

**Laboy v Thompson**

2023 NY Slip Op 33789(U)

October 24, 2023

Supreme Court, New York County

Docket Number: Index No. 151561/2019

Judge: Denise M. Dominguez

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DENISE M DOMINGUEZ PART 21

Justice

DENISE LABOY, INDEX NO. 151561/2019
MOTION SEQ. NO. 002

Plaintiff,

- v -

PHILLIP THOMPSON, NEW YORK CITY TRANSIT
AUTHORITY, MANHATTAN AND BRONX SURFACE
TRANSIT OPERATING AUTHORITY, METROPOLITAN
TRANSPORTATION AUTHORITY, MTA BUS COMPANY,

DECISION + ORDER ON
MOTION

Defendants.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 50, 51, 52, 53, 54, 55, 56, 57,
58, 59, 60, 61, 62, 80, 81, 82, 83, 84

were read on this motion to/for

VACATE/STRIKE - NOTE OF ISSUE/JURY
DEMAND/FROM TRIAL CALENDAR

Upon review of the above listed documents, Defendants Paul Salazar and The New York
and Presbyterian Hospital in the related action, captioned Phillip B. Thompson v. Paul M. Salzar
and the New York and Presbyterian Hospital, Index No. 450161/2020 ("Thompson Action"),
motion to vacate the Note of Issue pursuant to 22 NYCRR 202.21 or alternatively to compel
Plaintiff in the subject action ("Laboy Action") to provide outstanding discovery and to compel
Plaintiff Phillip B. Thompson to provide outstanding discovery and to extend the time to file
summary judgment motions is denied in part.

This matter arises out of a September 29, 2018 motor vehicle accident at or near St.
Nicholas Avenue and West 126th Street in Manhattan. Plaintiff DENISE LABOY, a passenger in
an ambulance that was owned by The New York and Presbyterian Hospital and operated by Paul
Salazar; the Defendants in the joined Thompson Action, alleges to have sustained various personal
injuries when the ambulance and a bus, operated by Defendant PHILLIP THOMPSON and
owned/maintained by Defendants NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN
AND BRONX SURFACE TRANSIT OPERATING AUTHORITY, METROPOLITAN

TRANSPORTATION AUTHORITY and MTA BUS COMPANY (“TRANSIT”), came into contact. (NYSCEF Doc. 1, 16, 18, 28, 40).

By Order of Judge Lisa Ann Sokoloff dated December 20, 2019 (NYSCEF Doc. 40), the subject action was joined for the purposes of discovery and trial with the Thompson Action and a third action, captioned *Paul M. Salazar v. Phillip B. Thompson, Metropolitan Transportation Authority and New York City Transit Authority*, Index No. 158552/2019 (“Salazar Action”).<sup>1</sup> The Plaintiffs in each of the joined actions have asserted various personal injuries.

Following the Order joining the three actions, discovery proceeded with a final discovery Order being issued on December 7, 2022, which directed all three Plaintiffs to file the Note of Issue by February 3, 2023. (NYSCEF Doc. 48; NYSCEF Doc. 17 Thompson Action). The parties in each action then separately filed their respective note of issue. In the subject matter, Plaintiff DENISE LABOY filed the note of issue on January 30, 2023 (NYSCEF Doc. 49). In the Thompson Action Plaintiff Phillip B. Thompson filed the note of issue on December 16, 2023 (NYSCEF Doc. 18).

The Defendants in the Thompson Action then filed the instant action seeking to vacate the note of issue, to compel discovery from the Plaintiff and separately, to compel discovery from Plaintiff Phillip B. Thompson.

Although the instant motion is pending in the Laboy Action, it is unclear from the motion that any discovery is actually owed by Plaintiff DENISE LABOY to the movants. The Affirmation of Good Faith (NYSCEF Doc. 51), bill of particulars (NYSCEF Doc. 61) and the Status Conference Order relied upon all appear to relate to outstanding discovery purportedly owed by Plaintiff Phillip B. Thompson (NYSCEF Doc. 62). Therefore, to the extent that the subject motion (Motion Seq. 2) seeks to vacate the note of issue in the subject Laboy Action due to outstanding discovery, that motion is denied as the movants have not established that there is any outstanding discovery in the Laboy Action.<sup>2</sup>

Rather, the within motion addresses alleged outstanding discovery owed by Plaintiff Phillip B. Thompson. As such, this motion would have more appropriately been filed in the Thompson Action. However, upon a review of the record, the parties appear to have at times treated this

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<sup>1</sup> The Thompson Action was transferred to Supreme Court, New York County from Supreme Court, Bronx County and then assigned a new Index No.

<sup>2</sup> The Court notes that the parties in the Laboy Action have resolved the outstanding discovery that was addressed in TRANSIT’s separate motion to vacate the note of issue (Motion Seq. 3) and that motion has been denied as moot.

matter as a fully consolidated action operating under one index number. Moreover, Plaintiff Phillip B. Thompson has submitted opposition to the motion (NYSCEF Doc. 80) and the Thompson Action is before this Court. Therefore, the motion will be addressed on the merits.

Defendants Paul Salazar and The New York and Presbyterian Hospital argue that the note of issue in the Thompson action should be vacated as discovery was owed by the Plaintiff at the time the note of issue was filed. Specifically, the movants allege that Plaintiff Phillip B. Thompson owes: an updated Workers' Compensation Board authorization related to a January 4, 2022 incident; authorizations to obtain the medical records related to the January 4, 2022 incident; and a response to the movant's post-deposition demands. Such items were made part of the August 11, 2022 Status Conference Order (NYSCEF Doc. 62). In opposition, Plaintiff Phillip B. Thompson opposes vacating the note of issue and asserts that the authorizations were previously provided. Plaintiff also submits that a post note of issue Supplemental Bill of Particulars, dated February 22, 2023 (NYSCEF Doc. 83) was served and that Plaintiff is willing to participate in a further deposition and independent medical examination ("IME") limited to the Supplemental Bill of Particulars.

Pursuant to 22 NYCRR §202.21(e), the note of issue may be vacated when the certificate of readiness is erroneous and asserts that discovery is complete when it is not. (*See Ortiz v Arias*, 285 A.D.2d 390, 727 N.Y.S.2d 879 [1st Dept 2001]). However, courts also have discretion to allow post-note of issue discovery without vacating the note of issue where neither party would be prejudiced, and where it is clear that post-note of discovery may be necessary. (*see Cuprill v. Citywide Towing & Auto Repair Servs.*, 149 A.D.3d 442, 49 N.Y.S.3d 624 [1<sup>st</sup> Dept 2017]; *Dominguez v. Manhattan & Bronx Surface Transit Operating Auth.*, 168 A.D.2d 376, 562 N.Y.S.2d 694 [1<sup>st</sup> Dept 1990]).

Here, the movants have not shown that they will be substantially prejudiced if post-note of discovery is permitted to continue while the case remains on the trial calendar. No trial date has yet to be set in any of these related matters. Thus, the parties would not be prejudiced if this matter were to remain on the trial calendar while the limited additional discovery is completed. Therefore, that branch of the motion which seeks to vacate the note of issue in the Thompson Action is denied.

That branch of the motion which seeks to compel discovery is granted to the limited extent as set forth herein. Plaintiff Phillip B. Thompson is directed to provide the movants with fresh authorizations for the Workers' Compensation Board records and medical records related to the

January 4, 2022 incident by November 17, 2023. Plaintiff Phillip B. Thompson is also directed to provide the movants with fresh authorizations responsive to the November 20, 2020 post deposition demand by November 17, 2023. Additionally, if not already completed, the Plaintiff is directed to appear for a deposition limited to the February 22, 2023 Supplemental Bill of Particulars by December 15, 2023. Movants are directed to designate a further IME limited to the February 22, 2023 Supplemental Bill of Particulars by December 15, 2023 and the IME shall be held by January 31, 2024 with report to be exchanged within 20 days of the IME. If a further deposition and/or IME are not needed, the movants are to advise Plaintiff Phillip B. Thompson in writing by November 17, 2023.

That branch of the motion which seeks an extension of time to file summary judgment motions is denied as the motion does not set forth any basis by which the outstanding discovery at issue is needed for the filing of any summary judgment motion.

Accordingly, it is hereby

ORDERED that Defendants Paul Salazar and The New York and Presbyterian Hospital's motion to vacate the note of issue in the subject action is denied; and it is further

ORDERED that Defendants Paul Salazar and The New York and Presbyterian Hospital's motion to vacate the note of issue in the subject related Thompson Action is denied; and it is further

ORDERED that the note of issue in the subject action is not vacated, and that the case shall remain on the trial calendar; and it is further

ORDERED that the note of issue in the Thompson Action is not vacated, and that the case shall remain on the trial calendar; and it is further

ORDERED that Plaintiff Phillip B. Thompson in the Thompson Action is directed to provide fresh authorizations and appear for a further deposition and IME limited to the February 22, 2023 Supplemental Bill of Particulars as set forth herein; and it is further

ORDERED that the Defendant's motion for an extension of time to file summary judgment motions in the subject action is denied; and it is further

ORDERED that the Defendant's motion for an extension of time to file summary judgment motions in the Thompson Action is denied; and it is further

ORDERED that, within 15 days from the entry of this order, movant shall serve a copy of this order with notice of entry on all parties in each of the three related actions and upon the Clerk

of the General Clerk's Office, who shall 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)].

Any requested relief not expressly addressed herein has nonetheless been considered by the Court and is hereby expressly denied.

10/24/2023  
DATE

CHECK ONE:  CASE DISPOSED  DENIED  NON-FINAL DISPOSITION

APPLICATION:  GRANTED  GRANTED IN PART  OTHER

CHECK IF APPROPRIATE:  SETTLE ORDER  SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE

HON. DENISE M. DOMINGUEZ J.S.C.

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