

McLaurin v Johnson

2024 NY Slip Op 35013(U)

February 5, 2024

Supreme Court, Queens County

Docket Number: Index No. 710266/2020

Judge: Mojgan C. Lancman

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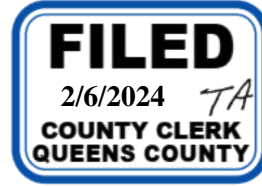
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. MOJGAN C. LANCMAN

IAS PART 20



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ELIZABETH A. MCLAURIN,

Index No.: 710266/2020

Plaintiff,

Motion Seq. No.: 6

-against-

Motion Date: 1.17.2024

ANTENOR V. JOHNSON, PEDRO G. MUNOZ, JR.,
ONEIL BROWN, METROPOLITAN TRANSPORTATION
AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY
and MTA BUS COMPANY,

Motion Cal. No.: 18

Defendants.
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The papers bearing NYSCEF Doc. Nos. 143-151, 153-159 and 161-163 were read on this discovery-related motion filed by the defendants MTA Bus Company (“MTA Bus”), New York City Transit Authority (“NYCTA”) and Metropolitan Transportation Authority (“MTA”) (collectively, the “Transit Defendants”). Upon the foregoing papers and in-person oral argument, this motion is determined as follows:

I. Background

The plaintiff, Elizabeth A. McLaurin (the “Plaintiff”), filed this cause seeking to recover damages for personal injuries allegedly sustained in a motor vehicle accident that occurred on December 2, 2019 (the “Accident”). The Plaintiff, a passenger in a bus, alleges that she was injured when the bus and a vehicle owned by the defendant Pedro G. Munoz, Jr. (“Munoz”) and operated by the defendant Antenor V. Johnson (“Johnson”) collided in Queens, New York.

Presently before the Court is the motion of the Transit Defendants for an Order: (1) vacating the note of issue and certificate of readiness; (2) extending their time to move for summary judgment; and (3) compelling the Plaintiff to respond to outstanding discovery. For the following reasons, the motion is granted in part and denied in part. Each branch of the motion shall be considered separately.

II. The Branch of the Motion to Vacate the Note of Issue and Certificate of Readiness

The Plaintiff filed the note of issue on December 4, 2023. The accompanying certificate of readiness indicates that discovery is complete. As explained below, this assertion is incorrect.

The Plaintiff served a third supplemental bill of particulars, dated November 22, 2023, on the Transit Defendants on or about November 28, 2023, alleging additional medical treatment. Specifically, it is asserted therein that on October 2, 2023, the Plaintiff underwent surgery to her lumbar spine, which involved: “1. [p]lacement of a posterior intrafacet implant and bone graft. [l]evel: L4-5; and 2. [e]ndoscopic dorsal ramus medial branch rhizotomy. [l]evel: L4-5, L5-S1 bilateral.”

By e-mail transmitted on November 29, 2023, the Transit Defendants advised the Plaintiff that they were requesting a further deposition of the Plaintiff with respect to the claims advanced in third supplemental bill of particulars and, in effect, reserving their right to an additional independent medical examination.

Despite the fact that the Plaintiff had lumbar surgery in October 2023; that the third supplemental bill of particulars relative thereto was served on or about November 28, 2023; and that the Transit Defendants advised the Plaintiff that they were seeking additional discovery by e-mail transmitted on November 29, 2023, the Plaintiff filed a note of issue on December 4, 2023, indicating that there was no outstanding discovery.

“Where a party timely moves to vacate a note of issue, it need show only that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of ... section [202.21] in some material respect” (*Vargas v Villa Josefa Realty Corp.*, 28 AD3d 389, 390 [1st Dept 2006] [internal quotation marks and citations omitted]).

Here, the Transit Defendants establish on their timely motion that this cause is not ready for trial; that there is open discovery; and that the certificate of readiness is materially incorrect because it indicates that discovery is complete and that this cause is ready for trial. Specifically, *inter alia*, the examination before trial of the Plaintiff relative to the allegations contained in the third supplemental bill of particulars remains outstanding. The note of issue is therefore a nullity and vacated, and this cause is stricken from the trial calendar (*see Ruiz Park Gramercy Owners Corp.*, 182 AD3d 471 [1st Dept 2020]; *Slovney v Nassao*, 153 AD3d 962 [2d Dept 2017]).

III. The Branch of the Motion to Extend the Time to Move for Summary Judgment

The application of the Transit Defendants for an extension of time to move for summary judgment is denied as academic. Since the note of issue is vacated, a new note of issue shall be filed after the completion of discovery. The deadline to file a summary judgment motion shall run from the date the new note of issue is filed (*see Williams v Peralta*, 37 AD3d 712 [2d Dept 2007]).

IV. The Branch of the Motion to Compel

The Transit Defendants seek to compel the Plaintiff to respond to the following demands contained in a notice for discovery and inspection dated April 17, 2023:

6. Photographs and/or videos depicting plaintiff during plaintiff’s vacation in July 2022;
7. Photographs and/or videos depicting plaintiff during plaintiff’s vacation in

August 2022;

8. Photographs and/or videos posted to plaintiff's Facebook account, Instagram account, and/or other social media accounts(s) from December 2, 2018 up to and including the present and up to and including the culmination of this litigation, depicting plaintiff's physical condition; including, but not limited to, plaintiff engaging in physical activities, engaging in recreational activities, at social events/parties/family functions, dancing, running, walking, exercising, traversing stairs, swimming, and on vacation;

The predicate for the demands is the Plaintiff's deposition testimony. Here, the Plaintiff testified that she can no longer perform activities in the same manner as she was able to prior to the Accident; that since the Accident, she is no longer able to swim, dance, or run; that she has difficulty climbing stairs, working out, and lifting things; and that, in general, she doesn't "do much of anything."

The Plaintiff objects to the demands, contending that they are "dramatically overbroad and harassing fishing expedition;" "unduly burdensome;" "lacking in specificity and seeking immaterial and irrelevant information;" and "not reasonably calculated to lead to the discovery of admissible information."

Discovery, including photographs, videos and social media postings, regarding a plaintiff's social and recreational activities that contradict his or her claims of disability "is relevant, useful, and reasonable" (*Caserta v Triborough Bridge & Tunnel Authority*, 180 AD3d 532, 532 [1st Dept 2020]).

The case of *Vasquez-Santos v Mathew*, 168 AD3d 587, 588 [1st Dept 2019], is also instructive:

Private social media information can be discoverable to the extent it contradicts or conflicts with a plaintiff's alleged restrictions, disabilities, and losses, and other claims. Here, plaintiff, who at one time was a semi-professional basketball player, claims that he has become disabled as the result of the automobile accident at issue, such that he can no longer play basketball ... access to plaintiff's accounts and devices ... is appropriately limited in time, *i.e.*, only those items posted or sent after the accident, and in subject matter, *i.e.*, those items discussing or showing plaintiff engaging in basketball or other similar physical activities [internal brackets, quotation marks and citations omitted].

The Court now turns to the demands at issue.

The demand for the photographs and/or videos depicting the Plaintiff during her vacation in July 2022 is overly broad. The Court therefore directs that only photographs and/or videos depicting the Plaintiff engaging in physical and recreational activities, including but not limited

to, dancing, running, walking, exercising, traversing stairs, and swimming (physical and recreational activities) during her vacation in July 2022 be exchanged by April 1, 2024.

The demand for photographs and/or videos depicting the Plaintiff during her vacation in August 2022 is also overly broad. The Court therefore directs that only photographs and/or videos depicting the Plaintiff engaging in physical and recreational activities during her vacation in August 2022 be exchanged by April 1, 2024.

The demand for photographs and/or videos posted to the Plaintiff's Facebook account, Instagram account, and/or other social media accounts(s) from December 2, 2018 is also overly broad. Here, the request for these items *prior* to the Accident is improper (*see id.*). The Court therefore directs that the photographs and/or videos posted to the Plaintiff's Facebook account, Instagram account, and/or other social media accounts(s) from the date of the Accident, December 2, 2019, depicting her engaging in physical and recreational activities be exchanged by April 1, 2024. The Plaintiff shall also exchange authorization(s) for the release of the foregoing by April 1, 2024.

A virtual conference shall be held on July 12, 2024 at 2:00 p.m. to discuss the status of discovery.

V. Conclusion

For the reasons stated above, it is hereby:

ORDERED, that the motion of the Transit Defendants is granted in part and denied in part; and it is further,

ORDERED, that Note of Issue is hereby vacated and that this cause is stricken from the trial calendar; and it is further,

ORDERED, that the Plaintiff shall exchange photographs and/or videos depicting her engaging in physical and recreational activities during her vacation in July 2022 by April 1, 2024; and it is further,

ORDERED, that the Plaintiff shall exchange photographs and/or videos depicting her engaging in physical and recreational activities during her vacation in August 2022 by April 1, 2024; and it is further,

ORDERED, that the Plaintiff shall exchange photographs and/or videos posted to her Facebook account, Instagram account, and/or other social media accounts(s) from December 2, 2019 depicting her engaging in physical and recreational activities, together with authorization(s) for the release of same, by April 1, 2024; and it is further,

ORDERED, that the Plaintiff shall submit to an examination before trial with respect the allegations set forth in her third supplemental bill of particulars on April 9, 2024; and it is further,

ORDERED, that independent medical examination(s) shall be designated by May 17, 2024 and conducted within 45 days of designation(s); and it is further,

ORDERED, that a virtual conference shall be held on July 12, 2024 at 2:00 p.m. to discuss the status of discovery; and it is further,

ORDERED, that the motion of the Transit Defendants is otherwise denied; and it is further,

ORDERED, that the Transit Defendants shall serve a copy of this Order with Notice of Entry upon the Plaintiff, Johnson and Munoz via NYSCEF by February 29, 2024.

This constitutes the Decision and Order of the Court.

Dated: Jamaica, New York
February 5, 2024



MOJGAN C. LANCMAN, J.S.C.

