St. John's Law Review

Volume 38
Issue 2 *Volume 38, May 1964, Number 2*

Article 30

May 2013

# Bill of Particulars--Broad Interpretation of Rule 3042

St. John's Law Review

(which would require the pleading of special damages).[102] Thus, the intentional infliction of serious mental distress without physical impact is actionable per se without the necessity of pleading special damages.[103]

Where special damages are an integral element of the cause of action, the courts require considerable particularity, especially in the libel and slander cases. Thus, allegations such as those pleaded in *Cowan*[104] that the pleader had suffered special damages, with no attempt at itemization, will be deemed a pleading of general damages. Where the special damages supporting the cause of action are the loss of customers, as in *Hecht*, the specific customers lost must be named.[105] Furthermore, even where the plaintiff names specific customers who have been lost, the loss constituting special damages, the court may characterize the damages as too speculative and dismiss the complaint.[106]

The early CPLR cases indicate that under rule 3015(d), the courts may require considerable specificity in the pleading of special damages in all actions where they are sought. In view of the retention of the bill of particulars under the CPLR, such a practice would be lamentable.[107]

*Bill of Particulars — Broad Interpretation of Rule 3042*

The function of a bill of particulars is to amplify the pleading, limit the proof, and prevent surprise at the trial.[108] When the

---

[102] Halio v. Laurie, 15 App. Div. 2d 62, 222 N.Y.S.2d 759 (2d Dep't 1961).

[103] *Ibid.*

[104] 41 Misc. 2d 198, 245 N.Y.S.2d 723 (Sup. Ct. 1963); *accord,* Leather Dev. Corp. v. Dun & Bradstreet, Inc., 15 App. Div. 2d 761, 224 N.Y.S.2d 513 (2d Dep't 1962), *aff'd,* 12 N.Y.2d 909, 188 N.E.2d 270, 237 N.Y.S.2d 1007 (1963).

[105] Reporters' Ass'n of America v. Sun Printing & Publishing Ass'n, 186 N.Y. 437, 79 N.E. 710 (1906); Henkin v. News Syndicate Co., 27 Misc. 2d 987, 210 N.Y.S.2d 302 (Sup. Ct. 1960).

[106] Trachtenberg Bros. v. Henrietta Steins, Inc., 64 N.Y.S.2d 565 (Sup. Ct. 1946).

[107] The current federal practice rules do not provide for a bill of particulars since its purposes could be adequately served by a motion to make more definite, expanded machinery of discovery, and the pretrial conference. 2 MOORE, FEDERAL PRACTICE §§ 1217-20 (2d ed. 1948). In accordance with the federal practice the First and Final Reports of the Advisory Committee omitted any provision for the bill of particulars. However, the change was rejected by the Codes Committee and the bill of particulars is retained in the CPLR. See 38 ST. JOHN'S L. REV. 190, 215 n.54 (1963).

[108] Solomon v. Travelers Fire Ins. Co., 5 App. Div. 2d 1017, 174 N.Y.S.2d 85 (2d Dep't 1958); Runals v. Niagara Univ., 16 Misc. 2d 853, 185 N.Y.S.2d 315 (Sup. Ct. 1959).

demanding party considers a bill of particulars insufficient, he may move under Rule 3042 of the CPLR for an order precluding the adverse party from introducing at trial any evidence on the items which were not sufficiently particularized in the bill. A frequent problem under the predecessor of this rule[109] arose where the defendant had rightfully demanded certain particulars which plaintiff was unable to furnish at that time, but which he might have been able to furnish at a later date. Many of the courts faced with such a situation granted the motion to preclude, but made it conditional upon failure to serve a bill within a specified time ranging from ten to thirty days from service of the preclusion order.[110] Failure to comply with the conditional order often resulted in a final order of preclusion.[111]

On the other hand, many courts indicated that where an attorney had furnished the most detailed bill which circumstances permitted, and stated an inability to particularize some aspects of the claim at that time, an order of preclusion would not be granted.[112]

In a recent case,[113] defendant demanded a bill of particulars specifying which injuries plaintiff would claim as permanent in his personal injury action. Because the injury had accrued only seven months before the demand, plaintiff claimed inability to specify at the moment which injuries he would claim as permanent, and defendant deemed the bill insufficient.[114] Defendant's motion to preclude was denied, instead, the court ordered plaintiff to furnish a further bill of particulars which would specify the permanent injuries and set a time limit within which such bill would have to be served (the time being based on the court's estimate of when the information should be available to the

---

[109] CPA § 115.

[110] Dusing v. Rosasco, 31 Misc. 2d 825, 220 N.Y.S.2d 987 (Sup. Ct. 1961); Rotendi v. Vaughan, 28 Misc. 2d 656, 220 N.Y.S.2d 213 (Sup. Ct. 1961); Desimore v. Robertson, 19 Misc. 2d 80, 189 N.Y.S.2d 70 (Sup. Ct. 1959).

[111] Jackson v. Antoniac, 13 App. Div. 2d 837, 216 N.Y.S.2d 174 (2d Dep't 1961).

[112] Runals v. Niagara Univ., *supra* note 108; see Decker v. Norton, Lilly & Co., 20 Misc. 2d 948, 195 N.Y.S.2d 283 (Sup. Ct. 1960); Conver v. City of Fulton, 104 N.Y.S.2d 77 (Sup. Ct. 1951); *In re* Ernst's Will, 194 Misc. 237, 86 N.Y.S.2d 562 (Surr. Ct. 1949). On one occasion the court ordered the plaintiff to particularize to the best of his current knowledge and furnish further particulars within a specified period after the examination before trial. Rowe v. Levine, 15 App. Div. 2d 571, 222 N.Y.S.2d 951 (2d Dep't 1961).

[113] Giles v. Cornell, 40 Misc. 2d 991, 244 N.Y.S.2d 467 (Nassau County Dist. Ct. 1963).

[114] Plaintiff had stated: "Some or all of injuries may be permanent in nature. But full extent of permanency cannot be determined at this time." The court declared that this was too indefinite and hence the bill was insufficient. *Id.* at 991, 244 N.Y.S.2d at 468-69.

plaintiff). The time limitation established, thirteen months, was sufficiently in the future so that plaintiff would be able to comply with the order.

The result reached in the principal case seems to balance the interests of the parties in an equitable manner. The granting of a preclusion order against a diligent plaintiff who is unable at the time to provide the information requested would have been an unfair result. He would be prevented from establishing even his permanent injuries since the courts still prevent him from reserving the right in his bill of particulars to amplify his claim for permanent injuries that appear later.[115] His recourse is held to be a motion to amend his bill, which motion could be granted only if prejudice to the defendant would not result.[116]

On the other hand, if the court held a bill sufficient merely because a party states he is unable to furnish the particulars currently, the defendant, who has a right to know the permanency of the injuries claimed in order to prepare effectively for trial, would be seriously prejudiced. In short, the court, by taking the middle position between two extremes, has interpreted rule 3042(d) broadly and reached an equitable result.

## DISCLOSURE

### *Scope of Disclosure in Defamation Actions*

In *Nomako v. Ashton*,[117] the appellate division of the first department held that a pretrial examination will be granted in a slander action without requiring that any special circumstances be shown. Previously, first department cases held that special circumstances were required before a pretrial examination would be permitted in defamation actions.[118] The court in *Nomako* found that "there is no longer persuasive reason for a general policy against examinations in intentional tort cases, including defamation actions."

---

[115] Brett v. Sinon, 277 App. Div. 890, 98 N.Y.S.2d 54 (2d Dep't 1950); see also Chimere v. Steinle, 237 N.Y.S.2d 49 (Sup. Ct. 1962).

[116] See, *e.g.*, Handsel v. Weltz, 13 App. Div. 2d 679, 213 N.Y.S.2d 795 (2d Dep't 1961); Overgaard v. Brooklyn Bus Corp., 237 App. Div. 829, 12 N.Y.S.2d 216 (2d Dep't 1939).

[117] 247 N.Y.S.2d 230 (1st Dep't 1964).

[118] *E.g.*, Murphy v. New York World-Telegram Corp., 8 App. Div. 2d 800, 188 N.Y.S.2d 271 (1st Dep't 1959); Kollsman Instruments Corp. v. Daily Mirror Corp., 7 App. Div. 2d 975, 183 N.Y.S.2d 525 (1st Dep't 1959); Olian v. Random House, 205 Misc. 878, 130 N.Y.S.2d 787 (Sup. Ct. 1954). The rule in the second department is that an examination before trial is permitted in a libel action without proof of special circumstances. *E.g.*, Milner v. Long Island Daily Press Pub. Co., 10 App. Div. 2d 519, 205 N.Y.S.2d 14 (2d Dep't 1960).