

**Basturan v New York City Tr. Auth.**

2023 NY Slip Op 32903(U)

August 10, 2023

Supreme Court, New York County

Docket Number: Index No. 151270/2017

Judge: Denise M. Dominguez

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DENISE M DOMINGUEZ PART 21

Justice

-----X

INDEX NO. 151270/2017

CEMAL BASTURAN

MOTION SEQ. NO. 002

Plaintiff,

- v -

DECISION + ORDER ON MOTION

NEW YORK CITY TRANSIT AUTHORITY,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 84, 85

were read on this motion to/for

STRIKE PLEADINGS

Upon review of the above listed documents, Defendant NEW YORK CITY TRANSIT AUTHORITY's ("TRANSIT") motion to strike the Plaintiff's supplemental bill of particulars and to preclude the Plaintiff from offering evidence at the time of trial, is granted and the Plaintiff's cross-motion for leave to amend the bill of particulars is denied.

This personal injury matter arises out of a May 1, 2016 incident where the Plaintiff alleges to have tripped on a component of the security gate locking system in a stairway at the downtown "6" train subway entrance at the Lexington Avenue and East 77th Street subway station.

The Plaintiff filed the note of issue in this matter, on June 14, 2022, certifying that all discovery had been completed (NYSCEF Doc. 22, 56). Following the filing of TRANSIT's motion for summary judgment, Motion Seq. 1<sup>1</sup>, the Plaintiff served a "supplemental" bill of particulars dated October 31, 2022 (NYSCEF Doc. 58). By letter dated November 7, 2022, TRANSIT rejected the Plaintiff's supplemental bill of particulars (NYSCEF Doc. 59). TRANSIT now moves by notice of motion pursuant to CPLR §3040(b), to strike the supplemental bill of particulars and to preclude the Plaintiff from offering evidence at the time of trail concerning the new allegations

1 This Court subsequently granted TRANSIT's summary judgment motion by Order dated July 10, 2023 (NYSCEF Doc. 86).

asserted in the supplemental bill of particulars. Plaintiff opposes the motion and cross-moves seeking leave pursuant to CPLR 3025(b) and (c) to amend the supplemental bill of particulars.

The newly asserted allegations in the October 31, 2022 bill of particulars consist of the following as to paragraph 6 of the bill of particulars:

The defendant, NEW YORK CITY TRANSIT AUTHORITY, their agents, servants, and/or employees permitted and allowed a tripping hazard posed by concealed obstructions along the stair walking path which is a foreseeable problem that is known and recognized in the engineering and safety industries; in failing to allow the resulting obstruction to exist; in failing to recognize the resulting obstruction provided by the gate post violates §1027.3 of the 2014 New York City Fire Code, which applies to the means of egress at all existing premises.

Pursuant to CPLR 3043(b), “[a] party may serve a supplemental bill of particulars with respect to claims of continuing special damages and disabilities without leave of court at any time... provided however that no new cause of action may be alleged.” A “supplemental” bill of particulars is one where the claims asserted are alleging a continuation of special damages and/or consequences of the injuries set forth in the initial bill of particulars. (*See Shahid v. New York City Health & Hosps. Corp.*, 47 A.D.3d 798, 850 N.Y.S.2d 521 [1st Dept 2008]). However, where the new bill of particulars does not set forth a continuation of damages, but in fact sets forth new theory of liability, it is not a *supplemental* bill of particulars, but in fact is an *amended* bill of particulars, which, when served after the filing of the note of issue, requires leave of court is a nullity. (*See Kassis v. Teacher's Ins. & Annuity Ass'n*, 258 A.D.2d 271, 272, 685 N.Y.S.2d 44 [1st Dept 1999]; *Stovall v. Lenox Hill Hosp.*, 200 A.D.3d 570, 155 N.Y.S.3d 333 [1st Dept 2021]).

Upon review, it is clear that the bill of particulars dated October 31, 2022 is not a *supplemental* bill of particulars, but, rather an *amended* bill of particulars as it changes and/or sets forth new theories of liability. Moreover, it is also clear that it was served over four months after the note of issue was filed, and just weeks *after* TRANSIT filed its summary judgment motion. Without first seeking leave of court to amend the bill of particulars, the October 31, 2022 bill of particulars is a nullity.

In response to the within motion, the Plaintiff cross moves seeking leave to amend the bill of particulars.

Although leave to amend a pleading may be freely given, unless undue prejudice, surprise or delay can be shown, “... an application for leave to amend would have been properly denied

herein since plaintiffs' proposed amendment would have prejudiced defendants by materially altering plaintiffs' theory of recovery on the eve of trial. Indeed, "[w]hen an amendment to a pleading or a bill of particulars is sought at or on the eve of trial, judicial discretion in allowing such amendment should be discrete, circumspect, prudent and cautious... and where, as here, there is an 'extended delay in moving to amend, an affidavit of reasonable excuse for the delay in making the motion and an affidavit of merit should be submitted in support of the motion.'" (*see Kassis v. Teacher's Ins. & Annuity Ass'n*, 258 A.D.2d 271, 272, 685 N.Y.S.2d 44, 45 [1st Dept 1999, quoting, *Volpe v. Good Samaritan Hosp.*, 213 A.D.2d 398, 398-399, 623 N.Y.S.2d 330, 331 [2d Dept 1995]; *internal quotations omitted*; *See also Reese v. City of New York*, 203 A.D.3d 448, 160 N.Y.S.3d 595 [1st Dept 2022]).

Plaintiff argues that the amendments to the bill of particulars are not a surprise to the Defendants as the allegations are set forth in the Plaintiff's August 23, 2021 expert exchange (NYSCEF Doc. 68). However, where leave is sought to amend the bill of particulars following the filing of the note of issue, a reasonable excuse for the delay in amending must be shown. Here, Plaintiff makes no showing as to why the bill of particulars was not amended prior to the note of issue being filed, nor why leave was not sought until after TRANSIT filed its summary judgment motion. This is especially concerning, as it is clear that the expert analysis relied upon by Plaintiff formulate the proposed amendments, was known to the Plaintiff almost a year before the note of issue was filed.

Yet, even if Plaintiff was not obligated to show a reasonable excuse for the delay, as the proposed allegations are not accounted for in the Plaintiff's notice of claim, same cannot be asserted for the first time in a bill of particulars. The notice of claim asserts claims sounding in negligence against TRANSIT based upon an "unleveled, uneven, raised, defective, dangerous and hazardous pole" in the subject staircase at the subway station (NYSCEF Doc. 60). There is no claim concerning a "concealed tripping hazard", "concealed obstruction along the stair walking path", nor an allegation of a violation of §1027.3 of the 2014 New York City Fire Code ("Fire Code"). Nor are such allegations asserted in the complaint (NYSCEF Doc. 1) or in the initial bill of particulars (NYSCEF Doc. 57).

It is long been settled that a bill of particulars may not be used a vehicle "... to assert new theories of liability against a municipal defendant if such theories were not raised in the plaintiff's notice of claim and the plaintiff is time-barred from serving a late notice of claim under General

Municipal Law § 50-e (5).” (*Clare-Hollo v. Finger Lakes Ambulance EMS, Inc.*, 99 A.D.3d 1199, 1201, 952 N.Y.S.2d 350 [3d Dept 2012] citing *Scott v. City of New York*, 40 A.D.3d 408, 836 N.Y.S.2d 140 [1st Dept 2007] see also *Mahase v. Manhattan & Bronx Surface Transit Operating Auth.*, 3 A.D.3d 410, 771 N.Y.S.2d 99 [1st Dept 2004]).

Upon review of the notice of claim and the proposed amended bill of particulars, those allegations related to a “concealed tripping hazard”, “concealed obstruction along the stair walking path”, and the allegation of a violation of §1027.3 of the 2014 New York City Fire Code (“Fire Code”) appear to go beyond simply amplifying the claims and are rather new and distinct theories of liability which were not asserted in the notice of claim. (*See Lopez v. New York City Hous. Auth.*, 16 A.D.3d 164, 165, 791 N.Y.S.2d 86 [1st Dept 2005]; *Melendez v. New York City Hous. Auth.*, 294 A.D.2d 243, 741 N.Y.S.2d 866 [1st Dept 2002]). As the time for by which Plaintiff had to amend the notice of claim has long since passed, Plaintiff cannot add new allegations and/or theories of liability by seeking to amend the bill of particulars.

This Court would be remiss if it did not note that in the interest of judicial economy and in an effort to consider TRANSIT’s summary judgment motion fully on the merits, as set forth in this Court’s July 10, 2023 Order, Plaintiff’s expert report and the untimely new theories of liability were considered. However, this Court found that TRANSIT met its *prima facie* burden in establishing that the subject steel angle/pole was not inherently dangerous and served a useful purpose in connection with the subway’s locking gate and that the Plaintiff did not raise material issue of fact in opposition. (*See Boyd v. New York City Hous. Auth.*, 105 A.D.3d 542, 542–43, 964 N.Y.S.2d 10, 11 [1<sup>st</sup> Dept. 2013], *Puma v. New York City Transit Auth.*, 55 A.D.3d 585, 585–86, 865 N.Y.S.2d 630, 631 [2d Dept. 2008]).

Accordingly, and for the reasons set forth herein, the Plaintiff’s motion to amend the bill of particulars is denied, and TRANSIT’s motion to strike the October 31, 2022 bill of particulars is granted and Plaintiff is precluded from presenting evidence at the time of trial concerning the new theories of liability as set forth in the October 31, 2022 bill of particulars.

It is hereby

ORDERED that TRANSIT’s motion to strike the October 31, 2022 bill of particulars is granted; and it is further

ORDERED that the Plaintiff is precluded from presenting evidence at the time of trial concerning the new theories of liability as set forth in the October 31, 2022 bill of particulars; and it is further

ORDERED that the Plaintiff's cross-motion seeking leave to amend the bill of particulars is denied; and it is further

ORDERED that counsel for Defendant NEW YORK CITY TRANSIT AUTHORITY shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website).

8/10/2023

DATE

DENISE M DOMINGUEZ, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE