

<b>Dockery v UPAC Site 7 Assoc., LP</b>
2016 NY Slip Op 31470(U)
July 27, 2016
Supreme Court, New York County
Docket Number: 155538/2012
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK : PART 55

-----X  
 JACQUELINE DOCKERY,

Plaintiff,

**DECISION/ORDER**  
**Index No. 155538/2012**

-against-

UPAC SITE 7 ASSOCIATES, LP and MANHATTAN  
 NORTH MANAGEMENT COMPANY, INC.,

Defendants.

-----X  
 HON. CYNTHIA KERN, J.:

Plaintiff Jacqueline Dockery commenced the instant action to recover damages for injuries she allegedly sustained when she slipped and fell in the lobby of an apartment building. Defendants now move for an Order striking plaintiff's Amended Bill of Particulars served on April 12, 2016 without leave of court and dismissing this action in its entirety. In opposition, plaintiff requests leave to amend the Bill of Particulars. For the reasons set forth below, defendants' motion is denied and plaintiff's request for leave to amend the Bill of Particulars is granted.

The relevant facts are as follows. Jacqueline Dockery slipped and fell in the lobby of a building located at 1900 Lexington Avenue and owned and operated by defendants (the "Accident"). In her complaint and Bill of Particulars and during her deposition, Jacqueline Dockery claimed that the Accident occurred on Sunday, February 26, 2012. Jacqueline Dockery testified during her deposition that she knew the Accident occurred on Sunday, February 26, 2012 for a number of reasons, including that she was picking up her daughter, Quandralin Dockery, who resided in the building, to go to church. Further, she testified that her daughter drove her to Mount Sinai Hospital following the Accident.

In the course of discovery, defendants requested Jacqueline Dockery's hospital records for February 26, 2012. Mount Sinai Hospital was unable to locate the records sought. Jacqueline Dockery then returned

to Mount Sinai Hospital to obtain all of her hospital records for January and February 2012, which showed that she was treated for a fall on January 27, 2012. On April 22, 2014, shortly after receiving the hospital records, Jacqueline Dockery died. On May 8, 2014, Jon Epstein, a former associate of plaintiff's counsel's firm, informed defendants' counsel that Jacqueline Dockery ascertained that the correct date of the Accident was Thursday, January 26, 2012 before she died. However, due to Jacqueline Dockery's death, the action was stayed and plaintiff was unable to serve an amended bill of particulars with the new date until the administrator of Jacqueline Dockery's estate was substituted as plaintiff on or about November 10, 2015. On April 12, 2016, plaintiff served defendants with the Amended Bill of Particulars stating that the Accident occurred on January 26, 2012.

The court first considers the portion of defendants' motion for an Order striking plaintiff's Amended Bill of Particulars served April 12, 2016 and plaintiff's request for leave to amend the Bill of Particulars. An amended bill of particulars served without leave of the court after the filing of the note of issue is a nullity. CPLR § 3042(b); *Boland v. Koppelman*, 251 A.D.2d 176, 176 (1<sup>st</sup> Dept 1998). However, leave to amend a bill of particulars is freely granted absent prejudice or surprise resulting therefrom, "unless the proposed amendment is palpably insufficient or patently devoid of merit." *Rodgers v. New York City Transit Authority*, 109 A.D.3d 535, 536-37 (2<sup>nd</sup> Dept 2013). See also *Sahdala v. New York City Health & Hosp. Corp.*, 251 A.D.2d 70, 70-71 (1<sup>st</sup> Dept 1998) (applying the CPLR § 3025(b) standard for motions to amend pleadings to bills of particulars).

In the present case, plaintiff's request to amend the Bill of Particulars is granted as plaintiff has shown that no prejudice or surprise would result therefrom and that the proposed amendment is not patently devoid of merit. Plaintiff has submitted the affidavit of Quandralin Dockery, who testifies that her mother came to meet her to go shopping on January 26, 2012. Quandralin Dockery further testifies that she was notified at around 9:30 a.m. by a security officer that her mother had fallen in the lobby, whereupon her mother was taken by ambulance to Mount Sinai Hospital. Further, plaintiff has submitted medical records dated January 27, 2012 showing that Jacqueline Dockery reported that she slipped and fell on January 26, 2012.

Although leave to amend a bill of particulars is generally freely granted, where there has been an extended delay in seeking leave to amend, the plaintiff must establish a reasonable excuse for the delay and submit an affidavit of merit in support of the amendment. *Cherebin v. Empress Ambulance Service, Inc.*, 43 A.D.3d 364, 365 (1<sup>st</sup> Dept 2007). In *Cherebin*, the First Department allowed leave to amend despite the lack of a “compelling” excuse where the plaintiff waited only two years in seeking to amend the bill of particulars after filing the original bill of particulars, noting that this delay was short compared to cases where leave to amend was denied. *See id.*, citing *Vega v. Lenox Hill Hosp.*, 235 A.D.2d 302 (1<sup>st</sup> Dept 1997) (leave to amend was denied after an eight-year delay) and *Baby Togs v. Faleck & Margolies*, 239 A.D.2d 278 (1<sup>st</sup> Dept 1997) (leave to amend was denied after a seven-year delay). In addition, the First Department noted that leave to amend was sought before a trial date was sought, allowing time for further discovery. *See Cherebin*, 43 A.D.3d at 365.

In the present case, the court finds that there has not been an extended delay in seeking leave to amend as plaintiff is seeking leave to amend less than three years after filing the original bill of particulars. Further, although the note of issue has been filed in the instant action, a trial date has not yet been set. However, even assuming *arguendo* that there has been an extended delay in seeking leave to amend, plaintiff has established a reasonable excuse for the delay and submitted an affidavit of merit. To the extent that there has been an extended delay in seeking leave to amend, plaintiff has provided a reasonable excuse for the delay as the case was stayed from May 2014 to November 2015 due to Jacqueline Dockery’s death. Further, plaintiff has submitted the affidavit of Quandralin Dockery, who testifies that the Accident occurred on January 26, 2012.

Defendants’ argument that Quandralin Dockery’s affidavit should be disregarded because it contradicts the deposition testimony of Jacqueline Dockery based on the inconsistent date of the Accident and mode of Jacqueline Dockery’s transportation to Mount Sinai Hospital is without merit. The case on which defendants rely in support of their argument, *Kistoo v. City of New York*, 195 A.D.2d 403, 404 (1<sup>st</sup> Dept 1993), only holds that a court cannot rely on a self-serving affidavit that contradicts the affiant’s prior deposition testimony to create an issue of fact to defeat a motion for summary judgment. This holding is

inapplicable to the present case as Quandralin Dockery's affidavit testimony does not contradict her own prior deposition testimony and the affidavit is not offered to create an issue of fact to defeat a motion for summary judgment.

To the extent that defendants contend that they would be prejudiced by an amendment of the Bill of Particulars to change the date of the Accident as they did not and will not have an opportunity to cross-examine Jacqueline Dockery regarding the new date, such contention is unavailing. Although defendants will not be able to cross-examine Jacqueline Dockery, they can introduce the fact that Jacqueline Dockery initially claimed the Accident occurred on February 26, 2012 into evidence through other means as Jacqueline Dockery represented that the Accident occurred on February 26, 2012 both in her deposition testimony and in multiple documents filed throughout the pendency of the action while she was alive.

The portion of defendants' motion to dismiss the action in its entirety is denied as defendants have not proffered any arguments in support of this portion of their motion.

Accordingly, defendants' motion for an Order striking plaintiff's Amended Bill of Particulars served April 12, 2016 and dismissing the action is denied and plaintiff's request for leave to serve an amended bill of particulars changing the date of the Accident to January 26, 2012 is granted. This constitutes the decision and order of the court.

DATE:

7/27/16  
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KERN, CYNTHIA S., JSC

**HON. CYNTHIA S. KERN**  
J.S.C.