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| <b>Richardson v Leelamma</b>   |
| 2018 NY Slip Op 33725(U)   |
| April 30, 2018   |
| Supreme Court, Westchester County  |
| Docket Number: 53333/2017  |
| 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  
LISA RICHARDSON,

Plaintiff,

-against-

CHERIAN LEELAMMA,

Defendant.  
-----X

**DECISION & ORDER**

Index No. 53333/2017  
Motion Date: Apr. 30, 2018  
Motion Seq. 1

The following papers were read on this motion by plaintiff pursuant to CPLR 3126 for an order striking defendant's answer and awarding costs, on grounds of insufficiently particularized bills of particulars as to affirmative defenses, awarding sanctions under Judiciary Law section 487 and Uniform Rule 130-1.1, and for related relief:

Order to Show Cause, Affirmation in Support, Exhibits A-R  
Affirmation in Opposition, Exhibits A-P

Upon the foregoing papers and proceedings held on April 30, 2018, the motion is determined as follows:

Plaintiff commenced this personal injury action by Verified Complaint dated March 15, 2017, alleging that she tripped and fell on a sidewalk abutting defendant's property in New Rochelle, New York, on or about October 25, 2015. Defendant joined issue and the parties concluded a Preliminary Conference stipulation so-ordered by this Court (Lefkowitz, J.) on August 8, 2017. As relevant here, the Preliminary Conference Order directed defendant to interpose a bill of particulars as to affirmative defenses within 45 days. At three successive conferences held on December 14, 2017; January 14, 2018; and February 22, 2018; plaintiff took the position that defendant either failed to interpose a bill of particulars or that the bill of particulars was inadequate. Most recently, the Compliance Conference Order arising from the conference of February 22, 2018, directed defendant to supplement her bill of particulars by March 8, 2018, as to certain matters enumerated in such Order. Defendant filed a supplemental bill of particulars dated March 6, 2018, which plaintiff again deemed inadequate. Accordingly, pursuant to a briefing schedule, plaintiff now moves by Order to Show Cause to strike defendant's answer and assess costs.

In support of this motion, plaintiff asserts that defendant's supplemental bill of particulars fails to particularize affirmative defenses as to culpable conduct, and that defense counsel violated Judiciary Law section 487 and Rule 3.1 of the Rules of Professional Responsibility by asserting affirmative defenses without legal or factual basis. Plaintiff argues that defendant's supplemental bill of particulars fails to articulate some factual basis for defendant's position that plaintiff failed to use ordinary care in traversing the sidewalk. This failure, plaintiff implies, prejudices the prosecution of this action and that defendant's failure to particularize is willful and contumacious. Accordingly, plaintiff concludes that defendant's answer should be stricken under CPLR 3126, and this Court should sanction defendant under Uniform Rule 130-1.1 and refer defense counsel for criminal prosecution and attorney discipline.

In opposition to this motion, defendant asserts that she repeatedly amplified her pleading, and that she is unable to further amplify at this early stage of litigation given that the alleged incident occurred at 3:00 a.m., defendant did not witness it, and defendant's first notice of it was nearly 18 months later when plaintiff commenced this action. Defendant avers that she raised a discrete number of affirmative defenses – culpable conduct by plaintiff, lack of jurisdiction, CPLR 1602 (liability for joint tortfeasors), CPLR 4545 (collateral source) and GOL 15-108 (release). Defendant asserts that the sidewalk may be owned by the City of New Rochelle, and thus that defendant properly may plead this affirmative defense in the alternative. Defendant further asserts that it complied with the Compliance Conference Order of February 22, 2018, by providing a further supplemental bill of particulars as required by such Order (NYSCEF Doc. 46). The remainder of plaintiff's demand for a bill of particulars, defendant argues, either does not apply to this action (*e.g.* motor vehicle matters having nothing to do with this sidewalk trip-and-fall incident), or seeks amplification of defenses that defendant never interposed (*e.g.* failure to join necessary parties, sudden emergency, etc.). Defendant concludes that plaintiff's motion does not sound in good faith.

### Analysis

Under CPLR 3042(a), a bill of particulars properly may be demanded to amplify pleadings, including affirmative defenses and counterclaims, "by setting forth in greater detail the nature of the allegations and what the party making them intends to prove" so as to limit proof and prevent surprise at trial (*Northway Engineering, Inc. v Felix Industries, Inc.*, 77 NY2d 332 [1991]; *Jurado v Kalache*, 93 AD3d 759 [2d Dept 2012]; *Jones v LeFrance Leasing Ltd. Partnership*, 61 AD3d 824 [2d Dept 2009]; *Ginsberg v Ginsberg*, 104 AD2d 482 [2d Dept 1984]). When requested, a party whose pleadings allege facts, statutes or rules must particularize such allegations (*see Ramondi v Paramount Fee, LP*, 30 AD3d 396 [2d Dept 2006]; *Alvarado v New York City Hous. Auth.*, 302 AD2d 264 [1<sup>st</sup> Dept 2003]; *Sacks v Town of Thompson*, 33 AD2d 627 [3d Dept 1969]). Such a party must particularize only those allegations for which such party bears the burden of proof: a demand for a bill of particulars is not a proper disclosure device to seek evidentiary material (*see Northway Engineering*, 77 NY2d at 332; *Tully v Town of North Hempstead*, 133 AD2d 657 [2d Dept 1987]; *Ginsberg*, 104 AD2d at 482). Upon a party's failure to comply with a proper demand to particularize, the court may compel compliance (*see* CPLR 3024[c]) or issue a conditional or final order under CPLR 3126 (*see* CPLR 3042[d]).

To strike a pleading under CPLR 3126, the proponent of this drastic remedy must show willful and contumacious conduct (*Greene v Mullen*, 70 AD3d 996 [2d Dept 2010]; *Maiorino v City of New York*, 39 AD3d 601 [2d Dept 2007]; *Kingsley v Kantor*, 265 AD2d 529 [2d Dept 1999]). Willful and contumacious conduct can be inferred from repeated noncompliance with court orders or a failure to comply with court ordered discovery over an extended period of time, coupled with the lack of an adequate excuse for the failure (*see Mei Yan Zhang v Santana*, 52 AD3d 484 [2d Dept 2008]; *Carbajal v Bobo Robo, Inc.*, 38 AD3d 820 [2d Dept 2007]; *Prappas v Papadatos*, 38 AD3d 871 [2d Dept 2007]). Even so, “[t]he 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]).

Defendant served a bill of particulars and then a supplemental bills of particulars – first in response to plaintiff’s demand, then in a good-faith attempt to address plaintiff’s objections, then again in response to the Compliance Conference Order of February 22, 2018. While plaintiff is correct that defendant failed to verify the most recent supplemental bill of particulars, it is clear that defendant tendered a further pleading before the deadline this Court specified in its Compliance Conference Order of February 22, 2018, and that defendant followed up with a proper verification in good faith. On these facts, and given defendant’s non-frivolous position that her further supplemental bill of particulars dated March 6, 2018, satisfied this Court’s Order that she amplify her pleading, plaintiff failed to show that any inadequacy in defendant’s bill of particulars reflects willful and contumacious conduct by defendant or defense counsel. There certainly is insufficient basis to find, as plaintiff exhorts this Court to conclude, that defense counsel should be prosecuted, disciplined or sanctioned. Accordingly, those branches of plaintiff’s motion are denied.

Turning to the remaining branch of this application, it is ironic that plaintiff’s motion papers fail to particularize any inadequacies that plaintiff alleges concerning defendant’s most recent supplemental bill of particulars. Rather, plaintiff leaves to this Court the task of comparing defendant’s most recent pleading to plaintiff’s original demand. Moreover, this Court notes that the Compliance Conference Order of February 22, 2018, directed defendant to amplify her responses only to plaintiff’s demands 3(a)-(b) and 7-20, and that plaintiff did not seek relief against that Compliance Conference Order then or now. Accordingly, this Court will restrict its review of defendant’s supplemental bill of particulars only to that extent, and any other plaintiff objections are deemed waived by operation of such Compliance Conference Order.

Turning to defendant’s supplemental bill of particulars, this Court determines that, solely for the purposes of particularizing defendant’s affirmative defenses, defendant’s supplemental bill of particulars with regards to items 3(a) and 3(b) are sufficient to explicate defendant’s position as to contributory negligence, explicitly subject to discovery. While plaintiff is correct that defendant has taken the position that she was not a witness to the incident, this position does not alone estop defendant from amplifying this affirmative defense to the extent stated.

As to the balance of defendant’s responses, plaintiff is correct that defendant must come forward with some basis to plead contributive negligence. A party cannot particularize such an

affirmative defense merely by speculating that a hypothetical third party such as a municipality or contractor might bear liability for a subject incident. Rather, on pleading an affirmative defense, the party and counsel must undertake sufficient inquiry as to proffer some good-faith factual and/or legal basis for each affirmative defense interposed, and a catch-all response that further particularization requires discovery is not responsive. Thus, defendant must further particularize her responses to items 13-16 and 20-22. Plaintiff is entitled to conditional relief to that extent. Defendant's affirmative defenses are not so vague that they should be stricken. Rather, if defendant fails to comply, plaintiff may upload to NYSCEF an affirmation of noncompliance, upon which those responses that remain impermissibly vague, open-ended and inconsistent with a bill of particulars' purpose may be stricken (*see e.g. Padro v Boulevard Hospital*, 92 AD2d 888 [2d Dept 1983]). All other arguments have been considered and all applications for relief not specifically granted herein are denied. Accordingly it is hereby

ORDERED that plaintiff's motion is granted to the extent that, on or before May 25, 2018, defendant shall upload to NYSCEF a further verified supplemental bill of particulars as to items 13-16 and 20-22, explicating with specificity the affirmative defenses to which those items seek amplification; and it is further

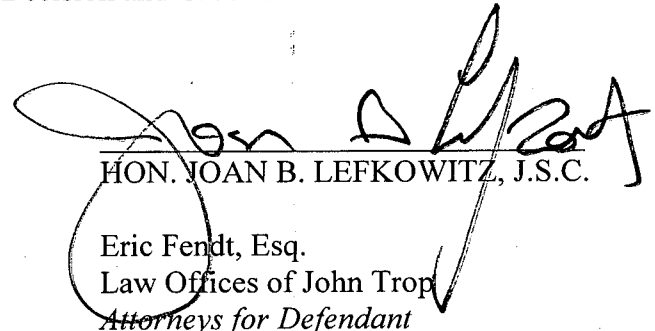
ORDERED that if defendant fails to comply, plaintiff may upload to NYSCEF, by June 1, 2018, an affirmation of noncompliance and proposed order, with Notice of Settlement, striking defendant's supplemental responses to the extent inconsistent with this Decision and Order, and such relief may be granted pursuant to CPLR 3042(d); and it is further

ORDERED that counsel for plaintiff shall serve this Decision and Order, with Notice of Entry, on defendant by NYSCEF by May 11, 2018; and it is further

ORDERED that all counsel shall appear in the Compliance Part, Room 800 of this Courthouse, at 9:30 a.m. on June 6, 2018, at which time schedules will be entered for depositions to be completed by July 10, 2018, and independent medical examinations by August 10, 2018.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York  
April 30, 2018



HON. JOAN B. LEFKOWITZ, J.S.C.

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