

<b>Maidstone Ins. Co. v Fernandez</b>
2018 NY Slip Op 30107(U)
January 19, 2018
Supreme Court, New York County
Docket Number: 153680/2017
Judge: Robert D. Kalish
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: Hon. Robert D. KALISH  
*Justice***

**PART 29**

**MAIDSTONE INSURANCE COMPANY ASO  
SVETLANA REDZHEPNAZAROVA**

**INDEX NO. 153680/2017**

**MOTION DATE 12/13/17**

**Plaintiff,**

**MOTION SEQ. NO. 001**

- v -

**ALEXIS A FERNANDEZ,**

**Defendant.**

The following papers, numbered 4-12, were read on this motion for leave to amend the complaint.

**Notice of Motion – Affirmation in Support – Aff of Service – Exhibits A-D** | **Nos. 4-12**

Motion by Plaintiff Maidstone Insurance Company ASO Svetlana Redzhepnazarova (“Maidstone”) pursuant to CPLR 3025 (b) for leave to amend its complaint against Defendant Alexis A. Fernandez (“Fernandez”) is denied.

**BACKGROUND**

In the instant action, Maidstone alleges that Fernandez’s motor vehicle struck its insured, Bayram Rejepnazarov (the “Insured”), due wholly to the negligence of Fernandez on October 25, 2015. Maidstone further alleges that it suffered loss in the sum of \$28,595.72.

While Plaintiff in its affirmation states that it “seeks to amend the amount demanded from \$34,349.41 to \$28,595.72,” Plaintiff’s verified complaint already alleges a loss of \$28,595.72, while Plaintiff’s proposed amended verified complaint states a loss of \$34,349.41. (Affirmation of Murtha ¶ 10; Murtha affirmation, exhibit C, ¶ 11.) For the purposes of the instant motion, the Court will disregard the affirmation’s sole inconsistency as a harmless clerical error. As such, the Court now considers Plaintiff’s motion for leave to amend its complaint to change the amount demanded from \$28,595.72 to \$34,349.41.

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

Defendant has submitted no opposition to the instant motion.

### DISCUSSION

CPLR 3025 provides

“(b) Amendments and supplemental pleadings by leave. A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.”

“As a general rule, leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit . . . , and the decision whether to grant leave to amend a complaint is committed to the sound discretion of the court.” (*Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 580 [2015] [internal quotation marks omitted]; see also *Y.A. v Conair Corp.*, 154 AD3d 611 [1st Dept 2017] [holding that leave should be granted “absent . . . surprise resulting therefrom”].) “To obtain leave, a plaintiff must submit evidentiary proof of the kind that would be admissible on a motion for summary judgment.” (*Velarde v City of New York*, 149 AD3d 457, 457 [1st Dept 2017].) “[P]laintiff need not establish the merit of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit.” (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010].)

Here, Maidstone submits an affirmation by counsel stating that “[a] copy of the documents reflecting the correct amount is attached herein as Exhibit D. Our office inadvertently omitted a portion of the balance[.]” (Affirmation of Murtha ¶ 10.) Exhibit D is a five-page document, titled “Transactions” on page one, with various rows and columns. The contents of the document are not explained further on the instant motion. The document appears to list the details of payments made from Maidstone to various medical providers in relation to the Insured as of October 11, 2017. The payment details include, among other things, the names of the providers, the amounts paid to each individual payee, and the dates of service.

Plaintiff states that Exhibit D “reflect[s] the correct amount,” \$34,349.41, to be sought in the amended complaint. The dollar amounts listed in the first four pages of the document total to \$16,802.35, based upon the Court’s arithmetic.

On the last page, titled “Claim Inquiry – Payment Details,” in row 2, monies are listed for the Insured as being in an “Indemnity Reserve” and an “Expense Reserve.” The amounts listed there are presumably in dollars—although no units are listed—are \$14,274.10 and \$2528.25, respectively, and, based upon the Court’s arithmetic, sum to \$16,802.35. Above and below, rows 1 and 3 list further amounts for Svetlana and Bayram Redzhepzanarova, respectively, of \$7185.31 and \$12,000.00, respectively. For all three rows, amounts “Recovered” and “Outstanding” are listed as “.00.”

The Court finds that there are no dollar amounts in Exhibit D which correspond to the amount to be sought in Maidstone’s proposed amended complaint. The Court finds further that Exhibit D only lists \$16,802.35 which appears to relate directly to the Insured. Neither the complaint (original or proposed amended) nor the instant motion address the Redzhepzanarovas.

Even if the seeming amounts listed on Exhibit D, page four, which seem to relate to the Redzhepzanarovas were somehow also a part of the amount sought in Maidstone’s proposed amended complaint, together, the page four sums total to \$35,987.66, which is \$1638.25 more than the amount in Maidstone’s proposed amended complaint. Further, there is no itemization accompanying the Redzhepzanarovas’ “payment details.”

As such, the Court finds, in its sound discretion, that Plaintiff’s proposed amendment is palpably insufficient and its motion for leave to amend devoid of merit in light of the evidentiary proof entered in the instant motion, specifically, Exhibit D to the affirmation.


**CONCLUSION**

Accordingly, it is

ORDERED that Plaintiff Maidstone Insurance Company ASO Svetlana Redzhepnazarova's motion pursuant to CPLR 3025 (b) for leave to amend its complaint against Defendant Alexis A. Fernandez is denied.

The foregoing constitutes the decision and order of the Court.

Dated: January 19, 2018  
New York, New York

  
J.S.C.  
**HON. ROBERT D. KALISH**  
J.S.C.

- 1. Check one:.....
- 2. Check if appropriate:..... MOTION IS:
- 3. Check if appropriate:.....

- CASE DISPOSED       NON-FINAL DISPOSITION
- GRANTED     DENIED     GRANTED IN PART     OTHER
- SETTLE ORDER       SUBMIT ORDER
- DO NOT POST     FIDUCIARY APPOINTMENT     REFERENCE