

**Herz v Silletti**

2007 NY Slip Op 30673(U)

April 5, 2007

Supreme Court, New York County

Docket Number: 0116974/2005

Judge: Deborah A. Kaplan

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Deborah Kaplan  
*Justice*

PART 22

ZEEV HERZ

INDEX NO. 116974/05

MOTION DATE 4-4-07

MOTION SEQ. NO. 003

MOTION CAL. NO. \_\_\_\_\_

- v -

ROGER SILLETTI

The following papers, numbered 1 to 6 were read on this motion for leave to serve an amended bill of particulars and cross-motion to strike the plaintiff's fifth and seventh bill of particulars.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	<u>1</u>
Answering Affidavits — Exhibits	<u>2</u>
Replying Affidavit	<u>3</u>
Notice of Cross-Motion — Affidavits — Exhibits	<u>4</u>
Answering Affidavit — Exhibits	<u>5</u>
Replying Affidavit	<u>6</u>

**FILED**  
APR 12 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Cross-Motion:  Yes  No

On November 25, 2005, the 65-year-old plaintiff was struck by the defendant's vehicle as he was crossing a Manhattan street. He sustained injuries to his left leg and left shoulder, underwent surgery for a leg fracture, remained hospitalized for one month and underwent a second leg surgery a year later. In December 2006, he had surgery on his left shoulder.

The plaintiff commenced the instant action seeking damages for his injuries on or about December 6, 2005. His first bill of particulars, served on or about May 6, 2006, alleged, among other things, that he sustained dislocation, contusions and sprain of the left shoulder. Fifth and seventh supplemental bills of particulars were served upon the defendant on or about December 14, 2006, and January 19, 2006, respectively. The fifth bill alleges a "recommendation of a left rotator cuff repair and possible biceps tendonitis," "tears of the anterior and posterior fibers of the supraspinatus" and other injuries and conditions concerning the left shoulder. The seventh bill alleges further left shoulder injuries and conditions, post-surgery.

The plaintiff now moves for leave to serve an amended bill of particulars to assert a new claim of "exacerbation of pre-existing depressive disorder; major depressive disorder; exacerbation of pre-existing anxiety and feelings of

helplessness, loneliness and despair." The defendant opposes the plaintiff's motion and cross-moves to strike the fifth and a seventh supplemental bills of particulars.

In his motion, the plaintiff, in essence, is claiming that the car accident exacerbated his pre-existing psychological condition, which arose from his tragic childhood holocaust experiences. He claims that he only recently became aware of the nexus between his current depression and anxiety and his holocaust experiences. However, a report from a Senior Psychologist at Bellevue Hospital Center, where the plaintiff treated since February 2006, submitted in support of the motion, states that the plaintiff "had been struggling with depression, anxiety and interpersonal difficulties stemming from early childhood traumas, throughout his life" and that he had been treated with psychotherapy and psychopharmacology for many years prior to the accident, as well as after.

The plaintiff's proposed amended bill of particulars does not merely seek to update a claim of damages previously asserted but seeks to assert new injuries and an entirely new category of damages. As such, leave of court is required. See CPLR 3042(b); 3043(b). However, leave is denied. In light of the long-standing nature of the plaintiff's psychological condition, he failed to adequately explain the delay in seeking to amend his bill of particulars to assert the new claim. Leave to amend should be denied where a plaintiff seeks to assert an entirely new claim, does so only weeks before trial and fails to proffer any reasonable excuse for the delay. It is settled law that when leave to amend a bill of particulars is sought on the eve of trial, judicial discretion should be exercised sparingly. See Cohen v Ho, – AD3d –, 2007 WL 853179 (2<sup>nd</sup> Dept.2007); Diaz v Ford Motor Company, 29 AD3d 339 (1<sup>st</sup> Dept. 2006); Masterson v New York Hospital, 181 AD2d 451 (1<sup>st</sup> Dept. 1992); Wohn v Suffolk, 237 AD2d 412(2<sup>nd</sup> Dept. 1997); Pearce v Booth Memorial Hospital, 152 AD2d 553 (2<sup>nd</sup> Dept. 1989).The court notes that the plaintiff filed a note of issue on November 20, 2006, was thereafter granted a special trial preference and a trial date has been set for April 17, 2007.

Since the fifth and a seventh supplemental bills were merely updating allegations of damages previously asserted in the original bill of particulars, and they were served at least 30 days prior to trial, the plaintiff was entitled to serve them without leave of court. Under the circumstances presented, the defendant cannot reasonably claim prejudice or surprise and, in any event, is entitled to exercise his rights to discovery in regard to the supplemental pleading. See CPLR 3043(b). Therefore, the cross-motion is denied.

For these reasons and upon these papers, it is

ORDERED that the plaintiff's motion for leave to serve an amended Bill of Particulars is denied; and it is further,

ORDERED that the defendant's cross-motion to strike the fifth and a seventh supplemental Bills of Particulars is denied in its entirety.

This constitutes the Decision and Order of the Court.

Dated: April 5, 2007

*Deborah Kaplan*  
Deborah Kaplan  
**DEBORAH A. KAPLAN**  
J.S.C.

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