

**Lopez v Bedoya**

2016 NY Slip Op 30491(U)

March 22, 2016

Supreme Court, New York County

Docket Number: 651424/2012

Judge: Anil C. Singh

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 45

-----X  
FERNANDO ESPINAL LOPEZ and ANA MILENA  
BEDOYA,

Plaintiffs,

DECISION AND  
ORDER

-against-

Index No.  
651424/2012

LA FONDA BORICUA, INC., et al.,

Defendant.  
-----X

HON. ANIL C. SINGH, J.:

Plaintiff moves for an order pursuant to CPLR 3025(b) permitting plaintiff to serve an amended bill of particulars, or deeming the previously served supplemental/amended bill of particulars dated August 26, 2015, to have been properly served, nunc pro tunc. Defendant opposes the motion.

Plaintiff Fernando Lopez commenced the instant action by filing a summons and verified complaint on April 30, 2012, alleging that he sustained personal injuries during the course of his employment as a construction laborer.

Plaintiff served a verified bill of particulars on July 12, 2012. The verified bill of particulars describes Mr. Lopez's injury as bone fractures in his left leg and ankle.

Dr. Leonard Harrison, M.D., conducted a medical examination of Mr. Lopez

on behalf of the defendant on May 2, 2013.

The note of issue was filed on July 16, 2013, and the matter was placed on the trial calendar.

Plaintiff's counsel states that he sent a request for updated medical records to Mr. Lopez's treating physician, and he received the records in or about August 2015. Further, counsel contends that the records included an EMG report dated June 5, 2013, which indicated that plaintiff had left common peroneal neuropathy and left tarsal tunnel syndrome related to his left leg injury. Counsel contends that he had not previously received this report, which is annexed to the moving papers as exhibit B.

Plaintiff's counsel served a supplemental/amended bill of particulars dated August 26, 2015, which states in its entirety:

1. As a result of the injuries sustained, as previously alleged, the plaintiff has left common peroneal neuropathy and left tarsal tunnel syndrome.
2. Plaintiff continues to be totally disabled from employment and is continuing to suffer a loss of earnings at the rate of pay previously alleged.

(Motion, exhibit C).

Defendant's counsel sent correspondence dated September 1, 2015, to plaintiff's counsel stating as follows:

We are in receipt of plaintiff's supplemental/amended bill of particulars, dated August 26, 2015.

Although plaintiff has named the document as a supplemental/amended bill of particulars, the document is clearly an amended bill of particulars since plaintiff seeks to assert new injuries in paragraph 1. Although plaintiff suggests that the injuries were previously alleged, common peroneal neuropathy and tarsal tunnel syndrome are not alleged in any prior bill of particulars in this matter. Indeed, it does not appear that any neurological injuries had been previously alleged.

Pursuant to CPLR 3042, a bill of particulars may only be amended without leave of court prior to the filing of the note of issue in this matter. The Note of Issue was filed in 2013, and the amended bill of particulars was not served with leave of court. Consequently, the amended bill of particulars was improperly served in this matter and is hereby rejected and returned.

(Motion, exhibit D).

Plaintiff's motion for permission to serve the amended bill of particulars is now pending before the court.

#### Discussion

"In deciding motions for leave to amend a bill of particulars the standard to be employed is akin to that enunciated in CPLR 3025 (subd. [b]) governing applications for leave to supplement or amend pleadings (3 Weinstein-Korn-Miller, N.Y. Civ. Prac., par. 3014.21). Thus, in the absence of prejudice..., leave to amend a bill of particulars should be freely granted" (Maloney v. Union Free

School Dist. No. 7, 46 A.D.2d 789 [2d Dept., 1974]); see also Kerlin v. Green, 36 A.D.2d 892 [4<sup>th</sup> Dept., 1971]).

“To supplement a bill of particulars with respect to continuing damages, the continuing damages must be an anticipated sequelae of the original injuries suffered and described in the original bill of particulars” (Pauling v. Glickman, 232 A.D.2d 465, 466 [2d Dept., 1996], citing Tate by McMahon v. Colabello, 58 N.Y.2d 84, 86-87 [1983]).

Defendant contends that plaintiff’s motion should be denied because plaintiff has delayed in making this motion until shortly before the trial of this matter, notwithstanding that plaintiff has been aware of the alleged neurological injuries for at least 18 months.

After careful consideration, the Court in its discretion finds that leave to amend must be granted for four reasons.

First, defendant has failed to demonstrate any undue prejudice.

Second, the supplemental bill simply elaborates further on the extent of the injuries to plaintiff’s left leg. Here, the proposed supplemental bill of particulars merely expands upon the continuing disabilities alleged in the original bill and does not set forth a new legal theory of liability or new injuries (see, Tate by McMahon v. Colabello, *supra.*, at 87; see also Spiegel v. Gingrich, 74 A.D.3d 425

[1<sup>st</sup> Dept., 2010] (stating that motion court improvidently exercised its discretion in granting defendant's motion to strike plaintiff's supplemental bill of particulars describing sequela because it was served 12 days before trial was scheduled to commence)).

Third, plaintiff exhibits a copy of Dr. Harrison's medical report dated May 7, 2014. The report states in part:

The diagnosis in this patient apparent during my examination of 5/2/13 (without the benefit of seeing x-rays) included:

1. Open pilon fracture left ankle treated surgically.
2. Symptomatic tarsal tunnel syndrome with EMG evidence of common peroneal neuropathy.

The left common peroneal neuropathy and the tarsal tunnel syndrome bear no relationship to any accident described on 5/2/13.

(Motion, exhibit E, p. 4).

In light of this report, defendant cannot in good faith claim surprise since its own examining physician provided defense counsel with a report dated May 7, 2014, diagnosing the alleged medical conditions (see, for example, Ackerman v. City of New York, 22 A.D.2d 790 [2d Dept., 1964]).

Fourth, plaintiff has offered a valid excuse for the delay in moving to amend as counsel did not receive medical records from plaintiff's treating physician

indicating that plaintiff had left common peroneal neuropathy and left tarsal tunnel syndrome until August 2015.

Accordingly, it is

ORDERED that plaintiff's motion for leave to serve an amended bill of particulars is granted, and the supplemental/amended bill of particulars dated August 26, 2015, is deemed properly served, nunc pro tunc.

The foregoing constitutes the decision and order of the court.

Date: March 22, 2016  
New York, New York

  
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Anil C. Singh