

Photenas v New York City Tr. Auth.

2023 NY Slip Op 34495(U)

December 19, 2023

Supreme Court, New York County

Docket Number: Index No. 151173/2022

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

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INDEX NO. 151173/2022

DANIELLE ALEXIS PHOTENAS, ELIEZER TORRES,

MOTION SEQ. NO. 001 002

Plaintiff,

- v -

NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN
TRANSPORTATION AUTHORITY, JOHN DOE

DECISION + ORDER ON
MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23,
24, 25, 26, 27, 39, 40, 41, 42, 43, 44

were read on this motion to/for

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

The following e-filed documents, listed by NYSCEF document number (Motion 002) 28, 29, 30, 31, 32, 33, 34, 35,
36, 37, 38

were read on this motion to/for

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

Upon the foregoing documents, and after oral arguments, Plaintiff DANIELLE ALEXIS
PHOTENAS on the Counterclaim's ("Plaintiff PHOTENAS on the Counterclaim") motion to
vacate the note of issue (Motion Seq. 1) and the Defendants' separate motion to vacate the note of
issue (Motion Seq. 2) are granted in part and denied in part without prejudice.

This personal injury matter arises out of an August 13, 2021 motor vehicle accident
between the Defendants' bus, bus number 2638, and a vehicle operated by Plaintiff DANIELLE
ALEXIS PHOTENAS, in which Plaintiff ELIEZER TORRES was a passenger. (NYSCEF Doc.
1, 19).

The Plaintiffs filed the note of issue on September 12, 2023, asserting in the certificate of
readiness that all discovery had been completed (NYSCEF Doc. #15). Plaintiff PHOTENAS on
the Counterclaim moves by notice of motion to vacate the note of issue alleging that Plaintiff
TORRES has not provided sufficient responses to post deposition discovery demands related to
Plaintiff TORRES' prior June 10, 2016 accident, and has not appeared for independent medical

examinations (“IMEs”). Defendants move by notice of motion to vacate the note of issue as Plaintiffs PHOTENAS and TORRES have not provided complete discovery responses, including responses to demands for medical records and authorizations related to their respective prior accidents and as Plaintiff TORRES has not appeared for an IME. Both movants also seek additional time to file dispositive motions.

Plaintiffs file an affirmation in opposition, sequenced to Plaintiff PHOTENAS on the Counterclaim’s motion (Motion Seq. 1). However, the opposition reads as if it is supposed to address the Defendants’ motion (Motion Seq. 2). The parties are reminded to properly file their papers to the appropriate motion sequence in order to ensure that the Court can identify accurate papers and to appear for oral argument in order to clarify any filing mistakes with the Court.

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]; *Pua v. Lam*, 155 A.D.3d 487, 63 N.Y.S.3d 859 [1st Dept 2017]). 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 [1st Dept 2017]; *Dominguez v. Manhattan & Bronx Surface Transit Operating Auth.*, 168 A.D.2d 376, 562 N.Y.S.2d 694 [1st Dept 1990]).

Here, the movants have not shown that they will be substantially prejudiced if limited post-note of issue discovery is permitted to continue while the case remains on the trial calendar. No trial date has yet to be set in this matter, nor does there appear to be a pending pre-trial conference currently scheduled. 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 is denied without prejudice.

That branch of the motions which seek to compel the purported outstanding discovery is granted in part as follows.

Plaintiff TORRES

With respect to Plaintiff TORRES’ records concerning the prior June 10, 2016 accident, a demand was duly made for the applicable records related to the accident and any resulting treatment (NYSCEF Doc. 23). Upon review, Plaintiff TORRES’ response to such demand is insufficient (NYSCEF Doc. 25). Although Plaintiff TORRES’ asserts that he does not recall the

accident and is unable to provide information to confirm the date, identify the location of the accident, or even identify the operators (including whether Plaintiff TORRES was an operator or passenger), Plaintiff TORRES was able to provide an authorization for a medical provider and the attorney who represented Plaintiff TORRES in connection with the accident. Moreover, the bulk of Plaintiff TORRES's responses to the requested documents and information is simply "not in our possession". It is incumbent upon a party to either obtain the information requested in a discovery demand if reasonably able to do so, explain why such information cannot be obtained, or offer an objection to the demand. "Not in our possession" is insufficient and unreasonable given the fact that at least one medical provider and the prior lawyer have been identified. Therefore, Plaintiff TORRES is directed to provide a supplemental response to Plaintiff PHOTENAS on the Counterclaim's August 2, 2023 demand, either providing the requested information or more clearly explaining why such information cannot be provided, by January 22, 2024. If the movants maintain any claim number or further information obtained via a claims search regarding Plaintiff TORRES' June 10, 2016 accident, the movants are directed to provide such claim number to Plaintiff TORRES to help facilitate the exchange of discovery regarding the June 10, 2016 accident.

Additionally, as per the Defendants' June 30, 2023 letter, Plaintiff TORRES was provided with a claims search summary concerning an April 22, 2016 accident which reflected injuries alleged/claimed and attorney representation (NYSCEF Doc. 37). Plaintiff TORRES is directed to provide an authorization for the no-fault file for the carrier identified in the claim search summary concerning the April 22, 2016 accident as well as the non-privileged portion of the legal file by January 22, 2024. Plaintiff TORRES is also directed to provide a supplemental response to the Defendants' February 3, 2023 demand regarding the full name and address for "Roy" (NYSCEF Doc. 34) by January 22, 2024. As the Defendants' have not shown that the demand for Plaintiff TORRES' cell phone records is material and necessary and as Plaintiff TORRES, a passenger at the time of the accident, has objected to disclosing same, Plaintiff TORRES is not directed to provide such records or an authorization for the release of such records.

As Plaintiff TORRES does not object to appearing for an IME, if not already done, the movants are directed to designate their IME physician(s) by January 22, 2024, with the IME to be held within 60 days of designation. If the movants are sharing the IME, Plaintiff TORRES is to be advised in writing by January 22, 2024.

Plaintiff PHOTENAS

With respect to Plaintiff PHOTENAS' records concerning any repair work to Plaintiff PHOTENAS' vehicle undertaken as a result of the subject accident, Plaintiff PHOTENAS is directed to provide any bills/invoices/estimates of any work recommended or actually performed by January 22, 2024 as such information is material and necessary to the defense and investigation of this incident. If no estimate for repair work was obtained, or if no repair work was actually performed, Plaintiff PHOTENAS to advise in writing by January 22, 2024.

Additionally, as per the Defendants' May 19, 2023 letter, Plaintiff PHOTENAS was provided with a claims search summary concerning a prior March 7, 2015 accident which reflected injuries alleged/claimed (NYSCEF Doc. 36). It appears that that an authorization was provided for the carrier GEICO, but could not be processed as provided. If not already provided, Plaintiff PHOTENAS is directed to provide a fresh authorization for GEICO, the no-fault file for the carrier identified in the claim search summary concerning the March 7, 2015 accident as well as for Dr. Korman by January 22, 2024.

With respect to Plaintiff PHOTENAS' March 13, 2013 and October 24, 2013 accidents, Plaintiff PHOTENAS has asserted that she does not have any recollection of any treatment providers and does not know the no-fault carriers. It does not appear that a claims search summary regarding either the March 13, 2013 and October 24, 2013 accident was provided in an effort to identify any carrier or medical provider. If the Defendants have such a claims search summary related to either the March 13, 2013 and/or October 24, 2013 accident, the Defendants are directed to provide Plaintiff PHOTENAS with such information by January 12, 2024 and the Defendants are also directed to serve a specific demand for such no fault carrier or medical provider(s) identified in the claims search, if any, by January 12, 2024. Plaintiff PHOTENAS to provide a response to such demand by January 31, 2024.

That branch of the motions which seek an extension of time to file summary judgment motions is granted in part as follows. The Part 21 Rules regarding the filing of summary judgment motions are 120 days following the filing of the note of issue. As the outstanding discovery pertains to the Plaintiff's injuries and damages, and does not relate to any liability issues, there is no additional time granted for the parties to file summary judgment motions as to liability. Thus, the time for the parties to file any summary judgment motions as to liability remains 120 days following the filing of the note of issue, which is not vacated. However, as the outstanding

discovery concerns various medical records related to several prior accidents involving alleged injuries to the same/similar body parts, the parties' time to file summary judgment motions related to whether the Plaintiffs sustained a serious injury pursuant to Insurance Law § 5102(d) shall be extended. Moreover, Plaintiff TORRES has not yet appeared for an IME(s) in this matter. Therefore, the parties have until April 30, 2024 to file such summary judgment motions in order to allow for the receipt of the aforementioned outstanding records and Plaintiff TORRES' IME(s) to be completed.

Accordingly, it is hereby

ORDERED that Plaintiff DANIELLE ALEXIS PHOTENAS on the Counterclaim's motion to vacate the note of issue is denied without prejudice; and it is further

ORDERED that the Defendants' motion to vacate the note of issue is denied without prejudice; and it is further

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

ORDERED that the Plaintiffs are directed to provide the supplemental responses as outlined above by January 22, 2024; and it is further

ORDERED that the Defendants are directed to provide a supplemental demand as to Plaintiff DANIELLE ALEXIS PHOTENAS' March 13, 2013 and October 24, 2013 accidents, as outlined above by January 12, 2024; and it is further

ORDERED that the IME(s) for Plaintiff ELIEZER TORRES are to be designated by January 22, 2024, and the IME is to be held within 60 days of designation; and it is further

ORDERED that the parties' time to file summary judgment motions as to whether the Plaintiffs sustained a serious injury pursuant to Insurance Law § 5102(d) is extended to April 30, 2024 and the time to file any liability related summary judgment motions remains 120 days following the filing of the note of issue which is not vacated; and it is further

ORDERED that, within 20 days from the entry of this order, Plaintiff DANIELLE ALEXIS PHOTENAS on the Counterclaim 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 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.

12/19/2023
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.