

Beasley v MTA Bus Co.

2023 NY Slip Op 32904(U)

August 16, 2023

Supreme Court, New York County

Docket Number: Index No. 153484/2021

Judge: Denise M. Dominguez

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DENISE M DOMINGUEZ PART 21

Justice

INDEX NO. 153484/2021

CHELISA BEASLEY, MOTION SEQ. NO. 001

Plaintiff,

- v -

DECISION + ORDER ON MOTION

MTA BUS COMPANY, ANA M CRUZ

Defendants.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, Defendants MTA BUS COMPANY and ANA M CRUZ's summary judgment motion pursuant to CPLR §3212 on the theory that the Plaintiff's claimed injuries do not satisfy New York Insurance Law §5102(d) is denied with leave to refile and the Plaintiff's cross motion seeking leave to serve an amended bill of particulars is granted in part.

This personal injury matter arises out of a July 23, 2020 motor vehicle accident that occurred on 84th Street and Fifth Avenue in Manhattan, when the Plaintiff, CHELISA BEASLEY, was caused to fall while exiting a bus, bearing New York State license plate AW7074 operated by Defendant ANA M CRUZ ("CRUZ").

Following the filing of the note of issue, the Defendants timely filed for summary judgment, asserting that the Plaintiff did not meet the "serious injury" threshold requirement of §5102(d) of the New York Insurance Law. In response, and in opposition to such motion, the Plaintiff cross-moved seeking leave to amend the bill of particulars to allege additional injuries.

Plaintiff's Cross-Motion Seeking Leave to Serve a Supplemental Bill of Particulars

Pursuant to CPLR §3043(b), "[a] party may serve a supplemental bill of particulars with respect to claims of continuing special damages and disabilities without leave of court at any time... provided however that no new cause of action may be alleged or new injury

claimed....” Where “... the plaintiff seeks to allege continuing consequences of the injuries suffered and described in a previous bill of particulars, rather than new and unrelated injuries, the bill is supplemental, and leave of the court is not required.” (*Shahid v. New York City Health & Hosps. Corp.*, 47 A.D.3d 798, 800, 850 N.Y.S.2d 521 [1st Dept 2008]). However, where the proposed/new bill of particulars does not set forth a continuation of damages, but in fact sets forth new injuries, it is not a *supplemental* bill of particulars, but in fact is an *amended* bill of particulars, which, requires leave of court. (See *Samuelsen v. Wollman Rink Operations LLC*, 196 A.D.3d 408, 151 N.Y.S.3d 41 [1st Dept 2021]; *Diaz v. Ford Motor Co.*, 29 A.D.3d 339, 814 N.Y.S.2d 606 [1st Dept 2006]; *Kassis v. Teacher's Ins. & Annuity Ass'n*, 258 A.D.2d 271, 272, 685 N.Y.S.2d 44 [1st Dept 1999]).

Here, the initial Bill of Particulars, dated May 24, 2021, alleged various injuries to the Plaintiff's: 1) the right shoulder; 2) left knee; 3) left foot; 4) left ankle; and 5) lumbar spine (L2-S1) (NYSCEF Doc. 15). The Plaintiff's proposed supplemental bill of particulars seeks to allege various “additional injuries” to the Plaintiff's: 1) cervical spine (C2-C7); 2) lumbar spine (L2-S1); 3) left shoulder; 4) right shoulder; 5) left knee; 6) left ankle (Achilles tendinosis); and 7) left great toe (NYSCEF Doc. 29).

In support of the motion, it is argued that the “additional injuries” as set forth in the proposed “supplemental” bill of particulars were previously testified to by the Plaintiff at the October 28, 202 50-h hearing, thus same should be of no surprise to the Defendants. Upon review, at the 50-h hearing, the Plaintiff testified that she made complaints when treated on the day of the accident regarding both shoulders and her left toe; x-rays taken that day indicated no fractures or sprains to such body parts. Subsequent MRIs apparently indicated torn tendons to the bilateral shoulders and left toe. There is no mention of cervical/neck complaints. (NYSCEF Doc. 30). Upon a review of the record, at the Plaintiff's January 7, 2022 deposition, it does not appear that the Plaintiff identified any specific injury, limitation or complaint as to the neck, shoulders or left big toe. However, the Plaintiff testified that she underwent MRIs and still had pain in such body parts. (NYSCEF Doc. 16).

It is argued that these “additional injuries” were not previously alleged prior to the filing of the note of issue due to unexplained law office failure. However, no specific reason is provided as to why, if the “additional injuries”, which appear to have been long experienced by the Plaintiff, and even testified to by the Plaintiff, were not previously claimed in the bill of particulars.

Although the Plaintiff waited to amend the bill of particulars until after the note of issue and the Defendants' summary judgment motion was filed, in light of the Plaintiff's prior testimony in this matter, the Defendants had notice of the general complaints concerning the cervical spine, left shoulder, left big toe and left ankle. Therefore, the Plaintiff is granted leave to amend the bill of particulars to the limited extent of those allegations as set forth in the proposed bill of particulars (NYSCEF Doc. 29). What is unclear to this Court upon a review of the record, is the extent to which the Defendants received medical records concerning such injuries and had the full opportunity to explore the claims during discovery. Therefore, Plaintiff is directed to provide all medical records and authorizations related to the claims concerning the cervical spine, left shoulder, left big toe and the left ankle/Achilles tendinosis (as this specific claim was not previously alleged), appear for a further limited deposition and appear for further independent medical examination(s) as set forth below.

Defendants Summary Judgment Motion

The Defendants' summary judgment motion seeks dismissal of the Plaintiff's complaint on the grounds that the Plaintiff's injuries do not satisfy New York Insurance Law §5102(d).

The motion is not accompanied by a statement of materials facts supported by proper citation to the submitted evidence as required by 22 NYCRR 202.8-g[d] and Part 21 rules. Moreover, in light of forthcoming amended bill of particulars (as discussed above), additional discovery regarding the Plaintiff's additional injuries is necessary. Therefore, the Defendants' motion for summary judgment denied without prejudice and with leave to re-file.

Accordingly, it is hereby

ORDERED the Plaintiff's motion to amend the bill of particulars is granted to the limited extent that the Plaintiff is permitted to serve the bill of particulars as filed in NYSCEF Doc. 29 within 20 days; and it is further

ORDERED that the Plaintiff is to provide medical records for any and all treatment, including any diagnostic testing, from the date of the accident to the present regarding treatment as to the Plaintiff's cervical spine, left shoulder, left big toe and left ankle/Achilles tendinosis complaints/injuries, as well as duly executed HIPAA authorizations permitting the Defendants to

obtain such records directly from the providers within 20 days of the entry of this Order; and it is further

ORDERED that the Plaintiff is directed to appear for a further deposition limited to the newly added claims regarding the Plaintiff's cervical spine, left shoulder, left big toe and left ankle/Achilles tendinosis by September 29, 2023; and it is further

ORDERED that the Defendants are to designate the respective physicians to conduct the IMEs regarding the newly added claims as to the Plaintiff's cervical spine, left shoulder, left big toe and left ankle/Achilles tendinosis by September 29, 2023; and it is further

ORDERED that the Plaintiff is directed to appear for such IMEs by November 30, 2023; and it is further

ORDERED that the Defendants are to exchange the IME reports by December 31, 2023; and it is further

ORDERED that the Defendant's motion for summary judgment is denied without prejudice and with leave to refile by February 2, 2024, with the inclusion of a statement of material facts that is in accordance with 22 NYCRR 202.8-g[d] and Part 21 rules; and it is further

ORDERED no adjournments of the above are permitted absent Court approval.

8/16/2023
DATE


DENISE M DOMINGUEZ, 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 type="checkbox"/> GRANTED IN PART <input checked="" 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