

**Memedi v Martnick**

2023 NY Slip Op 34400(U)

December 14, 2023

Supreme Court, New York County

Docket Number: Index No. 158640/2019

Judge: J. Mabelle Sweeting

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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. J. MACHELLE SWEETING PART 62**

*Justice*

-----X

VALBONA MEMEDI,

Plaintiff,

- v -

STEPHEN C. MARTNICK, UNITED PARCEL SERVICE,  
INC.,

Defendants.

-----X

STEPHEN MARTNICK, UNITED PARCEL SERVICE, INC.

Plaintiff,

-against-

VINCENT JOHNSON, THE CITY OF NEW YORK, NEW YORK  
CITY POLICE DEPARTMENT

Defendants.

-----X

INDEX NO. 158640/2019

MOTION DATE 10/18/2023

MOTION SEQ. NO. 003

**DECISION + ORDER ON  
MOTION**

Third-Party  
Index No. 595569/2020

The following e-filed documents, listed by NYSCEF document number (Motion 003) 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120

were read on this motion to/for JUDGMENT - SUMMARY.

Pending before the court is a motion where Stephen C. Martnick and United Parcel Service, Inc. (collectively, the “movants”) seek an order granting partial summary judgment to movants pursuant to Civil Practice Law and Rules (“CPLR”) 3212 insofar as dismissing the lost wage claims against movants.<sup>1</sup>

<sup>1</sup> In a letter to the court (NYSEF Doc. No. 120), plaintiff argues that movants’ reply should not be considered because it was filed on November 21, 2023, one day after the motion return date on November 20, 2023. Contrary to plaintiff’s contentions, however, all submissions were due on December 6, 2023 at 5pm. Accordingly, the court considers this motion to be timely briefed, and considers it on the merits.

### Standard for Summary Judgment

The function of the court when presented with a motion for summary judgment is one of issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]; Weiner v. Ga-Ro Die Cutting, Inc., 104 A.D.2d331 [Sup. Ct. App. Div. 1<sup>st</sup> Dept. 1985]). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [NY Ct. of Appeals 1986]; Winegrad v. New York University Medical Center, 64 N.Y.2d 851 [NY Ct. of Appeals 1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party (Assaf v. Ropog Cab Corp., 153 A.D.2d 520 [Sup. Ct. App. Div. 1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]).

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact, and failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Alvarez v Prospect Hosp., 68 NY2d 320 [N.Y. Ct. of Appeals 1986]).

Further, pursuant to the New York Court of Appeals, “We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” (Zuckerman v City of New York, 49 NY2d 557 [N.Y. Ct. of Appeals 1980]).

#### Arguments Made by the Parties

It is undisputed that at plaintiff’s deposition on March 30, 2021 (transcript at NYSCEF Doc. No. 88), the following exchange occurred:

Q: As a result of the accident that we’re here for today, is it your clam that you lost any specific amount of wages?

A: No. I was being paid while I was out or injured in the line of duty.

Q: Okay. So there’s no lost-wage component to your claims against any of the parties in this action.

A: No.

Mr. Seiden [Plaintiff’s attorney]: By counsel, there’s no lost wage claim.

It is also undisputed that more than two years later, on June 8, 2023, plaintiff filed an Amended Bill of Particulars (“BOP”) (NYSCEF Doc. No. 93) which stated that:

Plaintiff, VALBONA MEMEDI, by her attorneys, BLOCK O’TOOLE & MUPRHY, LLP, as and for her Amended Verified Bill of Particulars, respectfully sets forth as follows:

21. Plaintiff is making a claim for lost wages, loss of annuity, loss of pension benefits and loss of additional employment benefits. The lost wages claim is being made from January 4, 2023, into the future.

PLEASE TAKE FURTHER NOTICE THAT THE PLAINTIFF RESERVES THE RIGHT TO SUPPLEMENT AND/OR AMEND THIS VERIFIED BILL OF PARTICULARS UP TO AND INCLUDING AT THE TIME OF TRIAL.

Movants argue that plaintiff knew or should have known at the time she was deposed if she had any potential lost wages claim, and plaintiff's deposition testimony as quoted above constitutes a complete waiver of any claim for lost wages, past, present or future. Movants argue that given that plaintiff's attorney also confirmed that plaintiff has no lost wages claim, there can be no claim that plaintiff was confused about the question or didn't know what she was saying. Movants argue that they were prejudiced, because based on the testimony above, movants did not pursue this avenue of discovery, as discovery was completed over the next two years. Therefore, movants argue, plaintiff cannot now assert a lost wages claim at the trial of this action, or seek recovery for any damages related to her alleged loss of wages or retirement (pension) benefits, and partial summary judgment dismissing the lost wages claim is warranted.

In opposition, plaintiff argues as follows: First, the issue of lost wages was already raised in court conferences, and in fact, court orders dated July 13, 2023 and September 21, 2023 both provide for a further EBT of plaintiff with respect to lost wages (*see* court orders at NYSCEF Doc. No. 116). Second, plaintiff argues, it is well settled that a plaintiff is permitted, pursuant to CPLR 3042, and as of right, to amend her BOP before filing the Note of Issue ("NOI"), and to include in the amended bill whatever could have been included in the original bill. Here, plaintiff argues that the BOP has not been amended and a NOI has not yet been filed. Thus, plaintiff's amendment is proper and there is "no basis to strike the Amended Bill or its future loss of wages claim." Third, with respect to the prejudice alleged by defendants, the court has already issued orders on July 13, 2023 and September 21, 2023 that granted movants leave to conduct further discovery about lost wages. Finally, plaintiff argues that the movants' argument that the lost wages claim was "waived" is unsupported by any law.

Conclusions of Law

There is no dispute that a BOP can be amended once before the NOI is filed. There is also no dispute that in this case, the NOI has not yet been filed, and this is the first time plaintiff has amended the BOP.

Importantly, movants' application is not for an order striking the Amended BOP, but for an order dismissing the lost wages claim as "waived" based on plaintiff's deposition testimony. While movants are correct in arguing that summary judgment can be granted based on a plaintiff's deposition testimony, here, it is unclear whether plaintiff was making a firm representation that she waived a lost wage claim for all future dates. Here, the testimony was a brief exchange in a deposition conducted almost three years ago, in March 2021. Plaintiff was asked whether she was claiming any specific amount of wages, and she answered that she was not, because she was being paid while she was out or injured in the line of duty. Plaintiff was then asked if there was a lost-wage component to her claims against any of the parties in this action, and she and her counsel both confirmed that there was not. Subsequently, however, plaintiff filed Amended BOP that included a claim for lost wages "from January 4, 2023, into the future." The record does not unequivocally establish that plaintiff waived a claim for all lost wages in the past, present, and future. Further, this "waiver" was not reduced to writing in the form of a stipulation, or other writing, that could have clearly set forth the terms regarding any claims that were waived.

Importantly, with respect to any prejudice suffered by movants as a result of plaintiff's deposition testimony, as plaintiff correctly argues, this can be addressed by allowing movants the opportunity to conduct further discovery on this issue. As plaintiff properly argues, the court already issued orders on July 13, 2023 and September 21, 2023 that granted movants leave to conduct such discovery.

Finally, movants argue that “Plaintiff’s belated attempt to claim lost wages for any future health issues from which she may suffer lacks the requisite specificity and is completely meritless.” At noted above, the application in the instant motion is limited to movants seeking summary judgment solely with respect to the lost wages claim plaintiff asserted in her Amended BOP. Thus, any issues related to plaintiff’s Amended BOP are not addressed herein.

Conclusion


Accordingly, it is hereby:

**ORDERED** that this motion is DENIED; and it is further

**ORDERED** that any party may, at its election, conduct further discovery with respect to the lost wages claim; and it is further

**ORDERED** that the deadline for filing the NOI is extended to **March 31, 2024**, subject to further extensions pursuant to court order or pursuant to the written consent of all parties; and it is further

**ORDERED** that the next DCM conference date remains scheduled for **January 25, 2024** **at 2:00 PM.**

<u>12/14/2023</u> DATE			 J. MACHELLE SWETLING, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> OTHER
			<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE