SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

CIGDEM ALTINERLIELMAS TANRIVERDI and MURAT TANRIVERDI,

Plaintiff(s),

- against -

UNITED SKATES OF AMERICA, INC.,

Defendant(s).

TRIAL/IAS PART 5

INDEX NO. 601784/12

MOTION SEQUENCE NO. 2 & 3 & 4

MOTION SUBMISSION DATE: June 23, 2015

The following papers read on this motion:

Order to Show Cause	X
Notice of Motion	X
Notice of Cross Motion	X
Affirmation in Opposition	XXX
Reply	X

Upon the foregoing papers, by separate motions, plaintiffs, Cigdem Altinerlielmas Tanriverdi and Murat Tanriverdi, seek an Order of this Court as follows:

(1) [Mot. Seq. 002] pursuant to CPLR 3042(b), granting them leave to serve an amended second supplemental bill of particulars; and,

(2) [Mot. Seq. 004] pursuant to CPLR 3025[c] granting them leave to amend the complaint to conform to the evidence, and, pursuant to CPLR 3124 compelling the defendant to a further deposition.

Defendant, United Skates of America, Inc., moves [Mot. Seq. 003], pursuant to CPLR §§3124 and 3126, for an Order, *inter alia*, dismissing the plaintiff's complaint for failure to

provide discovery, or in the alternative compelling the plaintiff to provide the outstanding discovery, striking the plaintiff's amended second bill of particulars, and allowing for any additional discovery that may be required as a result of the outstanding discovery.

The motions are determined as herein set forth below.

This action arises from plaintiff, Cigdem Altinerlielmas Tanriverdi's (herein "Tanriverdi") claim that while roller skating at the defendant's facility located at 1276 Hicksville Road, Seaford, New York, on February 21, 2012 at approximately 1:40 p.m., she was caused to fall thereby sustaining personal injuries. Plaintiff Murat Tanriverdi's claims are derivative in nature.

As best as can be determined from the papers submitted herein, the following facts are undisputed:

Plaintiff commenced this action in September 2012. The defendant interposed an Answer and served Combined Discovery Demands as well as a Demand for a Verified Bill of Particulars on December 11, 2012. On January 23, 2013, the plaintiffs served a "Verified" Bill of Particulars[1] in which they claimed, *inter alia*, the following:

> 15. That the said incident and resulting injuries to the plaintiff were caused through no fault of her own but were solely and wholly by reason of the willful, wanton and gross negligence of the defendant...in that the defendant suffered, caused and/or permitted and/or allowed...a carpet to become hazardous, unsecured, loose, raised, upturned, irregular...
> (Motion [Seq. 003], Ex. C, ¶15).

That is, the principal theory of the plaintiffs' case was based upon the claim that the plaintiff was injured as a consequence of the carpet installed at the premises.

On March 28, 2013, this Court held a preliminary conference.

Subsequently, on August 7, 2013, i.e., prior to any depositions having taken place, defendant disclosed video surveillance of the alleged incident to plaintiff's counsel. This was

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[1]Despite the plaintiffs' identification of their Complaint and Bill of Particulars as being "Verified," neither document was in fact verified by the plaintiffs.

followed by the defendant producing its employee John Harper on August 22, 2013 for a deposition.

Four days later, on August 26, 2013, the plaintiffs appeared for a deposition.

As a result of the plaintiffs' testimony, the defendant, on September 3, 2013, served post-deposition discovery demands.

Approximately one month later, in October 2013, the parties' herein entered into settlement negotiations and reached, what defense counsel understood to be, a settlement in the total sum of $5,000. Notably, there is no documentation or any other evidence of any kind furnished to this Court memorializing any terms of the purported settlement. That being said, it remains undisputed by and among the parties herein that there was a settlement of this action. Indeed, on October 10, 2013, this Court was advised of the settlement at a scheduled conference. At that point, this case was deemed disposed by this Court. The matter was marked off the Court's calendar.

At some point following notification to this Court that this case had settled however, the plaintiffs refused to accept the settlement. Again, there is no documentary evidence furnished to this Court substantiating any of these otherwise undisputed claims.

Three months later, on or about January 28, 2014, plaintiff served a Second Supplemental Bill of Particulars, which was also void of a "verification" page. Notably, in their Second Supplemental Bill of Particulars, the plaintiffs changed the theory of their case against the defendant. Specifically, they claimed therein as follows:

> 15. That the said incident and resulting injuries to the plaintiff were caused through no fault of her own but were solely and wholly by reason of the willful, wanton and gross negligence of the defendant,....in providing plaintiff with defective ice skates, skate laces too short, stringy, frayed, flimsy, bumper on skate loose, allowing said ice skates to be, become and remain in a dangerous, defective, and/or, hazardous, unsafe, loose condition and said skates were negligently and/or improperly maintained, repaired...
> (Mot. [Seq. 003], Ex. G).

In addition, more than eight months following the Court's disposal of this action, the plaintiff, on June 11, 2014, moved to restore the action. The defendant opposed the motion. Ultimately, however, by Order dated September 26, 2014, this Court granted the plaintiff's motion to restore the action.

A Court conference was conducted on November 6, 2014 wherein this Court, on its own motion, directed the parties to respond to all outstanding discovery demands by December 6, 2014 and directed a further court conference, if necessary on January 6, 2015.

While the plaintiff served a discovery response dated November 5, 2014 (pre-dating the November 6 court conference), said response was, as argued by the defendant, insufficient. As such, on December 31, 2014, the defendant served a second good faith letter seeking the outstanding discovery and requesting that a January 6, 2015 court conference be conducted to resolve the outstanding discovery issues.

It remains unclear to this Court as to whether there was indeed a January 6, 2015 conference before this Court and what the resulting directions and conclusions were of that conference

Nevertheless, on January 30, 2015, the defendant sent a third good faith letter seeking outstanding discovery. Subsequently, on February 6, 2015, the parties appeared for another court conference where this Court directed the plaintiff to provide responses to the outstanding discovery in the matter by February 23, 2015. This was followed by the defendant's fourth good faith letter dated February 6, 2015.

Although the plaintiff served a response on February 20, 2015, according to the defendant, this response was again insufficient. As a result, two additional Court orders dated February 23, 2015 and March 25, 2015 also directed the plaintiff to respond to the outstanding discovery.

Notably, also on February 20, 2015, the plaintiffs served an Amended Second Supplemental Bill of Particulars in order to: (1) correct a typographical error found in the original Second Supplemental Bill of Particulars wherein the plaintiffs identified the cause of the accident as "ice skates" rather than "roller skates"; (2) supplement their lost wage claim; (3) supplement statutory violations; (4) provide all tax records in plaintiffs' possession; (5) provide authorizations; (6) exchange photographs from Disney World; (7) supplement psychological injuries: (8) object to defendant's demand for various verifications; and (9) convey plaintiffs' good faith efforts to obtain the remaining electronic appointment book, medical bills, and individual tax returns for years 2011 and business tax returns for 2009 and 2011.

On March 20, 2015, the defendant rejected the plaintiffs' Amended Second Supplemental Bill of Particulars.

Thereafter, on April 14, 2015, plaintiffs responded by (1) effectively withdrawing their lost wage claim, eliminating the need to further provide missing tax returns and appointment book and (2) provide color photos of plaintiffs' x-rays, injuries and defendants' premises.

Two days later, on April 16, 2015, the parties appeared before this Court where the plaintiffs' personally served a Further Supplemental Bill of Particulars to address special damages accompanied with the corresponding medical bills.

On May 4, 2015 the parties stipulated to adjourn plaintiff's Order to Show Cause to June 8, 2015. On May 6, 2015, the plaintiffs served unrestricted medical authorizations stated in defendant's moving papers at paragraph 35. Thereafter, on May 11, 2015, the plaintiffs served authorizations to obtain tax returns for 2009 through 2015, and, on June 1, the plaintiffs signed affidavits with respect to, *inter alia*, the appointment book.

Upon the instant motions the plaintiffs seek, *inter alia*, leave to serve an "Amended Second Supplemental Bill of Particulars" and leave to amend the complaint to conform to the evidence. The defendant on the other hand seeks leave to, *inter alia*, dismiss the plaintiff's

complaint for failure to provide discovery, or in the alternative compelling the plaintiff to provide the outstanding discovery, striking the plaintiff's amended second bill of particulars, and allowing for any additional discovery that may be required as a result of the outstanding discovery.

Initially, this Court notes that the defendant's application to dismiss the plaintiff's complaint for their failure to provide discovery is denied. The determination whether to strike a pleading lies within the sound discretion of the trial court (*see* CPLR 3126[3]; *JPMorgan Chase Bank, N.A. v. New York State Dept. of Motor Vehs.*, 119 AD3d 903, 903–904 [2nd Dept. 2014]; *Walter B. Melvin, Architects, LLC v. 24 Aqueduct Lane Condominium*, 51 AD3d 784, 785 [2nd Dept. 2008]). However, the drastic remedy of striking a pleading is not appropriate absent a clear showing that the failure to comply with discovery demands was willful or contumacious (*see* CPLR 3126[3]; *JPMorgan Chase Bank, N.A. v. New York State Dept. of Motor Vehs.*, *supra* at 903; *Walter B. Melvin, Architects, LLC v. 24 Aqueduct Lane Condominium*, *supra* at 785; *Harris v. City of New York*, 211 AD2d 663, 664 [2nd Dept. 1995]).

Here, while this Court agrees with the defendant that the plaintiff's responses to the defendant's discovery demands were incomplete and insufficient, this Court cannot find the plaintiff's behavior to rise to the level of constituting a pattern of willful failure to respond to discovery demands or comply with disclosure orders, so as to justify dismissing the complaint (*Walter B. Melvin, Architects, LLC v. 24 Aqueduct Lane Condominium*, *supra* at 785; *Matter of Blauman–Spindler v. Blauman*, 68 AD3d 1105, 1107 [2nd Dept. 2009]). In addition, given the strong public policy favoring the resolution of actions on the merits, this Court will not strike the plaintiff's complaint, provided that, the plaintiffs provide full and complete responses to all of the outstanding discovery demands within seven (7) days of entry of this Decision and Order. This shall include, but not be limited to: verifications for the plaintiff's Complaint, Bill of Particulars, Second Supplemental Bill of Particulars, and, the electronic appointment book from February 21, 2011 to present.

In the event that the plaintiffs fail to furnish the requested discovery within 45 days of the date of this Order, this Court shall deem the plaintiff's complaint be struck in its entirety without the necessity of any further directive or order of this Court.

With respect to the plaintiffs' motion, pursuant to CPLR 3042(b), granting them leave to serve an amended second supplemental bill of particulars, the motion is granted to the limited extent that it replaces the term "ice skates" with the term "roller skates." Further, the "Amended Second Supplemental Bill of Particulars" are herewith deemed served. To the extent that the "Amended Second Supplemental Bill of Particulars" exceeds what was and could have properly been included in the "Second Supplemental Bill of Particulars", the application is denied (CPLR 3042[b]; *cf. Jones v. LeFrance Leasing Ltd. Partnership*, 61 AD3d 824, 825 [2nd Dept. 2009]; *Castleton v. Broadway Mall Props., Inc.*, 41 AD3d 410, 411 [2nd Dept. 2007]; *Geller v. Port Jefferson Obstetrics & Gynecology*, 294 AD2d 537 [2nd Dept. 2002]).

Finally, although plaintiff also seeks leave, pursuant to CPLR 3025[c] to grant them leave to amend the Complaint to conform to the evidence and a directive of this Court pursuant to CPLR 3124 compelling the defendant to submit to a further deposition, such relief is denied in its entirety.

"Leave to conform a pleading to the proof pursuant to CPLR 3025[c] should be freely granted absent prejudice or surprise resulting from the delay" (*Alomia v. New York City Tr. Auth.*, 292 AD2d 403, 406 [2nd Dept. 2002]; *Worthen–Caldwell v. Special Touch Home Care Serv., Inc.*, 78 AD3d 822 [2nd Dept. 2010]). Mere lateness is not a barrier to amendment, but this Court will preclude the amendment if it is coupled with significant prejudice to the other side (*Worthen–Caldwell v. Special Touch Home Care Serv., Inc.*, *supra* at 822). "Prejudice, of course, is not found in the mere exposure of the defendant to greater liability" (*Loomis v. Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23 [1981]). Ultimately, an application pursuant to CPLR 3025© to amend the pleadings is addressed to the sound discretion of the court, and

where no prejudice is shown, the amendment may be allowed during trial (*Murray v. City of New York*, 43 NY2d 400, 404–405 [1977]).

Here, the plaintiffs' drastic change of theory of their entire complaint against the defendant constitutes significant prejudice to the defendant. Whereas at the outset the plaintiffs' claim was one predicated upon the "defective carpet" theory, at this juncture, the plaintiffs' basis for their action against the defendant is one sounding in "defective roller skates." The change in theory and the long and tortured procedural history of this case due to the parties' behavior in handling this litigation from the outset does not entitle the plaintiff to this relief.

The plaintiffs' conduct and their failure to alert the defendant of this possible theory even as an alternate theory has undoubtedly left the defendant unable to properly defend this action as they claim that they did not, nor did they have reason to, preserve the subject skates. As a result, this Court finds that the defendants are severely handicapped in their ability to prove that the skates were not defective as alleged, or defective in any capacity. Moreover, because of the plaintiffs' conduct, the defendants' ability to investigate this new theory of liability has been irreparably harmed as any investigation or interviews with employees as to the alleged defective skate condition has now, four years following the date of the accident, effectively been foreclosed.

Given the foregoing, the plaintiffs' motion seeking leave to amend the complaint to conform to the evidence and compelling the defendant to submit to a further deposition is denied in its entirety (*Loomis v. Civetta Corinno Constr. Corp.*, *supra* at 23; *Matter of Cohn*, 46 AD3d 680, 681 [2nd Dept. 2007]).

The parties' remaining contentions have been considered and do not warrant discussion.

Any applications not specifically addressed are herewith denied.

This shall constitute the decision and order of this Court.

DATED: 7/29/2015

Roy S. Mahon
J.S.C.