

Sebastiano v Bamundo, Zwal & Schermerhorn, LLP
2020 NY Slip Op 34926(U)
June 24, 2020
Supreme Court, Bronx County
Docket Number: Index No. 21365/2014
Judge: Laura G. Douglas
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
PART 11 - DCM

Index No. 21365/2014



ALESSANDRO SEBASTIANO, as Ancillary Administrator of the
Goods, Chattels, and Credits of ROSARIO SEBASTIANO,

Plaintiff,

DECISION/ORDER

-against-

Present:
Hon. Laura G. Douglas
J.S.C.

BAMUNDO, ZWAL & SCHERMERHORN, LLP, and
MICHAEL C. ZWAL,

Defendants.

Recitation, as required by Rule 2219(a) of the C.P.L.R., of the papers considered in the review of this motion to preclude:

<u>Papers</u>	<u>Numbered</u>
Defendants' Notice of Motion, Affirmation of Michael C. Zwal, Esq. dated August 13, 2019 in Support of Motion, and Exhibits ("A" through "G").....	1
Affirmation of David Fischman, Esq. dated September 23, 2019 in Opposition to Motion and Exhibits ("A" through "E").....	2

Upon the foregoing papers and after due deliberation, the Decision/Order on this motion is as follows:

The defendants seek an order pursuant to CPLR § 3126 penalizing the plaintiff for the purported failure to provide proper responses to certain demands for a bill of particulars and any response to the defendants' First Request for Production of Documents dated March 10, 2015 by precluding the plaintiff from offering any evidence at trial in support of the claim that the defendants failed to prove the violation of a predicate statute in the prosecution of the underlying claim under General Municipal Law § 205-e. The motion is granted solely as ordered below and is denied in all other respects.

The plaintiff seeks monetary damages on claims of legal malpractice against the attorneys who represented the plaintiff's decedent ("Sebastiano") in a personal injury action. Sebastiano, an on-duty police officer at the time, slipped and fell on a staircase inside a subway station originally constructed in 1915 and under renovation at the time of the accident. One of the claims brought in the underlying action was made pursuant to GML 205-e, which requires proof that an injury sustained by a police officer in the line of duty was caused by the defendant's failure to comply with a certain statute or regulation

(see *Gammons v. City of New York*, 24 NY2d 652 [Ct App 2014]). The plaintiff contends that the defendants failed to include proof of certain predicate violations that would have satisfied GML 205-e, including violations of various sections of the Labor Law, Building Code (specifically, violations of the 1968 New York City Building Code), and Property and Maintenance Code. The plaintiff argues that this old subway station would have been subject to such violations had the attorneys introduced proof that the costs of the renovations made by the accident date equaled 60% of the value of the station on that date. Instead, while the plaintiff's expert witness testified at the underlying trial that the stairs were defective in violation of the 1968 NYC Building Code, the action was dismissed on appeal because the plaintiff failed to prove that the 1968 Code applied.

In pertinent part, the demand for a bill of particulars asked the plaintiff to provide the factual basis for his claim that these various codes were violated in the underlying case and for particularization of the material that the plaintiff claims should have been introduced regarding the extent and costs of the renovations. The plaintiff has refused to respond to these demands on the grounds that they seek evidentiary facts. The defendants contend that these objections are untimely and inaccurate.

A bill of particulars simply serves to amplify the pleadings, limit the proof, and prevent surprise at trial; the factual evidence that supports the claims is disclosed through the devices set forth in Article 31 of the CPLR (see *Miccarelli v. Fleiss*, 219 AD2d 469 [1st Dept 1995]). Objections to palpably improper requests survive the deadline for responses (see *Franklin, Weinrib, Rudell & Vassallo, P.C. v. Stellato*, 240 AD2d 301 [1st Dept 1997]).

At issue is whether and to what extent the plaintiff has to respond or supplement his response to the following demands for particulars:

- Demand numbered "10" – Set forth and describe in detail the factual basis for plaintiff's claim that the following codes, as set forth in the amended verified complaint, were applicable to the premises that was the subject of the underlying case: NYC Building Code sections 27-127, 27-128, and 27-375, NYS Property Maintenance Code section 304.4, and NYS Labor Law section 27-a;
- Plaintiff's response – Objection. The demand calls for evidentiary facts which is improper for a bill of particulars; and
- Demand numbered "18" – Set forth and describe in detail the evidence that plaintiff claims should have introduced at trial regarding the extent

and cost of the renovations of the subject premises,
as set forth in paragraph “19” of the amended verified complaint;

Plaintiff’s response – Objection. Said demand calls for evidentiary material
which is not properly the subject of a bill of particulars; and

Demand numbered “34” – Set forth in detail the legal and/or statutory basis for any
and all claims that plaintiff alleges could have been brought,
and the parties against whom these those claims could have been
brought in connection with any claim or action arising out of the
incident described in the amended verified complaint;

Plaintiff’s response – Objection. Said demand calls for evidentiary material which
is not appropriate for a bill of particulars.

The plaintiff did not supplement his response to demand numbered “10”. With respect to demand numbered “18”, the plaintiff supplemented his original objection by responding “defendant failed to address or establish the cost of the alterations to the station Transit Authority documents and/or other public records as to the amounts expended on the station alterations. Moreover, defendant failed to present any economic analysis at trial on the issue in order to prove the costs of making the renovations in any twelve-month period exceeded 60% of the station’s value.” The plaintiff supplemented his original objection to demand numbered “34”, by listing multiple code sections and statutes that the defendants failed to allege in the underlying lawsuit.

Demand numbered “10” in the defendants’ demand for a bill of particulars is stricken. Having identified the statutes and rules that the plaintiff contends were applicable to the underlying event, he has satisfied the requirement that a bill of particulars amplify the complaint to limit the proof at trial and prevent the defendant from being surprised by undisclosed claims at trial. Here, the plaintiff has advised the defendants of the specific omissions that he will be relying on at trial. Why or what support the plaintiff holds that these statutes and rules applied goes beyond the scope of a bill of particulars and is an issue better addressed through CPLR Article 31 disclosure devices.

The plaintiff’s supplemental response to demand numbered “18” is adequate. The defendants’ alleged omissions in the underlying litigation are expressly set forth in sufficient detail to permit the defendants to prepare a defense and conduct meaningful disclosure proceedings.

With respect to demand numbered “34”, the plaintiff has not stated which parties should have been subjected to the additional statutes and rules. This is an essential element of the plaintiff’s malpractice claims and is appropriately demanded in a bill of particulars. It does not ask for the

evidence that supports these claims. Otherwise, the plaintiff's supplemental response to this demand is adequate.


With respect to the discovery notice, it appears that the plaintiff provided responses to same during the course of the instant motion practice (*see* Fischman Affirmation, Exh. "A").

Accordingly, it is hereby

ORDERED that the plaintiff shall provide a supplemental bill of particulars responsive to item numbered "34" of the defendants' demand for a bill of particulars dated March 10, 2015, specifically particularizing the parties against whom the omitted violations could have been brought in connection with any claim or action arising out of the incident described in the amended verified complaint no later than 30 days following service of a copy of this Order with notice of entry.

The foregoing constitutes the Decision/Order of this Court.

DATED: June 24, 2020
Bronx, New York



HON. LAURA G. DOUGLAS
J.S.C.