Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **ALLAN B. WEISS** IAS PART 2
Justice

HAGOP A. PARTAMIAN, Individually and as Administrator of the Estate of ARMAN PARTAMIAN, Deceased,	Index No: 26069/09
Plaintiff,	Motion Date: 3/14/12
-against-	Motion Cal. No.: 15
HENRIK SUKONNIK, ALEX N. STUCKI, DANIEL M. WECH, ADAM C. BROWNSTEIN DEVIN MCCLAIN, MARK G. BOISE, JOHN DOES STUDENTS, SCOTT R. KIPPHUT and SCOTT N. HILTS d/b/a KIPPHUT & HILTS ENTERPRISES and KEVIN BRAYER a/k/a KEVIN BRAER	Motion Seq. No.: 7
Defendants.	

The following papers numbered 1 to 13 read on this motion by plaintiff, for an Order compelling defendant, SUKONNIK, to accept plaintiff's second Supplemental Bill of Particulars in the form annexed to the moving papers or in the alternative, leave to serve the Second Supplemental Bill of Particulars in the form annexed to the moving papers, plus costs and fees for having to make the instant motion

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits	1 - 7
Answering Affidavits-Exhibits.....	8 - 9
Answering Affidavits-Exhibits.....	10 - 11
Replying Affidavits.....	12 - 13

Upon the foregoing papers it is ordered that this motion is determined as follows.

Before determining this motion, it is necessary to address the plaintiff's counsel's statement in paragraph 8 of his Reply Affirmation that the court, in its April 23, 2012 decision denying summary judgment, "established the law of this case", to

wit, that the "pleadings and evidence garnered in discovery..." support the plaintiff's claim for concerted action. Plaintiff is mistaken.

The court made no findings with respect to the plaintiff's claim for concerted action. The defendants', Sukonnik's and Wench's, motions for summary judgment were denied on the ground that they failed to establish, prima facie, their entitlement to summary judgment by submitting sufficient evidence to eliminate all issues of fact. Denial of summary judgement establishes nothing except that summary judgment is not warranted (see Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3212:21, p 30; Sackman-Gilliland Corp. v. Senator Holding Corp., 43 AD2d 948 [1974], lv denied 34 NY2d 515 [1974]; Clearwater Realty Co. v. Hernandez, 256 AD2d 100 [1998]).

A supplemental pleading is one that seeks to allege facts which came into existence or became known to the plaintiff after the service of the prior pleading. Generally, a supplemental bill of particulars is permitted to particularize continuing special damages and disabilities (see CPLR 3043[b]; Leon v. First Nat. City Bank, 224 AD2d 497 [1996]). An amended pleading is one that makes any change at all including additional facts & claims that were in existence at the time of the original pleading (see Siegel, NY Practice § 237 at 396 [4th ed]).

CPLR 3042(b) provides that a party may serve an amended bill of particulars once as of right prior to the filing of a note of issue. An amended bill of particulars served after the filing of the note of issue without leave of court is a nullity (see Elkrichi v. Flushing Hosp. Med. Ctr., 203 AD2d 706 [2002]). A plaintiff cannot avoid the application of this rule by denominating an amended bill of particulars that asserts new injuries and a new category of damages as "supplemental" (see Fuentes v. City of New York, 3 AD3d 549, 550 [2004]; Pearce v. Booth Mem. Hosp., 152 AD2d 553, 554 [1989]).

It is undisputed that plaintiff, on January 18, 2012, nine months after the plaintiff filed the note of issue and without leave of court, served defendant, Sukonnik with what plaintiff denominated as a Second Supplemental Bill of Particulars. Defendant promptly objected on the grounds that, inter alia, it was served without leave of court, that it contains new causes of action and new claims for damages, i.e. punitive damages, and rejected the Second Supplemental Bill of Particulars. The defendants, Sukonnik and Wech oppose the motion on these same grounds. Wech also opposes on the ground that the violation of the rules promulgated by State University of New York, Geneseo

and contained in its Code of Conduct cannot form the basis for a finding of negligence. Finally, defendants assert that allowing plaintiff to assert a claim for punitive damages is prejudicial since such items of damages is not covered by insurance.

In support of his motion, plaintiff claims that the defendant improperly rejected his Second Supplemental Bill of Particulars which merely "amplifies" the plaintiff's Bill of Particulars previously served based upon information plaintiff found through discovery.

The plaintiff has not submitted a copy of the Bill of Particulars or the First Supplemental Bill of Particulars previously served, or even a copy of the complaint. The Second Supplemental Bill of Particulars does not comply with CPLR 3025(b) in that it does not show the changes or additions to be made to any Bill of Particulars previously served. Nevertheless, it is apparent that what plaintiff claims are "amplifications" intended to supplement inadequate pleadings, are new allegations intended to support a new cause of action based upon allegations of reckless and grossly negligent conduct, in support of a claim for punitive damages, a new item of damages which is not included in the plaintiff's complaint. Punitive damages may not be sought as a separate cause of action and are an additional item of damages which must be included in the *ad damnum* clause of the complaint (see Rocanova v. Equitable Life Assur. Socy. of U.S., 83 NY2d 603, 616 [1994]; Weir, Metro Ambu-Service Inc v. Turner, 57 NY2d 911 [1982]). The *ad damnum* clause of plaintiff's complaint does not include a claim for punitive damages as an item of damages.

The court finds that service of the Second Supplemental Bill of Particulars after the note of issue was filed and without leave of court is a nullity. The plaintiff has improperly designated the Second Supplemental Bill of Particulars as supplemental when in fact it is an amendment (see Fuentes v. City of New York, supra). Accordingly, the branch of the plaintiff's motion to compel Sukonnik to accept the Second Supplemental Bill of Particulars is denied.

The branch of the plaintiff's motion for leave to serve the Second Supplemental Bill of Particulars in the form annexed to the moving papers is denied.

While generally leave to amend a bill of particulars is freely granted in the absence of prejudice and surprise, when leave to amend is sought on the eve of trial, judicial discretion should be exercised in a "discreet, circumspect, prudent and

cautious manner" (Fuentes v. City of New York, 3 AD3d 549, 550 [2004] quoting Smith v. Plaza Transp. Ambulance Serv., 243 AD2d 555 [1997]). Where as here, there is an extensive delay in moving for leave to amend, the plaintiff must submit a reasonable excuse for the delay, an affidavit establishing the merit of the amendment and demonstrate the existence of extraordinary circumstances warranting the amendment (see Fuentes v City of New York, supra; see also Wilson v. Haagen-Dazs Co., Inc., 215 AD2d 338 [1995]; Orros v. Yick Ming Yip Realty, Inc., 258 AD2d 387 [1999]). Plaintiff has failed to demonstrate a reasonable excuse for the delay (see Travelers Property Cas. v. Powell, 289 AD2d 564 [2001]).

Contrary to plaintiff's claim the evidence presented does not support his claim that he only recently acquired knowledge of the facts. Plaintiff deposed six defendants and Misfud, non-party between November, 2010 and March, 2011. Plaintiff also had copies of the written statements of defendant, Wech, and non-parties Misfud and Tanchyck, all dated March, 2009. Only one defendant, Kevin Bayer, was recently deposed. In addition, the proposed Second Supplemental Bill of Particulars goes beyond what is properly included in a bill of particulars by including, inter alia, what amounts to legal arguments as well as evidentiary material, including expert testimony.

However, to the extent that the plaintiff seeks to amend Item 16 of defendant's, Sukonnik's, demand by adding the alleged violation of specified sections of the State University of New York, Geneseo Code of Conduct is neither prejudicial nor a surprise to the defendants. Although the violation of a code or rule or regulation does not constitute negligence as a matter of law, such violation may be considered along with other evidence in the case as evidence of negligence (see PJI 2:29).

Accordingly, the plaintiff's motion for leave to serve a Second Amended Bill of Particulars upon defendant Sukonnik is granted to the extent that the plaintiff may serve the amended pleading amending Item 16 of defendant's, Sukonnik's, demand by adding the alleged violation of specified sections of the State University of New York, Geneseo Code of Conduct. In all other respects the plaintiff's motion is denied.

Dated: August 1, 2012
D# 47

.....
J.S.C.