SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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STEPHANIE TRAICOFF,

Plaintiff,

-against-

THE CITY OF NEW YORK and THE NEW YORK CITY HOUSING AUTHORITY,

Defendants.

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PART C-2
Present:
Hon. Thomas P. Aliotta

DECISION AND ORDER

Index No. 101439/10
Motion No. 3075-001
3179-002

The following papers number 1 to 4 were marked fully submitted on the 19th day of December, 2012:

	Pages Numbered
Notice of Motion pursuant to CPLR 4102(a),(e) and 3043(c) by Defendant New York City Housing Authority, with Supporting Papers and Exhibits (dated October 9, 2012)	1
Notice of Cross Motion pursuant to CPLR 3025(c) by Plaintiff, with Supporting Papers and Exhibits (dated October 17, 2012)	2
Affirmation in Opposition to Cross Motion and Affirmation in Reply by Defendant New York City Housing Authority, with Supporting Papers and Exhibits (dated December 12, 2012)	3
Affirmation in Reply (dated December 17, 2012)	4

Upon the foregoing papers, the motion by defendant the New York City Housing Authority (hereinafter the "NYCHA") is denied and plaintiff's cross motion is granted, in part, and is otherwise denied.

In this personal injury action, plaintiff claims that on December 3, 2009 at 11:30 p.m., she was negligently caused to slip-and-fall on debris near the garbage compactor door in the fifth floor hallway of the premises located at 81 Jersey Street, Staten Island, New York, which is owned and managed by defendant NYCHA.[1] According to the Verified Bill of Particulars, defendant "permitted said hallway to remain in a hazardous, defective condition for an unreasonable length of time after notice" of same, thereby causing plaintiff to "slip and fall on a wet slippery substance... resulting in her sustaining serious personal injuries" (Plaintiff's Verified Bill of Particulars, para 3). General violations of the "Building Code of the State of New York Multiple Dwelling Housing Law" are alleged, as are the "applicable standards, rules, regulations and ordinances provided under the New York City Housing Authority Section 8 Housing Program and/or the Administrative Code of the City of New York" (id.).

Defendant's motion is twofold: (1) pursuant to CPLR 4102(a) and (e), defendant seeks leave to file a jury demand nunc pro tunc and (2) pursuant to CPLR 3043(c), defendant seeks to strike plaintiff's Supplemental Verified Bill of Particulars and to preclude plaintiff from testifying at trial with respect to the items alleged in same.

Plaintiff cross-moves to conform the pleadings to the proof under CPLR 3025(c) and in effect, to compel the defendant to accept service of the Supplemental Verified Bill of Particulars.

It is undisputed that the Note of Issue filed by plaintiff on June 22, 2012 requests a "Trial without jury" (*see* Defendant's Exhibit "L"). However, in its motion dated October 9, 2012, the NYCHA claims that it inadvertently failed to notice that no jury trial had been demanded by plaintiff, and that it never intended to waive a jury trial in this action. Plaintiff opposes defendant's motion on the basis that "a jury trial would add at least a year to the conclusion of this matter" (*see*

[1] Plaintiff's claims against defendant the City of New York have been discontinued.

Affirmation of James M. Santner, Esq.).

A motion pursuant to CPLR 4102(e) for leave to serve and file a late demand for a jury trial must be based upon a factual showing that the earlier waiver of that right was the result of either inadvertence of other excusable conduct indicating a lack of intention to waive such right (*see Caruso, Caruso & Branda, PC v. Hirsch*, 60 AD3d 886 [2nd Dept 2009]; *Fischer v. RWSP Realty, LLC*, 53 AD3d 595, 597 [2nd Dept 2008]). Here, the Court opines that defendant has failed to make an adequate factual showing that its delay in making the instant application was inadvertent or the result of clerical error (*see* CPLR 4102[a]; *Hyatte v. GBW Glenwood Dental Adm'rs*, 8 AD3d 233 [2nd Dept 2004]; *cf*. CPLR 2004, 2005). Accordingly, this branch of defendant's motion must be denied.

Turning to the second branch of its motion, the NYCHA maintains that despite having served a Demand for Supplemental Bill of Particulars on May 17, 2011, plaintiff did not serve her Supplemental Verified Bill of Particulars until September 5, 2012 (*see* Defendant's Exhibit "M"), almost two months after the Note of Issue. To the extent relevant, this demand requested further particulars as to, inter alia, the specific laws, statutes, regulations, codes and ordinances allegedly violated, as well as the particulars regarding plaintiff's allegations as to the creation of and/or notice of the allegedly defective condition (*see* Defendant's Exhibit "G"). In support of its motion, defendant contends that plaintiff's Supplemental Verified Bill of Particulars, "which was served without leave of court, attempts to bolster plaintiff's theory of liability and establish notice", and therefore constitutes an improper and untimely "amended" Bill of Particulars (*see* Affirmation of Anthony Spiga, Esq., para 11). Pursuant to CPLR 3042(b) "a party may amend the bill of particulars once as of course *prior* to the filing of the note of issue" (emphasis added). CPLR 3043(b) provides, in relevant part, that "[a] party may serve a supplemental bill of particulars with respect to claims for continuing special damages and disabilities without leave of court at any time, but not less than

thirty days prior to trial".

In her Supplemental Verified Bill of Particulars, plaintiff asserts, inter alia, specific dollar amounts incurred for physicians' and hospital services as special damages (*see* Defendant's Exhibit "M"), in addition to providing a response to defendant's demand for particulars regarding notice, i.e., that notice was given to defendant 24 hours prior to the accident to "Tonya", who (plaintiff alleges) "works for the defendant in the Housing office located at 121 Jersey Street, Staten Island, NY" (id.). Finally, plaintiff augments her response to defendant's demand for particularized regulatory violations by claiming that the NYCHA violated "Multiple Dwelling Law section 80 and NYC Administrative Code sections 27-127 [and] 27-128" (id.).

As previously indicated, CPLR 3043(b) allows a plaintiff in a personal injury action to serve a supplemental bill of particulars containing continuing special damages and disabilities, without leave of the court, "[p]rovided... that no new cause of action may be alleged or new injury claimed" (CPLR 3043[b]; *see Erickson v. Cross Ready Mix, Inc*, 98 AD3d 717, 718 [2nd Dept 2012]). Thus, where, as here, a plaintiff alleges continuing damages resulting from the injuries suffered and described in a previous bill of particulars, rather than new and unrelated injuries, the contested bill of particulars is a "supplemental" rather than an "amended" bill of particulars (id.), and is properly served "at any time" (CPLR 3043[b]).

Turning to her allegation of Multiple Dwelling Law and Administrative Code violations, the NYCHA has failed to demonstrate that the alleged violations constitute new theories of liability, or that it would be prejudiced if plaintiff was allowed to amend her bill of particulars to add these allegations. Neither has it demonstrated that the supplemental responses are palpably insufficient or patently devoid of merit (*cf. Roman v. 233 Broadway Owners, LLC*, 99 AD3d 882, 885 [2nd Dept 2012]). Therefore, plaintiff's service, without leave of court, of a supplemental bill of particulars

identifying "Multiple Dwelling Law section 80 and NYC Administrative Code sections 27-127 [and] 27-128" was proper under CPLR 3043(b) as a mere amplification and/or elaboration of the facts and theories of liability previously set forth in the original bill of particulars. In this regard, it is worthy of note that Administrative Code §§ 27-127 and 27-128 merely require that the owner of a building maintain its premises and be responsible for its safe condition, and do not impose liability in the absence of a breach of some specific safety provision of the Administrative Code (*see Plung v. Cohen*, 250 AD2d 430, 431 [1st Dept 1998]). Somewhat similarly, section 80 of the Multiple Dwelling Law simply requires a property owner to keep its premises clean. Hence, no new theory of liability has been asserted (*see Noetzell v. Park Ave Hill Hous Dev Fund Corp*, 271 AD2d 231, 232 [1st Dept 2000]).

The same is true of plaintiff's particularizing that the notice previously given was tendered to an employee by the name of "Tonya". This same information was provided in plaintiff's testimony at her deposition on November 30, 2011 (*see* EBT of plaintiff, pp 200-201), in her original bill of particulars and in her testimony at her 50-h hearing on May 27, 2010 (*see* Plaintiff's General Municipal Law Hearing, p 105). Therefore, no prejudice has been shown which would warrant the denial of plaintiff's cross motion, in effect, to compel acceptance of her supplemental bill (*see Altman v. Broadway Realty Co*, 101 AD2d 83, 85-86 [2nd Dept 1984]).

Under these circumstances, so much of plaintiff's cross motion for relief pursuant to CPLR 3025(c) has been rendered academic.

Accordingly, it is

ORDERED that defendant New York City Housing Authority's motion is denied; and it is further

ORDERED that plaintiff's cross motion , in effect, to compel acceptance of her supplemental bill of particulars is granted; and it is further

ORDERED that the balance of plaintiff's cross motion is denied as academic.

ENTER,

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Hon. Thomas P. Aliotta
J.S.C.

DATED: March 15, 2013