Israel Med. Ctr.*, 78 AD3d 873, 874, 911 NYS2d 174 [2d Dept 2010]). Given that the note of issue was only recently filed

in June 2022 (the case was marked disposed after it was briefly removed to federal court), the Court finds that there is little prejudice to the Moving Defendants.

However, given the clear and obvious fact that plaintiffs have identified new theories of liability, new statutes and codes, and new injuries, the Court strikes the note of issue to permit the Moving Defendants to conduct an additional deposition and IMEs of plaintiff Ormsten solely about the new topics and information raised in the June 2022 bill of particulars. That, along with any discovery that flows from this deposition, is the only additional discovery that is permitted. The Court observes that plaintiffs included additional medical records with the June 2022 bill of particulars, documents that can also be part of the questions posed at the additional deposition and the subject of additional IMEs if desired.

The issue of the surveillance demand is moot given that plaintiffs withdrew this demand on page 2 of their memorandum of law in opposition.

Accordingly, it is hereby

ORDERED that defendants KIOP MERRICK L.P., KIR MERRICK 028, LLC, KIMCO INCOME OPERATING PARTNERSHIP, L.P., KIMCO INCOME REIT, KIMCO REALTY CORPORATION's motion is granted only to the extent that the note of issue is stricken and these defendants shall be entitled to take an additional deposition and IMEs of plaintiff Ormsten solely about the new issues raised in the amended bill of particulars dated June 9, 2022; and it is further

ORDERED that the note of issue is vacated and the case is stricken from the trial calendar, and it is restored to the active calendar as well; and it is further

ORDERED that, within 30 days from the entry of this order, movants 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 restore this case to the active calendar and 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)]; and it is further

ORDERED that a further status conference will be scheduled for April 25, 2023 at 10 a.m. By April 18, 2023, the parties are directed to upload 1) a discovery stipulation signed by all parties, 2) a stipulation of partial agreement that identifies the areas in dispute or 3) letters explaining why no agreement can be reached. If the additional deposition of plaintiff Ormsten is completed, as well as any discovery that flows from this deposition, the parties may jointly request that the Court issue a new note of issue date. The failure to upload anything by April 18, 2023 will result in an adjournment of the conference.

12/21/2022
DATE


ARLENE P. BLUTH, J.S.C.

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