

<b>Ramos v Sears, Roebuck &amp; Co.</b>
2016 NY Slip Op 33195(U)
August 8, 2016
Supreme Court, Westchester County
Docket Number: Index No. 53486/2015
Judge: Joan B. Lefkowitz
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER - COMPLIANCE PART

-----X  
ISABEL RAMOS,

Plaintiff,

-against-

SEARS, ROEBUCK AND CO., MACERICH  
MANAGEMENT COMPANY and CROSS  
COUNTY SHOPPING CENTER, INC. ,

Defendants.  
-----X

DECISION & ORDER

Index No. 53486/2015  
Motion Date: August 8, 2016

Seq. No. 2

LEFKOWITZ, J.

The following papers were read on this motion by defendants for an order striking plaintiff's complaint, precluding plaintiff from offering evidence at trial; or alternatively, compelling plaintiff to serve a supplemental bill of particulars and awarding costs, disbursements and attorneys fees.

Order to Show Cause - Affirmation in Support - Exhibits  
Affirmation in Opposition -Exhibits

Upon the foregoing papers and the proceedings held on August 8, 2016, this motion is determined as follows:

Plaintiff seeks to recover damages for injuries allegedly sustained in or about a Sears store located at the Cross County Shopping Center.

Defendants served discovery demands, including a demand for a verified bill of particulars dated October 14, 2015. In their demand for a bill of particulars, defendants demanded, inter alia, that plaintiff provide specific information as to (1) when and where the injury occurred; (2) the statutes, ordinances, regulations or rules that defendants allegedly violated; and (3) plaintiff's special damages.

On April 12, 2016, plaintiff served a verified bill of particulars and response to defendants' discovery demands. By letter dated April 13, 2016, defendants' counsel advised plaintiff's counsel that the bill of particulars and document responses served were deficient.

Specifically, defendants contend that the April 2016 bill of particulars failed to state the date and time of the accident, failed to specify her allegations that plaintiff fell as a “result of the obstructed and/or uneven pathway and/or in the aforesaid premises”. Further, defendants asserted that plaintiff gave no information as to the statutes, ordinances, regulations or rules that plaintiff claims defendants allegedly violated and that plaintiff’s statement that her special damages have been “partially or completed [sic] paid by the No-Fault insurance carrier” is inexplicable in so far as her claims do not relate to a motor vehicle accident. Defendants also argue that the bill of particulars does not contain specific information as to how long plaintiff was confined to bed and home. Defendants add that plaintiff’s own demands for discovery of information seek information relating to the parking lot outside the store, which indicates that a motor vehicle may have been involved.

By Compliance Conference Report and Order dated April 14, 2016 and June 2, 2016, plaintiff was directed to cure the deficiencies in the verified bill of particulars. Plaintiff failed to comply with the court orders. Defendant now moves for an order striking plaintiff’s complaint, precluding plaintiff from offering evidence at trial; or alternatively, compelling plaintiff to serve a supplemental bill of particulars and awarding costs, disbursements and attorneys fees.

On July 12, 2016, plaintiff served a supplemental bill of particulars in response to the motion. The supplemental bill of particulars states that “upon information and belief”, the accident occurred on the “2<sup>nd</sup> level in or around the children’s clothing department in the Sears Roebuck and Co. Store”. The supplemental bill of particulars further states that the defendants were negligent in “causing, permitting and allowing objects and/or obstructions including but not limited to clothing racks, to rain on the pathway, and/or floor inside defendants premises”. Plaintiff further states that defendants “jointly and severally violated statutes, ordinances, regulations or rules of the State and City of New York or their subdivisions that this Honorable Court will take judicial notice of at the time of trial.” Plaintiff further states in the supplemental bill of particulars that plaintiff incurred special damages “upon information and belief” which have been “partially or completely paid” by United Healthcare and lists approximate sums paid for unspecified services.

CPLR 3101(a) requires “full disclosure of all matter material and necessary in the prosecution or defense of an action.” The phrase “material and necessary” is “to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason” (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). Although the discovery provisions of the CPLR are to be liberally construed, “a party does not have the right to uncontrolled and unfettered disclosure” (*Merkos L Inyonei Chinuch, Inc v Sharf*, 59 AD3d 408 [2d Dept 2009]; *Gilman & Ciocia, Inc v Walsh*, 45 AD3d 531 [2d Dept 2007]). “It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims” (*Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). The trial court has broad discretion to supervise discovery and to determine whether

information sought is material and necessary in light of the issues in the matter (*Auerbach v Klein*, 30 AD3d 451 [2d Dept 2006]; *Feeley v Midas Properties, Inc.*, 168 AD2d 416 [2d Dept 1990]).

CPLR 3126 provides that if any party “wilfully fails to disclose information which the court finds ought to have been disclosed,” the court may, inter alia, issue an order of preclusion or an order striking the pleadings, dismissing the action, or rendering judgment by default against the disobedient party. “The nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter generally left to the discretion of the Supreme Court” (*Carbajal v Bobo Robo*, 38 AD3d 820 [2d Dept 2007]). To invoke the drastic remedy of striking a pleading a court must determine that the party’s failure to disclose is willful and contumacious (*Greene v Mullen*, 70 AD3d 996 [2d Dept 2010]; *Maiorino v City of New York*, 39 AD3d 601 [2d Dept 2007]).

CPLR 3043 provides that in bills of particulars in personal injury actions, certain particulars may be required, including the “approximate location” of the incident. Defendant property owners are entitled to a “precise description of the accident location” (*Portney v SMG Mgt.*, — Misc3d —, 2011 NY Slip Op 32093(U)[Sup Ct, Nassau County 2011]; *Mastey v Mancusi*, 122 Misc 2d 119 [Sup Ct, Kings County 1983]), and while the “exact location of an accident need not be specified . . . the place of the occurrence should be identified by reference to some object” (*Sanchez v Ibrahim*, 2011 WL 11022887 [Sup Ct, Westchester County 2011]; *Dusing v Rosasco*, 31 Misc 2d 825 [Sup Ct, Nassau County 1961] (where plaintiff stated the accident happened on a particular roadway, the Court held that plaintiff must identify the “particular area in the roadway claimed to be defective”). Here, plaintiff’s response in the supplemental bill of particulars is insufficient. The time and location of plaintiff’s fall is material and necessary to prepare the defense of this action and plaintiff has failed to provide sufficient details as to the time or approximate location in the store where the alleged incident occurred. Plaintiff shall provide a second supplemental bill of particulars identifying the particular area in the store where plaintiff allegedly fell and what objects were purportedly obstructing the area where plaintiff fell.

Plaintiff’s supplementary bill of particulars regarding defendants’ violations of “statutes, ordinances, regulations or rules of the State and City of New York or their subdivisions” and special damages is similarly vague and insufficient, and plaintiff fails to cite to explain what statute, ordinance, regulation or rule of the City of New York is applicable to an accident that allegedly occurred in Westchester County.

In view of plaintiff’s failure to comply with multiple court orders directing her to serve proper responses to the defendants’ demand for a bill of particulars, her failure can only be deemed by this court to be willful and contumacious. However, in view of the preference for matters to be resolved on the merits, plaintiff will have one last chance to supplement her bill of particulars and provide a proper response.

In view of the foregoing, it is

ORDERED that defendants' motion is granted to the extent that plaintiff shall provide on or before August 30, 2016, a second supplemental bill of particulars identifying the time of the accident and the particular area in the store where the alleged incident occurred and any objects or obstructions present at the time of the alleged accident, together with the specific statutes, ordinances, regulations or rules allegedly violated by defendants and detailed special damages incurred by plaintiff to date; and it is further

ORDERED that the branch of the motion seeking an order awarding costs and attorneys fees is granted to the extent that plaintiff shall pay, on or before August 30, 2016, defendants' motion costs in the sum of \$250.00; and it is further

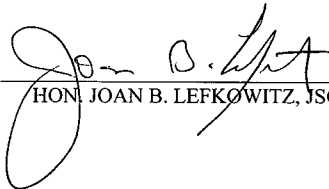
ORDERED that in the event that plaintiff fails to comply with this Order, then on or before September 8, 2016, defendants shall file an affidavit of non-compliance and a proposed order precluding plaintiff from introducing testimony or evidence as to those items that plaintiff has failed to supplement in a second verified bill of particulars in accordance with this Order; and it is further

ORDERED that the parties are directed to appear in the Compliance Part, Courtroom 800, for a conference on September 14, 2016 at 9:30 a.m.; and it is further

ORDERED that defendants shall serve a copy of the order with notice of entry upon the plaintiff within 10 days of entry.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York  
August 8, 2016

  
HON. JOAN B. LEFKOWITZ, JSC

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cc: Compliance Part