

<b>Lopez v 106 LPA LLC</b>
2017 NY Slip Op 32781(U)
December 15, 2017
Supreme Court, Bronx County
Docket Number: 300181/2016
Judge: Lucindo Suarez
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: I.A.S. PART LPM

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GERSSON LOPEZ,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 300181/2016

106 LPA LLC, HKS CONSTRUCTION CORP.,  
LIANI DEVELOPMENT GROUP, LLC and RD2  
CONSTRUCTION & DEMOLITION, LLC,

Defendants.

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106 LPA LLC and LIANI DEVELOPMENT GROUP,  
LLC,

Third-Party Plaintiffs,

Third-Party Index No.  
83807/2016

- against -

SCALPEL CONTRACTING, INC.,

Third-Party Defendant.

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PRESENT: Hon. Lucindo Suarez

Upon the notice of motion dated October 23, 2017 of defendants and third-party plaintiffs 106 LPA LLC and Liani Development Group, LLC and the affirmation and exhibits submitted in support thereof; defendant Scalpel Contracting, Inc.'s affirmation in support dated October 31, 2017; plaintiff's affirmation in opposition dated November 27, 2017 and the exhibits submitted therewith; movants' affirmation in reply dated December 7, 2017; and due deliberation; the court finds:

Defendants 106 LPA LLC and Liani Development Group, LLC move pursuant to CPLR 3124 and 3126 to strike plaintiff's complaint and to compel plaintiff's production of discovery. Defendants argue that the bill of particulars failed to specify the location of the accident, failed to separately particularize the negligence of each defendant, failed to specify when and to whom notice of the subject condition was given and failed to specify the length of time plaintiff was confined to bed and home. The fourth supplemental bill of particulars, served in response to the

motion, adequately described the accident location with sufficient detail, but reiterated the original responses as to negligence, notice and confinement.

Plaintiff served a fourth supplemental bill of particulars purportedly responsive to each movant. The bills of particulars are identical as to each movant, including the allegations of negligence. Nevertheless, they allege that each movant was negligent, *inter alia*, in the storage and stacking of construction materials and in failing to maintain material piles in a stable condition so they would not collapse or fall. It may very well be that each movant's negligence was similar or cannot at this stage be differentiated. In any event, the court finds that the bills of particulars set forth a sufficient "general statement of the acts or omissions constituting the negligence claimed" and that no further particularization is required at this time. *Graves v. County of Albany*, 278 A.D.2d 578, 579, 717 N.Y.S.2d 420, 422 (3rd Dep't 2000).

Pursuant to CPLR 3043(a)(5), any party may require a plaintiff alleging actual notice of a condition to particularize when and to whom such notice was given. The plaintiff who fails to so particularize is bound by that choice. *See Amchin v. Lone Star Steakhouse*, 2011 NY Slip Op 30524(U) (Sup Ct N.Y. County Feb. 22, 2011). Plaintiff's bill of particulars alleges "the defendants . . . through their agents, servants and/or employees actually knew and/or directed the creation of the dangers and defective conditions that caused the accident herein." The response is insufficient and must be supplemented. *See Manzanares v. ATM Four LLC*, 2012 NY Slip Op 30998(U) (Sup Ct Nassau County Apr. 10, 2012).

Pursuant to CPLR 3043(a)(7), any party may require the plaintiff to particularize the "[I]ength of time confined to bed and to house." *See Ferris v. Brooklyn H. R. Co.*, 116 A.D. 892, 102 N.Y.S. 463 (2d Dep't 1907). Plaintiff alleged that he had been "intermittently confined to bed and/or home since the date of the accident. Plaintiff is unaware of the dates of confinement to bed." It has been held that such statements of broad inspecific approximation are non-

responsive. *See Dusing v. Rosasco*, 31 Misc.2d 825, 220 N.Y.S.2d 987 (Sp Term Nassau County 1961). The court finds plaintiff's response to be inadequate and must be supplemented.

Movants also argue that plaintiff has failed to respond to their combined demands with respect to prior injuries and psychological treatment, relevant because plaintiff has alleged same in his bill of particulars. In opposition, plaintiff's counsel argued that he claimed no such injuries, yet the fourth supplemental bill of particulars again alleged such injuries. If plaintiff is not claiming such injuries, they should be stricken from the bill of particulars; otherwise, plaintiff should provide the relevant disclosure.

Movants also argue that with respect to their demand for photographs, plaintiff failed to provide the identity of the photographer, the date taken and the means by which taken. Movants' demand for photographs did not seek any such information. The April 27, 2017 compliance conference order specifically incorporated movants' March 27, 2017 letter, which sought the additional information regarding the photographs exchanged by plaintiff, but only as to the bill of particulars and medical authorizations. The order further stated that disclosure demands not raised at the conference were deemed waived. Therefore, no response to this demand is required.

Finally, movants' March 7, 2016 demands sought "copies of any and all documentation establishing the plaintiff's residence to be the address identified in the complaint." They argue that a response to this demand remains outstanding. Plaintiff does not claim to have responded to the demand or objected to it, *see* CPLR 3122(a)(1), and does not oppose this facet of the motion. Plaintiff shall therefore respond to the demand.

Accordingly, it is

ORDERED, that the motion of defendants and third-party plaintiffs 106 LPA LLC and Liani Development Group, LLC for an order striking plaintiff's complaint and compelling plaintiff's production of discovery is granted to the extent set forth below; and it is further

ORDERED, that within thirty days after service upon him of a copy of this order with written notice of its entry, plaintiff shall

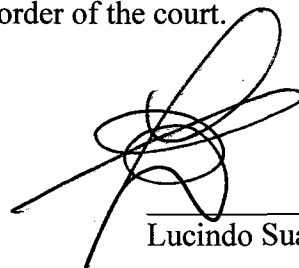
- (1) supplement his bill of particulars to state when and to whom actual notice of the claimed condition(s) was given; the length of time he was confined to bed and to house; and the injuries claimed to have been exacerbated or aggravated by the subject occurrence and the names of providers who treated plaintiff for such pre-existing injuries;
- (2) provide HIPAA-compliant authorizations for the records of treatment of such pre-existing injuries, for plaintiff's primary care physician for three years prior to the date of accident to the present and for all providers of psychological treatment for three years prior to the date of the accident to the present; and
- (3) provide documentation of plaintiff's residence at 301 East 193rd Street, Bronx, NY 10458 at the time of commencement of this action;

and it is further

ORDERED, that should plaintiff fail to withdraw the claims of pre-existing and psychological injuries or fail to provide the afore-mentioned discovery with respect to the pre-existing and/or psychological injuries, the allegations of such injuries shall be deemed stricken, without further order of the court.

This constitutes the decision and order of the court.

Dated: December 15, 2017



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Lucindo Suarez, J.S.C.