

When Is It Too Late to Change Your Theory of the Case?

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The bill of particulars is one of the most important documents exchanged in personal injury litigation. The bill of particulars provides a plaintiff's blueprint of a case, including specificity as to the nature of injuries as well as the basis for an argument for liability. Plaintiffs are allowed to serve amended and supplemental bills of particulars throughout the course of discovery and defense attorneys will regularly use the bill of particulars as a tool directing their investigation. However, there comes a point in every case when it is too late to serve an amended bill of particulars. Specifically, after discovery has been completed, a plaintiff must seek leave from the court to amend their bill of particulars. Moreover, the standard applied by the court in deciding a motion to amend a bill of particulars is extremely narrow and circumspect. In a motion for leave to amend a bill of particulars after discovery has been completed, the movant must demonstrate a "showing of special and extraordinary circumstances." See *Schreiber-Cross v. State*, 57 A.D.3d 881, 870 N.Y.S.2d 438 (2008). The party must also provide explanation for any unreasonable delay.

In *King v. Marwest*, the plaintiff, Lisa King, advanced an entirely new theory of liability in opposition to defendant, Marwest's, summary judgment motion. See *King v. Marwest*, 192 A.D.3d 874, 143 N.Y.S.3d 673 (2021). King allegedly sustained personal injuries when she was pushing a cart through glass doors at the store where she worked. Through the course of discovery, King argued she was injured as a result of a door defect that caused the door to close too fast and hit her hand. Within her opposition papers, however, King changed her argument and claimed that she was injured because her cart became stuck on the door threshold. She now claimed that the cart became stuck while she tried to push it through the door because of a defect with the height of the door threshold and surrounding floor area, which resulted in the door hitting her hand when it closed. Simultaneously to opposing Marwest's summary judgment motion, King also served a cross-motion for leave to amend her bill of particulars, in which she raised her new theory of liability relating to a defect with the door threshold and floor. The trial court denied Marwest's motion for summary judgment and granted King's motion for leave to amend her bill of particulars. Further, the trial court allowed the parties to engage in

limited further discovery, including additional expert site inspections and an additional deposition of the plaintiff.

Interestingly, from a litigation practice standpoint, it should be noted that the trial court scheduled a conference upon the plaintiff filing the motion for leave to amend her bill of particulars. The trial court was initially reluctant to set forth a detailed order denying Marwest's motion, and essentially wanted the parties to stipulate at the court conference to allow the amended bill of particulars and additional post note of issue discovery. It is recommended that in a scenario such as this, the handling attorney request that any discovery-related decision from the court be reduced to a formal, appealable written decision. Otherwise, there will be no recourse with the appellate court.

In *King v. Marwest*, Marwest appealed the trial court's order allowing the plaintiff to serve the amended bill of particulars. The Second Department reversed the trial court's decision granting King's motion to amend her bill of particulars, and also reversed the trial court's denial of Marwest's motion for summary judgment. *King v. Marwest*, 192 A.D.3d 874, 143 N.Y.S.3d 673 (2021). In its decision, the Second Department drew a very clear line in the sand, holding that leave to amend a bill of particulars cannot be given if the plaintiff is asserting a new theory of liability, as the

plaintiff was doing in the case at hand. *Id.* Moreover, the Second Department determined that even though the trial court allowed further discovery with respect to the plaintiff's new theory of liability, allowing her to amend her bill of particulars was prejudicial to Marwest and should not have been allowed. This decision expands upon prior decisions because here, the Second Department found that there was prejudice by amending the bill of particulars following the filing of the Note of Issue despite the fact that Marwest had been allowed further discovery on the new theory of liability.

Given the Second Department's holding in *King v. Marwest*, plaintiffs who intend to amend a bill of particulars should do so prior to the filing of the note of issue. Likewise, it is important for defense attorneys to stand their ground if a plaintiff advances a new theory or new injury post after the filing of the note of issue and, importantly, not stipulate to allowing additional discovery prior to obtaining a formal court order granting a plaintiff leave to amend.



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