

Utica Mut. Ins. Co. v Style Mgt. Assoc. Corp.

2013 NY Slip Op 34121(U)

September 20, 2013

Supreme Court, Nassau County

Docket Number: 4764/10

Judge: Denise L. Sher

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

UTICA MUTUAL INSURANCE COMPANY a/s/o
HARRIS BERENSON and E. TYLER BERENSON,

Plaintiffs,

- against -

STYLE MANAGEMENT ASSOCIATES CORP., STYLE
MANAGEMENT CORP., YOSI SASON a/k/a YOSEF
SASON, ZAK BARUCH, AA FINE HOME BUILDER, INC.,
SERGEI BROOKLYN (last name fictitious, but representing
a floor refinishing employee of defendants) and MOSCO
FLOORING COMPANY,

Defendants.

TRIAL/IAS PART 33
NASSAU COUNTY

Index No.: 4764/10
Motion Seq. Nos.: 04, 05
Motion Dates: 06/20/13
06/28/13

The following papers have been read on these motions:

| | Papers Numbered |
|--|-----------------|
| <u>Order to Show Cause (Seq. No. 04), Affirmation and Exhibits</u> | <u>1</u> |
| <u>Affirmation in Opposition to Seq. No .04 and Exhibits</u> | <u>2</u> |
| <u>Reply Affirmation to Seq. No. 04 and Exhibit</u> | <u>3</u> |
| <u>Notice of Motion (Seq. No. 05), Affirmation and Exhibits</u> | <u>4</u> |
| <u>Affirmation in Opposition to Seq. No. 05 and Exhibit</u> | <u>5</u> |
| <u>Reply Affirmation to Seq. No. 05 and Exhibits</u> | <u>6</u> |

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Plaintiff moves (Seq. No. 04), pursuant to CPLR § 3025(b), for an order granting it leave to amend the *ad damnum* clause in its Complaint and to serve defendants with a Supplemental/Amended Bill of Particulars. Defendants Style Management Associates Corp., Style Management Corp. and Yosi Sason a/k/a Yosef Sason (collectively the "Style Management

defendants”) oppose the motion.

The Style Management defendants move (Seq. No. 05), pursuant to CPLR §§ 3042 and 3025(b), for an order precluding plaintiff from offering evidence at the trial consistent with its proposed Supplemental Bills of Particulars, dated March 26, 2013, and striking said Supplemental Bill of Particulars; or in the alternative, should the Court permit the March 26, 2013 Supplemental Bill of Particulars, the Style Management defendants move, pursuant to 22 NYCRR 202.21(e), for an order striking the Note of Issue and Certificate of Readiness to permit additional discovery in regards to the information contained in said Supplemental Bill of Particulars including, but not limited to, the taking of further depositions of plaintiff. Plaintiff opposes the motion.

Plaintiff, as subrogee of Harris Berenson and E. Tyler Berenson, seeks to recover from the defendants for damages to the Berensons’ home at 21 Briarfield Drive, Great Neck, New York, which was caused by fires on June 23, 2009 and June 24, 2009. The Style Management defendants have cross-claimed against defendants Zak Baruch (“Baruch”), AA Fine Home Builder, Inc., Sergei Brooklyn and Mosco Flooring Company for common law and contractual indemnification and contribution. Defendants AA Fine Home Builder, Inc. and Baruch have cross-claimed against defendant Sergei Brooklyn. In its Complaint, which was served in 2010, in its *ad damnum* clause, plaintiff sought “a sum not less than \$800,000.00.” In its original Bill of Particulars, dated January 20, 2011, plaintiff sought itemized damages “to date” in the amount of \$573,490.21, plus \$82,016.94, totaling \$655,507.15. That Bill of Particulars, however, specifically provided that “[t]he final adjustment of the damages sustained by plaintiff’s subrogors as a result of the fires that ignited at the subject premises on June 23, 2009 and June 24, 2009 are ongoing.”

The parties certified this case as ready for trial on January 31, 2012, and a Note of Issue

was filed on April 23, 2012. The attorneys for the Style Management defendants served a Notice of Change of Address on September 18, 2012. On February 4, 2013, counsel for defendants Baruch and AA Fine Home Builder, Inc. moved to be relieved as counsel, which application was granted by a Decision and Order dated March 1, 2013 and the action was stayed until April 1, 2013. On April 1, 2013 and April 19, 2013, plaintiff served Supplemental Bills of Particulars on the defendants which reflected an increase in the total damages to \$1,233,964.30, an increase of \$578,457.15. This Supplemental Bill of Particulars, however, was served at the Style Management defendants' attorney's old address. In the interim, the stay of this action was extended and it was ultimately orally vacated on May 15, 2013. A copy of plaintiff's Supplemental Bill of Particulars was sent to the Style Management defendants' attorney's new address on May 16, 2013. The Style Management defendants maintain that the Supplemental Bill of Particulars was only received for the first time on May 20, 2013 and that on May 24, 2013 they rejected it as untimely and improperly served without leave of court. The instant motions resulted. More specifically, on or about May 28, 2013, the Style Management defendants moved to strike the Supplemental Bill of Particulars and, on June 4, 2013, plaintiff, via Order to Show Cause, moved to amend its Complaint and Bill of Particulars.

"In general, motions for leave to amend a pleading should be granted unless the proposed amendment is 'palpably insufficient or patently devoid of merit, or where the delay in seeking the amendment would cause prejudice or surprise.'" *Corwise v. Lefrak Organization*, 93 A.D.3d 754, 940 N.Y.S.2d 659 (2d Dept. 2012) citing *Loomis v. Civetta Corinno Constr. Corp.*, 54 N.Y.2d 18, 444 N.Y.S.2d 571 (1981) rearg denied 55 N.Y.2d 801, 447 N.Y.S.2d 436 (1981); *Commissioners of State Ins. Fund v. Service Unlimited, USA, Inc.*, 50 A.D.3d 1085, 857 N.Y.S.2d 231 (2d Dept. 2008); *Kushner v. Queens Tr. Corp.*, 97 A.D.2d 432, 467 N.Y.S.2d 399 (2d Dept. 1983); *Hillenbrand v. 3801 Review Place*, 72 A.D.2d 554, 420 N.Y.S.2d 766 (2d Dept.

1979). "Leave to supplement or amend a bill of particulars is to be freely given in the absence of prejudice or surprise, unless the proposed amendment is sought on the eve of trial, or where the amendment is patently insufficient or devoid of merit." *Creese v. Long Is. Light Co.*, 98 A.D.3d 708, 950 N.Y.S.2d 167 (2d Dept. 2012) citing *Alvarado v. Beth Israel Med. Ctr.*, 78 A.D.3d 873, 911 N.Y.S.2d 174 (2d Dept. 2010); *Ito v. 324 E. 9th St. Corp.*, 49 A.D.3d 816, 857 N.Y.S.2d 578 (2d Dept. 2008); *Delahaye v. Saint Anns School*, 40 A.D.3d 679, 836 N.Y.S.2d 233 (2d Dept. 2007).

Plaintiff required leave to amend its Bill of Particulars since a Note of Issue had been filed. See CPLR § 3042(b); *Cyril v. Neighborhood Partnership Hous. Fund, Inc.*, 309 A.D.2d 828, 766 N.Y.S.2d 66 (2d Dept. 2003); *Keeler v. Perrino*, 85 A.D.3d 1424, 925 N.Y.S.2d 268 (3d Dept. 2011). Accordingly, plaintiff's service of the Supplemental Bill was a nullity. In any event, it could not be deemed served until the stay of this action was vacated on May 15, 2013.

Plaintiff is correct that the defendants were on notice of the possible increase in damages from the inception of this action. However, when the case was certified as trial ready without any increase in the *ad damnum* clause of a Supplement to the Bill of Particulars, the situation became static, particularly once the Note of Issue was filed. While plaintiff maintains that the Berensons brought suit against it to obtain insurance coverage for the fires and that the defendants participated in discovery in that action rendering any further discovery here superfluous, plaintiff's allegations, standing alone, fail to establish that fact. The bottom line is that the damages sought have doubled following the Certificate of Readiness and the filing of the Note of Issue. Defendants are entitled to additional discovery.

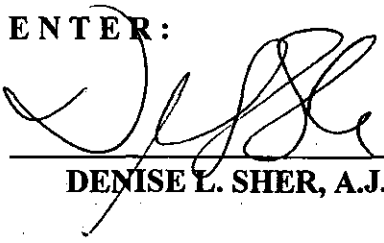
Accordingly, plaintiff's motion (Seq. No. 04), pursuant to CPLR § 3025(b), for an order granting it leave to amend the *ad damnum* clause in its Complaint and to serve defendants with a Supplemental/Amended Bill of Particulars is hereby **GRANTED**.

The branch of the Style Management defendants' motion (Seq. No. 05), pursuant to CPLR §§ 3042 and 3025(b), for an order precluding plaintiff from offering evidence at the trial

consistent with its proposed Supplemental Bills of Particulars dated March 26, 2013, and striking said Supplemental Bill of Particulars is hereby **DENIED**. However, the branch of the Style Management defendants' motion (Seq. No. 05), pursuant to 22 NYCRR 202.21(e), for an order striking the Note of Issue and Certificate of Readiness to permit additional discovery in regards to the information contained in said Supplemental Bill of Particulars including, but not limited to, the taking of further depositions of the plaintiff is hereby **GRANTED**.

All parties shall appear in IAS Part 33, on October 8, 2013, at 9:30 a.m., for a conference with respect to further discovery.

This constitutes the Decision and Order of this Court.

ENTER:


DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
September 20, 2013

ENTERED
SEP 23 2013
NASSAU COUNTY
COUNTY CLERK'S OFFICE