

Portney v SMG Mgt.

2011 NY Slip Op 32093(U)

July 18, 2011

Supreme Court, Nassau County

Docket Number: 9171/10

Judge: Anthony L. Parga

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SHORT FORM ORDER

**SUPREME COURT-NEW YORK STATE-NASSAU COUNTY
PRESENT:**

HON. ANTHONY L. PARGA
JUSTICE

-----X **PART 8**
LINDA A. PORTNEY and WILLIAM C. PORTNEY,

Plaintiff,

INDEX NO. 9171/10

-against-

**MOTION DATE: 06/03/11
SEQUENCE NO. 01, 02, 03**

SMG MANAGEMENT and FELD ENTERTAINMENT,

Defendants.

-----X

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Defendant Feld Entertainment, Inc.'s motion and defendant SMG Management's cross-motion to compel plaintiffs to furnish defendants with a Supplemental Bill of Particulars are granted to the extent directed below. Plaintiff's cross-motion to strike defendant SMG Management's answer is denied to the extent directed below.

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

This is an action wherein plaintiff, Linda A. Portney, alleges that she sustained personal injuries as the result of a fall on a staircase at the Nassau Veterans Memorial Coliseum (hereinafter the "Coliseum") on March 18, 2009. Plaintiff William C. Portney has asserted a derivative cause of action.

Both defendants move to compel plaintiff to provide a Verified Supplemental Bill of Particulars responsive to their respective demands regarding the specific location where the plaintiff Linda A. Portney's accident occurred and the nature of the defective condition which

plaintiffs allege existed at the accident situs. The preliminary conference order in this action directed that plaintiffs serve a supplemental bill of particulars as to defendant Feld Entertainment, Inc.'s (hereinafter "Feld") demands regarding the accident location, the defective condition, and manner in which the accident occurred. Plaintiffs served a Supplemental Bill of Particulars, dated March 11, 2011, which both defendants contend fails to identify the specific location of the staircase and step where the accident happened with sufficient specificity and also fails to particularize the specific defective condition which is alleged to have caused or contributed to the happening of the accident

Plaintiffs' bill of particulars describes the location of plaintiff's accident as "at or near the top of the staircase going down to the lower level," and their supplemental bill of particulars describes the location as "what the defendant's accident report describes as the 'main stairs to the lower lobby.'" Said description is devoid of specificity as to what area, section, gate, or level of the Coliseum the staircase is located at, nor does the plaintiff offer any identifying features or nearby fixtures to identify the location of the staircase. Defendants are entitled to a more precise description of the accident location. (*Mastey v. Mancusi*, 122 Misc.2d 119, 469 N.Y.S.2d 890 (Sup. Ct. Kings Cty. 1983)). Contrary to plaintiff's contentions, a plaintiff is not excused from providing proper and complete responses to a defendant's demand for a bill of particulars because the plaintiff claims that the defendants have full knowledge of the facts. (*Draper v. Zamara*, 126 A.D.2d 941, 511 N.Y.S.2d 986 (4th Dept. 1987)). Further, defendant Feld contends that it lacks knowledge regarding the layout of the premises where the plaintiff's accident occurred, as defendant Feld was present at the Coliseum only for a limited period of time, for the purpose of presenting the circus, and that the plaintiffs' description in their supplemental bill of particulars is insufficient to adequately describe the location of the accident.

Additionally, plaintiffs' bill of particulars and supplemental bill of particulars allege, *inter alia*, that the defendants were negligent "in allowing and permitting a defective condition to exist" at the premises, "in causing the dangerous and defective condition and failing to repair the dangerous and defective condition," in failing to give notice or warning of the dangerous condition existing" at the premises, and "in failing to repair the dangerous and defective condition." Nowhere within the plaintiffs' bill of particulars or supplemental bill of particulars does the plaintiff particularize the nature of the defect. The type of defect which is alleged to have caused or contributed to plaintiff's accident and the location of said defect are not specified in the plaintiffs' bill of particulars or supplemental bills of particulars. The plaintiffs' bill of particulars and supplemental bill of particulars does not even state whether the alleged "dangerous and defective condition" is on a step of the staircase or at some other place within the

“premises.” Such allegations are insufficient to adequately inform the defendants as to the specific nature of the defect complained of or the nexus of such defect to plaintiffs’ alleged injuries. (See, *Kelly v. American International Health Facilities*, 105 A.D.2d 595, 481 N.Y.S.2d 74 (1st Dept. 1984) *Cornachio v. General Motors*, 63 A.D.2d 941, 406 N.Y.S.2d 982 (1st Dept. 1978)). The defendants are entitled to a specification of both the type of dangerous and defective condition which plaintiff alleges caused or contributed to her accident and the location of said dangerous and defective condition.

Where a party’s conduct is alleged to have been negligent, he is entitled to particulars as to the specific acts of negligence which will be claimed. (*Moore v. Chrysler Corp.*, 100 A.D.2d 955, 475 N.Y.S.2d 96 (2d Dept. 1984)). A defendant is entitled to a Bill of Particulars delineating the defective condition which the plaintiff alleges caused or contributed to the happening of her accident, as well as specification with respect to the plaintiffs’ claims concerning the creation of the allegedly dangerous condition. (*Jones v. LeFrance Leasing Ltd. Partnership*, 61 A.D.3d 824, 877 N.Y.S.2d 424 (2d Dept. 2009); *Ramondi v. Paramount Fee, LP*, 30 A.D.3d 396, 817 N.Y.S.2d 341 (2d Dept. 2006)). A response to a demand that is vague, nonspecific and open-ended fails to satisfy the purpose of a bill of particulars. (*Alvarado v. New York City Housing Authority*, 302 A.D.2d 264, 756 N.Y.S.2d 6 (1st Dept. 2003); *Miccarelli v. Fleiss*, 219 A.D.2d 469, 631 N.Y.S.2d 159 (1st Dept. 1995); See also, *Valentine v. Armor Elevator Co., Inc.*, 155 A.D.2d 597, 547 N.Y.S.2d 656 (2d Dept. 1989)).

Liberality in granting bills of particulars and full disclosure is the public policy of this state. (*Paladino v. E.J. Korvettes, Inc.*, 65 A.D.2d 617, 409 N.Y.S.2d 541 (2d Dept. 1979)). It is well settled that the purpose of a bill of particulars is to amplify the pleadings, limit the proof, and prevent surprise at trial. (*Jones v. LeFrance Leasing Ltd. Partnership*, 61 A.D.3d 824, 877 N.Y.S.2d 424 (2d Dept. 2009); *Paladino v. E.J. Korvettes, Inc.*, 65 A.D.2d 617, 409 N.Y.S.2d 541 (2d Dept. 1979); *Bergman v. General Motors Corp.*, 74 A.D.2d 886, 426 N.Y.S.2d 303 (2d Dept. 1980); *Moore v. Chrysler Corp.*, 100 A.D.2d 955, 475 N.Y.S.2d 96 (2d Dept. 1984)). Further, a plaintiff’s inability to identify the cause of his or her fall is fatal to his or her cause of action. (*Jackson v. Fenton*, 38 A.D.3d 495, 831 N.Y.S.2d 260 (2d Dept. 2007); *Manning v. 6638 18th Ave. Realty Corp.*, 28 A.D.3d 434, 814 N.Y.S.2d 178 (2d Dept. 2006); *Fox v. Watermill Enterprises, Inc.*, 19 A.D.3d 364, 796 N.Y.S.2d 697 (2d Dept. 2005)).

Accordingly, it is hereby ordered that plaintiffs serve a verified second supplemental bill of particulars, within fifteen (15) days of this Order, to (1) specify with particularity the location where the plaintiff’s accident is alleged to have occurred, (2) specify with particularity the specific nature and type of “dangerous and defective condition” alleged to have caused or

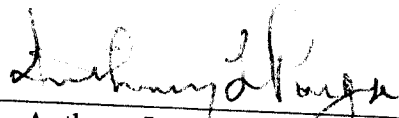
[* 4]
contributed to plaintiff's accident, and (3) to specify with particularity the location within the premises of the alleged dangerous and defective condition. Should the plaintiff fail to comply with the above directive, the plaintiff's complaint shall be deemed dismissed.

Plaintiffs cross-move to strike the defendant SMG Management's (hereinafter "SMG") answer, or for a conditional order striking its answer, for SMG's failure to provide complete discovery responses, including the lease between SMG and the County of Nassau relating to the Coliseum, and for SMG's failure to comply with the directives of the preliminary conference order relating to an inspection of said defendant's premises. Plaintiffs argue that they are entitled to the lease between SMG and the County of Nassau, as it likely contains terms regarding the responsibility of SMG with respect to the maintenance of the staircase at issue in this action. In opposition, defendant SMG submits its discovery responses and argues that a site inspection of the premises should not be permitted until a supplemental bill of particulars, which delineates the accident location and alleged defective condition, is provided by the plaintiffs.

It is hereby ordered that defendant SMG provide plaintiff with a copy of the lease between SMG and the County of Nassau relating to the premises at issue within thirty (30) days. It is further ordered that a site inspection of the location of the accident be held within sixty (60) days *after* the plaintiffs provide a verified second supplemental bill of particulars, as directed above, to both defendants.

The parties are forewarned that any failure to comply with the directives of this order may result in sanctions pursuant to CPLR §3126. This constitutes the decision and order of this Court.

Dated: July 18, 2011



Anthony L. Parga, J.S.C.

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ENTERED

JUL 19 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

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