

**Matter of World Trade Ctr. Bombing Litig.**

2010 NY Slip Op 32776(U)

September 29, 2010

Supreme Court, New York County

Docket Number: 100051/1994

Judge: Louis B. York

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

**LOUIS B. YORK**

PART 2

PRESENT:  
Index Number : 100051/1994

**J.S.C.**

MERCADO, OLGA

vs  
PORT AUTHORITY

Sequence Number : 017

STRIKE

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

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

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**Motion is decided in accordance with  
the decision ~~dictated on the record.~~ *Accompanying  
this greysheet.***

**FILED**  
OCT 07 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 9/29/10

*Luy*  
**LOUIS B. YORK** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 2

-----x  
In re World Trade Center Bombing Litigation  
-----x

OGLA MERCADO, et. al.,  
Plaintiffs,

Index No. 100051/1994

-against-

PORT AUTHORITY OF NEW YORK AND NEW  
JERSEY,  
Defendant.

-----x  
SUSAN ESPOSITO,  
Plaintiff,

-against-

PORT AUTHORITY OF NEW YORK and NEW  
JERSEY,  
Defendant.

-----x  
LOUIS B. YORK, J.:

**FILED**  
OCT 07 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

In this motion, Defendant Port Authority of New York and New Jersey ("Port Authority") seeks to strike Plaintiff Susan Esposito's ("Esposito") amended bill of particulars. Esposito cross-moves to seek leave of the court to amend the bill of particulars pursuant to CPLR 3025(b). For the reasons below, the Court grants Defendant's motion and denies Esposito's cross-motion.

Defendant Port Authority owns and operates the World Trade Center. On February 26, 1993, there was an explosion in the World Trade Center's garage. Esposito, who allegedly suffered and continues to suffer from several health conditions as a result of the evacuation of the building, commenced the action by filing the Summons and Complaint on January 2, 1994. In the Verified Bill of Particulars, which Esposito served on April 20, 1995, Esposito enumerated the injuries she allegedly sustained during the evacuation, including injury to regions of her cervical and lumbar spine resulting in pain, numbness and weakness in her extremities and decreased range of motion. Esposito served a Supplemental Bill of Particulars on July 22, 1997, in which she set

forth further injuries to the cervical and lumbar spine region, and reported the special damages she incurred to that date.

Defendant filed a Notice of Physical Examination on September 16, 2002, seeking a psychological evaluation of Esposito. Esposito refused and moved for a protective order, arguing that there was no need for a psychological examination because she had not claimed psychological injury. On October 2, 2002, Esposito withdrew this motion; however, she never underwent a psychological evaluation and she was not questioned about her psychological state.

After Esposito withdrew her motion, she and Defendant Port Authority did not correspond about the case until August 18, 2008, when Esposito retained new counsel and filed a document entitled "Second Supplemental Bill of Particulars." In this pleading, Esposito set forth new injuries, including dysautonomia, orthostatic hypotension and fainting spells, brain injury due to chronic pain, progressive neurocognitive loss and exacerbation of preexisting anxiety and depression. Defendant interpreted the document to be an "Amended Bill of Particulars" rather than the "Second Supplemental Bill of Particulars."

Esposito and Defendant then did not correspond until May 2009, when Esposito retained new counsel again. On November 2, 2009, Esposito requested and obtained a stipulation to restore the action to the discovery calendar as the case had been marked off the Court's active discovery calendar. Esposito's counsel also asked Defendant to sign a stipulation to amend the Bill of Particulars to include psychological damages. Defendant refused. On March 8, 2010, Esposito served a "First Amended Verified Bill of Particulars" setting forth newly alleged psychological injuries, including post-traumatic stress syndrome, extreme emotional distress, bipolar disorder, chronic sleep disorder and chronic fatigue syndrome.

Defendants objected to the pleading, claiming that since the 2008 "Second Supplemental Bill of Particulars" was actually an amended bill, the 2010 "First Amended Verified Bill of Particulars" should be stricken for failure to seek the Court's consent. Defendants also claimed that amending a pleading 16 years after commencement of the action to include a claim for

psychological damage is extremely prejudicial, especially after Esposito's counsel had blocked the investigation into Esposito's psychological state eight years earlier. Esposito, however, refused to withdraw the pleading. She argued that this was not a second modification because the Second Supplemental Bill of Particulars already mentions brain injury and exacerbation of pre-existing mental health issues. Esposito's counsel also claims that, as new counsel, the firm did not have a copy of the Second Supplemental Bill of Particulars filed on August 18, 2008 when it filed the 2010 "First Amended Verified Bill of Particulars." Esposito also indicated that she would file the Note of Issue within 14 days if Defendant didn't schedule a further deposition of Esposito.

On April 14, 2010, Defendant learned that this case was marked "disposed" and informed Esposito of this fact by letter. The Court restored the action on April 15, 2010, concluding that the "disposed" status was an administrative error. Currently, Defendant moves to strike Esposito's Amended Bill of Particulars. Esposito cross-moves for leave of the court to amend the pleading.

When a plaintiff seeks to allege continuing consequences of the injuries suffered and described in a previous bill of particulars, rather than new and unrelated injuries, the bill is supplemental and leave of the court is not required to serve it. (*See* CPLR 3043(b); *Shahid v. New York City Health & Hospitals Corp.*, 47 AD3d 798, 800, 850 NYS2d 521, 523 [2nd Dept. 2008]) A second supplemental bill of particulars, if it is served without leave of court and asserts new injuries, is considered an amended bill of particulars. (*See* CPLR § 3042(b); *Vargas v. Villa Josefa Realty Corp.*, 28 A.D.3d 389, 391, 815 N.Y.S.2d 30, 33 [1st Dept. 2006]). Under CPLR § 3042(b), a party may amend the bill of particulars once as of course prior to the filing of a note of issue. A party who has amended a bill of particulars already must seek leave of the court before making a second amendment. (*See* CPLR § 3042(b)). Leave to amend a bill of particulars is ordinarily freely given in the absence of prejudice or surprise resulting directly from the delay (*see* CPLR § 3025(b); *McCaskey, Davies & Assoc. v. New York City Health & Hosps. Corp.*, 59 NY2d 755, 757, 463 N.Y.S.2d 434, 434 [Ct. App. 1983]). If there has been an unreasonable delay

in seeking leave to amend, the plaintiff must establish a reasonable excuse for the delay and submit an affidavit to establish the merits of the proposed amendment. (*see Volpe v. Good Samaritan Hosp.*, 213 A.D.2d 398, 399, 623 N.Y.S.2d 330, 332 [2nd Dept. 1995]).

Defendant Port Authority asserts two arguments to strike Esposito's Amended Bill of Particulars. First, Port Authority argues that Esposito improperly amended her Bill of Particulars a second time without having secured leave of the court and added a new claim of psychological damages in the second amendment. Although there is a right to amend a pleading at any time, a pleading in which new injuries are asserted will be considered an "Amended" Bill of Particulars, not a "Supplemental" Bill of Particulars. (*See Vargas v. Villa Josefa Realty Corp.*, 28 AD3d 389, 391, 815 NYS2d 30, 33 [1st Dept. 2006]). Esposito's August 2008 Second Supplemental Bill of Particulars sets forth new injuries not contained in the initial Verified Bill of Particulars and thus it is actually an amended bill of particulars. Esposito did include psychological damages in her August 2008 Second Supplemental Bill of Particulars. Although Esposito argues that Defendant never objected to the August 2008 "Second Supplemental Bill" which claims some of the same injuries – in particular, brain injury or exacerbated brain injury, aggravation of pre-existing anxiety and depression – the March 2010 "First Amended Verified Bill of Particulars" asserts wholly new injuries, including post traumatic stress disorder, bipolar disorder, chronic sleep disorder. (*See id.*) Esposito therefore was required to seek leave of the Court before making the March 2010 First Amended Verified Bill of Particulars.

Second, Defendant claims it would be substantially prejudiced by Plaintiff's incorporation of a claim for psychological damages 16 years after commencement of the action. Leave to amend a bill of particulars usually is given freely in the absence of prejudice or surprise, and courts should only sparingly exercise their discretion by denying leave to amend. (*See CPLR 3025(b); Torres v. Educational Alliance*, 300 AD2d 469, 470, 752 NYS2d 80, 82 [2nd Dept. 2002]). If there has been an unreasonable delay in seeking leave to amend, however, the plaintiff must establish a reasonable excuse for the delay and submit an affidavit to establish the merits of the proposed amendment (*See*

*Cherebin v. Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365, 841 NYS2d 277, 279 [1st Dept. 2007]). Furthermore, if there is an inordinate delay when a plaintiff seeks to amend her bill of particulars to assert a new injury, the plaintiff must also be “a medical affidavit showing a casual connection between the alleged injury and the original injuries sustained.” (*Simino v. St. Mary's Hospital*, 107 A.D.2d 800, 801, 484 N.Y.S.2d 634, 635 [2nd Dept 1985]). Courts have found that a period of roughly ten years constitutes “inordinate delay” (*see e.g., Weinstock v. Handler*, 254 AD2d 165, 172, 679 NYS2d 48, 53 [1st Dept. 1998] (holding that eleven year delay in seeking to enforce any contractual rights was barred by laches), *Baby Togs, Inc. v. Faleck & Margolies, Inc.*, 239 A.D.2d 278, 278 658 N.Y.S.2d 842, 843 [1st Dept. 1997] (holding that period of seven years after first bill of particulars was served constitutes inordinate delay), *Cseh v. New York City Transit Auth.*, 240 A.D.2d 270, 271-272, 658 N.Y.S.2d 618, 620 [1st Dept. 1997] (holding that ten years constitutes undue delay and significant prejudice due to statute of limitations)).

Here, Esposito waited sixteen years to incorporate claims for psychological damages. Furthermore, Esposito has not provided an affidavit of reasonable excuse for the delay in making the motion and has only offered a reason for the delay after Defendant filed a motion to strike the Amended Bill of Particulars. Her excuse – principally law office failure and a change in counsel – is insufficient to justify such a lengthy delay. This is especially true because in 2002 Esposito blocked all attempts by Defendant to investigate her psychological status and specifically argued that she was not incorporating a claim of psychological harm. She withdrew her motion for a protective order but in light of her representation the examination was not pursued. Thus, the Court rejects Esposito’s argument here as well.

Defendant alleges that because of the lapse of years, an order allowing the amendment at this point would result in prejudice. Esposito claims that Defendant would not be prejudiced because Port Authority can obtain the relevant information through Esposito’s workman’s compensation documents, a limited deposition of Esposito on the subject of her alleged emotional

injuries, and testimony by psychiatrist Dr. Frances Mas, who treated Esposito from the mid-1980s to 1995 and again from 2007 to the present. As Defendant counters, however, Dr. Mas will not be able to provide concrete information about the care and treatment Esposito allegedly received between 1995 and 2007, 12 of the pertinent years in question; any testimony he could give as to Esposito's state of mind during this period would be speculative in nature. Had the psychological claims been included in either the original or Second Bill of Particulars, or if Esposito had allowed a psychological evaluation eight years ago when defendant initially requested it, this change of position and potential expense could have been avoided. (*See Murray v. City of New York*, 51 AD3d 502, 503, 858 NYS2d 131, 132-133 [1st Dept 2008]). Thus, the Court rejects Esposito's arguments here as well.

Based on the above, therefore it is

ORDERED that the Defendant's motion to strike Esposito's amended Bill of Particulars is granted; and it is further

ORDERED that Esposito's <sup>CROSS-</sup>motion for leave to amend the Bill of Particulars herein is denied.

Dated: 9/29/10

ENTER:

*Lly*  
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 LOUIS B. YORK, J.S.C.

**LOUIS B. YORK**  
**J.S.C.**

**FILED**  
 OCT 07 2010  
 NEW YORK  
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