

NY CLS CPLR R 3042

Current through 2025 released Chapters 1-207

New York

Consolidated Laws Service >
Civil Practice Law And Rules (Arts. 1 — 100) >
Article 30 Remedies and Pleading (§§ 3001 — 3045)

R 3042. Procedure for bill of particulars

(a) Demand. A demand for a bill of particulars shall be made by serving a written demand stating the items concerning which particulars are desired. Within thirty days of service of a demand for a bill of particulars, the party on whom the demand is made shall serve a bill of particulars complying with each item of the demand, except any item to which the party objects, in which event the reasons for the objection shall be stated with reasonable particularity. The assertion of an objection to one or more of the items in the demand shall not relieve the party on whom the demand is made from the obligation to respond in full within thirty days of service of the demand to the items of the demand to which no objection has been made.

(b) Amendment. In any action or proceeding in a court in which a note of issue is required to be filed, a party may amend the bill of particulars once as of course prior to the filing of a note of issue.

(c) Failure to respond or to comply with a demand. If a party fails to respond to a demand in a timely fashion or fails to comply fully with a demand, the party seeking the bill of particulars may move to compel compliance, or, if such failure is willful, for the imposition of penalties pursuant to subdivision (d) of this rule.

(d) Penalties for refusal to comply. If a party served with a demand for a bill of particulars willfully fails to provide particulars which the court finds ought to have been

provided pursuant to this rule, the court may make such final or conditional order with regard to the failure or refusal as is just, including such relief as is set forth in section thirty-one hundred twenty-six of this chapter.

(e) Service of improper or unduly burdensome demands. If the court concludes that the demand for particulars, or a part thereof, is improper or unduly burdensome, in addition to vacating or modifying the demand, the court may make such order with regard to the improper or unduly burdensome demand as is just.

History

Add, L 1962, ch 308; amd, L 1978, ch 296, § 1, eff June 19, 1978; L 1978, ch 297, § 1; L 1984, ch 294, § 1; L 1994, ch 562, § 2, eff Jan 1, 1995.

Annotations

Notes

Prior Law:

Earlier rules: RCP 115.

Editor's Notes:

Laws 1994, ch 562, § 4, eff Jan 1, 1995, provides as follows:

§ 4. This act shall take effect on the first day of January next succeeding the date on which it shall have become a law; provided, however, it shall apply only to actions commenced on or after the effective date of this act. Actions commenced prior to the effective date of this act shall be governed by the provisions of rule 3042 of the civil practice law and rules then in effect.

1994 Recommendations of Advisory Committee on Civil Practice:

The Committee recommends the amendment of CPLR 3041, 3042 and 3044 to save the time of courts and litigants, to curtail pronounced and widespread abuses which have arisen under present law, and to improve the procedures governing the use of bills of particulars.

Under the present provisions of CPLR 3042, many attorneys serve a bill of particulars only after being served with a conditional order of preclusion. Initial requests for bills of particulars routinely are ignored. Some attorneys routinely serve prolix and burdensome demands that serve only to harass opponents. Still other attorneys routinely serve patently defective bills.

The courts are inundated with motions to preclude for failure timely to serve bills of particulars, as with motions relating to disclosure generally. Motions relating to bills of particulars are adjourned frequently, and the final determination is generally a conditional order of preclusion which may or may not be obeyed. This practice wastes judicial resources and burdens litigants.

This proposal would establish a realistic time frame for the production of a bill of particulars, would eliminate the requirement for motions to vacate improper demands and would provide the courts with a larger array of remedies for a willful failure to provide bills or for making clearly improper demands.

Currently, a party served with a demand for a bill of particulars must comply with the demand within twenty (20) days of service, or move to vacate or modify the demand within ten (10) days. This proposal would amend CPLR 3042(a) to extend the time to answer or object to a bill to thirty (30) days, and would eliminate the requirement that the party receiving the demand move to vacate the demand as improper. The party providing the bill would have to specifically object to those demands it found improper, provide reasons, with reasonable particularity, for the objection and provide the bill with regard to those items to which there was no objection.

Subdivision (b) of CPLR 3042, which allows a party seeking a bill of particulars to proceed by motion instead of demand, is deleted. This provision seldom is utilized, and the Committee is aware of no circumstances in which proceeding by motion initially is appropriate.

Present subdivision (c), to be relettered subdivision (b), would be amended to provide that a party may move to compel compliance with a demand or a response, and, if the failure to comply was willful, under new subdivision (c), may move for all the penalties available with respect to disclosure under CPLR 3126.

Present subdivision (e), governing the conditional order of preclusion, would be deleted, since the procedure is superseded by this revision. Present subdivision (f), governing affidavits, would be eliminated as unnecessary because general rules governing motions and affidavits are adequate.

Present subdivision (g) (Amendment) would be redesignated as new subdivision (e) and slightly reworded for the sake of clarity.

Present subdivision (h) (Costs) would be eliminated as superfluous (see CPLR 8106).

Finally, the language of CPLR 3042 is streamlined by making a minor amendment to CPLR 3041. “Bill of particulars” is defined to include “copy of the items of an account,” thus eliminating the need for numerous references in CPLR 3042 to the latter term.

CPLR 3044 would be amended to conform to the change made in CPLR 3041.

Nothing in the revision of this rule precludes parties or their attorneys from extending by written stipulation the time for serving any notice, motion or bill of particulars.

This measure should reduce the number of motions required with respect to bills of particulars, and improve the administration of justice.

Revision of rule 3042 also provides an opportunity to make minor grammatical and technical changes in the wording of various provisions. These changes are not intended to have any substantive effect.

Notes to Decisions

I.Under CPLR

A.In General

- 1.Generally; bills as evidence**
- 2.Particular items discoverable**
- 3.Particular items not discoverable**
- 4.Special rules for particular jurisdictions**

B.Procedure

1.In General

- 5.Generally**
- 6.Service of process and papers**
- 7.Motion to vacate or modify demand**
- 8.—Timeliness**
- 9.Sufficiency of bill generally**
- 10.Affidavits**
- 11.Amendments, generally**
- 12.—Automobile accident**
- 13.—Bailment**
- 14.—Employee injured on the job**
- 15.—Family Court proceeding**
- 16.—Medical malpractice, generally**

17.— —Obstetrics

18.— —Surgery

19.—Municipal law

20.—Negligent supervision of child

21.—Personal injury generally

22.—Slip and fall

23.Costs

2.Preclusion

24.Preclusion for failure to supply bill, generally

25.—Change of counsel

26.—Conditional order

27.—Death of party

28.—Failure of service

29.—Family Court proceeding

30.—Illness of party

31.—Law office error or failure

32.—Settlement, effect of

33.—Stipulation, effect of

34.—Unforeseeable developments

35.Preclusion for defective or insufficient bill, generally

36.—Amended bill

37.—Conditional order

38.—Failure of service

39.—Family Court proceeding

40.—Further bill

41.—Pro se plaintiff

42.—“Special circumstances”

43.—Stipulation, effect of

44.—Supplemental bill

45. Conditional order of preclusion, generally

46.—Attorney malpractice

47.—Automobile accident

48.—Breach of contract

49.—Indemnity action

50.—Medical malpractice generally

51.—Negligence generally

52.—Products liability

II. Under Former Civil Practice Laws

A. Subject Matter of Bill of Particulars

53. Generally

54.Matters within knowledge of moving party

55.Evidence

56.Identification of witnesses

57.Adverse possession and color of title

58.Payment

59.Damages

60.Statute or ordinance

61.Secret process or trade secret

B.Demand and Compliance

62.Generally

63.Form of demand or order for bill

64.Motion to vacate or modify notice

65.Discretion to require particulars

66.Effect of prior orders

67.Laches

68.Requiring particulars before answer

69.Requiring particulars before examination before trial

70.Form of bill

71.Right to serve amended or further bill

72.Lack of knowledge by party required to furnish particulars

C.Enforcing Demand for Particulars

73.Generally

74.Right to preclusion order

75.—Substantial compliance

76.—Effect of prior orders

77.Lack of knowledge of particulars required as avoiding preclusion

78.Contest by party in default

79.Motion for further particulars or preclusion

80.—Returning bill for insufficiency

81.Waiver

82.—Failure to move within ten-day period

83.Service of bill pending preclusion motion

84.Affidavits

85.—By attorney

86.Discretion

87.Conditions in preclusion order

88.Vacating preclusion order

89.Dismissal of pleading for failure to serve particulars

I. Under CPLR

A. In General

1. Generally; bills as evidence

Factual allegation in bill of particulars does not become prima facie proof at trial. Decisions regarding admissibility of factual allegations in bill of particulars are for trial court. *Morello v Saratoga Harness Racing, Inc.*, 44 A.D.2d 884, 356 N.Y.S.2d 114, 1974 N.Y. App. Div. LEXIS 4871 (N.Y. App. Div. 3d Dep't 1974).

Although bills of particulars were not in evidence, cross-examination of personal injury plaintiff concerning inconsistencies between his testimony and original bill of particulars was proper. Personal injury plaintiff's claim that he might not have understood statements made in bill of particulars because of his Spanish origin did not preclude the cross-examination of plaintiff concerning inconsistencies between his testimony and original bill of particulars, especially where there was no objection made at trial that plaintiff could not proceed because of language difficulty and ample opportunity existed for plaintiff to explain to jury inconsistencies in light of language difficulties. *Gonzalez v Colella*, 55 A.D.2d 534, 389 N.Y.S.2d 577, 1976 N.Y. App. Div. LEXIS 15180 (N.Y. App. Div. 1st Dep't 1976).

Alleged "law office failure" or "law office inadvertence" of plaintiffs' attorney was insufficient reason to excuse inordinate delay in the furnishing of bill of particulars after service upon attorney of an order of preclusion. *Outley v Pearson*, 59 A.D.2d 938, 399 N.Y.S.2d 456, 1977 N.Y. App. Div. LEXIS 14173 (N.Y. App. Div. 2d Dep't 1977), app. dismissed, 45 N.Y.2d 896, 411 N.Y.S.2d 8, 383 N.E.2d 560, 1978 N.Y. LEXIS 2316 (N.Y. 1978).

Inasmuch as issue was joined in the action in January of 1973 and plaintiffs neither requested nor moved for discovery since that time, they could not now assert that they were deprived of the opportunity to ascertain and demonstrate the extent of defendant's knowledge concerning the information sought to be precluded upon plaintiff's failure to comply with demand for bill of particulars. That a defendant might appear to have knowledge of the information sought in a bill of particulars is immaterial. Granting of a bill of particulars depends upon what the aggrieved

party claims the facts are, not upon the adversary's knowledge thereof, nor upon the actual facts. *Le Frois Foods Corp. v Policy Advancing Corp.*, 59 A.D.2d 1013, 399 N.Y.S.2d 742, 1977 N.Y. App. Div. LEXIS 14291 (N.Y. App. Div. 4th Dep't 1977).

While the compulsory financial disclosure provisions of the Equitable Distribution Law, Dom Rel Law § 236(B)(4), evinces a legislative intent that parties to a matrimonial action give full financial disclosure, and includes the use of any appropriate device authorized in CPLR Art 31, it does not alter the long-standing prohibition against pretrial discovery of information concerning the merits of a matrimonial action; accordingly, in a husband's action for a conversion divorce, the wife's demand for a bill of particulars would be vacated insofar as it sought disclosure on the merits of the action, including the question of child custody; additionally, the particulars demanded by defendant wife went far beyond a mere amplification of the pleadings, and were clearly evidentiary in nature, in that they improperly sought to obtain names and addresses of witnesses without a showing of special circumstances, discovery and inspection of documentary and physical evidence, matters upon which the wife had the burden of proof, and the grounds of the husband's legal arguments; thus, even if the particulars sought did not pertain to the merits of the matrimonial action, they were subject to vacation as being unduly burdensome and oppressive. *Ginsberg v Ginsberg*, 104 A.D.2d 482, 479 N.Y.S.2d 233, 1984 N.Y. App. Div. LEXIS 19933 (N.Y. App. Div. 2d Dep't 1984).

In personal injury action alleging that plaintiff's motorcycle was forced off road by defendant's car which had its high beam headlights on and crossed over center line of road, plaintiff's bill of particulars asserting that car lights blinded his eyes, without mentioning that car crossed center line, constituted inconsistent statement and thus was admissible against plaintiff under "statement by party opponent" exception to hearsay rule. Court should have permitted defendant to show plaintiff's bill of particulars to jury, although it was not formally introduced in evidence, since bill of particulars constitutes pleading, which is always before court. Bill of particulars submitted on behalf of infant plaintiff was not admissible as evidence-in-chief against him under "statement by party opponent" exception to hearsay rule where it was completed and verified by

infant's father. *Hayes v Henault*, 131 A.D.2d 930, 516 N.Y.S.2d 798, 1987 N.Y. App. Div. LEXIS 48356 (N.Y. App. Div. 3d Dep't 1987).

Hospital was not entitled to order striking, from medical malpractice patient's bill of particulars, allegation that she risked amputation of her leg and that she might require someone to take care of her, since factual allegation did not constitute proof, and admissibility of such evidence was for trial court to determine at time of trial on proper foundation. *Carroll v Nunez*, 137 A.D.2d 911, 524 N.Y.S.2d 578, 1988 N.Y. App. Div. LEXIS 1621 (N.Y. App. Div. 3d Dep't 1988).

Defendants were properly required to comply with plaintiff's request for verified bill of particulars regarding their affirmative defenses in negligence action, even though plaintiff's request sought information which is generally obtained through discovery and bill of particulars is not evidence-producing device, where there was no showing that defendants would suffer any prejudice by providing information requested; rigid adherence to purpose behind bill of particulars would only result in additional meaningless time-consuming motion practice. *Twiddy v Standard Marine Transport Services, Inc.*, 162 A.D.2d 264, 556 N.Y.S.2d 622, 1990 N.Y. App. Div. LEXIS 7407 (N.Y. App. Div. 1st Dep't 1990).

In action for injuries sustained when pedestrian was when struck by car, new trial would be ordered where (1) chief issue at trial was whether pedestrian was on sidewalk or on roadway at time of accident, and (2) court improperly refused to permit defendant to introduce bill of particulars in which plaintiff stated that he had been injured as result of defendant's failure to observe plaintiff's presence in roadway and his failure to keep lookout along roadway where plaintiff was crossing. Statements made in verified bill of particulars constitute informal judicial admissions and are generally admissible under exception to hearsay rule, and fact that bill of particulars was drafted by attorney presents no impediment to its admission at trial. *Payne v New Hyde Park Dodge*, 163 A.D.2d 285, 557 N.Y.S.2d 152, 1990 N.Y. App. Div. LEXIS 8239 (N.Y. App. Div. 2d Dep't 1990).

In personal injury action arising from motor vehicle accident, plaintiff was not precluded from presenting testimony concerning injury to her sub-talar joint on ground that such injury was not

set forth in bill of particulars, since testimony necessarily flowed from injuries set forth in bill of particulars, and defendants should have been aware of such injury, where (1) plaintiff sustained fracture to calcaneus bone, which was jagged as result of crush-down type fracture, (2) bone that was fractured and jagged formed joint with calcaneus bone passing over talas, (3) bill of particulars indicated that plaintiff sustained permanent consequential limitation to her right heel by reason of fractured bone, (4) hospital record mentioned ankle and stated that superior calcaneal surface was flattened, and (5) defendants had access to all medical records and never secured physical examination, although court informed defendants that they had right to do so. *Van Derzee v Knight-Ridder Broadcasting, Inc.*, 185 A.D.2d 1011, 586 N.Y.S.2d 839, 1992 N.Y. App. Div. LEXIS 9932 (N.Y. App. Div. 3d Dep't 1992).

Each defendant is entitled to separate bill of particulars specifying acts or omissions on which plaintiff's claim of negligence against him is based, as distinguished from those claimed against other defendants. *Laukaitis v Ski Stop*, 202 A.D.2d 554, 609 N.Y.S.2d 285, 1994 N.Y. App. Div. LEXIS 2659 (N.Y. App. Div. 2d Dep't 1994).

2. Particular items discoverable

In action by Argentine lawyer for professional services in an amount allegedly fixed by Argentine law, defendant is entitled to bill with respect to foreign law relied on. *Haines v Cook Electric Co.*, 20 A.D.2d 517, 244 N.Y.S.2d 483, 1963 N.Y. App. Div. LEXIS 2802 (N.Y. App. Div. 1st Dep't 1963).

In action for cancellation of deed defendant is entitled to substance of plaintiff's demand to vacate the premises, if oral, the date and place thereof, and if written, a copy thereof, all of which does not constitute evidentiary matter. *Pagliero v Baffa*, 22 A.D.2d 920, 255 N.Y.S.2d 571, 1964 N.Y. App. Div. LEXIS 2475 (N.Y. App. Div. 2d Dep't 1964).

In an action for a judicial separation, where a wife counterclaimed for money she allegedly was required to expend for her own maintenance and necessities, the plaintiff was entitled to details

with respect to an aggregate figure expressed in the counterclaim. *Olena v Olena*, 24 A.D.2d 636, 262 N.Y.S.2d 404, 1965 N.Y. App. Div. LEXIS 3494 (N.Y. App. Div. 2d Dep't 1965).

In action for damages for false arrest and malicious prosecution, demand requesting particulars as to general damages alleged in complaint was not of such a nature as to be palpably improper and plaintiff should have been directed to furnish particulars in regard to such demand. *Morello v Saratoga Harness Racing, Inc.*, 44 A.D.2d 884, 356 N.Y.S.2d 114, 1974 N.Y. App. Div. LEXIS 4871 (N.Y. App. Div. 3d Dep't 1974).

That defendants might appear to have knowledge of information sought by bill of particulars is immaterial as purpose of such bill is to advise adverse party of pleader's claim, since issue is not what facts are, but what pleader claims them to be. *Whirl Knits, Inc. v Adler Business Machines, Inc.*, 54 A.D.2d 760, 387 N.Y.S.2d 699, 1976 N.Y. App. Div. LEXIS 14422 (N.Y. App. Div. 2d Dep't 1976).

In a wrongful death action against a hospital and physician, the trial court correctly denied plaintiff's motion to vacate or modify the hospital's demand for a bill of particulars, insofar as the demand concerned claimed acts of negligence, where plaintiff's complaint did not adequately set forth a general statement of the acts or omissions constituting the negligence claim; the hospital's demand for particulars was overbroad, however, in that it sought evidentiary material. *McKenzie v St. Elizabeth Hospital*, 81 A.D.2d 1003, 440 N.Y.S.2d 109, 1981 N.Y. App. Div. LEXIS 11753 (N.Y. App. Div. 4th Dep't 1981).

In action for divorce in which defendant had counterclaimed for divorce, defendant's cross motion to strike plaintiff's demand for bill of particulars was properly denied, and conditional order of preclusion against defendant was properly granted, where defendant had not moved to strike plaintiff's demand for bill or particulars within 10-day period provided for in CLS CPLR § 3042, and items requested in plaintiff's demand were not palpably improper since plaintiff had requested only that defendant specify dates, times and places relative to allegations in his counterclaim and had requested information regarding merits of matrimonial action. *Nigro v*

Nigro, 121 A.D.2d 833, 504 N.Y.S.2d 264, 1986 N.Y. App. Div. LEXIS 58780 (N.Y. App. Div. 3d Dep't 1986).

In action by attorney to recover legal fees and disbursements for professional services rendered, Supreme Court properly denied plaintiff's motion to vacate defendants' demand for bill of particulars, since plaintiff was not proceeding only on theory of quantum meruit, where issue is only reasonableness of fees, but also pursuant to agreement to pay agreed hourly rate, thus entitling defendants to detailed description of services rendered. *Nossen v Ballinger*, 156 A.D.2d 160, 548 N.Y.S.2d 206, 1989 N.Y. App. Div. LEXIS 15310 (N.Y. App. Div. 1st Dep't 1989).

Although stating it would be more appropriate for the motorist to proceed under CPLR 3120 rather than under this section, the court held that a motorist involved in an automobile collision was entitled to a bill of particulars which set forth the complete statement made by the other motorist involved in the collision to its own insurance carrier, where that carrier sought a declaratory judgment that its liability policy had been breached by its insured's false statements and failure to cooperate and that it was not obliged to defend any action with respect to claims arising out of the accident. *Empire Mut. Ins. Co. v Cleckner*, 50 Misc. 2d 53, 269 N.Y.S.2d 466, 1966 N.Y. Misc. LEXIS 2003 (N.Y. Sup. Ct. 1966).

In will contest, objectant who made generalized claim of lack of testamentary capacity and due execution would be required to furnish bill of particulars as to which requirements of CLS EPTL § 3-2.1 (respecting execution and attestation) were allegedly not complied with, and as to details of mental illness allegedly suffered by decedent; although proponent has burden of proof concerning due execution and testamentary capacity, it was objectant who placed those requirements at issue. *In re Estate of Sheehan*, 137 Misc. 2d 310, 520 N.Y.S.2d 342, 1987 N.Y. Misc. LEXIS 2693 (N.Y. Sur. Ct. 1987).

3. Particular items not discoverable

Demand for bill of materials which sought evidentiary material should have been stricken. *Harding v Spofford Laundry Corp.*, 44 A.D.2d 804, 355 N.Y.S.2d 590, 1974 N.Y. App. Div. LEXIS 5024 (N.Y. App. Div. 1st Dep't 1974).

A demand for a bill of particulars would be vacated where much of the information demanded by plaintiff was evidentiary in nature, and included, inter alia, the names of potential witnesses. *Frequency Electronics, Inc. v We're Associates Co.*, 90 A.D.2d 822, 456 N.Y.S.2d 20, 1982 N.Y. App. Div. LEXIS 19063 (N.Y. App. Div. 2d Dep't 1982).

The trial court erred in denying defendant's motion to vacate plaintiffs' demand for a bill of particulars where the demand was overbroad, and improperly sought evidentiary material, names of possible witnesses, and matters on which plaintiffs had the burden of proof. *Fuller v New York Cent. Mut. Fire Ins. Co.*, 104 A.D.2d 727, 480 N.Y.S.2d 644, 1984 N.Y. App. Div. LEXIS 20150 (N.Y. App. Div. 4th Dep't 1984).

In an action brought to recover a referral fee, Special Term properly vacated defendant's entire demand for a bill of particulars where the individual demands were designed to elicit plaintiff's evidence in support of his claim, rather than to obtain the details of his claim, containing requests for the names of potential witnesses as well as for the details of the work which plaintiff had performed pursuant to an alleged oral contract, in that both types of demands were unacceptable as calling for evidentiary information. *Clark v Vicinanzo*, 108 A.D.2d 984, 484 N.Y.S.2d 971, 1985 N.Y. App. Div. LEXIS 43312 (N.Y. App. Div. 3d Dep't 1985).

The trial court's order directing response to defendant's demand for a bill of particulars in an action by an attorney placement service against a former employee was overly broad, where it required plaintiff to disclose tax returns, and where it enforced a demand for the actual fees paid by plaintiff to its counsel and the basis upon which such payment was made, which was clearly evidentiary and thus improper. *Fergus Associates, Inc. v Hayden*, 111 A.D.2d 662, 490 N.Y.S.2d 495, 1985 N.Y. App. Div. LEXIS 49928 (N.Y. App. Div. 1st Dep't 1985).

Bill of particulars may not be used to obtain evidentiary material; in products liability case, defendant is not entitled to seek particularization of alternative designs which plaintiff claims should have been used in connection with design of product since such particularization calls for expert testimony and is evidentiary; party may not be required to hire expert to respond to demand for bill of particulars. *Nuss v Pettibone Mercury Corp.*, 112 A.D.2d 744, 492 N.Y.S.2d 240, 1985 N.Y. App. Div. LEXIS 56107 (N.Y. App. Div. 4th Dep't 1985).

In action for breach of fire insurance contract, insured's 17-page demand for bill of particulars, consisting of 41 paragraphs and at least 170 requests for information, was unduly burdensome and oppressive and would be vacated in its entirety where many requests for information improperly sought (1) names and addresses of witnesses without showing of special circumstances, (2) discovery and inspection of documents, (3) evidentiary material, or (4) grounds for insurer's legal arguments. *176-178 Ashburton Ave. Corp. v New York Property Ins. Underwriting Assn.*, 125 A.D.2d 653, 510 N.Y.S.2d 12, 1986 N.Y. App. Div. LEXIS 62934 (N.Y. App. Div. 2d Dep't 1986).

Defendant's demand for further bill of particulars which called for plaintiffs to itemize their claimed damages of \$250,000 in breach of contract action did not require answer, since general damages were sought. *Havens v Tucker*, 136 A.D.2d 814, 523 N.Y.S.2d 648, 1988 N.Y. App. Div. LEXIS 272 (N.Y. App. Div. 3d Dep't 1988).

Court did not err in refusing to compel plaintiff to particularize matters which would be elements of claim grounded on alternative theory of liability where plaintiff had never embraced such theory and where such theory in fact formed basis of defendant's first affirmative defense. *Gottlieb v Kenneth D. Laub & Co.*, 155 A.D.2d 293, 547 N.Y.S.2d 56, 1989 N.Y. App. Div. LEXIS 14007 (N.Y. App. Div. 1st Dep't 1989).

Requests, included in plaintiff's demand for bill of particulars, which sought specification of statutes, regulations, citations or other legal authorities on which defendants would rely for their affirmative defenses in negligence action would be stricken where defenses did not raise any

allegation as to such violations. *Twiddy v Standard Marine Transport Services, Inc.*, 162 A.D.2d 264, 556 N.Y.S.2d 622, 1990 N.Y. App. Div. LEXIS 7407 (N.Y. App. Div. 1st Dep't 1990).

In wrongful death action commenced by administratrix of her husband's estate to recover for alleged medical malpractice, it was error to require plaintiff to respond to item in defendant's demand for bill of particulars that she set forth those known and material risks and hazards surrounding treatment of decedent; demand was palpably improper as it called for expert information and was purely evidentiary. *Scalone v Phelps Memorial Hosp. Center*, 184 A.D.2d 65, 591 N.Y.S.2d 419, 1992 N.Y. App. Div. LEXIS 13639 (N.Y. App. Div. 2d Dep't 1992).

Court properly directed medical malpractice plaintiffs to serve further response to item of demand for bill of particulars requesting plaintiffs to identify procedure and treatment performed without their informed consent, but it was improper to require plaintiffs to state content of warnings that should have been disclosed as well as alternative medical procedure they would have chosen had they been given such warnings. *Liddell v Cree*, 233 A.D.2d 593, 649 N.Y.S.2d 101, 1996 N.Y. App. Div. LEXIS 11441 (N.Y. App. Div. 3d Dep't 1996).

4. Special rules for particular jurisdictions

It is the rule in the Third Department that it is not necessary that a bill of particulars be furnished in response to an outstanding demand before the examination before trial is held. *Paticopoulos v Slocum House, Inc.*, 33 A.D.2d 960, 306 N.Y.S.2d 844, 1970 N.Y. App. Div. LEXIS 5668 (N.Y. App. Div. 3d Dep't 1970).

It is customary in accounting proceedings in the Surrogate's Courts that bills of particulars are not required to be furnished until after the completion of examination before trial and failure to furnish bill of particulars did not preclude examination of executrix. *In re Reis' Will*, 48 Misc. 2d 330, 264 N.Y.S.2d 731, 1965 N.Y. Misc. LEXIS 1348 (N.Y. Sur. Ct. 1965).

B. Procedure

1. In General

5. Generally

Ordinarily the question of priority as between the filing of a bill of particulars and the holding of an examination before trial is within the discretion of Special Term. *Paticopoulos v Slocum House, Inc.*, 33 A.D.2d 960, 306 N.Y.S.2d 844, 1970 N.Y. App. Div. LEXIS 5668 (N.Y. App. Div. 3d Dep't 1970).

Defendants were not entitled to motion to strike material from bill of particulars inasmuch as CPLR provides no such remedy. *Morello v Saratoga Harness Racing, Inc.*, 44 A.D.2d 884, 356 N.Y.S.2d 114, 1974 N.Y. App. Div. LEXIS 4871 (N.Y. App. Div. 3d Dep't 1974).

It was appropriate for trial court to deny plaintiff's motion to extend time to serve a bill of particulars until completion of the deposition of the defendants and to require service of an interim bill within 20 days of the publication of the order, where plaintiff's brief demonstrated knowledge sufficient to supply the information sought in the bill of particulars. *Wolfram v Stokes*, 51 A.D.2d 690, 379 N.Y.S.2d 98, 1976 N.Y. App. Div. LEXIS 11119 (N.Y. App. Div. 1st Dep't 1976).

Where plaintiffs filed three certificates of readiness with respect to two actions without making any attempt to amend bills of particulars, even though for well over two years they were fully cognizant of the new material sought to be included in the proposed bill of particulars, delay was inordinate and unjustified, despite claim of law office failure, in case almost nine years old since date of accident thus requiring that motion to amend bill of particulars be denied. *McLeod v Duffy*, 53 A.D.2d 1011, 386 N.Y.S.2d 270, 1976 N.Y. App. Div. LEXIS 15810 (N.Y. App. Div. 4th Dep't 1976).

Plaintiffs were not entitled to amend bill of particulars to assert a new theory or cause of action. *Hodaba v St. Agnes Hospital*, 55 A.D.2d 927, 390 N.Y.S.2d 637, 1977 N.Y. App. Div. LEXIS 10182 (N.Y. App. Div. 2d Dep't 1977).

Reviewing court would vacate an order granting defendant's motion for summary judgment dismissing the complaint as to him upon the condition that plaintiffs' attorney personally pay \$500 to respondent within 20 days, where trial court granted the motion on the basis that plaintiffs failed to answer the request for a bill of particulars, in that during the period that service of the bill of particulars was due and the motion for preclusion was granted plaintiffs' attorney had undergone an operation for cancer and had continued his practice on a restricted schedule; under such circumstances it is appropriate that the default be opened with costs against the attorney personally. *Konrad v Mt. Sinai Hospital*, 84 A.D.2d 828, 444 N.Y.S.2d 192, 1981 N.Y. App. Div. LEXIS 16056 (N.Y. App. Div. 2d Dep't 1981).

In an action pursuant to CPLR 3042 wherein a doctor who was charged with professional misconduct by the State Board of Professional Medical Conduct sought to stay a disciplinary hearing until the Board furnished a bill of particulars, the trial court erred in ordering a stay, where the court based its authority to grant relief upon CPLR Article 78 and in effect granted a writ of prohibition, and where the doctor had an adequate remedy in his right to bring an Article 78 proceeding following a final administrative determination. *State Bd. of Professional Medical Conduct v Schlesinger*, 84 A.D.2d 879, 444 N.Y.S.2d 736, 1981 N.Y. App. Div. LEXIS 16131 (N.Y. App. Div. 3d Dep't 1981).

Motion pursuant to CLS CPLR § 3042 is exclusive remedy for defective bill of particulars; there is no authority under statute to return defective bill to opposing party or to request further bill. *Anzalone v Preferred Mut. Ins. Co.*, 121 A.D.2d 491, 504 N.Y.S.2d 12, 1986 N.Y. App. Div. LEXIS 58469 (N.Y. App. Div. 2d Dep't 1986).

Supreme Court did not commit reversible error in requiring plaintiff to respond to defendant's demand for bill of particulars, even though court itself had redrafted one of defendant's demands, where plaintiff had failed to make timely objection to defendant's demand, court was therefore empowered to order plaintiff to furnish bill as demanded by defendant, and court's redrafting of one demand was merely attempt to expedite litigation which had been characterized by dilatory and harassing tactics. *Capoccia v Brognano*, 126 A.D.2d 323, 513

N.Y.S.2d 863, 1987 N.Y. App. Div. LEXIS 41238 (N.Y. App. Div. 3d Dep't), app. dismissed, 70 N.Y.2d 742, 519 N.Y.S.2d 964, 514 N.E.2d 384, 1987 N.Y. LEXIS 18588 (N.Y. 1987), app. dismissed, 70 N.Y.2d 743, 519 N.Y.S.2d 965, 514 N.E.2d 385, 1987 N.Y. LEXIS 18589 (N.Y. 1987), app. dismissed, 70 N.Y.2d 743, 519 N.Y.S.2d 965, 514 N.E.2d 385, 1987 N.Y. LEXIS 18590 (N.Y. 1987).

Defendants were entitled to summary judgment dismissing complaint on ground of plaintiff's failure to serve bill of particulars where (1) plaintiff finally served bill after 2 ½ -year delay and only in response to defendants' summary judgment motion, (2) plaintiff had not moved to vacate her default in timely serving bill, and (3) plaintiff failed to establish meritorious claim. *Turbowitz v Mapeth, Inc.*, 140 A.D.2d 433, 528 N.Y.S.2d 135, 1988 N.Y. App. Div. LEXIS 4919 (N.Y. App. Div. 2d Dep't 1988).

In action by administratrix against hospital for conscious pain and suffering of decedent, who left no distributees eligible to maintain wrongful death action, it was error for court to grant motion to strike word "death" from plaintiff's bill of particulars; since estate was entitled to recover funeral expenses under CLS EPTL § 11-3.3, inclusion of word "death" in bill of particulars was proper, and was not attempt to add nonviable cause of action for wrongful death. *Seitzman v Hospital of Albert Einstein College of Medicine*, 167 A.D.2d 177, 561 N.Y.S.2d 249, 1990 N.Y. App. Div. LEXIS 13495 (N.Y. App. Div. 1st Dep't 1990).

Because exclusive remedy for defective or insufficient bill of particulars is provided by CPLR § 3042(d) by way of motion for preclusion or to direct service of further bill, court erred in granting summary judgment for defendants at time when plaintiffs were not precluded from submitting medical evidence because no preclusion order had been granted, and defendants, having failed to meet their burden of showing that plaintiffs' cause of action had no merit, could not rely on plaintiffs' failure to show that their cause of action had merit. *Zetko v McDonald's Corp.*, 174 A.D.2d 1056, 572 N.Y.S.2d 219, 1991 N.Y. App. Div. LEXIS 9025 (N.Y. App. Div. 4th Dep't 1991).

In wrongful death action commenced by administratrix of her husband's estate to recover for alleged medical malpractice, it was improvident exercise of discretion to hold that plaintiff was required to serve further bill of particulars in connection with her claim for lack of informed consent before defendants were required to serve bills of particulars regarding affirmative defenses of informed consent, since plaintiff's original bill of particulars was adequate, and defendants had burden of proof with respect to their affirmative defense. *Scalone v Phelps Memorial Hosp. Center*, 184 A.D.2d 65, 591 N.Y.S.2d 419, 1992 N.Y. App. Div. LEXIS 13639 (N.Y. App. Div. 2d Dep't 1992).

Supreme Court improperly exercised its discretion in extending time to file bill of particulars where it based its determination solely on plaintiff's delay during 45-day period following expiration of conditional preclusion order, and ignored prior delays that had occurred following service of request for bill of particulars more than 3 years earlier; it was clear that plaintiff had demonstrated "calculated indifference to the CPLR." *Williams v Harrington*, 216 A.D.2d 761, 628 N.Y.S.2d 842, 1995 N.Y. App. Div. LEXIS 6573 (N.Y. App. Div. 3d Dep't 1995), app. dismissed in part, app. denied, 87 N.Y.2d 967, 642 N.Y.S.2d 194, 664 N.E.2d 1257, 1996 N.Y. LEXIS 291 (N.Y. 1996).

Nothing in CPLR limits use of demand for bill of particulars until after disclosure. *Foster v Moses Ludington Hosp.*, 223 A.D.2d 905, 636 N.Y.S.2d 220, 1996 N.Y. App. Div. LEXIS 388 (N.Y. App. Div. 3d Dep't 1996).

Where certain information sought in defendant's demand for a bill of particulars was a matter of public record and thus could be ascertained by plaintiff before an examination of defendant, and where other information demanded by defendant had been partially answered by plaintiff in an affirmation on a motion, plaintiff was required to answer such demands as were within its present knowledge before conducting defendant's examination. When a pleader can supply certain demands for a bill of particulars without examination before trial, better practice requires that he should do so to the extent of his ability and state therein that a supplemental bill of particulars will be served on completion of examination before trial. *Warriner Smith Util., Inc. v*

Intercoast Ellenville Associates, 85 Misc. 2d 495, 380 N.Y.S.2d 947, 1976 N.Y. Misc. LEXIS 2020 (N.Y. Sup. Ct. 1976).

In a Court of Claims action, a bill of particulars may be obtained merely by service of a written demand therefor (CPLR 3042; 22 NYCRR 1200.18) since a bill of particulars serves as an amplification of the pleadings and not as a method of obtaining evidence. *Little v State*, 100 Misc. 2d 57, 418 N.Y.S.2d 289, 1979 N.Y. Misc. LEXIS 2412 (N.Y. Ct. Cl. 1979).

Motion for preclusion order relating to bill of particulars would be denied without prejudice where request for relief was predicated upon CLS CPLR § 3124, relating to disclosure, whereas proper procedure to seek order was contained in CLS CPLR § 3042. *Galtman v Edelman*, 134 Misc. 2d 599, 511 N.Y.S.2d 1011, 1987 N.Y. Misc. LEXIS 2073 (N.Y. Sup. Ct. 1987)).

It is not inappropriate to request bill of particulars after depositions have been held. *Rodriguez v Scovill, Inc.*, 171 Misc. 2d 840, 656 N.Y.S.2d 120, 1997 N.Y. Misc. LEXIS 74 (N.Y. Sup. Ct. 1997).

Objections to the timeliness of claimant's notice of claim in an action asserting sexual harassment by a state employee did not have to be raised in a verified bill of particulars and those objections were not untimely although raised 5 ½ years after suit was brought because claimant could have made a motion to compel compliance under N.Y. C.P.L.R. 3042(c). *Czynski v State of New York*, 838 N.Y.S.2d 414, 16 Misc. 3d 465, 2007 N.Y. Misc. LEXIS 3695 (N.Y. Ct. Cl. 2007), *aff'd*, 53 A.D.3d 881, 861 N.Y.S.2d 845, 2008 N.Y. App. Div. LEXIS 6154 (N.Y. App. Div. 3d Dep't 2008).

6. Service of process and papers

In an action in which plaintiffs never complied with the defendant's conditional order of preclusion and in which plaintiffs' papers averred that it appeared that the order was mailed but never received and surmised that the document was lost in the mail, plaintiff raised no question of fact and therefore defendant's motion for summary judgment, made 14 months after the

mailing, was properly granted since a properly executed affidavit of service raises a presumption that a proper mailing occurred and, by statute, services completed upon mailing (CPLR § 2103(b)(2)). *Engel v Lichterman*, 62 N.Y.2d 943, 479 N.Y.S.2d 188, 468 N.E.2d 26, 1984 N.Y. LEXIS 4464 (N.Y. 1984).

It is better practice to serve demand for bill of particulars and demand for discovery of documents separately. *Harding v Spofford Laundry Corp.*, 44 A.D.2d 804, 355 N.Y.S.2d 590, 1974 N.Y. App. Div. LEXIS 5024 (N.Y. App. Div. 1st Dep't 1974).

Plaintiff's bill of particulars was timely served on March 25, 1981, in compliance with the terms of a 20-day conditional order of preclusion, which was expressly authorized by CPLR § 3042(e), and which was served upon plaintiff by mail on March 2, 1981, since CPLR § 2013(b)(2) applies to a time limit set by statute and by the court, which section authorizes service of papers upon a party in a pending action by mailing them to the parties' attorney, and provides that three days be added to the period of time prescribed by law for service of the paper when that service is by mail, and since the extension provided in that section constitutes legislative recognition of and compensation for delays inherent in mail delivery, which occur regardless of how the number of days for responding is fixed. *Corradetti v Dales Used Cars*, 102 A.D.2d 272, 477 N.Y.S.2d 779, 1984 N.Y. App. Div. LEXIS 18337 (N.Y. App. Div. 3d Dep't 1984).

Bill of particulars was timely served where plaintiff's counsel submitted affidavit of legal assistant swearing that she placed bill of particulars in mail on particular date, notwithstanding assertion of defendant's counsel that bill of particulars was not received until many months later, since affidavit of legal assistant raised presumption that proper mailing occurred, and defendant's counsel did not claim that address to which bill of particulars was mailed was incorrect in any respect; mere denial of receipt was insufficient to overcome presumption and trigger need for hearing. Notice of motion to preclude was timely served within 10 days of receipt of bill of particulars, notwithstanding contention that bill of particulars was originally mailed months earlier, since presumption of mailing and service of bill of particulars did not relate to defendant's time to file motion to preclude, which was triggered by actual receipt of bill of particulars; thus,

notice was timely served where defendant's counsel asserted, in absence of contrary proof, that he did not actually receive bill of particulars until date many months after original mailing and less than 10 days before notice of motion was served. *Andersen v Mazza*, 193 A.D.2d 898, 597 N.Y.S.2d 769, 1993 N.Y. App. Div. LEXIS 4805 (N.Y. App. Div. 3d Dep't 1993).

Wife was entitled to an order compelling the husband to serve a bill of particulars in response to her demand because the demand concerned the family offense petition filed in the proceeding and leave of court was unnecessary to serve a demand for a bill of particulars, regardless of whether a family offense proceeding constituted a "special proceeding" where the purpose of a bill of particulars was to amplify the pleadings, limit the proof, and prevent surprise at trial. *Matter of Carlos L. v Sandy C.*, 51 Misc. 3d 506, 25 N.Y.S.3d 822, 2016 N.Y. Misc. LEXIS 194 (N.Y. Fam. Ct. 2016).

7. Motion to vacate or modify demand

In action for separation where complaint complies with CPLR 3016(c), demand for particulars of general course of conduct of defendant will be vacated. And, demand for particulars of specific acts will be also be vacated where complaint is sufficiently informative. *Jacobs v Jacobs*, 20 A.D.2d 812, 248 N.Y.S.2d 761, 1964 N.Y. App. Div. LEXIS 4169 (N.Y. App. Div. 2d Dep't 1964).

Where demand for bill is unreasonably burdensome, far reaching, and oppressive, in demanding many items patently objectionable, the remedy is not successive prunings by the court, but a vacatur of entire demand. *Vicidomini v State*, 21 A.D.2d 837, 250 N.Y.S.2d 85, 1964 N.Y. App. Div. LEXIS 3646 (N.Y. App. Div. 3d Dep't 1964).

Although a cross-motion to motion for preclusion order under CPLR § 3042, subd c was properly granted in the exercise of discretion and in the interest of orderly procedure to stay service of bill of particulars until after an examination before trial so that entire bill could be better prepared, court warned that in the future a failure to seek appropriate timely relief under CPLR § 3042, subd a would be penalized by the imposition of costs. *Bernard Cesar, Inc. v Eberle*, 41 A.D.2d 898, 342 N.Y.S.2d 509, 1973 N.Y. App. Div. LEXIS 4745 (N.Y. App. Div. 4th Dep't 1973).

Failure of party to vacate or modify notice indicating and concerning which particulars are desired will not permit that party to later have relief which he could have had with timely procedure. *Morello v Saratoga Harness Racing, Inc.*, 44 A.D.2d 884, 356 N.Y.S.2d 114, 1974 N.Y. App. Div. LEXIS 4871 (N.Y. App. Div. 3d Dep't 1974).

In an action against an insurance company for an alleged breach of an insurance contract, the insurance company was improperly ordered to furnish a bill of particulars on the issues of the value of the insured building and its contents, since the burden of proof as to such issues is on the plaintiff. *New England Seafoods, Inc. v Travelers Cos.*, 84 A.D.2d 676, 446 N.Y.S.2d 628, 1981 N.Y. App. Div. LEXIS 15798 (N.Y. App. Div. 4th Dep't 1981).

In an action by plaintiff to recover for legal services rendered by plaintiff on behalf of defendant, plaintiff's motion to preclude defendant from offering evidence on his counterclaim because of defendant's failure to serve a verified bill of particulars pursuant to plaintiff's demand was improperly denied and would be granted unless defendant, who had made no motion to vacate and modify the demand pursuant to CPLR § 3042, furnished such a bill within 20 days after service upon him of a copy of the order. *Waldman v Allen*, 87 A.D.2d 817, 448 N.Y.S.2d 770, 1982 N.Y. App. Div. LEXIS 16272 (N.Y. App. Div. 2d Dep't 1982).

The trial court erred in denying plaintiff's motion for a protective order vacating defendant's entire demand for a bill of particulars in a dog bite case where the demand was unduly burdensome and oppressive in that it called for evidentiary material and material upon which defendant had the burden of proof, and the demand for names and addresses of witnesses to the incident was also improper absent a showing of special and unusual circumstances to warrant such disclosure. *Nazario v Fromchuck*, 90 A.D.2d 483, 454 N.Y.S.2d 476, 1982 N.Y. App. Div. LEXIS 18493 (N.Y. App. Div. 2d Dep't 1982).

In a medical malpractice action, Special Term erred in striking from plaintiff's bill of particulars items relating to claimed damages for future loss of earnings and the reasonable value of nursing and custodial services performed by members of plaintiff's family, since the issue of whether plaintiff would be permitted to introduce evidence with respect to the claimed damages

is a matter for determination by the trial court, not by Special Term. *Nordhauser v New York City Health & Hospitals Corp.*, 102 A.D.2d 818, 476 N.Y.S.2d 380, 1984 N.Y. App. Div. LEXIS 18989 (N.Y. App. Div. 2d Dep't 1984).

Demand for bill of particulars that included improper requests for information should be vacated with leave to amend rather than pruned. *Simpson Electric Corp. v Leucadia, Inc.*, 130 A.D.2d 738, 516 N.Y.S.2d 39, 1987 N.Y. App. Div. LEXIS 46750 (N.Y. App. Div. 2d Dep't 1987).

Court properly denied plaintiff's motion to modify demand for bill of particulars where (1) papers in support thereof did not specify objections and grounds therefor, (2) it was alleged in wholly conclusory terms that "defendant's demands call for evidentiary details properly disclosed by way of the disclosure devices of Article 31 of the CPLR," and (3) only demands specifically addressed in motion, those seeking information as to medical treatment and expense, were allowable. *Pump v Anchor Motor Freight, Inc.*, 138 A.D.2d 849, 525 N.Y.S.2d 959, 1988 N.Y. App. Div. LEXIS 2906 (N.Y. App. Div. 3d Dep't 1988).

In a motorist's personal injury action that arose from a vehicle accident with a tractor trailer, the motorist was not entitled to serve an amended bill of particulars without leave of court because the note of issue had already been filed, she failed to make the requisite showing of special and extraordinary circumstances, and the pleading presented a new theory not raised either in the complaint or in the original bill of particulars. *Stewart v Dunkleman*, 128 A.D.3d 1338, 8 N.Y.S.3d 515, 2015 N.Y. App. Div. LEXIS 3659 (N.Y. App. Div. 4th Dep't), app. denied, 26 N.Y.3d 902, 38 N.E.3d 828, 17 N.Y.S.3d 82, 2015 N.Y. LEXIS 2248 (N.Y. 2015).

Motion to vacate demand for bill of particulars would be denied where it merely asserted that many of demands were palpably improper, that entire demand was unreasonable, and that attorneys for parties made unsuccessful attempts to speak to each other, since mere recitation of phone calls to opposing counsel without any discussion of specific objections is insufficient to comply with 22 NYCRR § 202.7. *Yankee Trails, Inc. v Jardine Ins. Brokers, Inc.*, 145 Misc. 2d 282, 546 N.Y.S.2d 534, 1989 N.Y. Misc. LEXIS 647 (N.Y. Sup. Ct. 1989).

8. —Timeliness

The court had discretion to vacate a demand even though movant failed to move within five days after receipt of demand. The court has also has discretion to vacate a demand even though movant failed to move within five days after receipt of demand. *Jacobs v Jacobs*, 20 A.D.2d 812, 248 N.Y.S.2d 761, 1964 N.Y. App. Div. LEXIS 4169 (N.Y. App. Div. 2d Dep't 1964).

Plaintiffs, in negligence and breach of warranty action, could not resist defendant's motion for a further bill of particulars on theories that defendant was seeking evidentiary material and was going beyond the proper nature and extent of information it could demand where plaintiff did not make a motion to vacate or modify the notice in whole or in part within five days after receipt of request for bill of particulars and where defendant's demand for more specific particulars as to defect of part and manner in which defendant was negligent was not "palpably improper." *Goldstein v Brogan Cadillac Oldsmobile Corp.*, 46 A.D.2d 799, 361 N.Y.S.2d 48, 1974 N.Y. App. Div. LEXIS 3613 (N.Y. App. Div. 2d Dep't 1974).

When demand for bill of particulars is for essential and material facts, failure to move to vacate demand within ten days may be determinative factor in granting motion for preclusion but where demands are "palpably improper" court may rely on its implicit discretionary authority and examine contents of demand to perceive if that which is sought is proper and relevant despite failure of party opposing motion to timely move to vacate or modify demand. *Peri v State*, 54 A.D.2d 997, 388 N.Y.S.2d 54, 1976 N.Y. App. Div. LEXIS 14958 (N.Y. App. Div. 3d Dep't 1976).

In an action to recover damages for harassment, defendants' motion to vacate plaintiff's notice requesting a bill of particulars was properly denied where the motion to vacate was untimely, and where the requested items were not palpably improper. *Ritschl v Highland Falls*, 92 A.D.2d 586, 459 N.Y.S.2d 473, 1983 N.Y. App. Div. LEXIS 16840 (N.Y. App. Div. 2d Dep't 1983).

In action for divorce in which defendant had counterclaimed for divorce, defendant's cross motion to strike plaintiff's demand for bill of particulars was properly denied, and conditional order of preclusion against defendant was properly granted, where defendant had not moved to

strike plaintiff's demand for bill or particulars within 10-day period provided for in CLS CPLR § 3042, and items requested in plaintiff's demand were not palpably improper since plaintiff had requested only that defendant specify dates, times and places relative to allegations in his counterclaim and had requested information regarding merits of matrimonial action. *Nigro v Nigro*, 121 A.D.2d 833, 504 N.Y.S.2d 264, 1986 N.Y. App. Div. LEXIS 58780 (N.Y. App. Div. 3d Dep't 1986).

Plaintiffs did not waive their right to oppose defendant's untimely motion for order of preclusion by consenting to preliminary disclosure order since order merely deferred resolution of dispute concerning bills of particulars until formal motion was made pursuant to CLS CPLR § 3042. Special Term properly denied defendant's motion for order of preclusion or for order directing service of further bills of particulars since motion was made after 10-day period within which party must move for such relief; although defendant did voice objection to bills of particulars in its request for preliminary disclosure conference, that procedure could not be deemed equivalent of, or substitute for, motion pursuant to CLS CPLR § 3042 in view of vastly divergent notice requirements of each procedure. *Martin v We're Associates, Inc.*, 127 A.D.2d 568, 511 N.Y.S.2d 368, 1987 N.Y. App. Div. LEXIS 43039 (N.Y. App. Div. 2d Dep't 1987).

Plaintiff's motion to dismiss defendants' affirmative defenses did not suspend their obligation to timely move to vacate or modify plaintiff's subsequent demands for bills of particulars, since bill of particulars is not disclosure device. *Pagones v Maddox*, 172 A.D.2d 809, 569 N.Y.S.2d 180, 1991 N.Y. App. Div. LEXIS 5380 (N.Y. App. Div. 2d Dep't 1991).

Where plaintiff is honestly unable to state in bill which injuries are permanent, court can fix a date when plaintiff must make such statement. *Giles v Cornell*, 40 Misc. 2d 991, 244 N.Y.S.2d 467, 1963 N.Y. Misc. LEXIS 1358 (N.Y. Dist. Ct. 1963).

Executrix was not entitled to a protective order against discovery proceeding on basis that bill of particulars had not been served where the failure to move to vacate or modify the demand for the bill of particulars within five days after receipt thereof was satisfactorily explained by the

unexpected death of counsel's father. In re Reis' Will, 48 Misc. 2d 330, 264 N.Y.S.2d 731, 1965 N.Y. Misc. LEXIS 1348 (N.Y. Sur. Ct. 1965).

9. Sufficiency of bill generally

Where employer's demand for bill of particulars filed an action brought by employee to recover for injuries allegedly sustained while working in employer's railroad yards did not specifically request identification of statutes relied upon by employee but only the "respect" in which employer may have violated Federal Employers' Liability Act or any other federal statutes, employee's bill of particulars which alleged, inter alia, that employer was negligent in failing to give employee a reasonably safe place to work was responsive, even though it did not specifically identify federal statutes alleged to have been violated. *Richards v South B. R. Co.*, 54 A.D.2d 310, 388 N.Y.S.2d 479, 1976 N.Y. App. Div. LEXIS 14033 (N.Y. App. Div. 4th Dep't 1976).

In plaintiff's action to recover for damages to property and for business losses as result of fire, plaintiff's response to defendants' bill of particulars' demand for sections of law claimed to have been violated by plaintiff, that such items were not proper subject of bill of particulars, was inadequate and defendants were entitled to have plaintiff specify statutes or ordinances claimed to have been violated as well as particulars concerning violations placed on subject building. *Whirl Knits, Inc. v Adler Business Machines, Inc.*, 54 A.D.2d 760, 387 N.Y.S.2d 699, 1976 N.Y. App. Div. LEXIS 14422 (N.Y. App. Div. 2d Dep't 1976).

It was reversible error to permit defendant to introduce evidence of certain defects in connection with counterclaim in breach of contract action where plaintiff had demanded, in bill of particulars, statement of "nature of the alleged defects," to which defendant had responded "Not applicable." *Tri-State Aluminum Products, Inc. v Wecher*, 128 A.D.2d 697, 513 N.Y.S.2d 242, 1987 N.Y. App. Div. LEXIS 44385 (N.Y. App. Div. 2d Dep't 1987).

Disposition of motion addressed solely to alleged defects in bill of particulars does not establish law of the case with respect to substantive evidentiary issues subsequently raised. *Levitt v*

Lenox Hill Hosp., 184 A.D.2d 427, 585 N.Y.S.2d 401, 1992 N.Y. App. Div. LEXIS 8595 (N.Y. App. Div. 1st Dep't 1992).

Affirmation and claim of permanency, as alleged in plaintiff's bill of particulars, that "damage to [his] ankle will have permanent effects," was insufficient to notify defendants of claim for loss of future earnings. *Seargent v Berben*, 235 A.D.2d 1024, 652 N.Y.S.2d 904, 1997 N.Y. App. Div. LEXIS 765 (N.Y. App. Div. 3d Dep't 1997).

In a vehicle passenger's action against a driver and another motorist, arising from a motor vehicle collision, the significant disfigurement category of serious injury was adequately raised in the amended verified bills of particulars filed after summary judgment motions, such that it would have remained "intact" following a summary judgment hearing and accordingly, the trial court properly addressed it during the motion. *Cook v Peterson*, 137 A.D.3d 1594, 28 N.Y.S.3d 501, 2016 N.Y. App. Div. LEXIS 1982 (N.Y. App. Div. 4th Dep't 2016).

Allegation in bill of particulars that plaintiff will seek to charge defendant with future medical services and expenses constitutes a "reservation clause" which is improper. *Pistorio v Levine*, 43 Misc. 2d 262, 250 N.Y.S.2d 709, 1964 N.Y. Misc. LEXIS 1637 (N.Y. Sup. Ct. 1964).

The responses of the bill of particulars should be chronologically numbered to coincide with the demand of the defendant. *Macri v St. Agnes Cemetery, Inc.*, 44 Misc. 2d 702, 255 N.Y.S.2d 278, 1965 N.Y. Misc. LEXIS 2392 (N.Y. Sup. Ct. 1965).

Letter written by defendants' counsel to plaintiffs' attorney in regard to alleged insufficiency of bill of particulars in effort to comply with requirement of 22 NYCRR § 202.7(a) that counsel make good faith attempt to resolve problem was not basis for toll or extension of time to move against defective bill of particulars, as no special circumstances existed. *Russo v Inserra Supermarkets*, 152 Misc. 2d 357, 576 N.Y.S.2d 764, 1991 N.Y. Misc. LEXIS 639 (N.Y. Sup. Ct. 1991).

Although an aggrieved candidate failed to verify her bill of particulars with respect to her fraud allegations in an election dispute, such was not a fatal defect that required preclusion of her fraud allegations because the "bill of particulars" required by the special election part rules was

not a bill of particulars subject to the requirements of the regular civil procedure rules. *Thomas v Eugene*, 973 N.Y.S.2d 529, 41 Misc. 3d 418, 2013 N.Y. Misc. LEXIS 3529 (N.Y. Sup. Ct. 2013).

The trial court erred in denying a county's motion to compel the parents of an injured child to serve a supplemental bill of particulars and more complete answers to discovery demands pursuant to N.Y. C.P.L.R. 3042(d), because in responding to the county's demand for discovery, the parents of an injured child failed to provide information concerning the collateral sources, if any, from which the parents had recovered or expect to recover for items other than medical expenses set forth in the county's demand for discovery, and the parents further failed to respond to the request for information concerning special damages. *Mawhinney v Rumpf*, 298 A.D.2d 885, 747 N.Y.S.2d 836, 2002 N.Y. App. Div. LEXIS 8910 (N.Y. App. Div. 4th Dep't 2002).

10. Affidavits

In a medical malpractice action in which plaintiffs failed to comply with a conditional order of preclusion requiring them to serve a bill of particulars, it was error as a matter of law not to have granted defendant hospital's motion for summary judgment, in the absence of a sufficient affidavit of merits; plaintiff's verified complaint could not be accepted as an affidavit of merits, since plaintiff's claim of negligence in the failure to diagnose cancer, and in the performance of abdominal operation, required expert evidence and the complaint could include none. *Fiore v Galang*, 64 N.Y.2d 999, 489 N.Y.S.2d 47, 478 N.E.2d 188, 1985 N.Y. LEXIS 16687 (N.Y. 1985).

A motion for leave to serve an amended bill must be supported by an affidavit of a person with knowledge of the facts, and omission of such affidavit requires a denial if opposed by the other side, even without the submission of opposing affidavits. *Montondo v Petty*, 21 A.D.2d 975, 252 N.Y.S.2d 943, 1964 N.Y. App. Div. LEXIS 3182 (N.Y. App. Div. 4th Dep't 1964).

Hospital and 2 individual defendants were not entitled to summary judgment dismissing medical malpractice against them where affidavits of their medical experts were conclusory and did not attempt to refute, by specific factual reference, allegations of negligence in bills of particulars.

Kenny v Parkway Hosp., 281 A.D.2d 596, 722 N.Y.S.2d 167, 2001 N.Y. App. Div. LEXIS 3111 (N.Y. App. Div. 2d Dep't 2001).

11. Amendments, generally

While leave to amend bill of particulars is to be freely given in absence of showing of prejudice, judicial discretion in allowing such amendment on eve of trial should be discreet, circumspect, prudent and cautious. Leon v Central General Hosp., 156 A.D.2d 338, 548 N.Y.S.2d 291, 1989 N.Y. App. Div. LEXIS 15400 (N.Y. App. Div. 2d Dep't 1989).

Plaintiffs were not relieved of requirement of seeking leave to amend bill of particulars under CLS CPLR § 3042 to include psychological injuries on ground that such injuries allegedly sustained by plaintiff were merely “logical sequelae” of physical injuries recited in earlier bill of particulars. Thomas v Mat Power, Inc., 205 A.D.2d 525, 613 N.Y.S.2d 55, 1994 N.Y. App. Div. LEXIS 5991 (N.Y. App. Div. 2d Dep't 1994).

Court properly denied plaintiff's motion for leave to amend his bill of particulars where (1) he first moved to amend after commencement of trial and approximately 10 years after commencement of action, (2) he offered no reasonable excuse for extended delay, (3) there was no affidavit from him as to merits of motion, and (4) his injury occurred approximately 18 years prior to application for leave to amend, thus hindering defendant's discovery as to new allegations. Volpe v Good Samaritan Hosp., 213 A.D.2d 398, 623 N.Y.S.2d 330, 1995 N.Y. App. Div. LEXIS 2492 (N.Y. App. Div. 2d Dep't 1995).

Amended bill of particulars was nullity where it was not served prior to note of issue, and plaintiffs did not seek leave of court to amend bill of particulars. Leon v First Nat'l City Bank, 224 A.D.2d 497, 637 N.Y.S.2d 482, 1996 N.Y. App. Div. LEXIS 1186 (N.Y. App. Div. 2d Dep't 1996).

It was abuse of discretion to deny plaintiff's motion to amend her bill of particulars where proposed amendment was merely embellishment of theory of liability contained in original bill of

particulars. *Dent v Siara Mgmt.*, 225 A.D.2d 1032, 639 N.Y.S.2d 768, 1996 N.Y. App. Div. LEXIS 2850 (N.Y. App. Div. 4th Dep't 1996).

It was abuse of discretion to deny plaintiff's motion for leave to amend their bill of particulars where defendants failed to show that they would suffer any prejudice if motion were granted. *Benjamin v Desai*, 228 A.D.2d 764, 643 N.Y.S.2d 717, 1996 N.Y. App. Div. LEXIS 6412 (N.Y. App. Div. 3d Dep't 1996).

Court properly denied plaintiffs' motion for leave to amend their bill of particulars to claim that all statutes alleged in their notice of claim had been violated by defendants since statutes sought to be referenced were not in plaintiffs' complaint, bill of particulars, or in any other pleading, notice of claim was served over 5 years earlier than their motion for leave to amend, note of issue and certificate of readiness had been served, and no discovery as to any of claims in question was ever conducted. *Hedlund v County of Tompkins*, 235 A.D.2d 980, 652 N.Y.S.2d 877, 1997 N.Y. App. Div. LEXIS 744 (N.Y. App. Div. 3d Dep't), app. dismissed, 89 N.Y.2d 1086, 659 N.Y.S.2d 859, 681 N.E.2d 1306, 1997 N.Y. LEXIS 1233 (N.Y. 1997), app. denied, 90 N.Y.2d 808, 664 N.Y.S.2d 269, 686 N.E.2d 1364, 1997 N.Y. LEXIS 3086 (N.Y. 1997).

Court abused its discretion in granting plaintiff's motion for leave to serve amended bill of particulars where she failed to offer reasonable excuse for her inordinate delay in seeking to add new injuries, and her medical affidavit failed to sufficiently show nexus between new injuries and her accident. *Smith v Plaza Transp. Ambulance Serv.*, 243 A.D.2d 555, 665 N.Y.S.2d 513, 1997 N.Y. App. Div. LEXIS 9828 (N.Y. App. Div. 2d Dep't 1997).

In action under CLS Labor § 241(6), court properly denied plaintiff's motion to amend bill of particulars to allege defendant's violation 12 NYCRR § 23-1.7(e)(1) and (2) since those regulations did not apply to instant situation involving out-of-doors worn dirt pathway. *Gavigan v Bunkoff Gen. Contrs.*, 247 A.D.2d 750, 669 N.Y.S.2d 69, 1998 N.Y. App. Div. LEXIS 1577 (N.Y. App. Div. 3d Dep't), app. denied, 92 N.Y.2d 804, 677 N.Y.S.2d 779, 700 N.E.2d 318, 1998 N.Y. LEXIS 1868 (N.Y. 1998).

Court properly denied plaintiff's motion for leave to serve supplemental and amended verified bills of particulars where motion was made some 11 years after commencement of action, and several years after action had been certified ready for trial by filing of note of issue, amendments consisted of addition of new series of liability not readily discernible from contents of original bill of particulars, and would require defendants to reorient their defense strategy, and only excuse offered for delay in making motion was based on assertion that plaintiff's counsel had only recently consulted with type of medical expert who could have been and should have been consulted some 10 years earlier. *Markarian v Hundert*, 262 A.D.2d 369, 691 N.Y.S.2d 165, 1999 N.Y. App. Div. LEXIS 6340 (N.Y. App. Div. 2d Dep't 1999).

Court erred in failing to compel defendants to accept plaintiff's amended and supplemental bill of particulars, even though plaintiff did not provide reasonable excuse for delay in seeking to amend and did not provide affidavit of merit, where amendment sought to allege more specifically precise nature of injuries set forth in original bill, matter had not yet been placed on trial calendar, no certificate of readiness had been filed, and defendants did not assert prejudice by such amendment. *Tsachalis v City of Mt. Vernon*, 262 A.D.2d 399, 690 N.Y.S.2d 746, 1999 N.Y. App. Div. LEXIS 6390 (N.Y. App. Div. 2d Dep't 1999), overruled in part, *Kooper v Kooper*, 74 A.D.3d 6, 901 N.Y.S.2d 312, 2010 N.Y. App. Div. LEXIS 4067 (N.Y. App. Div. 2d Dep't 2010).

In action under CLS Labor § 241(6), court abused its discretion in denying plaintiff's motion for leave to amend bill of particulars to include alleged violations of Industrial Code (12 NYCRR §§ 23-1.7 and 23-1.15) since proposed amendment contained no new factual allegations; however, court properly denied that branch of motion to amend bill of particulars to include alleged violations of Industrial Code (12 NYCRR § 23-1.5) and rules of Occupational Safety and Health Administration since those alleged violations did not provide basis for liability under statute. *Ferreira v Unico Serv. Corp.*, 262 A.D.2d 524, 692 N.Y.S.2d 445, 1999 N.Y. App. Div. LEXIS 6962 (N.Y. App. Div. 2d Dep't 1999).

Plaintiff's motion for leave to amend bill of particulars to include new theories of liability was properly denied where motion was made 5 months after filing of note of issue and nearly 5 years

after accident, and plaintiff did not show special or extraordinary circumstances. *De Ordio v Golembieski*, 269 A.D.2d 861, 703 N.Y.S.2d 807, 2000 N.Y. App. Div. LEXIS 1824 (N.Y. App. Div. 4th Dep't 2000).

Amended bill of particulars alleging that accident occurred one week earlier than originally alleged was not new claim of which original pleadings did not give notice within meaning of CLS CPLR § 203(f) such that action should therefore be dismissed as time-barred. *Drwal v 101 Ltd. Pshp.*, 271 A.D.2d 227, 706 N.Y.S.2d 385, 2000 N.Y. App. Div. LEXIS 3841 (N.Y. App. Div. 1st Dep't 2000).

Court abused its discretion in granting plaintiff's motion to amend her bill of particulars to allege violations of various regulations where motion was made approximately 6 months after note of issue had been filed and 3 years after accident, and proposed amendment lacked merit. *Cerni v Zambrana*, 271 A.D.2d 566, 706 N.Y.S.2d 153, 2000 N.Y. App. Div. LEXIS 4325 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff injured in traffic accident was entitled to amend his bill of particulars to reflect current state of his physical injuries, even though his motion was made 5 years after accident, absent prejudice to defendants, and plaintiff was entitled to amend his bill of particulars to add claim for lost earnings as accountant, even though he was employed as bicycle delivery person at time of accident, where defendants had notice that he had bachelor's degree in accounting, had previously worked as accountant, and intended to resume that career. *Abdelnabi v New York City Transit Auth.*, 273 A.D.2d 114, 709 N.Y.S.2d 548, 2000 N.Y. App. Div. LEXIS 7177 (N.Y. App. Div. 1st Dep't 2000).

When the tenant served his amended bill of particulars, the trial court vacated the original note of issue and no second note of issue had been filed; thus, under N.Y. C.P.L.R. 3042(b), the tenant properly served his amended bill of particulars without obtaining leave of court. *Fields v Lambert Houses Redevelopment Corp.*, 105 A.D.3d 668, 965 N.Y.S.2d 23, 2013 N.Y. App. Div. LEXIS 2952 (N.Y. App. Div. 1st Dep't 2013).

Because the new injuries alleged in the individuals' first two supplemental bills expanded the extent of a continuing disability and the nature of the injuries, the companies would have been prejudiced by an amendment under N.Y. C.P.L.R. § 3042(b) since they were only notified of the injuries and business loss nine days before the scheduled trial. *Wolfer v 184 Fifth Ave. LLC*, 27 A.D.3d 280, 811 N.Y.S.2d 45, 2006 N.Y. App. Div. LEXIS 2740 (N.Y. App. Div. 1st Dep't 2006).

Although leave to amend a bill of particulars was normally granted very freely in the absence of prejudice or surprise to the opposing party, the trial court did not err in denying the patient's cross-motion for leave to amend the patient's bill of particulars, as the patient did not provide a reasonable excuse for the 10-month delay following the filing of a note of issue in moving to amend the bill of particulars and the merits of that motion. *Romanello v Jason*, 303 A.D.2d 670, 756 N.Y.S.2d 657, 2003 N.Y. App. Div. LEXIS 3144 (N.Y. App. Div. 2d Dep't 2003).

Plaintiffs' claim that they were only seeking to supplement under N.Y. C.P.L.R. 3043(b) rather than to amend under N.Y. C.P.L.R. 3042(b) the bill of particulars was rejected; this was at odds with the form and content of the motion and with their proposed amended bill of particulars. *Diaz v Ford Motor Co.*, 29 A.D.3d 339, 814 N.Y.S.2d 606, 2006 N.Y. App. Div. LEXIS 5906 (N.Y. App. Div. 1st Dep't 2006).

In a patient's medical malpractice action, the patient's "supplemental" bill of particulars adequately set forth the theory of negligent diagnosis, as it was more of an "amendment" to the original bill of particulars rather than a supplemental bill, and his mistake in labeling it as a "supplemental" bill was disregarded because there was no prejudice to the medical defendants' substantial rights. *Mackauer v Parikh*, 148 A.D.3d 873, 49 N.Y.S.3d 488, 2017 N.Y. App. Div. LEXIS 1770 (N.Y. App. Div. 2d Dep't 2017).

12. —Automobile accident

In light of lateness of plaintiff's application, absence of any reasonable excuse for delay, and material nature of proposed amendment, court in personal injury action arising out of automobile accident did not abuse its discretion in denying plaintiff leave to amend bill of particulars one

year after note of issue had been filed to allege additional injuries and assert further claim that injury she sustained 2 years after automobile accident aggravated original injuries and rendered them permanently disabling. *Dubissette v Davis*, 158 A.D.2d 504, 551 N.Y.S.2d 267, 1990 N.Y. App. Div. LEXIS 1779 (N.Y. App. Div. 2d Dep't 1990).

13. —Bailment

Court properly denied plaintiff's motion for leave to amend its bill of particulars, which limited scope of damages to 65 checked items of inventory out of 1,060 contained in warehouse reconciliation report, to include all 1,060 items where motion was not made until eve of trial, nearly 7 years after filing original bill, even though it could have done so from outset, especially given severe prejudice to defendants due to lack of discovery as to remaining items in report. *Baby Togs, Inc. v Faleck & Margolies, Inc.*, 239 A.D.2d 278, 658 N.Y.S.2d 842, 1997 N.Y. App. Div. LEXIS 5422 (N.Y. App. Div. 1st Dep't 1997).

14. —Employee injured on the job

In action arising under CLS Labor § 241(6) asserted by plaintiff who was injured while unloading sheetrock from flatbed truck using extension boom, court did not err in permitting plaintiff to amend and supplement his bill of particulars in response to recent case law where, despite delay, there was no showing of type of prejudice that would require denial of motion to amend. *Smith v Hovnanian Co.*, 218 A.D.2d 68, 633 N.Y.S.2d 888, 1995 N.Y. App. Div. LEXIS 12361 (N.Y. App. Div. 3d Dep't 1995).

In janitor's action for slip and fall, while mopping washroom floor, on water that had leaked from toilet, he was not entitled to amend his bill of particulars to allege various statutory violations on theory that his employer, who was commercial tenant in building, was running factory or mercantile establishment where amendment was requested 3 years after he commenced action and 5 months after he filed note of issue, and thus request was untimely and prejudicial. *Del*

Rosario v 114 Fifth Ave. Assocs., 266 A.D.2d 162, 699 N.Y.S.2d 19, 1999 N.Y. App. Div. LEXIS 12372 (N.Y. App. Div. 1st Dep't 1999).

Defendants were not entitled to summary judgment dismissing CLS Labor § 241(6) claim where claim was not plainly lacking in merit, there was no showing of prejudice to defendants, and motion court properly allowed plaintiff to submit supplemental bill of particulars that merely expanded previous one by specifying Industrial Code sections relied on. Baten v Wehuda, 281 A.D.2d 366, 722 N.Y.S.2d 534, 2001 N.Y. App. Div. LEXIS 3200 (N.Y. App. Div. 1st Dep't 2001).

15. —Family Court proceeding

In determining whether to permit department of social services (DSS) to amend bill of particulars after it has commenced its case-in-chief in child protective proceeding, court should apply balancing test which takes into account any prejudice or surprise to respondent, reason that DSS failed to include issues or facts in its initial pleadings, ability of continuance to ameliorate prejudice of allowing late introduction of new evidence, over-all affect on orderly administration of justice, and policy considerations set forth in CLS Family Ct Act § 1011. Albany County Dep't of Social Servs. v James T., 172 Misc. 2d 427, 658 N.Y.S.2d 184, 1997 N.Y. Misc. LEXIS 175 (N.Y. Fam. Ct. 1997).

16. —Medical malpractice, generally

In medical malpractice action, amendment and supplement to bill of particulars was permissible under CLS CPLR § 3042(g) where (1) plaintiff's attorney sufficiently explained that reason for delay was failure to recognize causal connection between loss of plaintiff's gall bladder and alleged malpractice until he interviewed treating physician shortly before scheduled trial date, and (2) defendants failed to establish prejudice. Kirschner v Tindel, 155 A.D.2d 289, 547 N.Y.S.2d 51, 1989 N.Y. App. Div. LEXIS 14047 (N.Y. App. Div. 1st Dep't 1989).

Supreme Court did not improvidently exercise its discretion in medical malpractice case by denying plaintiffs' motion to amend their bill of particulars where amendment, apparently on eve of trial, sought to add new theory of recovery which was not readily discernible from allegations in original complaint and bill of particulars, and affidavit of physician in support of motion was insufficient to establish either departure from accepted practice or connection to alleged injury. *Leon v Central General Hosp.*, 156 A.D.2d 338, 548 N.Y.S.2d 291, 1989 N.Y. App. Div. LEXIS 15400 (N.Y. App. Div. 2d Dep't 1989).

In medical malpractice action, which was dismissed on ground that injuries claimed in plaintiff's bill of particulars were identical to those alleged in bill of particulars served in another action brought by plaintiff against city for his original injuries, which had been settled, court should have permitted plaintiff to amend his bill of particulars to more specifically allege precise nature of exacerbation injuries for which he held instant defendants responsible since (1) it was clear from complaint and bills of particulars that plaintiff was charging instant defendants with exacerbation of his leg fractures by their negligent post-accident treatment of him, and (2) at no point prior to trial nor at trial itself did defendants complain that they were unaware of essential elements of plaintiff's claim. *Fick v LaGuardia Medical Group, P. C.*, 208 A.D.2d 800, 618 N.Y.S.2d 72, 1994 N.Y. App. Div. LEXIS 10056 (N.Y. App. Div. 2d Dep't 1994).

Court properly denied medical malpractice plaintiffs' motion for leave to serve amended bill of particulars where motion was made on eve of trial, there was inordinate, unexplained delay in bringing motion, and they were seeking to make material amendment to their bill of particulars. *Rosa v Westchester County Medical Ctr.*, 233 A.D.2d 311, 649 N.Y.S.2d 179, 1996 N.Y. App. Div. LEXIS 11612 (N.Y. App. Div. 2d Dep't 1996).

Medical malpractice defendant waived his right to conduct psychiatric examination of injured plaintiff where (1) motion to compel examination was made almost 3 years after service of plaintiffs' amended bill of particulars and narrative reports of injured plaintiff's treating psychotherapist, almost 2 years after service of note of issue and certificate of readiness, and beyond 45-day period set forth in stipulation for arrangement for such examination, (2)

defendant did not move to vacate note of issue within 20 days as required by CLS Unif Tr Ct Rls § 202.21 (22 NYCRR § 202.21), (3) after service of plaintiffs' amended bill of particular, plaintiffs did not allege new or additional injuries or that nature and extent of existing injuries had changed dramatically, and (4) defendant failed to show that "unusual and unanticipated circumstances" developed after filing of note of issue and certificate of readiness that would require psychiatric examination. *Schenk v Maloney*, 266 A.D.2d 199, 697 N.Y.S.2d 332, 1999 N.Y. App. Div. LEXIS 11142 (N.Y. App. Div. 2d Dep't 1999).

Court improperly denied medical malpractice defendant's motion to strike plaintiffs' "supplemental verified bill of particulars" and to direct plaintiffs to serve further bill of particulars where alleged malpractice occurred in 1991, action was commenced in 1993, original bills of particulars were served in 1993, so-called "supplemental verified bill of particulars," which was in fact amended bill of particulars, was served in 1998, supplemental verified bill of particulars alleged as additional injuries, inter alia, that injured plaintiff's right leg had been amputated, which occurred in 1994, plaintiff failed to offer reasonable excuse for delay in seeking to add amputation as new injury until 1998, and he failed to submit medical affidavit showing nexus between new injury and alleged malpractice. *DeNicola v Mary Immaculate Hosp.*, 272 A.D.2d 505, 708 N.Y.S.2d 152, 2000 N.Y. App. Div. LEXIS 5838 (N.Y. App. Div. 2d Dep't 2000).

In medical malpractice action, plaintiff's "supplemental" bill of particulars was properly characterized as "amended" bill and was properly stricken as prejudicial to defendants where plaintiff sought to extend period of liability from 3-month period in 1987-1988 corresponding to his first hospital admission to 5 years following into 1993, and amended bill was not served until eve of trial more than 4 years after original bill was served. Court properly struck, as prejudicial to defendants, part of plaintiff's supplemental bill of particulars alleging injuries related to his social withdrawal, depression, and anxiety where any such injuries were not sequela of original injury involving orthopedic surgery and, if alleged to be "mental anguish," were not amplified until over 10 years after acts of malpractice alleged therein and in original bill of particulars. *Watson v*

City of New York, 273 A.D.2d 115, 709 N.Y.S.2d 546, 2000 N.Y. App. Div. LEXIS 7130 (N.Y. App. Div. 1st Dep't 2000).

In medical malpractice action, defendants were entitled to grant of their unopposed motion to strike plaintiff's amended bill of particular where that bill was served without leave of court, after note of issue had been filed, and thus was nullity under CLS CPLR § 3042(b). *Golub v Sutton*, 281 A.D.2d 589, 723 N.Y.S.2d 59, 2001 N.Y. App. Div. LEXIS 3098 (N.Y. App. Div. 2d Dep't 2001).

Court would deny defendants' motion for order precluding plaintiff from introducing evidence concerning new allegations of medical malpractice allegedly first set forth in plaintiff's amended bill of particulars, even though statement of readiness had been filed, since party in medical malpractice action may amend his or her bill of particulars as of right under CLS CPLR § 3042(g) before note of issue is filed; under circumstances, plaintiff was not required to obtain permission to amend by showing adequate reason for delay and merit under CLS CPLR § 3025(b). *Whalen v Marshall*, 146 Misc. 2d 149, 548 N.Y.S.2d 878, 1989 N.Y. Misc. LEXIS 826 (N.Y. Sup. Ct. 1989).

Decision that denied a malpractice patient's representatives from filing an amended bill of particulars was proper since an amendment was unnecessary since it was made after they filed an original note of issue and before that note was struck and a replacement note of issue was filed. *Leach v N. Shore Univ. Hosp.*, 13 A.D.3d 415, 787 N.Y.S.2d 65, 2004 N.Y. App. Div. LEXIS 15198 (N.Y. App. Div. 2d Dep't 2004).

17. — —Obstetrics

Court properly granted medical malpractice plaintiffs' motion for leave to serve amended bill of particulars alleging, inter alia, that infant plaintiff, while in utero, suffered from hypoxia and anoxia, which in turn, inter alia, made her more susceptible to damage from excessive bilirubin in her blood after birth, since those allegations were, according to main theory of recovery, inter alia, natural and necessary result of defendants' alleged failure to diagnose and treat Rh

incompatibility while infant plaintiff was in utero and to recognize and act on signs of fetal distress, 2 allegations that were made from inception of action. *Scheuerman by Scheuerman v Health & Hosps. Corp.*, 243 A.D.2d 553, 663 N.Y.S.2d 123, 1997 N.Y. App. Div. LEXIS 9816 (N.Y. App. Div. 2d Dep't 1997).

18. — —Surgery

In medical malpractice action arising from allegedly inept back surgery which caused plaintiff to lose both right leg and ability to ejaculate, court properly denied defendant's motion to vacate plaintiff's "supplemental bill of particulars" which added claims of malpractice resulting in additional listed injuries and asserted claims for special damages, since note of issue had not been filed at time bill was filed, and "supplemental bill" was more in nature of amended bill as contemplated by CLS CPLR 3042(g), under which party may amend bill of particulars once as of course before trial and prior to filing of note of issue. *Torre v Cifarelli*, 157 A.D.2d 713, 549 N.Y.S.2d 812, 1990 N.Y. App. Div. LEXIS 516 (N.Y. App. Div. 2d Dep't 1990).

19. —Municipal law

Court properly denied plaintiff's motion to amend bill of particulars to include claim for permanent psychological injury where (1) motion was made just prior to retrial on issue of damages and nearly 4 years after original bill of particulars was served, (2) neither original pleadings nor testimony at first trial presented municipal defendant with notice of claim that plaintiff was seeking to add, (3) plaintiff affirmatively stated in original bill of particulars that he suffered no permanent injuries, and (4) plaintiff failed to offer reasonable excuse for delay in asserting claim. *Young v New York City Transit Authority*, 172 A.D.2d 607, 568 N.Y.S.2d 147, 1991 N.Y. App. Div. LEXIS 4612 (N.Y. App. Div. 2d Dep't 1991).

20. —Negligent supervision of child

It was error the deny plaintiffs' motion for leave to file second amended complaint alleging negligent supervision, even though first amended complaint and bill of particulars alleged that defendants' son was child with "no dangerous propensities," since plaintiffs showed that parties were aware that plaintiffs' claims were premised on theory that child had "known dangerous propensities." *Grall v BaMar, Inc.*, 233 A.D.2d 368, 650 N.Y.S.2d 242, 1996 N.Y. App. Div. LEXIS 11625 (N.Y. App. Div. 2d Dep't 1996).

21. —Personal injury generally

In personal injury action, court acted properly in striking amended bill of particulars served by plaintiffs after they obtained vacatur of prior default judgment against them, since amended bill improperly set forth new cause of action and new injuries where it contained allegations that were substantially similar to those previously rejected by court on plaintiffs' prior motion to amend complaint to add new cause of action, and it alleged previously unmentioned injuries. *Marrero v 720 DeGraw Funding Corp.*, 150 A.D.2d 762, 542 N.Y.S.2d 211, 1989 N.Y. App. Div. LEXIS 7241 (N.Y. App. Div. 2d Dep't 1989).

It was abuse of discretion to grant plaintiff's motion for leave to supplement his bill of particulars in connection with retrial on issue of damages where plaintiff first moved to supplement bill 3 years after original trial and about 12 years after commencement of action, he offered no reasonable excuse for such delay, and he sought to supplement bill with new claims of permanent injuries and lost earnings. *Reape v City of New York*, 272 A.D.2d 533, 708 N.Y.S.2d 131, 2000 N.Y. App. Div. LEXIS 5796 (N.Y. App. Div. 2d Dep't 2000).

Personal injury plaintiffs had not demonstrated their entitlement to amend their bill of particulars as of right, where the supreme court struck the note of issue some 10 months after it was filed and removed the case from the trial calendar, specifically to accommodate plaintiffs' eleventh-hour motion to amend their bill of particulars and to thereafter permit summary judgment motions within mandated motion deadlines. *Harris v Jim's Proclean Serv., Inc.*, 34 A.D.3d 1009, 825 N.Y.S.2d 291, 2006 N.Y. App. Div. LEXIS 13591 (N.Y. App. Div. 3d Dep't 2006).

Where extensive discovery involving complex medical issues had been completed in plaintiffs' personal injury action, and almost five years had passed since the service of the original amended complaint, it was not an abuse of the supreme court's discretion to deny plaintiffs' motion for leave to amend and supplement their bill of particulars. *Harris v Jim's Proclean Serv., Inc.*, 34 A.D.3d 1009, 825 N.Y.S.2d 291, 2006 N.Y. App. Div. LEXIS 13591 (N.Y. App. Div. 3d Dep't 2006).

22. —Slip and fall

Court properly denied motion to amend notice of claim, complaint, and bill of particulars to correct date on which plaintiff allegedly slipped and fell on accumulation of paper handouts in subway station, as plaintiff's 5-year delay in seeking to amend original notice of claim, together with repetition of erroneous date in complaint, bill of particulars, and statutory hearing and deposition, frustrated defendant's ability to timely interview witnesses and otherwise prejudiced its ability to investigate. *Davis v New York City Transit Auth.*, 234 A.D.2d 153, 651 N.Y.S.2d 31, 1996 N.Y. App. Div. LEXIS 12547 (N.Y. App. Div. 1st Dep't 1996).

In tenant's action against landlord for fall on landlord's premises, landlord's "supplemental" bill of particulars, which actually was amended bill of particulars, alleging for first time that tenant was intoxicated at time of accident, was nullity where it was served without leave of court and after filing of note of issue. Also, landlord's motion for leave to file amended bill of particulars would be denied where delay in asserting new defense—that tenant was intoxicated at time of accident—until 2 months before scheduled start of trial was both inexcusable and prejudicial because (1) landlord's prior counsel had been given authorization for hospital record, on which landlord relied for his allegation of intoxication, almost immediately on commencement of action, and (2) passage of 4 years since hospital test was taken and almost 2 years since authorization was given severely undermined tenant's ability to investigate validity of test. *Boland v Koppelman*, 251 A.D.2d 176, 674 N.Y.S.2d 349, 1998 N.Y. App. Div. LEXIS 7305 (N.Y. App. Div. 1st Dep't 1998).

Court erred in denying plaintiff's motion to amend her bill of particulars, even though her original attorney should have moved to amend as soon as evidence emerged that permanent height differential existed on part of floor where plaintiff tripped and fell on what she had previously thought was merely bunched-up carpet, since complaint itself had indicated that cause of accident was "improper design, construction and maintenance of the said floor," and defendants were aware of defective condition of floor in area where plaintiff fell. *Rosinsky v Angel Orensanz Found., Inc.*, 253 A.D.2d 661, 677 N.Y.S.2d 363, 1998 N.Y. App. Div. LEXIS 9486 (N.Y. App. Div. 1st Dep't 1998).

In janitor's action for slip and fall, while mopping washroom floor, on water that had leaked from toilet, he was not entitled to amend his bill of particulars to allege various statutory violations on theory that his employer, who was commercial tenant in building, was running factory or mercantile establishment where amendment was requested 3 years after he commenced action and 5 months after he filed note of issue, and thus request was untimely and prejudicial. *Del Rosario v 114 Fifth Ave. Assocs.*, 266 A.D.2d 162, 699 N.Y.S.2d 19, 1999 N.Y. App. Div. LEXIS 12372 (N.Y. App. Div. 1st Dep't 1999).

Industrial Code regulation under 12 NYCRR § 23-2.7(b) did not apply to wooden staircase leading from trailer, notwithstanding that both trailer and staircase leading up to its door were located on construction site; thus, court properly denied plaintiffs' motion to amend their bill of particulars to assert violation of regulation. *Painton v Cosco Wholesale, Inc.*, 267 A.D.2d 288, 700 N.Y.S.2d 197, 1999 N.Y. App. Div. LEXIS 12868 (N.Y. App. Div. 2d Dep't 1999).

23. Costs

Amendment of bill of particulars was granted on condition that plaintiff pay full bill of costs to date and costs of appeal where no excuse was offered for two years' delay before seeking amendment, application was made on eve of trial, and movant had the information ever since commencement of action. *Silverman v Ashe*, 22 A.D.2d 659, 253 N.Y.S.2d 137, 1964 N.Y. App. Div. LEXIS 3070 (N.Y. App. Div. 1st Dep't 1964).

Reviewing court would vacate an order granting defendant's motion for summary judgment dismissing the complaint as to him upon the condition that plaintiffs' attorney personally pay \$500 to respondent within 20 days, where trial court granted the motion on the basis that plaintiffs failed to answer the request for a bill of particulars, in that during the period that service of the bill of particulars was due and the motion for preclusion was granted plaintiffs' attorney had undergone an operation for cancer and had continued his practice on a restricted schedule; under such circumstances it is appropriate that the default be opened with costs against the attorney personally. *Konrad v Mt. Sinai Hospital*, 84 A.D.2d 828, 444 N.Y.S.2d 192, 1981 N.Y. App. Div. LEXIS 16056 (N.Y. App. Div. 2d Dep't 1981).

Where service of plaintiff's bill of particulars crossed in mail with defendant's notice of motion seeking summary judgment based on plaintiff's failure to comply with preclusion order, summary judgment for defendant will be reversed upon condition that, within 20 days, plaintiff's attorney will personally pay \$500 costs to defendant in addition to costs of appeal. *Kadan v Volkswagen of America, Inc.*, 111 A.D.2d 540, 489 N.Y.S.2d 412, 1985 N.Y. App. Div. LEXIS 51591 (N.Y. App. Div. 3d Dep't 1985).

In medical malpractice action, court did not abuse its discretion in excusing plaintiff's default in serving timely and legally sufficient affidavit of merit by her medical expert with her bill of particulars, on condition that plaintiff's counsel make payment of \$1,000 in costs to compensate for inconvenience and additional legal work emanating from delay, in view of brevity of delay, absence of substantial prejudice to defendant, absence of any intent by plaintiff to abandon action, and public policy in favor of resolving cases on their merits. *Caggiano v Ross*, 130 A.D.2d 538, 515 N.Y.S.2d 274, 1987 N.Y. App. Div. LEXIS 46543 (N.Y. App. Div. 2d Dep't 1987).

Where plaintiff's totally unacceptable bill of particulars in flagrant disregard of court's prior directive for plaintiff to furnish bill was directly responsible for defendant's motion to require a new bill of particulars, court cost of \$100 would be imposed directly on plaintiff's attorney to be

paid to defendant's attorney within 15 days. CPLR 3042(g). *Goodman v Goodman*, 89 Misc. 2d 636, 391 N.Y.S.2d 974, 1977 N.Y. Misc. LEXIS 1909 (N.Y. Sup. Ct. 1977).

On granting third-party defendant's motion to compel plaintiff to respond to its demand for bill of particulars, court would deny third-party defendant's request for costs and legal fees, since plaintiff, who had made no claims directly against third-party defendant, had facially valid basis for his refusal to comply with demand. *Rodriguez v Scovill, Inc.*, 171 Misc. 2d 840, 656 N.Y.S.2d 120, 1997 N.Y. Misc. LEXIS 74 (N.Y. Sup. Ct. 1997).

2. Preclusion

24. Preclusion for failure to supply bill, generally

Order of preclusion for failure to respond to demand for bill of particulars may serve as basis for summary judgment dismissing complaint or counterclaim unless order is set aside. *Northway Engineering, Inc. v Felix Industries, Inc.*, 77 N.Y.2d 332, 567 N.Y.S.2d 634, 569 N.E.2d 437, 1991 N.Y. LEXIS 219 (N.Y. 1991).

In action by highway contractors against state for breach of contract and for value of extra work, state was entitled to order of preclusion where contractors failed to comply with demand for bill of particulars where demand was precise and in each instance addressed directly and specifically to the general and non-particularized allegations basic to a recovery. *Craven v State*, 24 A.D.2d 1034, 264 N.Y.S.2d 746, 1965 N.Y. App. Div. LEXIS 2887 (N.Y. App. Div. 3d Dep't 1965).

Demand for bill of particulars having no relationship to proof of cause of action was improper so that preclusion could be resisted in absence of motion to vacate or modify demand. *Morello v Saratoga Harness Racing, Inc.*, 44 A.D.2d 884, 356 N.Y.S.2d 114, 1974 N.Y. App. Div. LEXIS 4871 (N.Y. App. Div. 3d Dep't 1974).

Unless the excuse for neglecting to comply with an order of preclusion for failure to supply a bill of particulars is proportionate to the delay occasioned thereby, evidence of items of which particulars have not been delivered may be precluded at trial; conclusory and self-serving allegations of counsel are plainly insufficient to justify inordinate delay. Accordingly, where plaintiff, offering a flimsy excuse, supplied a partial bill of particulars in her medical malpractice action nine months late and seven months beyond the time fixed therefor by a court order, summary judgment was entered in favor of defendant hospital. *Scholefield v De Cordier*, 70 A.D.2d 351, 421 N.Y.S.2d 645, 1979 N.Y. App. Div. LEXIS 12720 (N.Y. App. Div. 3d Dep't 1979).

In a medical malpractice action, it was an abuse of discretion to deny defendant hospital's motion to dismiss the complaint for failure to comply with a conditional order of preclusion where plaintiffs, who furnished a bill of particulars nine months after the bill was originally due and four and one half months beyond the time fixed by the court order, failed to demonstrate a reasonable excuse for the delay with the legal merits of their claim. *Ferrigno v St. Charles Hospital*, 86 A.D.2d 594, 446 N.Y.S.2d 130, 1982 N.Y. App. Div. LEXIS 15120 (N.Y. App. Div. 2d Dep't 1982).

The trial court in a medical malpractice action erred in denying defendants' motion for summary judgment dismissing the complaint based on plaintiff's failure to supply a bill of particulars as had been required by a conditional order of preclusion, where plaintiff had failed to respond to defendants' demand for a bill of particulars, which had required an answer within ten days after plaintiff's receipt thereof, either during the four month period between service of the demand and the trial court's decision on defendants' motion to preclude, or during the seven month period between such decision and defendants' motion for summary judgment, where plaintiff's counsel offered no excuse for the lengthy delay in serving the bill of particulars, and where the papers submitted by plaintiff to the trial court in opposition to defendants' motion for summary judgment were devoid of any affidavit of merit containing evidentiary facts and attested to by an individual with personal knowledge of such facts. *La Buda v Brookhaven Memorial Hospital Medical*

Center, 98 A.D.2d 711, 469 N.Y.S.2d 112, 1983 N.Y. App. Div. LEXIS 21014 (N.Y. App. Div. 2d Dep't 1983), aff'd in part, 62 N.Y.2d 1014, 479 N.Y.S.2d 493, 468 N.E.2d 675, 1984 N.Y. LEXIS 4490 (N.Y. 1984).

In a medical malpractice action, the trial court erred in denying defendant's motion for summary judgment based on plaintiff's failure to timely serve a bill of particulars pursuant to a prior conditional order of preclusion where plaintiff failed to establish the legal merits of his action through an affidavit from a physician competent to attest to the meritorious nature of his claim. *Bustamonte v Koval*, 98 A.D.2d 739, 469 N.Y.S.2d 441, 1983 N.Y. App. Div. LEXIS 21049 (N.Y. App. Div. 2d Dep't 1983).

Special Term did not abuse its discretion in granting plaintiffs' cross-motion for relief from a conditional order of preclusion, and directing defendant to accept plaintiffs' bill of particulars, where defendant failed to follow the procedure outlined in CPLR § 3042(d) in challenging the sufficiency of the bill of particulars, thereby waiving any objection to the bill. *Hess v Wessendorf*, 102 A.D.2d 926, 477 N.Y.S.2d 515, 1984 N.Y. App. Div. LEXIS 19173 (N.Y. App. Div. 3d Dep't), app. dismissed, 64 N.Y.2d 602, 485 N.Y.S.2d 1026, 475 N.E.2d 125, 1984 N.Y. LEXIS 6462 (N.Y. 1984), app. dismissed, 64 N.Y.2d 754, 1984 N.Y. LEXIS 6733 (N.Y. 1984).

In matrimonial action, Special Term should have granted branch of defendant's cross-motion for preclusion order since plaintiff neither moved for order to vacate or modify demand within required 10 days nor timely served bill of particulars. *Hirschfeld v Hirschfeld*, 114 A.D.2d 1006, 495 N.Y.S.2d 445, 1985 N.Y. App. Div. LEXIS 54048 (N.Y. App. Div. 2d Dep't 1985), aff'd, 69 N.Y.2d 842, 514 N.Y.S.2d 704, 507 N.E.2d 297, 1987 N.Y. LEXIS 15893 (N.Y. 1987).

Special Term properly granted summary judgment in favor of defendant where prior order of preclusion for failure to serve bill of particulars made it impossible for plaintiffs to prove their cause of action. *Ervolina v Buffalo*, 124 A.D.2d 998, 508 N.Y.S.2d 792, 1986 N.Y. App. Div. LEXIS 62323 (N.Y. App. Div. 4th Dep't 1986).

Court properly granted summary judgment to defendants, and denied plaintiffs' cross motion to vacate preclusion order which was entered on their failure to respond timely to defendants' demand for bill of particulars, since (1) plaintiffs' medical excuse for failure to comply was unverified and otherwise legally insufficient, and (2) information requested in defendants' demand related to every aspect of plaintiffs' claim, so that preclusion order effectively prevented plaintiffs from establishing prima facie case. *Tuffo v Red Coach Realty, Inc.*, 129 A.D.2d 966, 514 N.Y.S.2d 283, 1987 N.Y. App. Div. LEXIS 45619 (N.Y. App. Div. 4th Dep't 1987).

Hospital was entitled to unconditional dismissal of medical malpractice action on ground that plaintiff was unable to establish prima facie case due to preclusion order issued against her because of her default in submitting bill of particulars, since plaintiff was bound by that order, having failed to vacate her underlying default; in any event, alleged confusion due to establishment of Individual Assignment System, without more, did not constitute reasonable excuse for default. *Trinchera v Yonkers General Hospital*, 131 A.D.2d 841, 517 N.Y.S.2d 202, 1987 N.Y. App. Div. LEXIS 48282 (N.Y. App. Div. 2d Dep't 1987).

Defendants were entitled to summary judgment dismissing negligence action where plaintiff was precluded from offering proof at trial with respect to acts or omissions constituting claimed negligence and nature and consequences of permanent injuries sustained due to her failure to adequately respond to defendants' demand for bill of particulars, since information requested in bill of particulars related to virtually every aspect of plaintiff's claim, and preclusion order effectively prevented her from establishing prima facie case. *Vecchiano v Greyhound Lines, Inc.*, 135 A.D.2d 708, 522 N.Y.S.2d 608, 1987 N.Y. App. Div. LEXIS 52646 (N.Y. App. Div. 2d Dep't 1987), app. denied, 71 N.Y.2d 803, 527 N.Y.S.2d 769, 522 N.E.2d 1067, 1988 N.Y. LEXIS 1218 (N.Y. 1988).

In personal injury action, plaintiff was not entitled to vacatur of preclusion order entered on his default, and defendants were properly granted summary judgment dismissing complaint, where more than 2 years elapsed before plaintiff responded to defendants' demand for bill of particulars, no valid excuse was offered for delay, and affidavit of merit submitted by plaintiff's

attorney consisted solely of proposed bill of particulars containing “boilerplate” language which did not specify how accident occurred; plaintiff’s purported excuse—that severity of his injuries was subject to reassessment—was insufficient since it did not prevent him from serving timely bill of particulars with reservation of his right to serve later supplemental bill itemizing any further injuries. *Onorio v Miller*, 143 A.D.2d 80, 531 N.Y.S.2d 331, 1988 N.Y. App. Div. LEXIS 8168 (N.Y. App. Div. 2d Dep’t 1988).

It was not abuse of discretion to deny plaintiff’s motion to vacate unconditional order of preclusion where motion was not brought within one year as required by CLS CPLR § 5015(a)(1), and plaintiff offered no excuse for inordinate delay in seeking relief. *Pawarski v Southeast Community Work Center, Inc.*, 143 A.D.2d 511, 533 N.Y.S.2d 161, 1988 N.Y. App. Div. LEXIS 10751 (N.Y. App. Div. 4th Dep’t 1988).

Trial court in personal injury action properly refused to admit proof regarding claim for loss of services of injured plaintiff to corporate business of which plaintiff’s husband was sole shareholder where claim was never pleaded, and plaintiffs’ response to request for bill of particulars stated “not applicable” to questions regarding wife’s employment, thus giving defendants impression that such claim would not be raised. *Ciriello v Virgues*, 156 A.D.2d 417, 548 N.Y.S.2d 538, 1989 N.Y. App. Div. LEXIS 15779 (N.Y. App. Div. 2d Dep’t 1989).

Under contract for sale of commercial realty, buyer which was unable to obtain mortgage commitment was not entitled to summary judgment for return of its deposit on ground of seller’s voluntary inaction in responding to verified demand for bill of particulars where, at time of summary judgment motion, it had been only about 6 weeks since demand was served. *BTS, Inc. v Webny Corp.*, 157 A.D.2d 638, 549 N.Y.S.2d 735, 1990 N.Y. App. Div. LEXIS 254 (N.Y. App. Div. 2d Dep’t 1990).

Petitioner was entitled to summary judgment dismissing objections to probate of last will and testament on basis of unconditional order of preclusion where (1) on July 26, after respondent filed objections to probate, petitioner served demand for bill of particulars, (2) on September 10, petitioner’s attorney sent letter to respondent’s attorney demanding bill of particulars, (3) there

was no response to request and petitioner moved to compel answer to demand on October 16, (4) on November 25, proposed preclusion order was submitted to court along with proof of service of motion to preclude, (5) on December 9, at which time respondent had not responded, court signed preclusion order, and (6) respondent filed bill of particulars on December 13; although respondent argued that delay was caused by difficulty in obtaining medical records, she could have furnished partial bill of particulars while reserving right to supplement it. In re Estate of Johnson, 192 A.D.2d 859, 596 N.Y.S.2d 526, 1993 N.Y. App. Div. LEXIS 3757 (N.Y. App. Div. 3d Dep't 1993).

In personal injury action, court did not err in summarily denying defense motion to strike complaint for failure to comply with order to serve bill of particulars, where counsel for defendant failed to confer with counsel for plaintiffs in good faith effort to resolve issues raised by motion. Gonzalez v IBM, 236 A.D.2d 363, 654 N.Y.S.2d 327, 1997 N.Y. App. Div. LEXIS 1021 (N.Y. App. Div. 2d Dep't 1997).

Drastic sanction of preclusion was not warranted by defendant's late furnishing of bill of particulars in response to plaintiff's demands, absent extant court order to furnish bill. Kleinberg Elec., Inc. v City of New York, 255 A.D.2d 248, 680 N.Y.S.2d 498, 1998 N.Y. App. Div. LEXIS 12688 (N.Y. App. Div. 1st Dep't 1998).

Trial court abused its discretion in granting a city's motion to strike that portion of plaintiff's complaint due to his failure to comply with the city's demand for a bill of particulars and discovery, as the city did not show that his failure to comply was willful and contumacious. Shahid v City of New York, 144 A.D.3d 1127, 43 N.Y.S.3d 88, 2016 N.Y. App. Div. LEXIS 7907 (N.Y. App. Div. 2d Dep't 2016).

Defendant was permitted to amend answer to assert counterclaim containing same allegations contained in affirmative defense included in original answer even though defendant was precluded under CPLR 3042, subd c from introducing evidence on affirmative defense. Ace Hoeffner Contracting Co. v P. J. Panzcka, Inc., 76 Misc. 2d 864, 351 N.Y.S.2d 813, 1973 N.Y. Misc. LEXIS 1543 (N.Y. Dist. Ct. 1973).

Since defendant had failed to properly provide particulars of his affirmative defense that plaintiff's decedent was contributorily negligent, court would preclude defendant from offering any evidence on that issue unless he served amended bill of particulars within 30 days; inasmuch as all discovery was complete, defendant was in position to particularize his negligence claims. *Saar v Brown & Odabashian, P.C.*, 139 Misc. 2d 328, 527 N.Y.S.2d 685, 1988 N.Y. Misc. LEXIS 102 (N.Y. Sup. Ct. 1988).

CPLR 205(a) may not be applied in a federal court to save an action that is time barred, where a suit instituted in state court was pending and could not be prosecuted by reason of a preclusion order entered against the plaintiff for failure to serve a bill of particulars, and plaintiff's second suit filed in the state court had been dismissed because of the pendency of the first action. *Graziano v Pennell*, 371 F.2d 761, 1967 U.S. App. LEXIS 7852 (2d Cir. N.Y. 1967).

25. —Change of counsel

Plaintiff would be granted leave to serve bill of particulars on defendant where (1) order of preclusion was granted at pretrial conference at which plaintiff's former counsel was not present, (2) plaintiff thereafter obtained new counsel, and (3) plaintiff showed valid excuse for failure to serve bill, and papers showed there was merit to action. *SYDA Foundation v Vanguard Organization, Inc.*, 185 A.D.2d 482, 586 N.Y.S.2d 32, 1992 N.Y. App. Div. LEXIS 8942 (N.Y. App. Div. 3d Dep't 1992).

26. —Conditional order

As plaintiff did not just fail to comply with a discovery demand, he disregarded a conditional preclusion order requiring him to furnish a supplement bill of particulars within 75 days or be barred from presenting evidence of defendant's negligence, the trial court did not need to find that his failure to comply was wilful under N.Y. C.P.L.R. 3042 or 3126 in order to enforce the preclusion order. *Gibbs v St. Barnabas Hosp.*, 16 N.Y.3d 74, 917 N.Y.S.2d 68, 942 N.E.2d 277, 2010 N.Y. LEXIS 3527 (N.Y. 2010).

Where plaintiff served a supplemental bill of particulars on defendant after the deadline imposed by a conditional preclusion order, as his failure to submit a medical expert's affidavit establishing the basis of plaintiff's malpractice claim was a fatal deficiency under *Fiore v Galang*, 64 N.Y.2d 999 (1985), the court should have enforced the preclusion order and barred plaintiff from presenting evidence of defendant's negligence. *Gibbs v St. Barnabas Hosp.*, 16 N.Y.3d 74, 917 N.Y.S.2d 68, 942 N.E.2d 277, 2010 N.Y. LEXIS 3527 (N.Y. 2010).

Where service of plaintiff's bill of particulars crossed in mail with defendant's notice of motion seeking summary judgment based on plaintiff's failure to comply with preclusion order, summary judgment for defendant will be reversed upon condition that, within 20 days, plaintiff's attorney will personally pay \$500 costs to defendant in addition to costs of appeal. *Kadan v Volkswagen of America, Inc.*, 111 A.D.2d 540, 489 N.Y.S.2d 412, 1985 N.Y. App. Div. LEXIS 51591 (N.Y. App. Div. 3d Dep't 1985).

There is no time limit under CPLR 3042 [c], unlike 10 day limit specified in CPLR 3042 [d] for motion to preclude, where deceptive bill of particulars has been served; therefore, defendant's motion, although made over 3 years after it served its demand for bill of particulars, should have been granted conditionally upon plaintiff's failure to serve proper bill as directed herein. *Magnus Drugs, Inc. v New York: Human Resources Admin.*, 112 A.D.2d 146, 490 N.Y.S.2d 834, 1985 N.Y. App. Div. LEXIS 56431 (N.Y. App. Div. 2d Dep't 1985).

Defendants in medical malpractice case were not entitled to summary judgment on basis of plaintiff's failure to serve bill of particulars where defendants' motions to preclude were granted only to extent of directing plaintiff to serve bill of particulars and order did not provide that plaintiff would be precluded if he failed to comply with time limitation in order; accordingly, there was no "conditional order" capable of becoming absolute on plaintiff's failure to serve bill of particulars. *Dugan v Seymour*, 121 A.D.2d 596, 503 N.Y.S.2d 635, 1986 N.Y. App. Div. LEXIS 58578 (N.Y. App. Div. 2d Dep't 1986).

Court erred in granting plaintiffs' motion to vacate or amend prior conditional order of preclusion requiring plaintiffs to serve bill of particulars on defendant within 30 days since plaintiffs failed to

comply with order or request extension and failed to show reasonable excuse for lengthy delay in serving bill of particulars. *Saunders v Bolgan*, 134 A.D.2d 904, 521 N.Y.S.2d 606, 1987 N.Y. App. Div. LEXIS 51099 (N.Y. App. Div. 4th Dep't 1987).

In action by infants and their mother for personal injuries sustained by infants in various foster homes, defendant agency was entitled to final order of preclusion and dismissal of complaint where (1) plaintiffs failed to comply with demand for bill of particulars, (2) defendant obtained 20-day conditional preclusion order, with which plaintiffs failed to comply, (3) defendant obtained second 20-day conditional preclusion order, with which plaintiffs failed to comply, and (4) more than one year later, defendant moved for final order of preclusion and dismissal of complaint, at which time bill of particulars was finally served; in absence of exceptional circumstances, such extraordinary delay and neglect could neither be condoned nor overlooked. *Lonesome v Angel Guardian Home*, 146 A.D.2d 503, 536 N.Y.S.2d 776, 1989 N.Y. App. Div. LEXIS 305 (N.Y. App. Div. 1st Dep't 1989).

Complaint should not have been stricken for plaintiff's failure to comply with court order to provide further response to bill of particulars where plaintiff had complied with original demand to best of ability, defendant failed to move for relief until 18 months following completion of post-note-of-issue deposition of its witness, and all disclosure of evidence material and necessary for defense of action had been made; thus, failure to comply was not willful refusal, and conditional order of preclusion would be sufficient sanction. *Dell'Aquila v Supermarkets General Corp.*, 180 A.D.2d 708, 579 N.Y.S.2d 738, 1992 N.Y. App. Div. LEXIS 2587 (N.Y. App. Div. 2d Dep't 1992).

In medical malpractice action, court did not improvidently exercise its discretion in permitting plaintiff additional time to serve bill of particulars, and denying defendant's cross motion for final order of preclusion and summary judgment, where (1) it was unclear whether conditional order of preclusion was ever served on plaintiff's attorney, (2) plaintiff died shortly after conditional order of preclusion was granted, (3) administrator was subsequently appointed and substituted in action, and (4) service of bill of particulars was hindered by defendant's failure to provide plaintiff's attorney with copy of hospital record. *Williamson v Brookdale Hosp. Medical Center*,

184 A.D.2d 564, 584 N.Y.S.2d 636, 1992 N.Y. App. Div. LEXIS 7931 (N.Y. App. Div. 2d Dep't 1992).

Defendant in personal injury action was entitled to summary judgment based on plaintiff's failure to comply with conditional order of preclusion which required her to serve bill of particulars within 30 days since (1) plaintiff failed to demonstrate reasonable excuse for delay by claiming that she thought law firm no longer represented her after one of its partners died where such claim was belied by fact that law firm thereafter sent numerous items of correspondence to plaintiff requesting her cooperation in preparation of bill of particulars, and (2) plaintiff's unsupported and conclusory allegation that her mail was at times intercepted was insufficient. *Johnson v Heavy Realty Corp.*, 191 A.D.2d 538, 595 N.Y.S.2d 104, 1993 N.Y. App. Div. LEXIS 2333 (N.Y. App. Div. 2d Dep't 1993).

Order which granted defendants' motion for preclusion unless plaintiff served bill of particulars within 60 days would be resettled to make preclusion unconditional; where conflict existed between court's decision, which granted preclusion unconditionally, and court's order, which granted preclusion conditionally, decision controlled. *Otero v Otero*, 222 A.D.2d 328, 636 N.Y.S.2d 22, 1995 N.Y. App. Div. LEXIS 13334 (N.Y. App. Div. 1st Dep't 1995).

Pursuant to CPLR 3042 (subd [c]), defendant's motion for summary judgment is granted on the ground that plaintiff is barred from proving a prima facie case due to its failure to serve a bill of particulars in compliance with a conditional order of preclusion. *Theocharidis v Weber Stores, Inc.*, 100 Misc. 2d 364, 418 N.Y.S.2d 1007, 1979 N.Y. Misc. LEXIS 2467 (N.Y. Sup. Ct. 1979).

27. —Death of party

In medical malpractice action, court did not improvidently exercise its discretion in permitting plaintiff additional time to serve bill of particulars, and denying defendant's cross motion for final order of preclusion and summary judgment, where (1) it was unclear whether conditional order of preclusion was ever served on plaintiff's attorney, (2) plaintiff died shortly after conditional order of preclusion was granted, (3) administrator was subsequently appointed and substituted

in action, and (4) service of bill of particulars was hindered by defendant's failure to provide plaintiff's attorney with copy of hospital record. *Williamson v Brookdale Hosp. Medical Center*, 184 A.D.2d 564, 584 N.Y.S.2d 636, 1992 N.Y. App. Div. LEXIS 7931 (N.Y. App. Div. 2d Dep't 1992).

28. —Failure of service

Repeated failure to serve bill of particulars without justification for delay warranted issuance of preclusion order, and as such preclusion order would render plaintiffs unable to make out a prima facie case, summary judgment for defendants should be granted. *McCraith v Wehrung*, 42 A.D.2d 825, 345 N.Y.S.2d 803, 1973 N.Y. App. Div. LEXIS 3877 (N.Y. App. Div. 4th Dep't 1973).

In a legal malpractice action in which plaintiff alleged that his former attorneys had failed to diligently press his negligence claim within the applicable statute of limitations, the trial court erred in granting summary judgment to defendants based on plaintiff's failure to timely comply with a conditional order of preclusion that had required plaintiff to furnish defendants with a bill of particulars concerning the injuries on which plaintiff's negligence claim had been based where plaintiff's attorney claimed that he had never been served with the order, where defendants had been provided with ample opportunity in the interim to ascertain the extent and permanency of plaintiff's prior injuries through pretrial proceedings, and where defendants made no tenable assertion that they had been prejudiced by plaintiff's failure to comply with the order, but only raised the technical objection that plaintiff had failed to provide information that essentially duplicated that which was otherwise ascertainable by defendants. *Modaferri v Siben*, 97 A.D.2d 377, 467 N.Y.S.2d 583, 1983 N.Y. App. Div. LEXIS 19932 (N.Y. App. Div. 1st Dep't 1983).

In action by infants and their mother for personal injuries sustained by infants in various foster homes, defendant agency was entitled to final order of preclusion and dismissal of complaint where (1) plaintiffs failed to comply with demand for bill of particulars, (2) defendant obtained 20-day conditional preclusion order, with which plaintiffs failed to comply, (3) defendant obtained second 20-day conditional preclusion order, with which plaintiffs failed to comply, and (4) more

than one year later, defendant moved for final order of preclusion and dismissal of complaint, at which time bill of particulars was finally served; in absence of exceptional circumstances, such extraordinary delay and neglect could neither be condoned nor overlooked. *Lonesome v Angel Guardian Home*, 146 A.D.2d 503, 536 N.Y.S.2d 776, 1989 N.Y. App. Div. LEXIS 305 (N.Y. App. Div. 1st Dep't 1989).

Plaintiff would be granted leave to serve bill of particulars on defendant where (1) order of preclusion was granted at pretrial conference at which plaintiff's former counsel was not present, (2) plaintiff thereafter obtained new counsel, and (3) plaintiff showed valid excuse for failure to serve bill, and papers showed there was merit to action. *SYDA Foundation v Vanguard Organization, Inc.*, 185 A.D.2d 482, 586 N.Y.S.2d 32, 1992 N.Y. App. Div. LEXIS 8942 (N.Y. App. Div. 3d Dep't 1992).

29. —Family Court proceeding

Order of preclusion in family court proceeding was vacated pursuant to CPLR § 3042, subdivision c, read through Family Court Act § 165, where no notice of motion was given prior to granting of said order. *M. v A.*, 73 Misc. 2d 683, 342 N.Y.S.2d 994, 1973 N.Y. Misc. LEXIS 2009 (N.Y. Fam. Ct. 1973).

30. —Illness of party

Party's uncontradicted illness and inability to aid her attorney in filing a bill of particulars was an adequate excuse explaining default in compliance with order to serve bill of particulars within 30 days of preclusion, and preclusion order should be vacated. *Blasi v Boucher*, 30 A.D.2d 674, 291 N.Y.S.2d 960, 1968 N.Y. App. Div. LEXIS 3793 (N.Y. App. Div. 2d Dep't 1968).

In claims against the State for false arrest, false imprisonment, and assault and battery, the Court of Claim's preclusion order based on claimant's failure to serve a bill of particulars as demanded would be vacated, subject to certain sanctions, where claimant's counsel averred

that the preparation of the bill of particulars had been a time-consuming process due to the large number of people to be interviewed and the difficulty in obtaining certain medical records, where claimant was unable to timely verify the bill of particulars due to his depressive illness, which was corroborated by a physician, and where the record showed no suggestion of prejudice to the State. *Wheeler v State*, 104 A.D.2d 496, 479 N.Y.S.2d 244, 1984 N.Y. App. Div. LEXIS 19939 (N.Y. App. Div. 2d Dep't 1984).

31. —Law office error or failure

Law office error did not excuse default in service of bill of particulars for failure to serve husband's bill until over one year following preclusion order and 1 ½ years after demand, despite attorney's belief that both husband and wife's bills had been served, where notice of preclusion order should have alerted attorney that only one bill had been served. It was an improvident exercise of judicial discretion to grant motion compelling acceptance of bill of particulars which was not served until one year after entry of preclusion order and 1 ½ years after demand therefor due to law office error. *Abbinanti v Baisch*, 41 A.D.2d 693, 342 N.Y.S.2d 506, 1973 N.Y. App. Div. LEXIS 5062 (N.Y. App. Div. 4th Dep't 1973).

Order of preclusion for failure of plaintiffs to serve bill of particulars would not be vacated on ground that plaintiffs' attorney was involved with his disbarment proceedings during much of the period of delay and plaintiffs thought that defendant had been furnished a bill of particulars. *De John v D. W. Winkelman Co.*, 53 A.D.2d 1049, 385 N.Y.S.2d 896, 1976 N.Y. App. Div. LEXIS 15861 (N.Y. App. Div. 4th Dep't 1976).

Trial court erred in denying summary judgment in a medical malpractice action where the service of the bill of particulars was not attempted until ten months after the entry of the conditional order of preclusion was served and 15 months after the demand for the bill of particulars, and where the sole reason given for plaintiff's delay in serving the bill was "law office failure," in that it is an abuse of discretion to deny a motion for summary judgment for law office

failure. *Berkowitz v Futernick*, 84 A.D.2d 825, 444 N.Y.S.2d 195, 1981 N.Y. App. Div. LEXIS 16048 (N.Y. App. Div. 2d Dep't 1981).

In a medical malpractice action, summary judgment was properly entered in favor of defendants, where plaintiff's excuse for his failure to comply with a 20-day conditional order of preclusion entered after he failed to furnish the defendants with a copy of a bill of particulars was essentially law office failure. *O'Neal v Pankin*, 90 A.D.2d 623, 456 N.Y.S.2d 228, 1982 N.Y. App. Div. LEXIS 18693 (N.Y. App. Div. 3d Dep't 1982).

Where the excuse proffered by plaintiff for her failure timely to comply with a prior order granting plaintiff's motion to modify defendant's demand for a bill of particulars, and directing service of a bill within 10 days after service of the order could only be characterized as law office failure, where the record did not support a finding that plaintiff's counsel had engaged in the practice of merely ignoring demands for bills of particulars, and where plaintiff's counsel promised at a deposition to serve a bill within a few days, and served a bill eight days after the deposition, but, prior to service, defendant had rushed to court with a motion to preclude although it was also in default, plaintiff's failure timely to comply with the prior order would require a judicial response, but not the severe sanction of imposing an absolute order of preclusion, so that she would be given 10 days from service of the instant order within which to serve a bill of particulars responsive to defendant's demand. *Milton v Smithtown General Hospital*, 96 A.D.2d 855, 465 N.Y.S.2d 770, 1983 N.Y. App. Div. LEXIS 19447 (N.Y. App. Div. 2d Dep't 1983).

Summary judgment in favor of property owner in trespass action against adjoining landowner would be reversed even though adjoining landowner had failed to serve bill of particulars within 20-day period required under preclusion order, since oversight occasioned by law office failure was not willful or deliberate nor was delay inordinate or prejudicial. *Kenosian v Service*, 126 A.D.2d 790, 510 N.Y.S.2d 293, 1987 N.Y. App. Div. LEXIS 41943 (N.Y. App. Div. 3d Dep't 1987).

Hospital was entitled to summary judgment in medical negligence action where (1) plaintiffs' excuse for 19-month delay in serving bill of particulars (that attorney had misplaced file) was not

retained due to their consent to 60-day extension on hospital's conditional motion to preclude bill, (2) plaintiffs never served bill until 2 weeks after end of extension period, (3) bill that was eventually served failed to distinguish between acts allegedly committed by hospital and those committed by 2 codefendant private physicians (for which hospital bore no responsibility as matter of law), and (4) bill did not name any hospital personnel involved in subject operation nor did it specify mistakes committed by unidentified personnel, so that it became impossible to determine any merit in plaintiffs' case. *Brusco v St. Clare's Hospital & Health Center*, 128 A.D.2d 390, 512 N.Y.S.2d 675, 1987 N.Y. App. Div. LEXIS 44104 (N.Y. App. Div. 1st Dep't), app. dismissed, 70 N.Y.2d 692, 518 N.Y.S.2d 1027, 512 N.E.2d 553, 1987 N.Y. LEXIS 17948 (N.Y. 1987), app. denied, 70 N.Y.2d 606, 519 N.Y.S.2d 1030, 514 N.E.2d 388, 1987 N.Y. LEXIS 18558 (N.Y. 1987).

Defendants were entitled to summary judgment in medical malpractice action where plaintiff's attorney did not respond to demand for bill of particulars for more than 4 years and did not serve verified bill of particulars until 4 months after acknowledging in open court that he would respond within 30 days of service of order; plaintiff's lengthy delay was not excused on basis of law office failure where plaintiff's attorney averred that he did not recall receiving conditional order of preclusion served on him on December 21, and that he went on vacation on December 22 and did not personally open his mail that week. *Truesdale v County of Erie*, 229 A.D.2d 907, 645 N.Y.S.2d 676, 1996 N.Y. App. Div. LEXIS 8921 (N.Y. App. Div. 4th Dep't 1996).

32. —Settlement, effect of

The trial court properly refused to excuse plaintiffs' default, based on their failure to comply with a conditional order of preclusion that had been previously entered when plaintiffs failed to respond to defendants' demand for a bill of particulars, where, though plaintiffs asserted that defense counsel had granted them an indefinite extension of time to serve their bill of particulars while settlement negotiations occurred, such alleged extension took place after the time limit in the conditional order of preclusion had passed, where the agreement to extend the time had

never been reduced to writing, where plaintiffs failed to seek a court order granting an extension of time pursuant to CPLR § 2004, and where plaintiffs failed to submit an affidavit, based upon personal knowledge of the relevant facts, that established the existence of a meritorious cause of action. *Taylor v Prudential Property & Casualty Ins. Co.*, 97 A.D.2d 660, 469 N.Y.S.2d 200, 1983 N.Y. App. Div. LEXIS 20290 (N.Y. App. Div. 3d Dep't 1983).

33. —Stipulation, effect of

Court did not abuse its discretion in denying defendant's motion for summary judgment where (1) plaintiff stipulated to provide supplemental bill of particulars within 10 days after completion of depositions, but stipulation did not set forth penalty for noncompliance, and (2) plaintiff failed to comply with stipulation and served supplemental bill of particulars 4 months late as part of opposition to defendant's motion for summary judgment. *Martinez v 2407 Morris Assoc.*, 186 A.D.2d 359, 588 N.Y.S.2d 36, 1992 N.Y. App. Div. LEXIS 11018 (N.Y. App. Div. 1st Dep't 1992).

34. —Unforeseeable developments

Trial court properly granted defendants' motion to vacate preclusion order in respect to their counterclaim and properly permitted them to submit verified bill of particulars where there was no law office failure or other insufficient excuse but rather a showing of unforeseeable developments which prevented defendants' attorney from submitting demanded information that he had agreed to submit when consenting to preclusion order, where delay was not unreasonable or outrageous and there was no protracted inactivity, where defendants had established, by affidavit, a viable counterclaim, and where granting of relief sought would not prejudice plaintiff. *Kolner, Inc. v Dziadul*, 55 A.D.2d 716, 389 N.Y.S.2d 43, 1976 N.Y. App. Div. LEXIS 15489 (N.Y. App. Div. 3d Dep't 1976).

35. Preclusion for defective or insufficient bill, generally

Preclusion order improper where particulars are sufficiently definite, though inartistically expressed, to apprise defendant of nature of claim and to limit the proof thereof as particularized. *Hencken v Edelman*, 19 A.D.2d 821, 243 N.Y.S.2d 548, 1963 N.Y. App. Div. LEXIS 3054 (N.Y. App. Div. 1st Dep't 1963).

Where the plaintiff, in response to defendant's demand therefor, filed a bill of particulars which defendant considered insufficient, and defendant failed to move for an order of preclusion within 10 days after receipt of the allegedly defective bill, defendant was not thereafter entitled to an order of preclusion. *Golowaty v MacHnick Constr. Co.*, 26 A.D.2d 718, 271 N.Y.S.2d 511, 1966 N.Y. App. Div. LEXIS 3775 (N.Y. App. Div. 3d Dep't 1966).

There is no authority for the return of a bill of particulars by the defendant, claiming that it was defective, since the rule has provided a specific remedy where a bill of particulars is deemed inadequate; its sufficiency is a question for the court and not for counsel to decide. Where defendant contended in a negligence action that plaintiff was precluded from presenting proof as to negligence and damages because a demanded bill of particulars was defective, a preclusion order was properly denied where defendants failed to follow the procedure prescribed in subd (d) of CPLR 3042 in respect to a bill of particulars regarded as defective. *Lutza v Bollacker*, 36 A.D.2d 789, 319 N.Y.S.2d 371, 1971 N.Y. App. Div. LEXIS 4484 (N.Y. App. Div. 3d Dep't 1971).

Plaintiff's failure to follow the procedure prescribed in CPLR 3042, subd d with respect to a bill of particulars which contained an open-ended damages clause enabled defendant to offer at trial proof of damages beyond those particularized. *Pacos Constr. Co. v State*, 41 A.D.2d 690, 342 N.Y.S.2d 595, 1973 N.Y. App. Div. LEXIS 5057 (N.Y. App. Div. 4th Dep't 1973).

Court has discretion of either directing preclusion or service of further bill of particulars if bill of particulars served is insufficient. *Morello v Saratoga Harness Racing, Inc.*, 44 A.D.2d 884, 356 N.Y.S.2d 114, 1974 N.Y. App. Div. LEXIS 4871 (N.Y. App. Div. 3d Dep't 1974).

Defendants' failure to move for further bill of particulars within ten days after receipt of contested bill precluded such motion in absence of showing of special circumstances to excuse delay.

Kursa v Barratiere, 49 A.D.2d 781, 372 N.Y.S.2d 741, 1975 N.Y. App. Div. LEXIS 10806 (N.Y. App. Div. 3d Dep't 1975).

In a shareholders derivative action, Special Term abused its discretion in granting plaintiff an order of preclusion, where the motion to preclude was premature, inasmuch as no depositions had been taken and few documents had been produced, and inasmuch as preclusion is the ultimate sanction and should not have been considered until defendants had had the opportunity to conduct examinations before trial. Miller v Kastner, 96 A.D.2d 714, 465 N.Y.S.2d 93, 1983 N.Y. App. Div. LEXIS 19275 (N.Y. App. Div. 4th Dep't 1983).

In an action for personal injuries allegedly due to a defective oxygen cylinder, plaintiffs were properly precluded from offering evidence of a physical defect in the oxygen cylinder where plaintiffs' several bills of particulars generally alleged that the cylinder was "defective", that it did not have a "proper valve and pressure gauge", and that it was "negligently designed, manufactured and tested," which were allegations insufficient to adequately inform defendant as to the specific nature of the defect complained of or the nexus of such defect to plaintiffs' alleged injuries. Kelly v American International Health Facilities, Inc., 105 A.D.2d 595, 481 N.Y.S.2d 74, 1984 N.Y. App. Div. LEXIS 20702 (N.Y. App. Div. 1st Dep't 1984).

There is no time limit under CLS CPLR § 3042 motion to preclude where defective bill of particulars has been served, and motion to preclude defective bill of particulars may be granted conditionally even though made over 3 years after service of demand for bill of particulars. Magnus Drugs, Inc. v New York: Human Resources Admin., 112 A.D.2d 146, 490 N.Y.S.2d 834, 1985 N.Y. App. Div. LEXIS 56431 (N.Y. App. Div. 2d Dep't 1985).

In principal's action for moneys received by agent, agent was entitled to granting of motion to preclude for failure of principal to respond properly to agent's demand for bill of particulars, despite principal's excuse that those particulars were within knowledge of agent; principal should be precluded from offering evidence at trial concerning particulars unless he complies within 30 days after service of order or moves for extension of time on showing of good cause.

Johnson v Wagner, 124 A.D.2d 1054, 508 N.Y.S.2d 738, 1986 N.Y. App. Div. LEXIS 62413 (N.Y. App. Div. 4th Dep't 1986).

New trial on medical malpractice liability was not warranted, despite admission of evidence on several additional acts of negligence not specified in bill of particulars, where physician was not found liable for one unspecified act and other such acts were covered by theories of liability specified in bill. McDougald v Garber, 135 A.D.2d 80, 524 N.Y.S.2d 192, 1988 N.Y. App. Div. LEXIS 590 (N.Y. App. Div. 1st Dep't 1988), modified, 73 N.Y.2d 246, 538 N.Y.S.2d 937, 536 N.E.2d 372, 1989 N.Y. LEXIS 202 (N.Y. 1989).

In action brought by state and town to abate public nuisance resulting from corporation's breach of its duty of care by causing or permitting wastes to be placed in improper containers and improperly disposed of, court erred in granting corporation's motion under CLS CPLR § 3042(d) for order of preclusion or order directing service of further bill of particulars respecting demands for information as to type of containers and methods of disposal which plaintiffs contended should have been used, since plaintiffs' complaint did not impose burden to establish identity, or even existence, of proper containers or methods, and thus demands sought material outside allegations of complaint; moreover, demands likewise sought material which was not evidentiary in nature but matter of expert proof, clearly beyond scope of bill of particulars. State v General Elec. Co., 173 A.D.2d 939, 569 N.Y.S.2d 804, 1991 N.Y. App. Div. LEXIS 5439 (N.Y. App. Div. 3d Dep't 1991).

In action arising from incident in which certain police officers and employees of city housing authority allegedly entered plaintiffs' apartment, committed assault and battery on them and then illegally arrested and maliciously prosecuted them, court should have precluded plaintiffs from offering evidence to support assertions that their alleged injuries resulted from negligence on part of housing authority's employees where complaint alleged only that officers acted intentionally, and allegation of negligence was first made in bill of particulars. Bryant v New York, 188 A.D.2d 447, 591 N.Y.S.2d 45, 1992 N.Y. App. Div. LEXIS 13570 (N.Y. App. Div. 2d Dep't 1992).

Plaintiff was not entitled to any relief arising from defendants' allegedly defective bill of particulars where bill of particulars was served in July 1987 and plaintiff did not move for order of preclusion until May 1990. *Oliveri v Carter*, 194 A.D.2d 525, 598 N.Y.S.2d 85, 1993 N.Y. App. Div. LEXIS 5448 (N.Y. App. Div. 2d Dep't 1993).

Plaintiff's expert was properly precluded from testifying, at motor vehicle accident trial, that MRI test showed that plaintiff had bulging discs at particular locations on cervical spine where bill of particulars stated various injuries at such locations but did not mention bulging discs, defendant was not provided with copy of MRI results as part of plaintiff's medical records, plaintiff did not advise defendants of bulging disc claim before objection was raised at trial, and plaintiff failed to make offer of proof to show in what way bulging disc caused radicular pain and numbness in plaintiff's arms and fingers as distinguished from effect of narrowing of disc spaces due to degenerative changes that were noted in bill of particulars. Testimony concerning specific injury not mentioned in bill of particulars should be excluded unless it can be shown that opposing party should have known of such injury. *D'Angelo v Bryk*, 205 A.D.2d 935, 613 N.Y.S.2d 757, 1994 N.Y. App. Div. LEXIS 6490 (N.Y. App. Div. 3d Dep't 1994).

On motion by state to preclude testimony of experts on grounds that it did not comply with CLS CPLR § 3101(d)(1)(i) and was outside parameters of claimant's bill of particulars, Court of Claims erred in delaying resolution of matter until trial; purpose of § 3101(d)(1)(i) is to facilitated effective cross-examination and rebuttal testimony. *Chapman v State*, 227 A.D.2d 867, 642 N.Y.S.2d 975, 1996 N.Y. App. Div. LEXIS 5777 (N.Y. App. Div. 3d Dep't 1996).

Court properly restricted malpractice plaintiff's proof to defendant's failure to warn her of risk involved in surgery, and prohibited evidence of defendant's failure to advise her of alternative procedures, where her complaint and bill of particulars limited her informed consent action to defendant's failure to advise of risks. *Larkin v Diaz*, 257 A.D.2d 843, 685 N.Y.S.2d 300, 1999 N.Y. App. Div. LEXIS 279 (N.Y. App. Div. 3d Dep't 1999).

Hospital which failed to produce copies of nursing notes relating to medical malpractice plaintiff's hospitalization, and indicated that presumably it had possession of them but was

unable to locate them although search had been made, was not entitled to strike paragraphs of plaintiff's verified bill of particulars as insufficiently particular, where information demanded by hospital was likely contained in nursing notes not produced. *Felock by Felock v Albany Med. Ctr. Hosp.*, 258 A.D.2d 772, 685 N.Y.S.2d 844, 1999 N.Y. App. Div. LEXIS 1172 (N.Y. App. Div. 3d Dep't 1999).

Generally, evidence of injuries or conditions not enumerated by plaintiff in bill of particulars will not be permitted at trial, but such evidence may be introduced where it flows immediately and necessarily from information conveyed in bill of particulars, or where record reveals that defendant should have known of such injury or condition. Arthritis was not condition that "immediately and necessarily" flowed from specific injuries set forth in plaintiff's bill of particulars, and thus medical evidence of such condition should not have been admitted in personal injury trial, where bill of particulars stated that plaintiff would suffer permanent inability to flex ankle resulting in abnormal walking gait and pain as well as limited range of motion in wrist, and that limitations and pain would increase with age, but no specific mention was made of likelihood of developing arthritis. Fact that medical expert's videotaped testimony was taken about one month before trial did not obviate prejudice to defendants resulting from his trial testimony on subject of arthritis, which had not been mentioned in plaintiff's bill of particulars, since defendants did not have sufficient time to prepare for and effectively cross-examine expert on subject. *Acunto v Conklin*, 260 A.D.2d 787, 687 N.Y.S.2d 779, 1999 N.Y. App. Div. LEXIS 3671 (N.Y. App. Div. 3d Dep't 1999).

It was reversible error to preclude defendant from introducing any testimony as to plaintiff's alleged culpable conduct, negligence, or assumption of risk for defendant's 8-month failure to serve bill of particulars where plaintiff neither argued nor showed that defendant's failure to respond was willful, and there was no showing that defendant demonstrated pattern of obstructive conduct or failure to comply with other discovery requests; further, plaintiff's counsel did not comply with 22 NYCRR § 202.7(a)(2), which required plaintiff to make good faith attempt to resolve issue with defense counsel before moving to preclude, supported by his affirmation to

that effect. *Kovacs v Castle Restoration & Constr., Inc.*, 262 A.D.2d 165, 692 N.Y.S.2d 63, 1999 N.Y. App. Div. LEXIS 6787 (N.Y. App. Div. 1st Dep't 1999).

Plaintiffs were properly precluded from introducing certain evidence that should have been provided for in a court-ordered supplemental bill of particulars after the plaintiffs provided the supplemental bill but failed to disclose requested information as directed by the court and failed to proffer any reasonable excuse for their default. *Precise Court Reporting, Inc. v Karten*, 6 A.D.3d 412, 775 N.Y.S.2d 339, 2004 N.Y. App. Div. LEXIS 3807 (N.Y. App. Div. 2d Dep't 2004).

Although some of the questions in a patient's bills of particulars were unanswered or incomplete, because the patient's failure to comply with a prior discovery order was not willful, contumacious, deliberate, or in bad faith, pursuant to N.Y. C.P.L.R. 3042(c), (d), 3126(3), the trial court erred in dismissing the complaint. *Kosh v Naughton*, 45 A.D.3d 1324, 844 N.Y.S.2d 811, 2007 N.Y. App. Div. LEXIS 11568 (N.Y. App. Div. 4th Dep't 2007).

36. —Amended bill

Defendant's delay of over two and one-half years in responding to plaintiff's bill of particulars did not preclude defendant from giving evidence at trial where the delay was significantly contributed to by procedural machinations of the parties, including an amended complaint, an amended answer, and an amended bill of particulars from plaintiff, and where plaintiff had made no demand for the bill until the motion to preclude was made. *Davis v Sapa*, 107 A.D.2d 1005, 484 N.Y.S.2d 568, 1985 N.Y. App. Div. LEXIS 42516 (N.Y. App. Div. 3d Dep't 1985).

In their personal injury action, plaintiffs had a right to supplement their bill of particulars because it was, in fact, an amended bill, in that it asserted new injuries, and a party had a right under N.Y. C.P.L.R. 3042(b) to amend a bill of particulars once as a matter of course before a note of issue was filed. *Vargas v Villa Josefa Realty Corp.*, 28 A.D.3d 389, 815 N.Y.S.2d 30, 2006 N.Y. App. Div. LEXIS 4941 (N.Y. App. Div. 1st Dep't 2006).

37. —Conditional order

A motion for preclusion was improperly denied where a judge ruling on the movant's second motion for preclusion abused his discretion by vacating and annulling a conditional order of another judge of coordinate jurisdiction which required that a bill of particulars be submitted, and where such bill of particulars was inadequate. *Harry T. Mangurian, Inc. v Lisbon Contractors, Inc.*, 86 A.D.2d 955, 448 N.Y.S.2d 316, 1982 N.Y. App. Div. LEXIS 15644 (N.Y. App. Div. 4th Dep't 1982), *aff'd*, *Romano v Perales*, 67 N.Y.2d 848, 501 N.Y.S.2d 659, 492 N.E.2d 787, 1986 N.Y. LEXIS 17590 (N.Y. 1986).

In an action to recover damages for breach of contract, a motion by plaintiff to preclude defendant from giving any evidence at trial as to his affirmative defenses and counterclaims was properly granted where the bill of particulars submitted by defendant was clearly inadequate in many instances and did not comply with a conditional order of preclusion, as extended by a subsequent order. *Half Hollow Hills Cent. School Dist. v Costello*, 100 A.D.2d 505, 472 N.Y.S.2d 710, 1984 N.Y. App. Div. LEXIS 17475 (N.Y. App. Div. 2d Dep't 1984).

In personal injury action, plaintiff's bald claim of "inadvertence" was insufficient to excuse 2-year delay in responding to defendants' demand for bill of particulars where plaintiff also did not oppose defendants' subsequent motion to preclude, ignored resulting conditional preclusion order, and did not proffer information sought by defendants until defendants moved for summary judgment based on prior preclusion order; consequently, defendants' motion for summary judgment should have been unconditionally granted. *Lawrence v Westchester Book Composition, Inc.*, 127 A.D.2d 744, 511 N.Y.S.2d 933, 1987 N.Y. App. Div. LEXIS 43229 (N.Y. App. Div. 2d Dep't 1987).

38. —Failure of service

A motion addressed to a defective bill of particulars, seeking either preclusion or directing the service of a further bill, must be within 10 days after receipt of the bill alleged to be insufficient, and a delay in making such a motion is not excused by the fact that the alleged defective bill

was not timely served. *Allstate Ins. Co. v Butindari*, 27 A.D.2d 653, 276 N.Y.S.2d 790, 1967 N.Y. App. Div. LEXIS 4976 (N.Y. App. Div. 1st Dep't 1967).

Denial of plaintiff's motion to vacate order of preclusion was proper where motion was not made until five months after expiration of time to appeal from denial of a prior motion to vacate order of preclusion, where no adequate excuse was given for inordinate delays in serving bill of particulars, in complying with conditions of the order of preclusion or in making the two motions to vacate and where there was no showing of merit. *Jankowski v Towmotor Corp.*, 56 A.D.2d 801, 393 N.Y.S.2d 10, 1977 N.Y. App. Div. LEXIS 11094 (N.Y. App. Div. 1st Dep't), app. dismissed, 42 N.Y.2d 909, 1977 N.Y. LEXIS 4296 (N.Y. 1977).

39. —Family Court proceeding

In a matrimonial action, the Family Court erred in disregarding a Supreme Court order that struck the husband's answer and counterclaim and precluded the husband from offering evidence upon trial of the contents of documents referred to in the answer and counterclaim as well as documents sought by a notice of discovery and inspection, where the husband's willful noncompliance with the Supreme Court's order and blatant disregard of his statutory obligation to disclose justified invocation of the sanctions in Dom Rel Law § 236, and where the Supreme Court's order was the law of the case, with the result that upon remand the husband would be considered to have defaulted and the proceedings would be solely upon the wife's proof. *Reed v Reed*, 93 A.D.2d 105, 462 N.Y.S.2d 73, 1983 N.Y. App. Div. LEXIS 17095 (N.Y. App. Div. 3d Dep't), dismissed, *Patricia R. v Thomas R.*, 59 N.Y.2d 761, 1983 N.Y. LEXIS 4998 (N.Y. 1983).

40. —Further bill

Plaintiffs should have been granted leave to serve a further bill of particulars where there was no real element of surprise involved, the bill being merely an elaboration of the earlier bill of particulars. *Vitiello v Consolidated Edison Co.*, 51 A.D.2d 523, 379 N.Y.S.2d 403, 1976 N.Y. App. Div. LEXIS 10725 (N.Y. App. Div. 1st Dep't 1976).

Where it appeared that present officers and directors of corporate defendant in civil action did not possess information called for in plaintiff's motion for supplemental bill of particulars, but that such information could be obtained through examination before trial of plaintiff, defendant would not be directed to serve second supplemental bill of particulars or be precluded from offering evidence in support of its second affirmative defense until it had been given opportunity to conduct such examination of plaintiff. *Chas. P. Young Co. v Great Western United Corp.*, 54 A.D.2d 829, 388 N.Y.S.2d 96, 1976 N.Y. App. Div. LEXIS 14576 (N.Y. App. Div. 1st Dep't 1976).

Bill of particulars furnished by plaintiff in divorce action in response to defendant's demand represented a flagrant disregard of court's directive as contained in stipulation on record requiring plaintiff to serve an entirely new bill of particulars in which item of demand is answered separately corresponding in number and without reference to other portions of bill of particulars. *Goodman v Goodman*, 89 Misc. 2d 636, 391 N.Y.S.2d 974, 1977 N.Y. Misc. LEXIS 1909 (N.Y. Sup. Ct. 1977).

41. —Pro se plaintiff

In action brought by pro se plaintiff, court would deny defendants' motion to preclude or dismiss for plaintiff's failure to respond to their bill of particulars, notwithstanding plaintiff's default on motion, since demand was overly broad and requested inappropriate information, and defendants' discovery demands displayed effort to take advantage of plaintiff's vulnerability; under circumstances, defendants's motion would be denied without prejudice to service of appropriate demand for bill of particulars or other disclosure device. *Bolshakov v McCarthy*, 182 Misc. 2d 477, 702 N.Y.S.2d 748, 1999 N.Y. Misc. LEXIS 487 (N.Y. Civ. Ct. 1999).

42. —“Special circumstances”

In an action to recover money damages against an insurance company by an assignee of an insured's rights, arising out of the company's alleged bad faith refusal to settle within policy limits a previous action between the plaintiff and the company's insured, which refusal had resulted in

a verdict in excess thereof, it was an abuse of discretion to grant to plaintiffs leave to file a supplemental bill of particulars despite their assertion that they had had considerable difficulty in obtaining a new attorney after their original attorney had been disqualified by court order, where there had been a lapse of six months from the changing of attorneys to the time the plaintiff offered the bill of particulars in defending against the defendant's motion for summary judgment. *Shumalski v Government Employees Ins. Co.*, 80 A.D.2d 975, 438 N.Y.S.2d 609, 1981 N.Y. App. Div. LEXIS 10885 (N.Y. App. Div. 3d Dep't), *aff'd*, 54 N.Y.2d 671, 442 N.Y.S.2d 508, 425 N.E.2d 897, 1981 N.Y. LEXIS 2620 (N.Y. 1981).

In a medical malpractice action, defendant's motion for an order of preclusion regarding certain items of plaintiffs' further bill of particulars or in the alternative for a direction that plaintiffs serve a supplemental further bill of particulars with respect to those items would be granted insofar as defendants sought a supplemental further bill of particulars, and plaintiffs would be directed to serve the same on defendants, since plaintiffs' responses were vague and overbroad, the unnecessarily broad responses failed to particularize and amplify the pleadings and would not limit proof or prevent surprise at trial, and plaintiffs were capable of providing more specific responses. *Gannotta v Long Island College Hospital*, 92 A.D.2d 930, 460 N.Y.S.2d 352, 1983 N.Y. App. Div. LEXIS 17338 (N.Y. App. Div. 2d Dep't 1983).

Plaintiffs were not entitled to further bill of particulars where their motion for further bill was served more than 2 months after date they were served with original bill, and where plaintiffs failed to assert existence of any special circumstances in their supporting papers; plaintiffs' argument that special circumstances existed because of their attempt to secure defendant's voluntary compliance by serving demand for further bill some 20 days after receiving allegedly defective bill was without merit. *Anzalone v Preferred Mut. Ins. Co.*, 121 A.D.2d 491, 504 N.Y.S.2d 12, 1986 N.Y. App. Div. LEXIS 58469 (N.Y. App. Div. 2d Dep't 1986).

Defendants' motion for preclusion, on basis of allegedly untimely and deficient bill of particulars, should have been denied where it was not made until more than 4 months had passed after service of bill of particulars; "special circumstances" were not shown by pendency of other

proceedings and motions involving plaintiff, including motion to dismiss complaint made by certain codefendants, especially where determination of codefendants' motion to dismiss would have no effect on plaintiff's claims against defendants seeking preclusion. *Murphy v Capone*, 121 A.D.2d 702, 503 N.Y.S.2d 889, 1986 N.Y. App. Div. LEXIS 58687 (N.Y. App. Div. 2d Dep't 1986).

In personal injury action, defendant tortfeasors would be deemed to have waived objection to supplemental bill of particulars expanding on extent of plaintiff's continuing disability where tortfeasors failed to timely challenge supplemental bill pursuant to CLS CPLR § 3042. *Schnarch v Owen*, 124 A.D.2d 372, 507 N.Y.S.2d 315, 1986 N.Y. App. Div. LEXIS 61389 (N.Y. App. Div. 3d Dep't 1986).

Court properly ordered plaintiffs to respond to request for itemization of disbursements allegedly incurred when plaintiff was attorney of record prior to defendant's substitution, since plaintiffs had refused to comply with defendant's demand for bill of particulars and to explain how \$25,000 figure was determined, particularly where plaintiffs made no motion objecting to demand. *Capoccia v Brognano*, 135 A.D.2d 1010, 522 N.Y.S.2d 733, 1987 N.Y. App. Div. LEXIS 52891 (N.Y. App. Div. 3d Dep't 1987), app. dismissed, 71 N.Y.2d 1022, 530 N.Y.S.2d 557, 526 N.E.2d 48, 1988 N.Y. LEXIS 2106 (N.Y. 1988).

Malpractice action would not be dismissed for failure to serve timely complaint where defendant was not prejudiced by 13-day inadvertent delay which was adequately excused by illness as detailed in physician's supporting affidavit, and where affidavit of plaintiff's expert showed viable cause of action in that defendant's conduct departed from accepted medical standards and proximately caused plaintiff's injuries as alleged in complaint. *Dorgan v Dunda*, 165 A.D.2d 949, 561 N.Y.S.2d 110, 1990 N.Y. App. Div. LEXIS 11270 (N.Y. App. Div. 3d Dep't 1990).

Defendants were entitled to final order of preclusion as to certain items contained in bill of particulars, despite contention that defendants failed to move for final order of preclusion within 10 days of receipt of second bill of particulars, since 10-day requirement of CLS CPLR § 3042(d) was not applicable where plaintiff's second bill of particulars was identical to her first bill

of particulars and thus defendants had received no “further” bill of particulars when they moved for final order of preclusion. *Murphy v Capone*, 168 A.D.2d 436, 562 N.Y.S.2d 526, 562 N.Y.S.2d 527, 1990 N.Y. App. Div. LEXIS 14999 (N.Y. App. Div. 2d Dep't 1990).

In action by plaintiff who was injured in shootout that occurred in her apartment between intruders and 2 New York City Housing Authority (NYCHA) police officers, court properly granted plaintiff's motion on eve of trial for leave to serve further supplemental bill of particulars to allege that NYCHA was negligent in reacting to 911 telephone call placed by her sister, since NYCHA had been familiar with underlying facts of shooting incident for many years and thus was not prejudiced by delay. *Salcedo v New York City Housing Authority*, 179 A.D.2d 440, 577 N.Y.S.2d 859, 1992 N.Y. App. Div. LEXIS 169 (N.Y. App. Div. 1st Dep't 1992).

In action against owner of housing complex and general contractor for breach of contract in connection with roof replacement project, owner was not entitled to dismissal of general contractor's answer to owner's cross claim where general contractor's repeated failure to comply with court's order to submit responsive supplemental bill of particulars providing cost/time breakdowns for alleged increased costs did not affect its defense to owner's cross claim, which required only general denial, and there was no willful or contumacious disregard of discovery by general contractor pertaining to owner's cross claim. Also, general contractor's cross claim against owner for causing delay and increased construction costs was properly dismissed where general contractor had 3 opportunities and each time failed to comply with court's order to submit responsive supplemental bill of particulars providing cost/time breakdowns for alleged increased costs. *Tempforce Inc. by Anton Wood Assocs. v Municipal Hous. Auth.*, 263 A.D.2d 926, 694 N.Y.S.2d 240, 1999 N.Y. App. Div. LEXIS 8449 (N.Y. App. Div. 3d Dep't), app. dismissed, 94 N.Y.2d 838, 702 N.Y.S.2d 586, 724 N.E.2d 378, 1999 N.Y. LEXIS 3850 (N.Y. 1999).

43. —Stipulation, effect of

In action by plaintiff who was shot by city police officer during his arrest for violent crime, defendants were not precluded from raising issue of assumption of risk based on their failure to provide bill of particulars amplifying such defense pursuant to parties' pre-trial stipulation, where plaintiff never sought sanctions based on defendants' failure, discovery went forward and was completed in due course, plaintiff placed matter on trial calendar knowing that he had not received bill of particulars, and all facts on which defendants relied to prove assumption of risk were fully known to plaintiff before trial began. *Fernandez v City of New York*, 169 Misc. 2d 397, 645 N.Y.S.2d 1004, 1996 N.Y. Misc. LEXIS 244 (N.Y. Sup. Ct. 1996).

44. —Supplemental bill

In an action to recover damages for negligence, breach of warranty and strict products liability, plaintiffs would be precluded from introducing at trial evidence of a specific defect in the subject motor vehicle where, in response to defendant manufacturer's demands for particulars, the plaintiffs asserted that they lacked present knowledge regarding the alleged negligence, and manufacturing and design defects, and that they would provide a supplemental bill containing such information when and if it was acquired, but failed or neglected subsequently to supply any additional or more specific particulars. *Gargano v Rosenthal*, 100 A.D.2d 534, 473 N.Y.S.2d 225, 1984 N.Y. App. Div. LEXIS 17505 (N.Y. App. Div. 2d Dep't 1984).

45. Conditional order of preclusion, generally

Plaintiff's service of a bill of particulars after the time fixed by the conditional order of preclusion, which delay was adequately explained, and in the absence of any proof of prejudice, was proper and plaintiff was entitled to be relieved of the effect of the preclusion. *Maglieri v Saks*, 33 A.D.2d 898, 306 N.Y.S.2d 479, 1970 N.Y. App. Div. LEXIS 5698 (N.Y. App. Div. 1st Dep't 1970).

Where following filing of complaint in civil action, conditional order of preclusion was entered against plaintiffs on October 5, 1972 for failure to comply with demand for bill of particulars dated June 26, 1972, where defendant's attorney thereafter authorized two extensions of time

for compliance, but finally advised plaintiffs' attorney that no further extension would be permitted beyond January 10, 1973, and where, on February 14, 1974, just prior to trial of action, plaintiffs served bill of particulars, trial court abused discretion by denying defendant's motion to dismiss complaint, despite medical disability of plaintiff's counsel from June 16, 1973 to August 3, 1973. *Ciccarelli v Welcome*, 50 A.D.2d 1046, 377 N.Y.S.2d 743, 1975 N.Y. App. Div. LEXIS 12049 (N.Y. App. Div. 3d Dep't 1975), *aff'd*, 40 N.Y.2d 954, 390 N.Y.S.2d 414, 358 N.E.2d 1039, 1976 N.Y. LEXIS 3134 (N.Y. 1976).

Where appellant did not submit a bill of particulars in reply to respondent's notice requesting such and failed to timely move to vacate or modify notice insofar as it requested items appellant regarded as objectionable, appellant was not entitled to relief from conditional order of preclusion, even though not all of items requested were strictly allowable by means of bill of particulars, since they were not palpably improper for it appeared that appellant would be able to supply them without unreasonable burden. *Walter S. Pratt & Sons, Inc. v Kingsley Drilling & Blasting, Inc.*, 52 A.D.2d 997, 383 N.Y.S.2d 449, 1976 N.Y. App. Div. LEXIS 12879 (N.Y. App. Div. 3d Dep't 1976).

Where plaintiffs who submitted incomplete bill of particulars made some attempt at compliance with defendants' demand for bill of particulars, defendants' motion for order of preclusion would be denied on condition that plaintiffs comply in full with demand for bill of particulars, move for modification of such demand within ten days of entry of order, even though plaintiffs made no timely objections to demand and made no showing that demand was "palpably improper"; examinations before trial would be ordered held after service by plaintiffs of proper bill of particulars. *Panarelli v State Farm Fire & Casualty Co.*, 54 A.D.2d 961, 388 N.Y.S.2d 927, 1976 N.Y. App. Div. LEXIS 14878 (N.Y. App. Div. 2d Dep't 1976).

Trial court abused its discretion by rendering an outright order of preclusion absent any reason to deny the plaintiff an opportunity to rectify her allegedly defective bill of particulars. *Hoven v Hoven*, 91 A.D.2d 805, 458 N.Y.S.2d 53, 1982 N.Y. App. Div. LEXIS 19702 (N.Y. App. Div. 3d Dep't 1982).

Plaintiff who responded inadequately to defendant's demand for further bill of particulars would be precluded from presenting evidence as to matters requested in demand, unless within 20 days of entry and service of order to compel furnishing of such bill he served further bill of particulars adequately responding to demand. *Draper v Zamiara*, 126 A.D.2d 941, 511 N.Y.S.2d 986, 1987 N.Y. App. Div. LEXIS 42044 (N.Y. App. Div. 4th Dep't 1987).

Court should have excused plaintiffs' failure to timely serve bills of particulars pursuant to conditional order of preclusion, due to law office failure, in light of relatively short delay in serving bills, absence of willful default or intention to abandon action, lack of prejudice to defendants, demonstrated merit of action, and long-established public policy that actions should be resolved on their merits; however, plaintiffs' attorney would be directed to personally pay \$500 to each defendant, since his delay caused plethora of unnecessary litigation. *Higgins v Community Hospital at Glen Cove*, 135 A.D.2d 607, 522 N.Y.S.2d 186, 1987 N.Y. App. Div. LEXIS 52546 (N.Y. App. Div. 2d Dep't 1987).

Complaint should not have been dismissed on basis of plaintiffs' noncompliance with conditional order of preclusion, entered on default for plaintiffs' failure to serve bill of particulars, since (1) complaint had merit and indigent plaintiffs had never abandoned their claims, (2) default leading to preclusion order and subsequent delay in responding to demand for particulars was due to lack of diligence by plaintiffs' former counsel, and (3) defendants suffered no prejudice by delay in furnishing particulars. *Fernandez v Tsoumpas Bros. Co.*, 140 A.D.2d 257, 528 N.Y.S.2d 327, 1988 N.Y. App. Div. LEXIS 5484 (N.Y. App. Div. 1st Dep't 1988).

Court should have granted defendant's summary judgment motion to dismiss complaint where plaintiff had failed to offer reasonable excuse for delay in furnishing bill of particulars more than 2 ½ years after plaintiff had consented to conditional order of preclusion, and where no affidavit of merits had been submitted. *Ramos v Lapommeray*, 140 A.D.2d 286, 528 N.Y.S.2d 581, 1988 N.Y. App. Div. LEXIS 5841 (N.Y. App. Div. 1st Dep't 1988).

Court should have unconditionally granted defendant's summary judgment motion to dismiss complaint where plaintiffs failed to give reasonable excuse for their extensive delay in serving

bill of particulars, they failed to comply with court's conditional order of preclusion, and they failed to submit affidavit of merit. *Barbera v De Rostaing*, 140 A.D.2d 660, 528 N.Y.S.2d 1020, 1988 N.Y. App. Div. LEXIS 6126 (N.Y. App. Div. 2d Dep't 1988).

Defaulting party must supply affidavit of merits from person competent to attest to meritorious nature of claim in situation where party defaults in timely service of bill of particulars under conditional order of preclusion, even if default results from law office failure. *Pomerantz v Long Island Paneling Co.*, 150 A.D.2d 665, 541 N.Y.S.2d 537, 1989 N.Y. App. Div. LEXIS 6928 (N.Y. App. Div. 2d Dep't 1989).

Court did not abuse its discretion in excusing plaintiff's late bill of particulars on condition that plaintiffs' attorney pay \$750 to defendant as sanction where (1) defendant was granted order of preclusion unless plaintiffs served bill of particulars within 45 days of service of order, (2) about 6 months after service, defendant moved for summary judgment dismissing complaint on basis that plaintiffs failed to comply with conditional order, and (3) plaintiffs' response alleged law office failure as excuse and demonstrated meritorious cause of action; delay was not extreme, there was no intent to abandon action, and there was no prejudice suffered by defendant. *Gutenplan v Dauman*, 154 A.D.2d 337, 545 N.Y.S.2d 815, 1989 N.Y. App. Div. LEXIS 12277 (N.Y. App. Div. 2d Dep't 1989).

Supreme court, in vacating palpably improper items in defendant's demand for bills of particulars, improperly deemed such items "additional" demands for disclosure and directed plaintiffs to comply therewith or suffer preclusion pursuant to CLS CPLR § 3042, even though most information sought by improper items was subject to disclosure under CLS CPLR Art 31, since court's actions ignored essential differences between CLS CPLR Art 30 and Art 31, and in effect permitted defendants who had made improper demands to utilize unauthorized disclosure devices. *Bharwani v Del Rosario*, 180 A.D.2d 704, 579 N.Y.S.2d 727, 1992 N.Y. App. Div. LEXIS 2604 (N.Y. App. Div. 2d Dep't 1992).

Plaintiff was not entitled to extension of time to comply with conditional preclusion order of which she was in default where (1) conditional order of preclusion requiring further bill of particulars

within 30 days was served in September 1987, (2) plaintiff never complied with order and motion for summary judgment was filed in June 1991, and (3) excuse offered was wholly speculative statement by plaintiff's current counsel which related to possible events at time of split up of law firm which formerly represented plaintiff, especially in light of extent of delay and fact that attorney who was involved in 1987 motion stayed with law firm and continued to work on file. *Clanton v Vagianellis*, 192 A.D.2d 943, 596 N.Y.S.2d 593, 1993 N.Y. App. Div. LEXIS 4049 (N.Y. App. Div. 3d Dep't 1993).

Plaintiff's motion to preclude evidence related to matters covered by defendant's late furnishing of bill of particulars would be denied on condition that defendant pay plaintiff's attorneys \$1,500 where those attorneys incurred expense and were inconvenienced by delay. *Kleinberg Elec., Inc. v City of New York*, 255 A.D.2d 248, 680 N.Y.S.2d 498, 1998 N.Y. App. Div. LEXIS 12688 (N.Y. App. Div. 1st Dep't 1998).

46. —Attorney malpractice

In action for legal malpractice arising from negligent representation in criminal proceeding, plaintiff had burden of proving its innocence of criminal charges as part of its prima facie case; thus, defendants were entitled to information requested in their demand for bill of particulars as to (1) whether plaintiff was guilty or innocent of underlying charges, (2) whether plaintiff claimed that, but for defendants' acts or omissions, plaintiff would not have been convicted, and (3) underlying facts forming basis of plaintiff's claim that it would not have been convicted but for defendants' negligence; moreover, plaintiff would be precluded from introducing at trial any evidence related to information sought if it failed to comply with such request. *B.K. Industries, Inc. v Pinks*, 143 A.D.2d 963, 533 N.Y.S.2d 595, 1988 N.Y. App. Div. LEXIS 10762 (N.Y. App. Div. 2d Dep't 1988).

47. —Automobile accident

In a personal injury action by a pedestrian following a car intersectional collision the trial court erred in denying the car manufacturer's motion, made after plaintiff filed one bill of particulars, to preclude the plaintiff or require a further bill, where plaintiff's original response to the demand was so general as to be useless and where the manufacturer suggested an amended bill by plaintiff that he had no further knowledge but that if any were obtained he would supply it to the manufacturer in that the manufacturer was entitled to the particulars demanded when and if plaintiff acquired the necessary information. *Finkel v Katz*, 84 A.D.2d 730, 444 N.Y.S.2d 90, 1981 N.Y. App. Div. LEXIS 15894 (N.Y. App. Div. 1st Dep't 1981).

In an automobile accident action, a motion to preclude plaintiff from offering evidence for which the particulars as to insurance coverage were demanded and which was "refused" would be granted unless a bill addressed to that demand was served within ten days, since following a written notice demanding a bill of particulars, a party who objects to providing any part thereof must move to vacate or modify the demand within ten days, under CPLR § 3042; except when the demand is probably improper, the objecting party can no longer resist preclusion by questioning the propriety of any item demanded. *Mull v Kenyon*, 118 Misc. 2d 114, 459 N.Y.S.2d 1009, 1983 N.Y. Misc. LEXIS 3273 (N.Y. County Ct. 1983).

48. —Breach of contract

In a breach of contract action in which defendant moved for an order precluding plaintiff from offering testimony about the contract based upon plaintiff's failure to comply with a demand for a bill of particulars, the trial court abused its discretion in granting the preclusion motion unconditionally, since, absent willful, deliberate and contumacious conduct, the accepted remedy for a party's failure to serve timely a bill of particulars is to grant a preclusion motion conditionally and, when appropriate, assess costs. *Scott v Lawyers Co-operative Pub. Co.*, 101 A.D.2d 1026, 476 N.Y.S.2d 693, 1984 N.Y. App. Div. LEXIS 18778 (N.Y. App. Div. 4th Dep't 1984).

Defendant's motion for preclusion would be granted unless within 30 days plaintiff served upon defendant a further bill of particulars containing a detailed itemization of their breach of contract damage claims, separately particularizing the cost of labor and the cost of materials, as related to each of the sidewalks, driveways, curbs, and steps for which damages were claimed. Although information previously supplied by plaintiffs merely indicated a combined labor and material cost for each of four general areas of defect, since plaintiffs did eventually make some attempt at compliance in response to a prior preclusion order, and since conditional preclusion orders are favored, plaintiffs would be given a final opportunity to supply the necessary information, with no further extension granted. *Greystone in Westchester Cooperative #1, Inc. v All Boro Paving Corp.*, 108 A.D.2d 720, 484 N.Y.S.2d 887, 1985 N.Y. App. Div. LEXIS 43061 (N.Y. App. Div. 2d Dep't 1985).

It was proper exercise of discretion to order plaintiffs to provide full and complete statement of exact terms of parties' disputed oral agreement or else be precluded from submitting any evidence in regard thereto, despite plaintiffs' contention that their response to defendant's demand for bill of particulars was complete statement of contract terms, since their response had used term "in part" to qualify statement of terms. *Capoccia v Brognano*, 135 A.D.2d 1010, 522 N.Y.S.2d 733, 1987 N.Y. App. Div. LEXIS 52891 (N.Y. App. Div. 3d Dep't 1987), app. dismissed, 71 N.Y.2d 1022, 530 N.Y.S.2d 557, 526 N.E.2d 48, 1988 N.Y. LEXIS 2106 (N.Y. 1988).

49. —Indemnity action

In third-party action for common-law indemnity, it was not abuse of discretion to deny third-party plaintiff's request for extension of time to serve bill of particulars to comply with conditional preclusion order, and third-party complaint was properly dismissed, where no action was taken in respect to preclusion order for over 6 months until third-party plaintiff was served with third-party defendant's summary judgment motion; third-party plaintiff's argument that he was not required to serve bill of particulars because he would be relying solely on plaintiff's proof in main

action, which he failed to raise on initial challenge to demand for bill of particulars or in opposition to motion for preclusion order, would not be considered. *Bacogiannis v Sayan*, 134 A.D.2d 553, 521 N.Y.S.2d 452, 1987 N.Y. App. Div. LEXIS 50761 (N.Y. App. Div. 2d Dep't 1987).

50. —Medical malpractice generally

In a medical malpractice action, defendant's motion for summary judgment on the ground that plaintiffs had failed to comply with a conditional order of preclusion that had been entered on consent would be granted unconditionally where defendant's verified affidavit of service of the preclusion order by mail indicated that service had been made some 15 months prior to the summary judgment motion, with notice of entry correctly designating the address of plaintiffs' attorney and plaintiffs' attorney's mere denial of receipt was insufficient to preclude summary judgment, in that the order was presumed to have been received by plaintiffs' attorney due both to the proper mailing itself and the fact that the mailing of the order was never challenged, and plaintiffs' mere speculation that the order had been lost in the mail was insufficient to rebut the presumption of delivery and trigger the need for hearing. *Engel v Lichterman*, 95 A.D.2d 536, 467 N.Y.S.2d 642, 1983 N.Y. App. Div. LEXIS 19857 (N.Y. App. Div. 2d Dep't 1983), *aff'd*, 62 N.Y.2d 943, 479 N.Y.S.2d 188, 468 N.E.2d 26, 1984 N.Y. LEXIS 4464 (N.Y. 1984).

In a medical malpractice action against a hospital to recover damages for personal injuries sustained by an infant, trial court's order that the hospital accept plaintiff's bill of particulars despite the fact that it was not served until ten months after the demand therefor would be affirmed under the circumstances of the case and particularly in view of the meritorious nature of the action, but, in consequence of their dilatory conduct, plaintiff's attorneys, as a condition to implementation of the order, would be required to pay the hospital the sum of \$1,000. *Heffney v Brookdale Hospital Center*, 102 A.D.2d 842, 476 N.Y.S.2d 609, 1984 N.Y. App. Div. LEXIS 19026 (N.Y. App. Div. 2d Dep't), *app. dismissed*, 63 N.Y.2d 770, 1984 N.Y. LEXIS 5968 (N.Y. 1984).

In a medical malpractice action, the trial court erred in relieving plaintiff from her failure to deliver a bill of particulars in response to a conditional preclusion order on the ground that her failure was excused as a law office failure under CPLR § 2005 in that her failure to file an affidavit from a physician attesting to the merits of her action precluded consideration of the effect of § 2005. *Fiore v Galang*, 105 A.D.2d 970, 482 N.Y.S.2d 110, 1984 N.Y. App. Div. LEXIS 21060 (N.Y. App. Div. 3d Dep't 1984), *aff'd*, 64 N.Y.2d 999, 489 N.Y.S.2d 47, 478 N.E.2d 188, 1985 N.Y. LEXIS 16687 (N.Y. 1985).

In medical malpractice action, Special Term properly denied defendants' motion to dismiss complaint, and properly directed that plaintiff's bill of particulars be deemed served, despite plaintiff's default and existence of conditional order of preclusion, where plaintiff demonstrated that her default was excusable since she was unaware that her former attorney had failed to submit bill of particulars and, in fact, had been suspended from practice of law, and plaintiff demonstrated that she had meritorious cause of action by physician's affidavit stating, within reasonable degree of medical certainty, that there had been deviation from proper medical practice in plaintiff's surgery. *Levin v Memorial Sloan-Kettering Hospital*, 122 A.D.2d 869, 505 N.Y.S.2d 732, 1986 N.Y. App. Div. LEXIS 59360 (N.Y. App. Div. 2d Dep't 1986).

In medical malpractice action, court did not abuse its discretion in excusing plaintiff's default in serving timely and legally sufficient affidavit of merit by her medical expert with her bill of particulars, on condition that plaintiff's counsel make payment of \$1,000 in costs to compensate for inconvenience and additional legal work emanating from delay, in view of brevity of delay, absence of substantial prejudice to defendant, absence of any intent by plaintiff to abandon action, and public policy in favor of resolving cases on their merits. *Caggiano v Ross*, 130 A.D.2d 538, 515 N.Y.S.2d 274, 1987 N.Y. App. Div. LEXIS 46543 (N.Y. App. Div. 2d Dep't 1987).

Plaintiffs failed to demonstrate meritorious cause of action for medical malpractice against nurse where allegations against her mistakenly referred to her status as physician; thus, court properly refused to excuse plaintiffs' failure to timely comply with conditional order of preclusion (for

failure to serve bills of particulars), and summary judgment dismissing complaint against nurse would be affirmed. *Higgins v Community Hospital at Glen Cove*, 135 A.D.2d 607, 522 N.Y.S.2d 186, 1987 N.Y. App. Div. LEXIS 52546 (N.Y. App. Div. 2d Dep't 1987).

It was abuse of discretion to grant medical malpractice plaintiff's motion to vacate conditional order of dismissal and allow her further opportunity to comply with court's 3 prior discovery orders where action was commenced by service of particularly vague complaint that did not specify condition for which plaintiff was treated or any of defendants' alleged specific acts or omissions, plaintiff served succession of bills of particulars over 4-year period wherein she repeatedly failed to provide requested specificity as to certain issues or to differentiate claims as to 3 defendants, and she failed to submit affidavit of merit with motion to vacate. *Abreu v St. Luke's-Roosevelt Hosp. Ctr.*, 247 A.D.2d 238, 668 N.Y.S.2d 365, 1998 N.Y. App. Div. LEXIS 983 (N.Y. App. Div. 1st Dep't 1998).

In a dental malpractice claim against the State of New York, absent a showing of willful, deliberate, and contumacious conduct on the part of the State for its failure to serve a bill of particulars, the trial court, pursuant to N.Y. C.P.L.R. 3042(d), providently exercised its discretion in only conditionally granting the patient's motion to preclude the State from offering evidence at trial regarding matters of which particulars were not given pursuant to written demands. *Whitfield v State of New York*, 28 A.D.3d 541, 814 N.Y.S.2d 185, 2006 N.Y. App. Div. LEXIS 4358 (N.Y. App. Div. 2d Dep't), app. dismissed, 7 N.Y.3d 782, 820 N.Y.S.2d 542, 853 N.E.2d 1111, 2006 N.Y. LEXIS 2091 (N.Y. 2006).

51. —Negligence generally

An order granting plaintiff's motion to open a default in a negligence action to recover damages for personal injuries, and extending the time for compliance with an order of preclusion, would be modified to increase the sanction imposed on plaintiff's attorney where defendant first demanded a bill of particulars from plaintiff on or about June 25, 1982, and plaintiff's bill of particulars was served on or about February 9, 1983. *Wilenski v Auricchio Monuments, Inc.*, 102

A.D.2d 824, 476 N.Y.S.2d 363, 1984 N.Y. App. Div. LEXIS 19003 (N.Y. App. Div. 2d Dep't 1984).

52. —Products liability

In products liability action, automobile manufacturer would be entitled to preclusion order unless plaintiffs served further bill of particulars in response to manufacturer's demand for specification of allegedly defective automobile parts, since statement claiming "steering mechanism defect and defective brakes" was overly broad and conclusory, and allegation that manufacturer failed to "properly design" steering mechanism and brakes did not adequately particularize specific acts of negligence which precipitated purported defective condition. *Major v General Motors Corp.*, 126 A.D.2d 521, 510 N.Y.S.2d 643, 1987 N.Y. App. Div. LEXIS 41660 (N.Y. App. Div. 2d Dep't 1987).

In products liability action, automobile manufacturer would be entitled to preclusion order unless plaintiffs served further bill of particulars in response to manufacturer's demand for specification of allegedly defective automobile parts, since plaintiffs' statement that "differential housing flange, axle housing, axle tubing and axle shaft" were defective was overly broad and conclusory, and allegation that "axle should have been designed to carry bending loads" did not sufficiently particularize specific acts of negligence which precipitated purported defective condition. *Pole v Frame Chevrolet, Inc.*, 126 A.D.2d 531, 510 N.Y.S.2d 644, 1987 N.Y. App. Div. LEXIS 41667 (N.Y. App. Div. 2d Dep't 1987).

II. Under Former Civil Practice Laws

A. Subject Matter of Bill of Particulars

53. Generally

Bill of particulars may be granted where it is necessary to know the date of a transaction in order to plead limitations, or whether a contract was in writing in order to plead the statute of frauds. *Bracken v Toland*, 153 A.D. 57, 137 N.Y.S. 1043, 1912 N.Y. App. Div. LEXIS 10473, 1912 N.Y. App. Div. LEXIS 9216 (N.Y. App. Div. 1912).

Plaintiffs were required in bill of particulars to state in what respects land and buildings were damaged, and to state in detail necessary repairs. *Stawiasz v Creadon*, 263 A.D. 934, 32 N.Y.S.2d 434, 1942 N.Y. App. Div. LEXIS 7433 (N.Y. App. Div. 1942).

Item relating to manner of paying salary was excluded from bill of particulars. *Dash v Witsenhuysen*, 264 A.D. 766, 35 N.Y.S.2d 270, 1942 N.Y. App. Div. LEXIS 4611 (N.Y. App. Div. 1942).

A bill of particulars involves at least some reference to facts, even though in the form of ultimate rather than of evidentiary facts. *Steinleger v Frankel*, 192 N.Y.S. 74, 117 Misc. 693, 1922 N.Y. Misc. LEXIS 1814 (N.Y. App. Term 1922).

An order requiring plaintiff in an action to recover damages for personal injuries sustained while plaintiff was upon premises under defendant's control, caused, as he alleged by the fall of a piece of plaster while he was in the hallway of such premises upon the invitation of a tenant of the building, to furnish a bill of particulars as to 19 named items, was held not an abuse of the discretion of the court, although including as items (1) plaintiff's age; (2) his residence; (4) the name of the tenant; (6) the size of the piece of plaster. *Steinleger v Frankel*, 192 N.Y.S. 74, 117 Misc. 693, 1922 N.Y. Misc. LEXIS 1814 (N.Y. App. Term 1922).

A bill of particulars being intended to make a pleading more definite so that the opposing party may meet the issues without surprise, the plaintiff is entitled to know the particulars as to defendant's claim that he stored petroleum oils on his premises and caused or instigated the fire against which he was insured. *Wolfson v Sun Ins. Office*, 214 N.Y.S. 179, 126 Misc. 738, 1926 N.Y. Misc. LEXIS 613 (N.Y. Mun. Ct. 1926).

Admission by defendant that loan was procured for him from plaintiff warranted particulars as to whom paid, cash or check, and if check, names thereon. *Carter v Carter*, 66 N.Y.S.2d 768, 188 Misc. 156, 1946 N.Y. Misc. LEXIS 3138 (N.Y. City Ct. 1946).

Specific acts or particular false statements and the names of the person or persons charged with the same may be properly demanded in a bill of particulars. *In re Draisin's Will*, 11 Misc. 2d 281, 170 N.Y.S.2d 368, 1958 N.Y. Misc. LEXIS 3896 (N.Y. Sur. Ct. 1958).

Ordinarily, upon demand, a bill of particulars should be furnished under this section. The bill of particulars need contain nothing more than the plaintiff is required to prove at the trial. *Rochester v McDowell*, 12 N.Y.S. 414, 59 Hun 615, 1891 N.Y. Misc. LEXIS 1775 (N.Y. Sup. Ct. 1891).

In action by employee to recover for personal injuries, he may be required to specify the respects in which it is claimed the employer breached its common-law obligations and to name the employees who, as alleged, were factors in bringing about the injuries. *Bolling v Cunard S.S. Co.*, 196 N.Y.S. 267, 1922 N.Y. Misc. LEXIS 1483 (N.Y. App. Term 1922).

Bill of particulars complied with demand for name of person requesting services, reasonable value of each service, and nature of each conference. *Cooney v Civic Broadcasting Corp.*, 45 N.Y.S.2d 159, 1943 N.Y. Misc. LEXIS 2579 (N.Y. Sup. Ct. 1943).

In view of indefinite statements of plaintiff's cause of action endorsed on summons, defendant was entitled to bill of particulars before being required to appear for examination, particularly where notice of examination is just as vague. *Crosland v Atlas Material Co.*, 146 N.Y.S.2d 415, 1955 N.Y. Misc. LEXIS 3905 (N.Y. App. Term 1955).

54. Matters within knowledge of moving party

Tenant denied particulars in landlord's action for ejectment as to failure to renew lease since tenant knew as much about it as landlord. *Slingerland v Corwin*, 105 A.D. 310, 93 N.Y.S. 953, 1905 N.Y. App. Div. LEXIS 2063 (N.Y. App. Div. 1905).

The granting of a bill of particulars does not depend upon the actual facts or the knowledge of the opposite party concerning them, but it is dependent upon the facts claimed to exist. The purpose of a bill of particulars is to amplify the pleading and to indicate more particularly the nature of the claim in order that surprise at trial may be avoided. *Dwyer v Slattery*, 118 A.D. 345, 103 N.Y.S. 433, 1907 N.Y. App. Div. LEXIS 669 (N.Y. App. Div. 1907).

Particulars will not be denied because the plaintiff is an administrator having no personal knowledge of the facts, because the function of the bill of particulars is to point out what the aggrieved party claims to be the facts, in order that the defendant may be prepared to meet the issues. *Waller v Degnon*, 120 A.D. 389, 105 N.Y.S. 203, 1907 N.Y. App. Div. LEXIS 1191 (N.Y. App. Div. 1907).

If information in regard to an accident is wholly in the possession of the defendant, he will be compelled to furnish a bill of particulars, but not if the plaintiff has knowledge thereof. *Egan v Julius Tishman & Sons, Inc.*, 222 A.D. 141, 225 N.Y.S. 631, 1927 N.Y. App. Div. LEXIS 7818 (N.Y. App. Div. 1927).

Defendant, an executor, without personal knowledge of matters pleaded, granted a bill of particulars. *Mogilevich v Grayzel*, 228 A.D. 821, 240 N.Y.S. 540, 1930 N.Y. App. Div. LEXIS 13516 (N.Y. App. Div. 1930).

The granting of a bill of particulars depends upon what the aggrieved party claims the facts are and not upon the adversary's knowledge of nor upon the actual facts, and liberality in granting bills of particulars is the general rule. *Solomon v Travelers Fire Ins. Co.*, 5 A.D.2d 1017, 174 N.Y.S.2d 85, 1958 N.Y. App. Div. LEXIS 6170 (N.Y. App. Div. 2d Dep't), reh'g denied, 6 A.D.2d 802, 175 N.Y.S.2d 575, 1958 N.Y. App. Div. LEXIS 5624 (N.Y. App. Div. 2d Dep't 1958).

The object sought by a bill of particulars is not the facts as they may actually exist, but as they are claimed to be by the party from whom the particularization is sought. Hence, knowledge of the actual facts is not necessarily a bar to an application for a bill of particulars, since what the applicant will be obliged to meet on the trial is the claim of his adversary, which may or may not

correspond with his own conception of the situation or the situation which actually exists. In re Herle's Estate, 283 N.Y.S. 588, 157 Misc. 352, 1935 N.Y. Misc. LEXIS 1575 (N.Y. Sur. Ct. 1935).

Party may not require particulars of facts within his own peculiar knowledge while withholding testimony thereon. Tozai Koeki Kaisha, Ltd. v Trans-America Industries, Inc., 132 N.Y.S.2d 27, 205 Misc. 1105, 1954 N.Y. Misc. LEXIS 3378 (N.Y. Sup. Ct. 1954).

Regardless of any knowledge of the facts which defendants may have they are entitled to bill of particulars stating what plaintiffs claim to be the facts. Merit Enterprises, Inc. v Gerson, 20 Misc. 2d 917, 194 N.Y.S.2d 869, 1959 N.Y. Misc. LEXIS 2374 (N.Y. Sup. Ct. 1959).

Knowledge by moving party, of facts of particulars requested, does not prevent granting of particulars. In re Di Napoli's Will, 61 N.Y.S.2d 662, 1946 N.Y. Misc. LEXIS 2115 (N.Y. Sur. Ct. 1946).

Knowledge by moving party of the particulars sought was held by some earlier cases to defeat the right to a bill of particulars. Stevens v Webb (N.Y.C.P. Mar. 15, 1883).

Moving party denied bill where he had better information than his adversary, or it lay peculiarly within his knowledge. Fink v Jetter, 38 Hun 163 (N.Y.).

Knowledge on the part of defendants of matters concerning which particulars are sought does not necessarily excuse the plaintiffs from furnishing such particulars. Hespe v Corning Glass Works, Inc., 9 F. Supp. 725, 1935 U.S. Dist. LEXIS 1899 (D.N.Y. 1935).

55. Evidence

In an action brought to recover the price of certain stock when the defendant alleged want of consideration for the agreement, a bill of particulars specifying the words, acts or writings on which the defense was based would not be granted, nor would a bill of particulars specifying the

words, acts and writings which constituted an alleged release. *Smith v Anderson*, 126 A.D. 24, 110 N.Y.S. 191, 1908 N.Y. App. Div. LEXIS 3283 (N.Y. App. Div. 1908).

Where a complaint in partition alleged that a devise was void by reason of the fact that the testatrix lacked testamentary capacity; that the execution was procured by fraud and undue influence, and that the will was not executed in the manner required by the laws of this state, the plaintiff was not required to give a bill of particulars containing the evidence which she would produce in support of such allegations. *Smidt v Bailey*, 132 A.D. 177, 116 N.Y.S. 805, 1909 N.Y. App. Div. LEXIS 1460 (N.Y. App. Div. 1909).

The purpose of a bill of particulars is to amplify the pleadings, not to set forth evidence. *Clum v Federal Sugar Refining Co.*, 136 A.D. 355, 120 N.Y.S. 975, 1910 N.Y. App. Div. LEXIS 25 (N.Y. App. Div. 1910).

Plaintiff may not compel defendants to disclose evidence in a bill of particulars. *Ferro v Steeplechase Amusement Co.*, 228 A.D. 828, 240 N.Y.S. 361, 1930 N.Y. App. Div. LEXIS 13565 (N.Y. App. Div. 1930).

Items of demand for particulars of defense of release which improperly sought evidence and names and addresses of witnesses were stricken. *Bruder v Schwartz*, 259 A.D. 905, 20 N.Y.S.2d 68, 1940 N.Y. App. Div. LEXIS 7225 (N.Y. App. Div. 1940).

Items requiring that evidence be furnished to adversary should be eliminated. *Mertz v Landa*, 260 A.D. 1034, 24 N.Y.S.2d 385, 1940 N.Y. App. Div. LEXIS 5958 (N.Y. App. Div. 2d Dep't 1940).

In action for broker's commissions, defenses based on accounts stated were held sufficiently detailed to preclude necessity of further particulars which would amount to evidence. *O'Donnell v Eugene E. Peterson Co.*, 278 A.D. 981, 105 N.Y.S.2d 686, 1951 N.Y. App. Div. LEXIS 5429 (N.Y. App. Div. 1951).

Certified copies of maps, title searches, names of certain persons whose only connection with action appears to be as prospective witnesses, are not properly obtainable by means of bill of particulars. *Churchfield v Hoffmann*, 284 A.D. 1003, 135 N.Y.S.2d 336, 1954 N.Y. App. Div. LEXIS 4364 (N.Y. App. Div. 1954).

Particulars which involve a disclosure of evidence may not be had. *Solomon v Travelers Fire Ins. Co.*, 5 A.D.2d 1017, 174 N.Y.S.2d 85, 1958 N.Y. App. Div. LEXIS 6170 (N.Y. App. Div. 2d Dep't), reh'g denied, 6 A.D.2d 802, 175 N.Y.S.2d 575, 1958 N.Y. App. Div. LEXIS 5624 (N.Y. App. Div. 2d Dep't 1958).

A defendant has no right to require a plaintiff to set forth the evidence and witnesses by which he expects to prove his relationship to a decedent against whose estate he makes claim. *Cuthbert v Rodger*, 222 N.Y.S. 109, 129 Misc. 584, 1927 N.Y. Misc. LEXIS 783 (N.Y. Sup. Ct. 1927).

Demand for plaintiff's version of case was denied as seeking evidence. *Marks v Marks*, 77 N.Y.S.2d 269, 191 Misc. 448, 1948 N.Y. Misc. LEXIS 2142 (N.Y. Sup. Ct. 1948).

Service of copies of all letters, documents or agreements constituting all or part of any transaction constitutes furnishing of evidence, which is beyond scope of bill of particulars. In re *Bishop's Will*, 107 N.Y.S.2d 706, 199 Misc. 1103, 1951 N.Y. Misc. LEXIS 2417 (N.Y. Sur. Ct. 1951).

Matters of an evidentiary nature are not the proper subject of a bill of particulars sought with respect to a fiduciary's account of his proceedings. In re *Kass' Estate*, 9 Misc. 2d 46, 167 N.Y.S.2d 596, 1957 N.Y. Misc. LEXIS 2538 (N.Y. Sur. Ct. 1957).

Demand for particulars in regard to 120 items in 14 pages of single spaced type was so prolix and meticulous as to constitute an attempt to obtain plaintiff's evidence and was vacated. *Lindly & Co. v Telephonics Corp.*, 19 Misc. 2d 518, 196 N.Y.S.2d 143, 1959 N.Y. Misc. LEXIS 2877 (N.Y. Sup. Ct. 1959).

Evidence of plaintiff's cause of action denied. *Kramer v Hubbell*, 67 N.Y.S.2d 43, 1946 N.Y. Misc. LEXIS 3176 (N.Y. Sup. Ct. 1946).

Where demand seeks meticulously to obtain many items of particulars of counterclaim, including evidence, particulars were denied. *Link Metal Finishing Corp. v Moskowitz*, 95 N.Y.S.2d 766, 1950 N.Y. Misc. LEXIS 1466 (N.Y. Sup. Ct. 1950).

The names and addresses of "notorious hoodlums", alleged in newspaper article to have been represented and defended by plaintiff, were proper particulars of defendant's charge, and did not disclose his evidence. *Polakoff v New York World-Telegram Corp.*, 140 N.Y.S.2d 814, 1955 N.Y. Misc. LEXIS 2439 (N.Y. Sup. Ct. 1955).

Plaintiffs need not give names of witnesses by whom, nor evidence by which, they expect to establish the facts on which they rely for recovery, but should furnish statement of ultimate facts they expect to prove. *Hespe v Corning Glass Works, Inc.*, 9 F. Supp. 725, 1935 U.S. Dist. LEXIS 1899 (D.N.Y. 1935).

56. Identification of witnesses

The general rule that a party may not have the names of his adversary's witnesses applied to bill of particulars. *New York Terrace Estates, Inc. v Richmond Development Co.*, 224 A.D. 765, 230 N.Y.S. 882, 1928 N.Y. App. Div. LEXIS 11079 (N.Y. App. Div. 1928).

In action for breach of warranty, names and addresses of customers, contracting to buy goods warranted, were ordered disclosed. *Hainbach v York Feather & Down Corp.*, 273 A.D. 814, 76 N.Y.S.2d 96, 1948 N.Y. App. Div. LEXIS 4762 (N.Y. App. Div. 1948).

In action for personal injuries resulting from attack of dog, where complaint alleged that various persons had previously been bitten, plaintiff was required to name such persons. *Robson v Driscoll*, 278 A.D. 847, 104 N.Y.S.2d 334, 1951 N.Y. App. Div. LEXIS 4959 (N.Y. App. Div. 1951).

Where complaint alleged special damages, plaintiff was required to give names and addresses who discharged him from his employment after his arrest, who refused to do business with him, and particulars of income. *Kosiorek v Hodgkinson*, 278 A.D. 852, 104 N.Y.S.2d 483, 1951 N.Y. App. Div. LEXIS 4975 (N.Y. App. Div. 1951).

Names of witnesses present at the making of an alleged oral agreement of a joint venture may not be obtained by a demand for a bill of particulars. *Szarf v Blumenfeld*, 5 A.D.2d 887, 172 N.Y.S.2d 982, 1958 N.Y. App. Div. LEXIS 6545 (N.Y. App. Div. 2d Dep't 1958).

Where a general denial is interposed in an action for breach of a written contract by which defendant hired plaintiff as sales agent, and its allegations with regard to the failure of plaintiff to comply with the contract are indefinite and multifarious, so as to expose plaintiff to danger of surprise on the trial, a bill of particulars will be granted though it involves the disclosure of names of persons who may be witnesses. *Sundheimer v James S. Barron & Co.*, 114 N.Y.S. 804, 62 Misc. 263, 1909 N.Y. Misc. LEXIS 523 (N.Y. App. Term 1909).

In claim for services rendered to decedent, and to predeceased wife during last illnesses, full particularization was required, except names of witnesses. *In re Heller's Estate*, 128 N.Y.S.2d 427, 205 Misc. 516, 1954 N.Y. Misc. LEXIS 2289 (N.Y. Sur. Ct. 1954).

Where demand for bill of particulars calls for names of witnesses, such items were struck out on motion. *Tiedemann v Tiedemann*, 1 Misc. 2d 1074, 149 N.Y.S.2d 306, 1956 N.Y. Misc. LEXIS 2164 (N.Y. Sup. Ct. 1956).

Where special circumstances exist in a libel action, the court is justified in granting an order compelling the giving of names of witnesses in advance of trial in response to a bill of particulars. *Flynn v Confidential, Inc.*, 10 Misc. 2d 1032, 169 N.Y.S.2d 784, 1957 N.Y. Misc. LEXIS 1893 (N.Y. Sup. Ct. 1957).

It is not the proper function of a bill of particulars to disclose names of witnesses present at the making of an alleged oral agreement, and where defendant has shown no unusual facts sufficient to establish an exceptional case justifying disclosure of names and addresses of

plaintiff's witnesses, defendant's motion to preclude denied. *Goldsmith v Goldsmith*, 13 Misc. 2d 749, 178 N.Y.S.2d 100, 1958 N.Y. Misc. LEXIS 2661 (N.Y. Sup. Ct. 1958).

Ordinarily names and addresses of witnesses to negotiations between parties may not be obtained by means of bill of particulars and where no facts alleged which entitled petitioner to be within any recognized exceptions to such rule, cross motion for preclusion denied. *In re Gerdik's Estate*, 13 Misc. 2d 908, 178 N.Y.S.2d 684, 1958 N.Y. Misc. LEXIS 2506 (N.Y. Sur. Ct. 1958).

In action to enjoin former employee and his present employer from using trade secrets acquired while in plaintiff's employ and restrain infringement of plaintiff's products, defendant was entitled to particulars as to names and addresses of any persons or firms alleged to have been deceived into believing that defendant's products were those of plaintiff as an exception to the general rule against compelling disclosure of witnesses. *Merit Enterprises, Inc. v Gerson*, 20 Misc. 2d 917, 194 N.Y.S.2d 869, 1959 N.Y. Misc. LEXIS 2374 (N.Y. Sup. Ct. 1959).

To warrant deviation from rule that a party is not required to furnish names of witnesses, special or unusual circumstances must be shown. *Guendler v Glassman*, 23 Misc. 2d 104, 205 N.Y.S.2d 289, 1960 N.Y. Misc. LEXIS 2952 (N.Y. Sup. Ct. 1960).

Disclosure of names is allowed in certain instances as exception to general rule that disclosure of evidence is not allowed. *Schafrann v Ruthberg*, 43 N.Y.S.2d 614, 1943 N.Y. Misc. LEXIS 2281 (N.Y. City Ct. 1943).

Allegation that disclosure of names is necessary for adequate and proper preparation for trial, and to limit proof and prevent surprise by enabling affiant to know claim to be met, is insufficient as conclusory. *Schafrann v Ruthberg*, 43 N.Y.S.2d 614, 1943 N.Y. Misc. LEXIS 2281 (N.Y. City Ct. 1943).

In action for services wherein defendant charged that plaintiff had as competitor solicited defendant's customers for orders, plaintiff was entitled to know names of such customers. *November v Hollander*, 83 N.Y.S.2d 869, 1948 N.Y. Misc. LEXIS 3464 (N.Y. Sup. Ct. 1948).

Generally names and addresses of possible witnesses should not be disclosed, but such rule is not inflexible, and it is departed from when interests of justice will be served by disclosure. *Cedar v Furst*, 112 N.Y.S.2d 712, 1951 N.Y. Misc. LEXIS 2847 (N.Y. Sup. Ct. 1951).

In estate proceeding on claim for services to decedent and his predeceased wife, claimant was not required to disclose names of witnesses. *In re Durkin's Estate*, 128 N.Y.S.2d 428, 1954 N.Y. Misc. LEXIS 2290 (N.Y. Sur. Ct. 1954).

Where original bill of plaintiff stated that at least two accidents occurred prior to date on which accident occurred to plaintiff and plaintiff stated when and to whom notice had been given as to one accident, they were required to state when and to whom notice had been given as to other accident but they were not required to reveal names of witnesses. *Gins v Leon Miller Realty Corp.*, 156 N.Y.S.2d 334 (N.Y. Sup. Ct. 1954).

57. Adverse possession and color of title

Bill of particulars was required where title by adverse possession was claimed, but it did not appear whether or not same was based upon color of title. *Rustin v Rustin*, 228 A.D. 839, 240 N.Y.S. 547, 1930 N.Y. App. Div. LEXIS 13631 (N.Y. App. Div. 1930).

58. Payment

Bill of particulars of defense of payment will not be ordered except under unusual circumstances or for special reasons. *Mills v Finley-Robertson-Porter Co.*, 203 A.D. 84, 196 N.Y.S. 412, 1922 N.Y. App. Div. LEXIS 7132 (N.Y. App. Div. 1922).

Special circumstances, disclosed in record in action for accounting of moneys intrusted to defendant for investment, held to justify particulars of defense of payment. *Dowling v Kelly*, 263 A.D. 837, 31 N.Y.S.2d 684, 1941 N.Y. App. Div. LEXIS 5199 (N.Y. App. Div. 1941).

Showing made by a corporation warranted order for bill. *Nonpareil Painting Co. v Holling*, 238 N.Y.S. 518, 135 Misc. 552, 1930 N.Y. Misc. LEXIS 928 (N.Y. City Ct. 1930).

A motion for a bill of particulars as to a defense of payment will not be granted unless special circumstances exist. *Rosenzweig v Larkin*, 270 N.Y.S. 787, 151 Misc. 105, 1934 N.Y. Misc. LEXIS 1210 (N.Y. City Ct. 1934).

Particulars may be required as to payment if special considerations are present, such as many items and relations involved, *Seely v Breakwater Co.*, 144 N.Y.S. 771 (N.Y. App. Term 1913).

59. Damages

Particulars may be required of special but not of general damages. *Keefe v Lee*, 197 N.Y. 68, 90 N.E. 344, 197 N.Y. (N.Y.S.) 68, 1909 N.Y. LEXIS 745 (N.Y. 1909).

For particulars as to theory of damages, see *Shaw v Stone*, 124 A.D. 624, 109 N.Y.S. 146, 1908 N.Y. App. Div. LEXIS 2167 (N.Y. App. Div. 1908).

No bill of particulars will be ordered of the items constituting damages, in an action for breach of contract, where a mere matter of computation. *Strohmeyer & Arpe Co. v Hartley Silk Mfg. Co.*, 130 A.D. 102, 114 N.Y.S. 287, 1909 N.Y. App. Div. LEXIS 150 (N.Y. App. Div. 1909).

In an action for tort, defendant should not be required to furnish a bill of particulars stating whether he demands exemplary damages. *Korber v Dime Sav. Bank*, 134 A.D. 149, 118 N.Y.S. 857, 1909 N.Y. App. Div. LEXIS 2797 (N.Y. App. Div. 1909).

In action for damages to plaintiff's automobile, information as to items of plaintiff's expenditure for repairs to his car should be obtained by bill of particulars and not by examination before trial. *Davidow v Jennings*, 214 A.D. 730, 210 N.Y.S. 840, 1925 N.Y. App. Div. LEXIS 7147 (N.Y. App. Div. 1925).

In action for injuries received from explosions of gas on street and adjacent premises, granting defendant gas company bill of particulars was error; plaintiff should not be limited to conditions attached to order. *Haines v Newburgh*, 234 A.D. 389, 255 N.Y.S. 167, 1932 N.Y. App. Div. LEXIS 10445 (N.Y. App. Div. 1932).

In action for breach of contract by defendants who counterclaimed for loss of profits from plaintiff's failure to deliver machines exclusively to defendants, plaintiff was entitled to particulars as to defendants' cost of manufacture because loss of profits constitutes special damages. *Mackenzie v General Finance Corp.*, 279 A.D. 1080, 112 N.Y.S.2d 108, 1952 N.Y. App. Div. LEXIS 5902 (N.Y. App. Div. 1952).

Although plaintiff's letter before the trial fixed a special day as that on which his tug was damaged, his bill of particulars did not; hence, he was not limited for damages to any shorter time than the two months defendant had the tug, as it was leased in good condition and returned damaged. *Ampere Barge Co. v New York C. R. Co.*, 216 N.Y.S. 287, 127 Misc. 444, 1926 N.Y. Misc. LEXIS 998 (N.Y. App. Term 1926).

A plaintiff will not be compelled to specify facts which he will not be required to prove upon the trial, such as names and addresses of those furnishing parts to plaintiff asking damages for injuries to an automobile, nor the prices of the parts, the reasonable value of labor and parts for replacement being the measure of damage. *Hobbie v Ryan*, 223 N.Y.S. 654, 130 Misc. 221, 1927 N.Y. Misc. LEXIS 1006 (N.Y. Sup. Ct. 1927).

Omission to plead special damage cannot be supplied by statements in a bill of particulars without amending the complaint. *Jennings v Piwinski*, 241 N.Y.S. 349, 136 Misc. 447, 1928 N.Y. Misc. LEXIS 1260 (N.Y. County Ct. 1928).

Itemized statement of claimed damage, giving only aggregate figure but not stating amount claimed under each item, was insufficient. *One Hundred Sixty-First Realty Corp. v United States Trust Co.*, 60 N.Y.S.2d 334, 1946 N.Y. Misc. LEXIS 1865 (N.Y. City Ct. 1946).

Particulars of special damages in business dealings granted, such as nature of dealings and damages sustained. *O'Brien v Wicklow*, 67 N.Y.S.2d 521, 1947 N.Y. Misc. LEXIS 1985 (N.Y. Sup. Ct. 1947).

In action for property damage particulars as to whether the repair of such damage has been paid for, and to whom, are improper. *Adair v Young*, 205 N.Y.S.2d 463 (N.Y. Sup. Ct. 1959).

60. Statute or ordinance

Although a plaintiff in an action for damages alleged that certain acts were in violation of the laws of the state and the ordinances of the city, defendant was not entitled to a bill of particulars stating the sections and the years of enactment of such statutes and ordinances. *Chadbourn v Jackson*, 194 N.Y.S. 207, 1922 N.Y. Misc. LEXIS 1213 (N.Y. Sup. Ct. 1922).

Particulars of violated “state laws and local rules” violated when pedestrian on sidewalk was struck by automobile, were denied, as court would judicially notice them. *Meyer v Triboro Coach Corp.*, 66 N.Y.S.2d 494, 1946 N.Y. Misc. LEXIS 3092 (N.Y. Sup. Ct. 1946).

Where plaintiff’s complaint charged a violation of city charter and administrative code, plaintiff was required to furnish section numbers thereof in his bill of particulars. *Gins v Leon Miller Realty Corp.*, 156 N.Y.S.2d 334 (N.Y. Sup. Ct. 1954).

Where plaintiff alleges violation of statutes, etc. he must give particulars thereof to defendant. *Wurms v Kingsley*, 156 N.Y.S.2d 532 (N.Y. Sup. Ct. 1954).

Defendant was entitled to a bill of particulars identifying the specific laws and administrative code provisions which violations were alleged in the complaint. *Noonan v R. K. O. Keith-Orpheum Theatres, Inc.*, 156 N.Y.S.2d 237 (N.Y. Sup. Ct. 1956).

Where pleadings alleged a violation of statute, ordinance, rule or regulation, defendant was entitled to request such item in bill of particulars. *Sepe v Johnson*, 157 N.Y.S.2d 781 (N.Y. Mun. Ct. 1956).

61. Secret process or trade secret

In action to restrain defendants from using or disclosing trade secrets alleged to have been surreptitiously obtained by the individual defendants, former employees of the plaintiffs, and for an accounting of all the profits made through the use of the said secrets, the defendants’ motion

for a bill of particulars in respect to the plaintiffs' trade secrets will be denied in the exercise of the court's discretion since the action seeks to enjoin the misappropriation of such secrets. *American Seal-Kap Corp. v Smith Lee Co.*, 277 N.Y.S. 549, 154 Misc. 176, 1935 N.Y. Misc. LEXIS 978 (N.Y. Sup. Ct. 1935), *aff'd*, 248 A.D. 617, 289 N.Y.S. 756, 1936 N.Y. App. Div. LEXIS 6566 (N.Y. App. Div. 1936).

Secret process should not be disclosed in detail in action to enjoin use of secret process and confidential information acquired by defendant while employed by plaintiff. *Burns v Hayes*, 84 N.Y.S.2d 262, 193 Misc. 491, 1948 N.Y. Misc. LEXIS 3555 (N.Y. Sup. Ct. 1948).

Court may properly deny motion to preclude as to items of demand requiring disclosure of secret processes. *Cornell-Dubilier Electric Corp. v Micamold Radio Corp.*, 50 N.Y.S.2d 318, 1944 N.Y. Misc. LEXIS 2316 (N.Y. Sup. Ct. 1944).

B. Demand and Compliance

62. Generally

A provision in an order for a bill of particulars, in an action based upon an alleged breach of contract for the production of an operetta composed by plaintiff, requiring plaintiff to set out the score of the operetta alleged to have been tendered defendant, will be stricken, on motion, where defendant's answer denies such tender. *Elman v Ziegfeld*, 200 A.D. 494, 193 N.Y.S. 133, 1922 N.Y. App. Div. LEXIS 8211 (N.Y. App. Div. 1922).

RCP 115 substituting demand for motion of preclusion that was theretofore necessary was designed to aid bar and litigants in speedier disposition of law suits. *Becker v Paragon Supply Co.*, 285 A.D. 991, 138 N.Y.S.2d 357, 1955 N.Y. App. Div. LEXIS 6400 (N.Y. App. Div. 1955).

To be effective, demand for bill must be addressed to pleading; defendant cannot seek information outside complaint, relating to defense. *Meltsner v Posmanick*, 96 N.Y.S.2d 906, 197 Misc. 1056, 1950 N.Y. Misc. LEXIS 1606 (N.Y. Mun. Ct. 1950).

Where the court from papers submitted believes that only the defendants do in fact know all of the details with regard to a claimed contract in the interest of orderly procedure, the plaintiffs should not be required to serve their bills of particulars until after the examination of the defendants since to require a bill of particulars in advance of obtaining the necessary information is futile. *Carney v Liebmann Breweries, Inc.*, 8 Misc. 2d 1064, 167 N.Y.S.2d 620, 1957 N.Y. Misc. LEXIS 2051 (N.Y. Sup. Ct. 1957).

Although there may be occasions where a plaintiff may question the propriety of a demand for a bill on a motion to preclude, the better practice is for him to either cross move for a modification of the demise, or for relief from his default in complying with the demand. *Innella v Salvation Army*, 25 Misc. 2d 1003, 209 N.Y.S.2d 880, 1961 N.Y. Misc. LEXIS 3587 (N.Y. Sup. Ct. 1961).

63. Form of demand or order for bill

An order, in an action for the rescission of a contract for the purchase of stock by plaintiffs, which requires plaintiffs to set forth "in full the substance" of their oral demand for the cancellation of the contract and return of the money, is improper. *Hill v International Products Co.*, 202 A.D. 701, 195 N.Y.S. 144, 1922 N.Y. App. Div. LEXIS 4960 (N.Y. App. Div. 1922).

Because it included particulars to which moving party was not entitled did not justify denial in entirety of motion for bill. *Smallman v Smallman*, 231 A.D. 739, 245 N.Y.S. 738, 1930 N.Y. App. Div. LEXIS 7417 (N.Y. App. Div. 1930).

Where plaintiff's notice of motion comprises 30 pages and calls for answers to 208 topical demands, demand was denied in toto. *Mutual Life Ins. Co. v Tailored Woman, Inc.*, 275 A.D. 798, 88 N.Y.S.2d 564, 1949 N.Y. App. Div. LEXIS 4528 (N.Y. App. Div. 1949).

A demand consisting of 59 paragraphs containing 200 items, meticulous and unnecessarily repetitious, required denial in its entirety, as abuse of right to particulars. *Winterstein v Mautner*, 284 A.D. 962, 135 N.Y.S.2d 322 (N.Y. App. Div. 1954).

Where defendant demands particulars of 93 items, many of which are immaterial or unnecessary in preparation of case for trial, and where plaintiff consents to furnish particulars of 43 items, order was modified by eliminating all items except those consented to by plaintiff, with leave to defendant to serve proper demand for any additional items deemed necessary. *R. K. Corbin, Inc. v Levine*, 286 A.D. 805, 141 N.Y.S.2d 345, 1955 N.Y. App. Div. LEXIS 4163 (N.Y. App. Div. 1955).

The practice of using a printed blanket form of demand for a bill of particulars should be discouraged and the use thereof without making it specific to the case is inexcusable and will not be tolerated. *Cutler v Silverstein*, 223 N.Y.S. 557, 130 Misc. 228, 1927 N.Y. Misc. LEXIS 983 (N.Y. Sup. Ct. 1927).

Substantially accurate and fair statements as to particulars may be required, but not “exact” particulars as to date and place and manner, nor detailed statement of substance thereof. *Burns v Hayes*, 84 N.Y.S.2d 262, 193 Misc. 491, 1948 N.Y. Misc. LEXIS 3555 (N.Y. Sup. Ct. 1948).

Where in discovery proceeding petitioner failed to comply with demand for bill of particulars, respondent, instead of moving for preclusion order moves for order requiring petitioner to comply with demand, such motion will be treated as if bill were sought in first instance by motion pursuant to Rule 115(b). *In re Kuster's Estate*, 12 Misc. 2d 239, 152 N.Y.S.2d 742, 1956 N.Y. Misc. LEXIS 1798 (N.Y. Sur. Ct. 1956).

64. Motion to vacate or modify notice

The failure of the plaintiffs to move to vacate or modify the demand by defendant for a verified bill of particulars, as required by subdivision (a) of this rule, did not preclude them from questioning the propriety of the defendant's request. *Buckley v Franklin Sav. Bank*, 258 A.D. 53, 15 N.Y.S.2d 477, 1939 N.Y. App. Div. LEXIS 6356 (N.Y. App. Div. 1939).

It is held improper to strike items from defendant's demand for bill of particulars merely because plaintiff's counsel appraised them as inapplicable to plaintiff's theory of its action by statements

contained in his moving affidavit on motion to vacate, which statements formed no part of the complaint. *P. M. Hughes & Sons, Inc. v Royal Indem. Co.*, 10 A.D.2d 717, 198 N.Y.S.2d 948, 1960 N.Y. App. Div. LEXIS 11340 (N.Y. App. Div. 2d Dep't 1960).

In the absence of a timely motion to vacate or modify a demand for bill of particulars, the items will not be scrutinized and an order of preclusion will be granted unless the demand is palpably improper. *Coin v Lebenkoff*, 10 A.D.2d 916, 200 N.Y.S.2d 441, 1960 N.Y. App. Div. LEXIS 10102 (N.Y. App. Div. 1st Dep't 1960).

Unless a demand is palpably improper, preclusion cannot be resisted by questioning the validity or propriety of any items instead of moving to modify or vacate the demand. *Helfant v Rappoport*, 14 A.D.2d 764, 220 N.Y.S.2d 285, 1961 N.Y. App. Div. LEXIS 8262 (N.Y. App. Div. 1st Dep't 1961).

A demand is "palpably improper" when it not only calls for items that are not strictly allowable, but also is so burdensome to supply that compliance will involve a task that is unreasonable to exact. *Helfant v Rappoport*, 14 A.D.2d 764, 220 N.Y.S.2d 285, 1961 N.Y. App. Div. LEXIS 8262 (N.Y. App. Div. 1st Dep't 1961).

Where plaintiff moved for bill of particulars after trial had actually commenced, without offering to excuse his delay, motion to vacate demand for particulars was granted. *Gross v Price*, 145 N.Y.S.2d 716, 208 Misc. 899, 1955 N.Y. Misc. LEXIS 3834 (N.Y. Sup. Ct. 1955).

Orderly procedure required that a party objecting to items of a demand for a bill of particulars move under RCP 115 to vacate or modify the same and where plaintiff failed to move for a modification of defendant's demand and time within which to make such motion had expired, the items in the demand would not be scrutinized and would be allowed unless palpably improper. *Friedman v Celfan Bldg. Corp.*, 13 Misc. 2d 192, 176 N.Y.S.2d 723, 1958 N.Y. Misc. LEXIS 3213 (N.Y. Sup. Ct. 1958).

Motion to vacate or modify demand for bill of particulars does not preclude respondent from thereafter claiming that he lacks sufficient knowledge to comply with demand. *In re Lombardi's Will*, 27 Misc. 2d 422, 212 N.Y.S.2d 711, 1961 N.Y. Misc. LEXIS 3211 (N.Y. Sur. Ct. 1961).

Modification of demand is proper where it exceeds reasonable bounds in asking principally evidentiary detail and embracing demands covering many matters not part of defendant's defense. *Burke v Leitman*, 112 N.Y.S.2d 31, 1952 N.Y. Misc. LEXIS 2595 (N.Y. Sup. Ct. 1952).

65. Discretion to require particulars

The order for a bill of particulars is discretionary and not reviewable on appeal. *Dwight v Germania Life Ins. Co.*, 84 N.Y. 493, 84 N.Y. (N.Y.S.) 493, 1881 N.Y. LEXIS 423 (N.Y. 1881).

Although the granting or denial of a motion for a bill of particulars is discretionary, yet the court of appeals will review such discretion where the order requires the plaintiff to furnish particulars of evidence. *People v McClellan*, 191 N.Y. 341, 84 N.E. 68, 191 N.Y. (N.Y.S.) 341, 1908 N.Y. LEXIS 1066 (N.Y. 1908).

The granting or withholding of a bill of particulars is within the discretion of the court. *Loewenthal v Globe & Rutgers Ins. Co.*, 132 A.D. 890, 116 N.Y.S. 454, 1909 N.Y. App. Div. LEXIS 1615 (N.Y. App. Div. 1909).

The granting of a bill of particulars rests in the discretion of the court, and such discretion is not abused by a refusal to require the personal representative of a decedent, seeking damages for death by wrongful act, to furnish a bill of particulars as to the age, occupation and income of the decedent. *De Roire v Lehigh V. R. Co.*, 205 A.D. 549, 199 N.Y.S. 652, 1923 N.Y. App. Div. LEXIS 5078 (N.Y. App. Div. 1923).

The appellate division, although slow to interfere with discretion in refusing or granting a bill of particulars, reversed the denial of a motion for a bill of particulars as to a defense of justification for plaintiff's discharge and of fraudulent representations made by him in securing his contracts of employment, in order to prevent surprise, limit and define the issues, and insure a fair trial.

Harmon v Robert Graves Co., 219 A.D. 830, 220 N.Y.S. 864, 1927 N.Y. App. Div. LEXIS 12360 (N.Y. App. Div. 1927).

Where no application for examination before trial of defendant is pending, direction that particulars be served within 20 days after completion of examination of adverse party before trial was improper exercise of court's discretion. Parker-Lauer Realty Co. v Long Island R. Co., 263 A.D. 955, 32 N.Y.S.2d 737, 1942 N.Y. App. Div. LEXIS 7584 (N.Y. App. Div. 1942).

Circumstances, particularly nature of demand, considered, court has discretion to decide motion on merits. Link Metal Finishing Corp. v Moskowitz, 95 N.Y.S.2d 766, 1950 N.Y. Misc. LEXIS 1466 (N.Y. Sup. Ct. 1950).

Granting a bill of particulars is discretionary with the court. Rockwood Co. v Northwestern Fire & Marine Ins. Co., 26 F.2d 824, 1928 U.S. Dist. LEXIS 1272 (D.N.Y. 1928).

66. Effect of prior orders

The defendant by not appealing from the first order for a bill of particulars is not estopped from refusing to give further particulars. Oliver Refining Co. v Aspegren, 140 A.D. 549, 125 N.Y.S. 796, 1910 N.Y. App. Div. LEXIS 2990 (N.Y. App. Div. 1910).

The fact that an order has already been made allowing an inspection of notes and a check is no bar to a motion for a bill of particulars. Miller v Miller, 144 A.D. 153, 128 N.Y.S. 965, 1911 N.Y. App. Div. LEXIS 1644 (N.Y. App. Div. 1911).

A prior order denying a bill of particulars is no bar to a subsequent motion for a bill, where a different state of facts is presented. Lundberg v De Ronde, 146 A.D. 1, 130 N.Y.S. 385, 1911 N.Y. App. Div. LEXIS 1814 (N.Y. App. Div. 1911).

67. Laches

A motion for a bill of particulars, on the eve of the trial, as to alleged negligence, should not be denied for laches, if plaintiff will not lose by the delay, or a postponement of the trial result. *Convery v Marrin*, 128 A.D. 265, 112 N.Y.S. 673, 1908 N.Y. App. Div. LEXIS 447 (N.Y. App. Div. 1908).

In the absence of a satisfactory explanation for lateness of a motion for a bill of particulars after statement of readiness filed, costs allowed to plaintiff. *Szarf v Blumenfeld*, 5 A.D.2d 887, 172 N.Y.S.2d 982, 1958 N.Y. App. Div. LEXIS 6545 (N.Y. App. Div. 2d Dep't 1958).

It would be miscarriage of justice to deny application of plaintiff for service of bill of particulars solely on ground that it is too late for bill of particulars because case is actually on trial, where pleadings have not been settled as to final form. *Gross v Price*, 148 N.Y.S.2d 375, 208 Misc. 899, 1955 N.Y. Misc. LEXIS 3916 (N.Y. Sup. Ct. 1955), modified, 2 A.D.2d 707, 153 N.Y.S.2d 424, 1956 N.Y. App. Div. LEXIS 4864 (N.Y. App. Div. 2d Dep't 1956).

68. Requiring particulars before answer

A motion for a bill of particulars on the ground that it is necessary to enable the defendant to prepare his defense is premature if made before the service of the answer, as the defendant may interpose an answer denying any knowledge or information sufficient to form a belief as to the material allegations of the complaint. *Hicks v Eggleston*, 95 A.D. 162, 88 N.Y.S. 528, 1904 N.Y. App. Div. LEXIS 1946 (N.Y. App. Div. 1904).

When the plaintiff sets out a contract of specific date made by the defendant through a specific agent, employing the plaintiff to secure contracts with the government for the purchase of torpedo boats at a specific commission, and that he procured the purchase of four boats, the defendant, having served an answer denying the contract and having an affidavit of the agent denying the same, is not entitled to a bill of particulars for the purpose of preparing an amended answer. *Sands v Holland Torpedo Boat Co.*, 115 A.D. 151, 100 N.Y.S. 684, 1906 N.Y. App. Div. LEXIS 3643 (N.Y. App. Div. 1906).

Motions to make a complaint more definite and certain or for a bill of particulars in the alternative cannot be united, because the first may only be made before and the latter ordinarily after answer unless necessary to enable the defendant to plead. *Mutual Life Ins. Co. v Granniss*, 118 A.D. 830, 103 N.Y.S. 835, 1907 N.Y. App. Div. LEXIS 764 (N.Y. App. Div. 1907).

In an action to recover excessive commissions, the defendant is not entitled to a bill of particulars before issue is joined; a bill of particulars is not ordered except under extraordinary circumstances, prior to joinder of issues. *United States Casualty Co. v Jamieson*, 122 A.D. 608, 107 N.Y.S. 490, 1907 N.Y. App. Div. LEXIS 2511 (N.Y. App. Div. 1907).

A bill of particulars before answer will not be granted, on allegations that defendant has no knowledge of plaintiff's claim or of any services rendered, and will deny the same; it will not be granted because it may suggest defenses of which defendant is unaware. *Ehrich v Dessar*, 130 A.D. 110, 114 N.Y.S. 271, 1909 N.Y. App. Div. LEXIS 153 (N.Y. App. Div. 1909).

Unless in exceptional cases clearly showing the necessity therefor before pleading, applications made before issue joined will be denied. *Bracken v Toland*, 153 A.D. 57, 137 N.Y.S. 1043, 1912 N.Y. App. Div. LEXIS 10473, 1912 N.Y. App. Div. LEXIS 9216 (N.Y. App. Div. 1912).

Where complaint for libel was based on complete magazine article covering four pages and containing many varied statements, including those of other persons, and purportedly covering different incidents occurring over long period of time, defendant was entitled to bill of particulars, before answer, designating statements claimed to be false. *Flynn v Confidential, Inc.*, 286 A.D. 1067, 145 N.Y.S.2d 499, 1955 N.Y. App. Div. LEXIS 5168 (N.Y. App. Div. 1955).

The particulars of complaint are allowable before answer to enable defendant to properly plead to complaint which did not attach writing sued on nor state its terms. *Entin v Margolin*, 66 N.Y.S.2d 66, 1946 N.Y. Misc. LEXIS 2985 (N.Y. Sup. Ct. 1946).

69. Requiring particulars before examination before trial

Where neither an order for a bill of particulars by plaintiff nor the stipulation extending the time to serve bill made the bill conditional to a prior examination of defendant by plaintiff, the bill of particulars was to be served prior to such examination. *Penn-Texas Corp. v Glickman*, 20 Misc. 2d 835, 197 N.Y.S.2d 83, 1959 N.Y. Misc. LEXIS 2532 (N.Y. Sup. Ct. 1959).

70. Form of bill

“Per agreement” added to the items in a bill is not restrictive of the proof. *Robinson v Weil*, 45 N.Y. 810, 45 N.Y. (N.Y.S.) 810, 1871 N.Y. LEXIS 214 (N.Y. 1871).

Where exact dates, times and places are demanded the defendant may state this information approximately, and where details of specific acts of abuse and insolence, and exact words of insolence, offense and threat and acts of insubordination are demanded, the defendant may state this information in a substantially accurate statement. *Godwin v Advance Metal Lithographing, Inc.*, 255 A.D. 791, 7 N.Y.S.2d 372, 1938 N.Y. App. Div. LEXIS 5344 (N.Y. App. Div. 1938).

Order directing affidavit of plaintiff’s attorney, previously used on motion for summary judgment, should serve as plaintiff’s bill of particulars, held proper where such affidavit set forth in detail items of sale and delivery with dates and amounts. *Schaffer Stores Co. v Capitol Health Center, Inc.*, 263 A.D. 920, 32 N.Y.S.2d 493, 1942 N.Y. App. Div. LEXIS 7368 (N.Y. App. Div. 1942).

Party or attorney may allege its particulars on information and belief, especially where sources of knowledge are set forth in verification. *Berger v American Nat'l Fire Ins. Co.*, 281 A.D. 801, 119 N.Y.S.2d 468, 1953 N.Y. App. Div. LEXIS 3328 (N.Y. App. Div. 1953).

Where plaintiff’s bill of particulars in his action for unfair competition substantially complied with order, adequately revealing to defendant information necessary to permit intelligent preparation for trial, plaintiff’s reference in bill to certain publications and photographs, introduced as exhibits upon examination before trial, was not improper under special circumstances of case. *Santa's*

Workshop, Inc. v Sterling, 285 A.D. 1210, 140 N.Y.S.2d 524, 1955 N.Y. App. Div. LEXIS 7173 (N.Y. App. Div. 1955).

Use in bill of particulars of “among others”, “and/or” and similar alternative and omnibus phraseology, destroys its essential functions to limit proof and prevent surprise to adverse party on trial of action, and party was directed to serve amended bill. Schlenker v School Dist., 103 N.Y.S.2d 415, 198 Misc. 775, 1950 N.Y. Misc. LEXIS 2476 (N.Y. Sup. Ct. 1950).

A response to a demand for a statement of the acts constituting the negligence claimed: “See Paragraphs ‘6’, ‘7’ and ‘8’ of plaintiff’s complaint deleting the words, ‘that he was otherwise negligent, which caused or contributed to the accident that occurred,’ ” is improper and insufficient. Desimone v Robertson, 19 Misc. 2d 80, 189 N.Y.S.2d 70, 1959 N.Y. Misc. LEXIS 3234 (N.Y. Sup. Ct. 1959).

A response to a demand for a description of injuries: “All . . . except those of a minor nature” was ambiguous, and did not satisfy RCP 115. Desimone v Robertson, 19 Misc. 2d 80, 189 N.Y.S.2d 70, 1959 N.Y. Misc. LEXIS 3234 (N.Y. Sup. Ct. 1959).

Where particulars were sought of voluminous papers, party’s promise in bill to exhibit same on movant’s request was sufficient. H. J. Metal Products Co. v Chaizuk, 60 N.Y.S.2d 522, 1946 N.Y. Misc. LEXIS 1890 (N.Y. City Ct. 1946).

Each item of demand must be answered separately and categorically under its own number and subdivision without reference to complaint; and plaintiff may not stymie legal effect of bill of particulars by statements, without reasonable detail, such as “other and additional promises”. Nassau Suffolk Lumber & Supply Corp. v Feldman, 125 N.Y.S.2d 27, 1953 N.Y. Misc. LEXIS 2269 (N.Y. Sup. Ct. 1953).

71. Right to serve amended or further bill

The amendment of a bill may be allowed at the close of the evidence. Parsons v Sutton, 66 N.Y. 92, 66 N.Y. (N.Y.S.) 92, 1876 N.Y. LEXIS 198 (N.Y. 1876).

In action to recover brokerage commissions, plaintiff was not permitted to amend bill of particulars to add name of additional purchaser where statement of readiness had been filed, case was on calendar awaiting trial, and he presented no valid excuse for seventeen months' delay in seeking such relief. *Handschu v Weltz*, 13 A.D.2d 679, 213 N.Y.S.2d 795, 1961 N.Y. App. Div. LEXIS 11511 (N.Y. App. Div. 2d Dep't 1961).

Party who has served a bill of particulars may at any time seek leave of court to amend it in furtherance of justice. *Force v Tracy Towing Lines, Inc.*, 74 N.Y.S.2d 454, 190 Misc. 446, 1947 N.Y. Misc. LEXIS 3264 (N.Y. Sup. Ct.), *aff'd*, 272 A.D. 912, 71 N.Y.S.2d 918, 1947 N.Y. App. Div. LEXIS 4180 (N.Y. App. Div. 1947).

Reservation of right to amend particulars, at conclusion of bill of particulars, is improper. *Force v Tracy Towing Lines, Inc.*, 74 N.Y.S.2d 454, 190 Misc. 446, 1947 N.Y. Misc. LEXIS 3264 (N.Y. Sup. Ct.), *aff'd*, 272 A.D. 912, 71 N.Y.S.2d 918, 1947 N.Y. App. Div. LEXIS 4180 (N.Y. App. Div. 1947).

Plaintiff was permitted to amend bill of particulars where defendant would not be prejudiced thereby despite defendant's objection that proposed bill contrary to that contained in original bill and was designed to defeat pending motion for summary judgment, since such material could be submitted in affidavit form in opposition to summary judgment motion and would be considered in determining whether an issue of fact existed precluding summary judgment. *Rudolph Bass, Inc. v Thomas Industries, Inc.*, 25 Misc. 2d 430, 199 N.Y.S.2d 58, 1960 N.Y. Misc. LEXIS 3610 (N.Y. Sup. Ct. 1960).

Bill of particulars has been included in category of pleadings freely permitted to be amended in advance of trial. *Rudolph Bass, Inc. v Thomas Industries, Inc.*, 25 Misc. 2d 430, 199 N.Y.S.2d 58, 1960 N.Y. Misc. LEXIS 3610 (N.Y. Sup. Ct. 1960).

72. Lack of knowledge by party required to furnish particulars

Where an action by an administrator to recover for the death of his intestate is on the calendar and set down for trial so that it is reasonable to assume that the plaintiff has knowledge respecting the facts alleged in the complaint, he will be required to give particulars identifying a tug and float concerned in the accident, and the pilot who is alleged to have been incompetent and a habitual drunkard; under the circumstances a bare allegation of lack of knowledge on the plaintiff's part is no answer to a demand for particulars. *Ditollo v Erie R. Co.*, 126 A.D. 811, 111 N.Y.S. 125, 1908 N.Y. App. Div. LEXIS 3452 (N.Y. App. Div. 1908).

Where an executrix suing a corporation to recover the value of legal services rendered by her testator has been ordered to serve a bill of particulars and has no personal information concerning the services rendered, she is entitled, in order to frame a bill of particulars, to an order for the examination of third persons who at the time of her testator's employment were officers of the defendant. *Chittenden v San Domingo Improv. Co.*, 132 A.D. 169, 116 N.Y.S. 829, 1909 N.Y. App. Div. LEXIS 1458 (N.Y. App. Div. 1909).

A representative suing to recover damages for negligence causing death should not be required to make her bill of particulars of defects in the ways, works, machinery or plant used by the defendant of her own knowledge, where it does not appear that she was on the spot when the accident happened; it is proper for the order to provide that the bill of particulars shall be furnished by the plaintiff only in so far as the same is within her knowledge or information. *Emmi v Ryan-Parker Const. Co.*, 134 A.D. 482, 119 N.Y.S. 267, 1909 N.Y. App. Div. LEXIS 2893 (N.Y. App. Div. 1909).

Where plaintiff failed to serve a bill of particulars adequately complying with the order therefor, but containing admissions indicating ability to make full compliance, defendant's motion for an order excluding evidence or in the alternative requiring a further bill of particulars will be granted, notwithstanding plaintiff's allegation in such inadequate bill of his inability to comply further with the order. *Hartog v Lewis*, 200 A.D. 649, 193 N.Y.S. 411, 1922 N.Y. App. Div. LEXIS 8245 (N.Y. App. Div. 1922).

Order directing defendant to serve bill of particulars modified by requiring him to give particulars asked for, or, if he is not in possession of such particulars, to so state and likewise to state that he intends to rely upon testimony of the plaintiff's witnesses on issue of contributory negligence. *Dunson v Kirtland*, 235 A.D. 854, 257 N.Y.S. 895, 1932 N.Y. App. Div. LEXIS 10091 (N.Y. App. Div. 1932).

If plaintiff, acting in good faith, has no present knowledge of particulars required, he should so state under oath. *Parker-Lauer Realty Co. v Long Island R. Co.*, 263 A.D. 955, 32 N.Y.S.2d 737, 1942 N.Y. App. Div. LEXIS 7584 (N.Y. App. Div. 1942).

Particulars granted of contributory negligence of plaintiff's intestate in action for personal injuries and death from fall on snow and ice, unless defendant states lack of knowledge. *Pascale v New York*, 277 A.D. 1004, 100 N.Y.S.2d 399, 1950 N.Y. App. Div. LEXIS 4240 (N.Y. App. Div. 1950).

Where earlier bill of particulars served in connection with complaint that had been superseded by subsequent amended complaint had alleged lack of knowledge, plaintiff's failure to allege lack of knowledge in motion to modify demand for further bill should have been disregarded since defendant could not have been misled thereby. *Jeshion v Holzer*, 13 A.D.2d 620, 213 N.Y.S.2d 311, 1961 N.Y. App. Div. LEXIS 11604 (N.Y. App. Div. 1st Dep't 1961).

A plaintiff is entitled to particulars of facts of contributory negligence alleged as a defense by the defendant if the latter cannot furnish them he must so state on oath and if they later come to his knowledge must furnish them before trial. *McCormick v New York Steam Corp.*, 224 N.Y.S. 387, 130 Misc. 566, 1927 N.Y. Misc. LEXIS 1128 (N.Y. Sup. Ct. 1927).

Where demand for particulars is answered as "presently unknown" to plaintiff, defendant cannot excuse delay in applying for further particulars until after expiration of ten-day period by claiming that he waited in order to give plaintiff sufficient time to comply with demand. *Curtis v Curtis*, 33 N.Y.S.2d 731, 178 Misc. 213, 1942 N.Y. Misc. LEXIS 1420 (N.Y. Sup. Ct. 1942).

Time to assert party's lack of knowledge to comply with demand for a bill of particulars is on hearing of motion when validity of disclaimer can be tested, and not afterwards. *Burke v Brown*,

48 N.Y.S.2d 67, 180 Misc. 903, 1943 N.Y. Misc. LEXIS 2850 (N.Y. Sup. Ct.), aff'd, 266 A.D. 962, 44 N.Y.S.2d 812, 1943 N.Y. App. Div. LEXIS 5493 (N.Y. App. Div. 1943).

Where party is unable to furnish details requested in demand for bill of particulars, basis for that inability should be shown on motion. *Sammons v Mahern*, 141 N.Y.S.2d 216, 207 Misc. 781, 1955 N.Y. Misc. LEXIS 2502 (N.Y. Sup. Ct. 1955).

Bill of particulars alleging lack of knowledge of facts demanded did not constitute sufficient compliance and plaintiff was directed to furnish further bill stating what she would claim to be the facts and further stating that she lacks further knowledge as to items demanded. *Boin v Equitable Life Assurance Soc.*, 28 Misc. 2d 489, 208 N.Y.S.2d 323, 1960 N.Y. Misc. LEXIS 2101 (N.Y. Dist. Ct. 1960).

C. Enforcing Demand for Particulars

73. Generally

The objection to evidence on account of variance from the bill of particulars should be taken as the testimony is offered. *Colrick v Swinburne*, 105 N.Y. 503, 12 N.E. 427, 105 N.Y. (N.Y.S.) 503, 8 N.Y. St. 172, 1887 N.Y. LEXIS 742 (N.Y. 1887).

Where the defendant failed to serve a bill of particulars of the defense of payment and counterclaim, he should have been precluded under CPA § 266 (§ 3019 herein) from giving evidence in support of a counterclaim. *Raff v Koster, Bial & Co.*, 37 A.D. 534, 56 N.Y.S. 292, 1899 N.Y. App. Div. LEXIS 299 (N.Y. App. Div. 1899).

Requirement that bill of particulars be furnished before giving of evidence is mandatory. *McKenna v Horwitz & Schanback*, 163 A.D. 541, 148 N.Y.S. 970, 1914 N.Y. App. Div. LEXIS 7009 (N.Y. App. Div. 1914).

It is error to permit a plaintiff to prove a cause of action at variance with the specifications of negligence contained in her bill of particulars. *Voccia v Pleasure Boat Co.*, 239 A.D. 165, 267

N.Y.S. 240, 1933 N.Y. App. Div. LEXIS 7985 (N.Y. App. Div. 1933), *aff'd*, 264 N.Y. 656, 191 N.E. 612, 264 N.Y. (N.Y.S.) 656, 1934 N.Y. LEXIS 1689 (N.Y. 1934).

Bill of particulars may be attacked at Special Term only to preclude for failure to serve bill complying with demand or order, or to preclude where bill is defective or insufficient. *Ivey v New York Tel. Co.*, 279 A.D. 972, 111 N.Y.S.2d 652, 1952 N.Y. App. Div. LEXIS 5476 (N.Y. App. Div. 1952).

Bill of particulars, served in answer to demand for statement of “specific acts or omissions constituting negligence”, which referred to certain numbered paragraphs of complaint, and, by cross reference, adopted general language of another paragraph of complaint, was stricken. *Hosie v Phoenix Brewery Corp.*, 11 A.D.2d 636, 200 N.Y.S.2d 898, 1960 N.Y. App. Div. LEXIS 9970 (N.Y. App. Div. 4th Dep't 1960).

Party failing to furnish a bill of particulars may, notwithstanding, on the trial, give evidence of the matters he failed to particularize, unless an order of preclusion has been procured by his adversary. *Judge v Milligan*, 229 N.Y.S. 287, 131 Misc. 925, 1928 N.Y. Misc. LEXIS 881 (N.Y. Sup. Ct. 1928).

Order of preclusion must be predicated upon order obtained to furnish particulars or demand for such particulars served in pursuance of RCP 115(d). *Tozai Koeki Kaisha, Ltd. v Trans-America Industries, Inc.*, 132 N.Y.S.2d 27, 205 Misc. 1105, 1954 N.Y. Misc. LEXIS 3378 (N.Y. Sup. Ct. 1954).

Where bill of particulars or copy of items of account was regarded as defective or insufficient, party upon whom it was served must make application, upon notice, for order of preclusion or for order directing service of further bill. A motion to strike out paragraphs of bill was not contemplated by RCP 115. *In re Ludlam's Will*, 156 N.Y.S.2d 239 (N.Y. Sur. Ct. 1956).

74. Right to preclusion order

Where a party has attempted in good faith, but unsuccessfully, to serve a sufficient bill of particulars, he should be given another reasonable opportunity to comply with the order of the court. *Boskowitz v Sulzbacher*, 128 A.D. 537, 112 N.Y.S. 890, 1908 N.Y. App. Div. LEXIS 526 (N.Y. App. Div. 1908).

The plaintiff was entitled to an order of preclusion under this rule where he sought particulars as to allegations in answers to an amended complaint served after the trial of issues framed by former pleadings. *King v Craddock*, 252 A.D. 719, 298 N.Y.S. 842, 1937 N.Y. App. Div. LEXIS 5872 (N.Y. App. Div. 1937).

Defendants, who failed to comply in many instances with an order directing them to serve a bill of particulars as to specific items, were precluded from offering evidence at the trial with respect to such of the items set forth as to which the particular defendant failed to comply. *Werbelovsky v Strausberg*, 258 A.D. 539, 17 N.Y.S.2d 231, 1940 N.Y. App. Div. LEXIS 8234 (N.Y. App. Div. 1940).

Where items demanded by defendant were appropriate, plaintiff was precluded from giving evidence on trial in support of complaint concerning all items in defendant's demand, unless plaintiff furnished particulars in compliance with demand within 30 days. *McArdle v F. W. Woolworth Co.*, 281 A.D. 973, 120 N.Y.S.2d 800, 1953 N.Y. App. Div. LEXIS 3968 (N.Y. App. Div. 1953).

Failure to comply with provisions of RCP 115 as to bills of particulars should not be condoned. *Kamp v Syracuse Transit Corp.* (1954) *Seehase v Webster*, 284 A.D. 1028, 135 N.Y.S.2d 763, 1954 N.Y. App. Div. LEXIS 4426 (N.Y. App. Div. 1954).

Practice of neglecting demand for bill of particulars until motion for preclusion order is made, condemned. *Becker v Paragon Supply Co.*, 285 A.D. 991, 138 N.Y.S.2d 357, 1955 N.Y. App. Div. LEXIS 6400 (N.Y. App. Div. 1955).

A party will not be precluded for failure to give names of physicians in response to demand to state the number of visits to physicians. *Attia v Koelling*, 9 A.D.2d 867, 192 N.Y.S.2d 957, 1959 N.Y. App. Div. LEXIS 6217 (N.Y. App. Div. 4th Dep't 1959).

In the absence of a timely motion to vacate or modify a demand for bill of particulars, the items will not be scrutinized and an order of preclusion will be granted unless the demand is palpably improper. *Coin v Lebenkoff*, 10 A.D.2d 916, 200 N.Y.S.2d 441, 1960 N.Y. App. Div. LEXIS 10102 (N.Y. App. Div. 1st Dep't 1960).

Unless a demand is palpably improper, preclusion cannot be resisted by questioning the validity or propriety of any items instead of moving to modify or vacate the demand. *Helfant v Rappoport*, 14 A.D.2d 764, 220 N.Y.S.2d 285, 1961 N.Y. App. Div. LEXIS 8262 (N.Y. App. Div. 1st Dep't 1961).

A demand is "palably improper" when it not only calls for items that are not strictly allowable, but also is so burdensome to supply that compliance will involve a task that is unreasonable to exact. *Helfant v Rappoport*, 14 A.D.2d 764, 220 N.Y.S.2d 285, 1961 N.Y. App. Div. LEXIS 8262 (N.Y. App. Div. 1st Dep't 1961).

The reason for requiring the preclusion order is to avoid confusion at the trial in case the facts are disputed. *Judge v Milligan*, 229 N.Y.S. 287, 131 Misc. 925, 1928 N.Y. Misc. LEXIS 881 (N.Y. Sup. Ct. 1928).

Plaintiff's evidence limited because of failure to furnish bill of particulars. *In re Lawrence's Will*, 240 N.Y.S. 816, 136 Misc. 755, 1930 N.Y. Misc. LEXIS 1142 (N.Y. Sup. Ct. 1930).

In action for wrongful death, plaintiff's motion to preclude was granted where defendant failed to serve bill of particulars of claimed acts of negligence of deceased and of third persons. *Quashnofsky v Davies Bldg., Inc.*, 4 Misc. 2d 38, 152 N.Y.S.2d 732, 1956 N.Y. Misc. LEXIS 1861 (N.Y. Sup. Ct. 1956).

While defendant may not be punished for contempt for failure to comply with court order requiring furnishing of additional information in bill of particulars and failure to file bill of particulars not disobedience of mandate of court and redress for failure to file bill of particulars is motion to preclude. *Bridgman v American Book Co.*, 12 Misc. 2d 63, 173 N.Y.S.2d 502, 1958 N.Y. Misc. LEXIS 3458 (N.Y. Sup. Ct. 1958).

That the defendant's attorney was too busy with court matters to make his motion to preclude within the ten-day period required by this rule does not constitute "special circumstances" and a motion made after that period had elapsed was denied. *Montagna v Profeta*, 17 Misc. 2d 59, 185 N.Y.S.2d 608, 1959 N.Y. Misc. LEXIS 3740 (N.Y. Sup. Ct. 1959).

Motion to preclude made more than seven months after the bill of particulars was served was deemed as untimely. *Attia v Koelling*, 17 Misc. 2d 500, 187 N.Y.S.2d 289, 1959 N.Y. Misc. LEXIS 3626 (N.Y. Sup. Ct. 1959).

A demand for a bill of particulars will not be permitted to prevent or delay a plaintiff from moving for summary judgment, and when that seems to be the purpose of the demand, upon the granting of the motion for summary judgment, a cross motion to preclude will be denied. *Levine v Blankman*, 28 Misc. 2d 748, 212 N.Y.S.2d 500, 1961 N.Y. Misc. LEXIS 3368 (N.Y. Sup. Ct. 1961).

Where party caused confusion by not following order or designation of items as set forth in demand, preclusion was ordered unless party complied with demand and corrected confusion. *Roden v Bond Stores, Inc.*, 80 N.Y.S.2d 88, 1944 N.Y. Misc. LEXIS 2815 (N.Y. Sup. Ct. 1944).

In action against city for damages to merchandise due to break in water main, wherein city claimed damages were due to other persons, city was precluded from offering evidence thereon unless it furnished particulars of its claim. *United Cigar-Whelan Stores Corp. v Syracuse*, 83 N.Y.S.2d 895, 1948 N.Y. Misc. LEXIS 3471 (N.Y. Sup. Ct. 1948).

75. —Substantial compliance

Where plaintiff's fourth bill of particulars sufficiently complied with defendant's demands except as to particular items, plaintiff was properly precluded from giving evidence on trial only with respect to such items. *Fidelity & Casualty Co. v Fischbach & Moore, Inc.*, 270 A.D. 830, 60 N.Y.S.2d 322, 1946 N.Y. App. Div. LEXIS 4153 (N.Y. App. Div. 1st Dep't 1946).

Substantial compliance bars preclusion order. *Steinberg Press, Inc. v Charles Henry Publications, Inc.*, 273 A.D. 772, 75 N.Y.S.2d 150, 1947 N.Y. App. Div. LEXIS 3082 (N.Y. App. Div. 1947).

In determining whether particular bill meets terms of particular demand, it is more satisfactory to use as guide whether it has performed its assigned function in pending action or proceeding, than it is to measure it against those dictionary definitions which can become weapons which thwart purposes of pleadings. *In re Ludlam's Will*, 154 N.Y.S.2d 989 (N.Y. Sur. Ct. 1956).

76. —Effect of prior orders

Prior preclusion orders, made by Special Term were binding upon plaintiff where he did not appeal from such orders. *Ogden Printing Co. v Miller Harness Co.*, 279 A.D. 1054, 112 N.Y.S.2d 863, 1952 N.Y. App. Div. LEXIS 5788 (N.Y. App. Div. 1952).

Order opening plaintiff's default in serving bill of particulars and permitting him to serve same was error, since it reversed a prior order precluding him from offering proof. *Sevouny v Henry Hellman Co.*, 233 N.Y.S. 332, 133 Misc. 714, 1929 N.Y. Misc. LEXIS 697 (N.Y. App. Term 1929).

77. Lack of knowledge of particulars required as avoiding preclusion

Lack of knowledge bars preclusion, though order for particulars did not authorize omission. *Schlank v East River Sav. Bank*, 272 A.D. 56, 69 N.Y.S.2d 6, 1947 N.Y. App. Div. LEXIS 3220 (N.Y. App. Div.), reh'g denied, 272 A.D. 802, 71 N.Y.S.2d 927, 1947 N.Y. App. Div. LEXIS 3687 (N.Y. App. Div. 1947).

Where earlier bill of particulars served in connection with complaint that had been superseded by subsequent amended complaint had alleged lack of knowledge, plaintiff's failure to allege lack of knowledge in motion to modify demand for further bill should have been disregarded since defendant could not have been misled thereby. *Jeshion v Holzer*, 13 A.D.2d 620, 213 N.Y.S.2d 311, 1961 N.Y. App. Div. LEXIS 11604 (N.Y. App. Div. 1st Dep't 1961).

A motion to preclude testimony for failure to file a bill of particulars will be denied until the defendant has had opportunity to secure the information therefor by preliminary examination if that is necessary to furnish such information, but with leave to renew if no effort is made to supply the information by such examination. *New York v Velmachos*, 221 N.Y.S. 40, 129 Misc. 177, 1927 N.Y. Misc. LEXIS 690 (N.Y. Sup. Ct. 1927).

Where contestants stated under oath as to certain demands that they lacked knowledge to furnish particulars, they were entitled to offer evidence of items omitted on trial as matter of right. *In re Ernst's Will*, 86 N.Y.S.2d 562, 194 Misc. 237, 1949 N.Y. Misc. LEXIS 1798 (N.Y. Sur. Ct.), modified, 275 A.D. 1020, 92 N.Y.S.2d 113, 1949 N.Y. App. Div. LEXIS 5525 (N.Y. App. Div. 1949).

Bill of particulars alleging lack of knowledge of facts demanded did not constitute sufficient compliance and plaintiff was directed to furnish further bill stating what she would claim to be the facts and further stating that she lacks further knowledge as to items demanded. *Boin v Equitable Life Assurance Soc.*, 28 Misc. 2d 489, 208 N.Y.S.2d 323, 1960 N.Y. Misc. LEXIS 2101 (N.Y. Dist. Ct. 1960).

Where party avers ignorance in good faith, he cannot be precluded from offering evidence at trial. *Advance Television Picture Service, Inc. v Columbia Broadcasting System, Inc.*, 90 N.Y.S.2d 65, 1949 N.Y. Misc. LEXIS 2371 (N.Y. Sup. Ct. 1949), *aff'd*, 276 A.D. 896, 94 N.Y.S.2d 819, 1950 N.Y. App. Div. LEXIS 5023 (N.Y. App. Div. 1950).

Where court orders plaintiff to furnish additional particulars or be precluded, plaintiff may, where he is without knowledge as to information sought, so state under oath in lieu of furnishing same.

Nassau Suffolk Lumber & Supply Corp. v Feldman, 125 N.Y.S.2d 27, 1953 N.Y. Misc. LEXIS 2269 (N.Y. Sup. Ct. 1953).

That plaintiff was suing as administratrix with possibly no real knowledge of the facts was no excuse for not furnishing a bill of particulars. Slocum v Erie R. Co., 36 F.2d 277, 1929 U.S. Dist. LEXIS 1678 (D.N.Y. 1929).

78. Contest by party in default

Discretion of trial justice in denying motion to open default will not be interfered with where party has been guilty of gross laches and inexcusable disregard of order directing service of bill of particulars. Mead v Consolidated Metal Spinning & Stamping Co., 208 A.D. 814, 204 N.Y.S. 76, 1924 N.Y. App. Div. LEXIS 6101 (N.Y. App. Div. 1924).

Court may, in its discretion, vacate a default preclusion order and permit plaintiff to question propriety of items notwithstanding his failure to have moved timely to modify the demand. Decker v Norton, Lilly & Co., 20 Misc. 2d 948, 195 N.Y.S.2d 283, 1960 N.Y. Misc. LEXIS 3853 (N.Y. Sup. Ct. 1960).

Contest of validity of various demands as excessive and improper cannot be made by party in default. Maynard v Maynard, 69 N.Y.S.2d 61, 1946 N.Y. Misc. LEXIS 3390 (N.Y. Sup. Ct. 1946).

79. Motion for further particulars or preclusion

Failure to move to vacate or modify did not entitle demanding party to particulars, but as order was discretionary, it was affirmed. Suto v Musella, 274 A.D. 952, 83 N.Y.S.2d 451, 1948 N.Y. App. Div. LEXIS 4228 (N.Y. App. Div. 1948).

Where it was probable that plaintiffs could supply a more definite and positive supplemental bill of particulars after completion of the examination, the preclusion order was reversed without prejudice to renewal, if necessary, after completion of the examination and the service of the

supplemental bill of particulars. *Erbe v Lincoln Rochester Trust Co.*, 7 A.D.2d 963, 182 N.Y.S.2d 107, 1959 N.Y. App. Div. LEXIS 10030 (N.Y. App. Div. 4th Dep't 1959).

It is improper practice to return a bill deemed insufficient; objector should move to preclude or to compel a further bill. *Holmes v Liquori*, 12 A.D.2d 735, 208 N.Y.S.2d 413, 1960 N.Y. App. Div. LEXIS 6562 (N.Y. App. Div. 4th Dep't 1960).

Party who desires to invoke the preclusion provisions must first move for and procure a preclusion order. *Judge v Milligan*, 229 N.Y.S. 287, 131 Misc. 925, 1928 N.Y. Misc. LEXIS 881 (N.Y. Sup. Ct. 1928).

When the bill served is considered defective or insufficient, motion for further bill is the regular and orderly practice. *Cohen v Katz*, 241 N.Y.S. 64, 136 Misc. 526, 1930 N.Y. Misc. LEXIS 1161 (N.Y. City Ct. 1930).

If particulars are claimed to be insufficient, other party should move for order precluding offer of any evidence in support of items omitted unless further bill is served. *Atlas Powder Co. v Mid Island Laundry Co.*, 25 N.Y.S.2d 872, 175 Misc. 960, 1941 N.Y. Misc. LEXIS 1508 (N.Y. App. Term 1941).

Statutory provision as to time of service of motion for further particulars is not absolute, and no hard and fast rule as to what constitutes "special circumstances" is possible, since application of rule depends upon facts peculiar to each proceeding. *Sammons v Mahern*, 141 N.Y.S.2d 216, 207 Misc. 781, 1955 N.Y. Misc. LEXIS 2502 (N.Y. Sup. Ct. 1955).

Motion on notice is necessary when applying for order of preclusion. *Levine v Pepsi Cola Metropolitan Bottling Co.*, 109 N.Y.S.2d 213, 1951 N.Y. Misc. LEXIS 2645 (N.Y. Sup. Ct. 1951), modified, 279 A.D. 869, 110 N.Y.S.2d 98, 1952 N.Y. App. Div. LEXIS 5144 (N.Y. App. Div. 1952).

80. —Returning bill for insufficiency

Where further supplemental bill of particulars was served within prescribed time but it was returned by defendant as insufficient, and there was no determination of insufficiency by court as required by RCP 115(d), plaintiff may not be deemed precluded, in absence of such determination, by mere claim of insufficiency on part of defendant. *Pavia & Co. v Siegel Chemical Co.*, 1 A.D.2d 655, 146 N.Y.S.2d 656, 1955 N.Y. App. Div. LEXIS 3842 (N.Y. App. Div. 1st Dep't 1955).

It is improper practice to return a bill deemed insufficient; objector should move to preclude or to compel a further bill. *Holmes v Liquori*, 12 A.D.2d 735, 208 N.Y.S.2d 413, 1960 N.Y. App. Div. LEXIS 6562 (N.Y. App. Div. 4th Dep't 1960).

Practice of returning a bill of particulars with a statement that it is insufficient, condemned and its folly demonstrated. *Thoma v Koeppen*, 240 N.Y.S. 190, 136 Misc. 346, 1930 N.Y. Misc. LEXIS 1050 (N.Y. City Ct. 1930).

Plaintiff who failed to comply with demand for bill of particulars and preclusion order predicated thereon cannot, on the ground of inability to comply, move to compel defendant to accept insufficient bill. *Rosen v Gotham Equipment Corp.*, 16 Misc. 2d 891, 183 N.Y.S.2d 911, 1959 N.Y. Misc. LEXIS 4304 (N.Y. Sup. Ct. 1959).

81. Waiver

The course pursued by the defendant in insisting upon the trial before the bill of particulars was due, and in trying the case and permitting the reception of plaintiffs' evidence without objection based upon their failure to serve the bill, waived his right to an order of preclusion. *Butler v Burlingame*, 240 A.D. 714, 265 N.Y.S. 1002, 1933 N.Y. App. Div. LEXIS 5628 (N.Y. App. Div. 1933).

Right to a further bill was waived by waiting until the day of trial to move therefor. *Cohen v Katz*, 241 N.Y.S. 64, 136 Misc. 526, 1930 N.Y. Misc. LEXIS 1161 (N.Y. City Ct. 1930).

82. —Failure to move within ten-day period

Where plaintiff's time to move for modification of demand for bill of particulars had expired and she did not contest items until defendant moved for preclusion order, such items will not be scrutinized and will be allowed unless palpably improper. *Tomasino v Prudential Westchester Corp.*, 1 A.D.2d 781, 147 N.Y.S.2d 601, 1956 N.Y. App. Div. LEXIS 6692 (N.Y. App. Div. 2d Dep't 1956).

Notwithstanding the condemnation of the courts of the disregard for the Rule, as a matter of discretion, plaintiff was permitted to open his default, upon payment of a full bill of costs to date, \$50 costs of appeal, and disbursements, where, even though he had served his bill late and it had been rejected by defendant, defendant was deemed to have contributed to the laxity by making no motion to preclude. *Mensh v 12 Beekman Place, Inc.*, 11 A.D.2d 642, 201 N.Y.S.2d 286, 1960 N.Y. App. Div. LEXIS 9408 (N.Y. App. Div. 1st Dep't 1960).

Phrase as to moving within ten days indicates a definite limitation that after expiration of ten-day period omission to make application should not be excused except for special reason, such as illness, absence or death of party or counsel, or some other incapacity or loss, misplacement of records, or some other contingency or reason out of the general or ordinary run of things. *Curtis v Curtis*, 33 N.Y.S.2d 731, 178 Misc. 213, 1942 N.Y. Misc. LEXIS 1420 (N.Y. Sup. Ct. 1942).

Where plaintiff was promptly apprised that bill served by him did not comply with defendant's demand and thereafter defendant so notified plaintiff and requested sufficient bill and plaintiff never refused definitely to serve further bill, defendant's motion for further bill was entertained by court in exercise of discretion, though served after 10-day period. *Sammons v Mahern*, 141 N.Y.S.2d 216, 207 Misc. 781, 1955 N.Y. Misc. LEXIS 2502 (N.Y. Sup. Ct. 1955).

Court might pass on propriety of demand for bill even though motion to vacate was not made as required by RCP 115. *Desimone v Robertson*, 19 Misc. 2d 80, 189 N.Y.S.2d 70, 1959 N.Y. Misc. LEXIS 3234 (N.Y. Sup. Ct. 1959).

Oversight, by attorney or his assistant, in not properly examining plaintiff's bill of particulars, due to lack of office help, was sufficient excuse for failure to move for further particulars within 10 days. *Poole v Eber Realty Corp.*, 48 N.Y.S.2d 818, 1944 N.Y. Misc. LEXIS 2001 (N.Y. Sup. Ct. 1944).

Untimeliness of plaintiff's motion does not of itself prevent court from determining propriety of demands in considering defendant's motion to preclude. *Cornell-Dubilier Electric Corp. v Micamold Radio Corp.*, 50 N.Y.S.2d 318, 1944 N.Y. Misc. LEXIS 2316 (N.Y. Sup. Ct. 1944).

Where plaintiff failed to furnish original bill within 10 days and defendant failed to move timely for further bill, court had discretion to hear defendant's motion on merits for further bill. *Evans v Delaware, L. & W. R. Co.*, 88 N.Y.S.2d 132, 1949 N.Y. Misc. LEXIS 2063 (N.Y. Sup. Ct. 1949).

Where motion to preclude was not served until 19 days after bill of particulars was served and moving papers disclose no facts excusing such delay, motion must be denied. *In re Walter's Will*, 113 N.Y.S.2d 353, 1952 N.Y. Misc. LEXIS 2778 (N.Y. Sur. Ct. 1952).

83. Service of bill pending preclusion motion

An order granting a motion to preclude petitioner from giving certain testimony in a proceeding to determine a claim for fees for legal services is reversed with privilege to the executor to move for a further bill of particulars, where it appears that, while the motion to preclude was pending, the appellant served a bill of particulars which was reasonably sufficient to satisfy most of the demand. *In re Pratt's Estate*, 259 A.D. 789, 18 N.Y.S.2d 391, 1940 N.Y. App. Div. LEXIS 6652 (N.Y. App. Div. 1940).

Party should not ignore demand for bill of particulars and then serve bill after motion has been made to preclude. *Weber v Feldman*, 24 Misc. 2d 105, 198 N.Y.S.2d 400, 1959 N.Y. Misc. LEXIS 2757 (N.Y. Sup. Ct. 1959).

84. Affidavits

The discretion of the court to grant a bill of particulars is properly exercised upon affidavits that plaintiffs did not know to what instances the averments in an answer referred that an insured had had certain diseases, obtained other insurance, and been rejected by other companies, as to which his application was false. *Dwight v Germania Life Ins. Co.*, 84 N.Y. 493, 84 N.Y. (N.Y.S.) 493, 1881 N.Y. LEXIS 423 (N.Y. 1881).

The affidavit of the president of a railroad used in a motion for a bill of particulars which admitted that the services were rendered “for the defendant” is competent evidence against it. *Bogart v New York & L. I. R. Co.*, 118 A.D. 50, 102 N.Y.S. 1093, 1907 N.Y. App. Div. LEXIS 608 (N.Y. App. Div. 1907), *aff’d*, 191 N.Y. 550, 85 N.E. 1106, 191 N.Y. (N.Y.S.) 550, 1908 N.Y. LEXIS 1181 (N.Y. 1908).

An affidavit that defendant has stated the elements of the justification pleaded with as great particularity as he can is a sufficient answer to an application for a bill of particulars. *La Scala v Lyon*, 11 N.Y.S. 31, 57 Hun 587, 1890 N.Y. Misc. LEXIS 585 (N.Y. Sup. Ct. 1890).

85. —By attorney

In an action for the conversion of specific machines “and other machinery,” a bill of particulars of the “other machinery” should not be granted on the affidavit of the defendant’s attorney who has no personal knowledge of the matter and whose only excuse for making the affidavit is that no officers of defendant corporation were within the county. *St. Regis Paper Co. v Santa Clara Lumber Co.*, 112 A.D. 775, 98 N.Y.S. 572, 1906 N.Y. App. Div. LEXIS 772 (N.Y. App. Div. 1906).

Although affidavit may be made by the party or his attorney under this rule, the affidavit, by whomever made, must be sufficient. *Hackett v Walters*, 295 N.Y.S. 622, 162 Misc. 730, 1937 N.Y. Misc. LEXIS 1683 (N.Y. Sup. Ct. 1937).

Motion by defendants for bill of particulars under RCP 115(b) was denied with leave to renew, where motion supported only by affidavit of defendants’ attorney, who did not claim therein

personal knowledge of the facts. *Hackett v Walters*, 295 N.Y.S. 622, 162 Misc. 730, 1937 N.Y. Misc. LEXIS 1683 (N.Y. Sup. Ct. 1937).

On a motion by the defendant to preclude the plaintiff from offering evidence because of a failure to furnish a bill of particulars, affidavits submitted in reply by plaintiff's attorney stating his willingness to furnish particulars will be regarded as a consent to furnish such particulars. *Michels v Ripley*, 26 F. Supp. 959, 1939 U.S. Dist. LEXIS 3064 (D.N.Y. 1939).

86. Discretion

Where a plaintiff has been ordered to give a further bill of particulars because of the insufficiency of the particulars first served, and merely notifies the defendant that he is unable to furnish any further particulars, it is error to deny the defendant's motion to preclude the plaintiff from giving evidence of allegations as to which particulars were ordered, or in the alternative to compel him to show cause why it is impossible to obey the order. *Osborn v McArthur Bros. Co.*, 132 A.D. 845, 117 N.Y.S. 750, 1909 N.Y. App. Div. LEXIS 1604 (N.Y. App. Div. 1909).

It was an improper exercise of discretion to make an order of preclusion where the reasons assigned by the plaintiff for delay in serving the bill of particulars are not questioned and it does not appear that the defendants were prejudiced by the delay. *Rubin v Laimbeer*, 251 A.D. 831, 296 N.Y.S. 538, 1937 N.Y. App. Div. LEXIS 7869 (N.Y. App. Div. 1937).

Order precluding corporate defendant from offering proof of its defense and counterclaim and refusing to open default in failing to furnish particulars was abuse of discretion. *Ferri v Greater New York Brewery, Inc.*, 266 A.D. 1005, 44 N.Y.S.2d 412, 1943 N.Y. App. Div. LEXIS 5729 (N.Y. App. Div. 1943).

Improper demand for particulars calling for evidence made it abuse of discretion to grant motion to preclude unless particulars served within 20 days. *Universal Metal Products Co. v De-Mornay Budd, Inc.*, 275 A.D. 575, 90 N.Y.S.2d 414, 1949 N.Y. App. Div. LEXIS 3821 (N.Y. App. Div. 1949).

Where defendant did not comply with demand for particulars and failed to move to vacate or modify such demand, order of preclusion was not mandatory, and discretion still resided in court. *Curran v Porkar*, 283 A.D. 849, 128 N.Y.S.2d 794, 1954 N.Y. App. Div. LEXIS 5496 (N.Y. App. Div. 1954).

Where plaintiff's demand for particulars of answer and counterclaim contained items not properly within purview of bill of particulars, preclusion order should have gone no further than to preclude defendant from giving evidence as to those matters of which particulars had been demanded and not furnished. *Curran v Porkar*, 283 A.D. 849, 128 N.Y.S.2d 794, 1954 N.Y. App. Div. LEXIS 5496 (N.Y. App. Div. 1954).

Where plaintiffs gave many particulars and did not give all because one plaintiff was absent in foreign country, order of preclusion was unnecessarily drastic where it amounts in effect to dismissal of complaint. *Raphael v Knickerbocker Foods, Inc.*, 283 A.D. 1027, 131 N.Y.S.2d 871, 1954 N.Y. App. Div. LEXIS 6149 (N.Y. App. Div. 1st Dep't 1954).

In action on fire policies wherein defendants interposed defenses of fraud and lack of insurable interest, where defendants obtained extension of four weeks within which to comply with plaintiff's demand for bill of particulars, and where plaintiff, after one month after expiration of extension, moved to preclude, unconditional order of preclusion was improperly granted. *Hersh v Home Ins. Co.*, 284 A.D. 428, 131 N.Y.S.2d 488, 1954 N.Y. App. Div. LEXIS 3418 (N.Y. App. Div. 1954).

Even though defendant failed to move to vacate or modify demand for bill of particulars, and failed to furnish any particulars as to those portions of demand which were proper, court, in its discretion, could refuse to grant preclusion order as to matters in demand which were improper where the entire demand was excessive and unduly elaborate. *Cities Service Oil Co. v 307 Summer Street, Inc.*, 10 A.D.2d 904, 200 N.Y.S.2d 559, 1960 N.Y. App. Div. LEXIS 10431 (N.Y. App. Div. 4th Dep't), reh'g denied, 11 A.D.2d 755, 204 N.Y.S.2d 125, 1960 N.Y. App. Div. LEXIS 9360 (N.Y. App. Div. 4th Dep't 1960).

Under RCP 115, if a party failed to furnish a bill of particulars, a preclusion order was not made as a matter of course, but discretion still rested with the court. *Peck v Bandell*, 1 N.Y.S.2d 325, 164 Misc. 352, 1937 N.Y. Misc. LEXIS 1082 (N.Y. County Ct. 1937).

A demand for a bill of particulars will not be permitted to prevent or delay a plaintiff from moving for summary judgment, and when that seems to be the purpose of the demand, upon the granting of the motion for summary judgment, a cross motion to preclude will be denied. *Levine v Blankman*, 28 Misc. 2d 748, 212 N.Y.S.2d 500, 1961 N.Y. Misc. LEXIS 3368 (N.Y. Sup. Ct. 1961).

87. Conditions in preclusion order

An order, denying defendant bank's motion to preclude plaintiffs from giving evidence as to certain matters as to which defendant alleged plaintiffs had failed to furnish particulars directed by prior orders at Special Term, was modified so as to require plaintiffs to furnish certain particulars and further requiring both parties to diligently proceed with defendant's examination before trial, heretofore ordered, and also requiring plaintiffs to delete from the bill of particulars to be furnished certain generalizations contained in specific items. *Delano v Central Hanover Bank & Trust Co.*, 252 A.D. 290, 299 N.Y.S. 181, 1937 N.Y. App. Div. LEXIS 5641 (N.Y. App. Div. 1937).

Motion to modify order of preclusion was in court's discretion granted upon condition that plaintiffs serve within ten days their proposed bill of particulars and pay to defendant \$50 costs. *Becker v Paragon Supply Co.*, 285 A.D. 991, 138 N.Y.S.2d 357, 1955 N.Y. App. Div. LEXIS 6400 (N.Y. App. Div. 1955).

Order denying leave to serve amended answer and granting plaintiff's motion to preclude unless defendant serve proper bill of particulars, was modified to grant cross-motion for leave to serve amended answer and to deny motion to preclude, on condition that such answer be served within 10 days and that defendant pay costs of action to date, with leave to plaintiff to serve

demand for particulars of amended answer. *Rogers v Remington Records, Inc.*, 286 A.D. 841, 142 N.Y.S.2d 233, 1955 N.Y. App. Div. LEXIS 4298 (N.Y. App. Div. 1955).

Where plaintiff ignored demand for bill of particulars and awaited motion to preclude before serving bill or contesting propriety of demand, order of preclusion was modified by granting leave to serve within ten days upon payment of full bill of costs to date and costs and disbursements on appeal of \$50. *Inter County Painting Co. v 200 East End Ave. Corp.*, 286 A.D. 482, 144 N.Y.S.2d 529, 1955 N.Y. App. Div. LEXIS 4067 (N.Y. App. Div. 1955).

88. Vacating preclusion order

Plaintiff's motion to vacate precluding order for failure to serve bill of particulars held improperly granted where motion was made two years after the order and plaintiff offered no reasonable excuse for his dilatory conduct. *Rando v Royal Mail Steam Packet Co.*, 208 A.D. 634, 204 N.Y.S. 5, 1924 N.Y. App. Div. LEXIS 5107 (N.Y. App. Div. 1924).

Order of preclusion vacated. *Jacobs v New York Rapid Transit Corp.*, 244 A.D. 738, 279 N.Y.S. 998, 1935 N.Y. App. Div. LEXIS 6167 (N.Y. App. Div. 1935).

Year's delay in complying with order precluding plaintiff from offering evidence concerning particulars demanded barred vacation of order of preclusion. *Sun Const. Corp. v Resnick*, 283 A.D. 797, 128 N.Y.S.2d 322, 1954 N.Y. App. Div. LEXIS 5357 (N.Y. App. Div. 1954).

Where plaintiff delayed 18 months in service of bill of particulars in action for conversion, granting plaintiff's motion to open his default was abuse of discretion. *Schmitt v Pietrangelo*, 285 A.D. 1058, 139 N.Y.S.2d 356, 1955 N.Y. App. Div. LEXIS 6664 (N.Y. App. Div.), reh'g denied, 285 A.D. 1082, 141 N.Y.S.2d 520, 1955 N.Y. App. Div. LEXIS 6720 (N.Y. App. Div. 1955).

Where defendant retained bill of particulars served by plaintiff in April 1954 and obtained order of preclusion in November, 1954, over year after service of demand for bill of particulars, and there were various communications between counsel for parties, court granted plaintiff's motion to vacate order of preclusion as matter of discretion. *Merritt v Ellis*, 285 A.D. 1216, 141 N.Y.S.2d

239, 1955 N.Y. App. Div. LEXIS 7192 (N.Y. App. Div.), app. denied, 286 A.D. 954, 143 N.Y.S.2d 667, 1955 N.Y. App. Div. LEXIS 4592 (N.Y. App. Div. 1955).

Where plaintiff did not comply with demand for particulars nor seek to have it modified and when motion was made to preclude, filed no affidavit, and plaintiff disregarded conditional preclusion order for nine months when he sought to vacate it, his motion was denied. *Paris v Poticha*, 1 A.D.2d 277, 149 N.Y.S.2d 735, 1956 N.Y. App. Div. LEXIS 5930 (N.Y. App. Div. 3d Dep't), reh'g denied, 2 A.D.2d 641, 152 N.Y.S.2d 435, 1956 N.Y. App. Div. LEXIS 5332 (N.Y. App. Div. 3d Dep't 1956).

Where Special Term gave serious consideration to failure of plaintiff's attorney to comply with RCP 115 resulting in order of preclusion, Appellate Division was constrained to sustain discretion of Special Term in vacating preclusion order and permitting service of bill of particulars. *Gigliotti v Morasco*, 2 A.D.2d 653, 152 N.Y.S.2d 45, 1956 N.Y. App. Div. LEXIS 5196 (N.Y. App. Div. 4th Dep't 1956), limited, *Goldstein v Wickett*, 3 A.D.2d 135, 158 N.Y.S.2d 599, 1957 N.Y. App. Div. LEXIS 6687 (N.Y. App. Div. 4th Dep't 1957).

A motion to vacate an order of preclusion entered when counsel for plaintiff failed to respond to demand for over one year was denied in exercise of discretion. *Goldstein v Wickett*, 3 A.D.2d 135, 158 N.Y.S.2d 599, 1957 N.Y. App. Div. LEXIS 6687 (N.Y. App. Div. 4th Dep't), limited, *O'Connell v Korb*, 3 A.D.2d 978, 162 N.Y.S.2d 705, 1957 N.Y. App. Div. LEXIS 5474 (N.Y. App. Div. 4th Dep't 1957).

Opening default in serving bill of particulars in an action for breach of contract was an improvident exercise of discretion where the preclusion order was on consent, no reasonable excuse for a delay of one year was offered, and there was no showing of merit in the cause of action. *Sandale Cooperative Apartments, Inc. v Sandale Constr. Corp.*, 4 A.D.2d 970, 168 N.Y.S.2d 365, 1957 N.Y. App. Div. LEXIS 3853 (N.Y. App. Div. 2d Dep't 1957).

Vacating a preclusion order, and allowing service of a bill of particulars four and a half years after an automobile accident, was held to be an improvident exercise of discretion, although

inexcusable neglect on the part of plaintiffs' first attorneys and concealment of the facts from the plaintiffs personally, were shown. *Walker v Ferri*, 5 A.D.2d 24, 169 N.Y.S.2d 305, 1957 N.Y. App. Div. LEXIS 3456 (N.Y. App. Div. 4th Dep't 1957), app. denied, 5 A.D.2d 954, 172 N.Y.S.2d 569, 1958 N.Y. App. Div. LEXIS 6768 (N.Y. App. Div. 4th Dep't 1958).

Where action for damages begun fifteen days before expiration of three-year statute of limitation and preclusion orders were granted when bills of particulars were not received, and actions were dismissed for failure to prosecute, a motion by a new attorney made more than one year and one-half after the actions commenced, to vacate previous orders, was improperly granted. *Walker v Ferri*, 5 A.D.2d 24, 169 N.Y.S.2d 305, 1957 N.Y. App. Div. LEXIS 3456 (N.Y. App. Div. 4th Dep't 1957), app. denied, 5 A.D.2d 954, 172 N.Y.S.2d 569, 1958 N.Y. App. Div. LEXIS 6768 (N.Y. App. Div. 4th Dep't 1958).

Motion by plaintiffs to vacate order of preclusion for failure to serve bill of particulars denied where plaintiff commenced action by service of summons and failed to serve complaint for two years and defendant's motion to dismiss action for lack of prosecution granted when no excuse given for failure to prosecute with reasonable diligence. *Harrington v Kaufman*, 5 A.D.2d 195, 170 N.Y.S.2d 694, 1958 N.Y. App. Div. LEXIS 6848 (N.Y. App. Div. 1st Dep't 1958).

The court's discretion was exercised to deny modification of a preclusion order and an extension of time to file bill of particulars, because of the delay of the party in serving bill and in moving for the extension of time. *Israel v Drei Corp.*, 5 A.D.2d 987, 173 N.Y.S.2d 360, 1958 N.Y. App. Div. LEXIS 6117 (N.Y. App. Div. 1st Dep't), reh'g denied, 6 A.D.2d 1005, 178 N.Y.S.2d 212, 1958 N.Y. App. Div. LEXIS 4812 (N.Y. App. Div. 1st Dep't 1958).

Delay of twelve days in serving bill after preclusion order will be excused absent showing of gross laches, inexcusable neglect, or prejudice. *Haber v Forbidussi*, 8 A.D.2d 820, 190 N.Y.S.2d 193, 1959 N.Y. App. Div. LEXIS 8409 (N.Y. App. Div. 2d Dep't 1959).

Where plaintiff offered no reasonable excuse for waiting 47 months after service of preclusion order before moving to vacate their default in service of bill of particulars the granting of their

motion was reversed. *Renzo v Kelton*, 10 A.D.2d 859, 199 N.Y.S.2d 116, 1960 N.Y. App. Div. LEXIS 10837 (N.Y. App. Div. 2d Dep't 1960).

It was held to be an improvident exercise of discretion to open plaintiff's default under a preclusion order without having established meritorious excuse for his inordinate default, and a meritorious cause of action. *D'Antonio v Fitzgerald*, 11 A.D.2d 804, 204 N.Y.S.2d 908, 1960 N.Y. App. Div. LEXIS 8468 (N.Y. App. Div. 2d Dep't 1960).

Absent a reasonable excuse for delay and an affidavit of merits, it is error to vacate a preclusion order. *Schippman v Rizzo*, 12 A.D.2d 984, 212 N.Y.S.2d 214, 1961 N.Y. App. Div. LEXIS 12445 (N.Y. App. Div. 2d Dep't 1961).

Vacatur of a preclusion order on the eve of the trial was an improvident exercise of discretion where the only excuse for a 3 ½ -year delay in compliance was the treating physician's refusal to furnish a record of the injuries. *Jackson v Antoniac*, 13 A.D.2d 837, 216 N.Y.S.2d 174, 1961 N.Y. App. Div. LEXIS 10555 (N.Y. App. Div. 2d Dep't 1961).

Where order of preclusion was granted on plaintiff's default and he failed to move for relief until case was reached on Appeal Calendar, for second time, when trial was again adjourned, plaintiff's failure for one year longer to move for relief from preclusion order was inexcusable, barring relief. *Jones v Merchants Mut. Casualty Co.*, 143 N.Y.S.2d 190, 208 Misc. 89, 1955 N.Y. Misc. LEXIS 3635 (N.Y. Sup. Ct. 1955).

Where bill of particulars retained more than one month after service and settlement negotiations continued, motion to relieve plaintiff of consequences of preclusion order should be granted. *Leiter v Green*, 13 Misc. 2d 449, 179 N.Y.S.2d 753, 1958 N.Y. Misc. LEXIS 3015 (N.Y. App. Term 1958).

Motion to vacate order of preclusion for plaintiff's failure to serve particulars on ground that plaintiff could not obtain hospital records was properly denied, where plaintiff refused to protect hospital. *Katzman v Gaskey*, 108 N.Y.S.2d 713, 1951 N.Y. Misc. LEXIS 2580 (N.Y. Sup. Ct. 1951).

89. Dismissal of pleading for failure to serve particulars

The court had power, under CPA § 181 (Rule 3216 herein) to dismiss the complaint, upon the failure of the plaintiff to obey an order requiring him to serve a bill of particulars. *Dwight v Germania Life Ins. Co.*, 84 N.Y. 493, 84 N.Y. (N.Y.S.) 493, 1881 N.Y. LEXIS 423 (N.Y. 1881).

An order, requiring a defendant to give a bill of particulars, should not direct that in the event of failure to comply he is estopped from proving his defense or counterclaim; the plaintiff is only entitled to an order excluding evidence after the defendant fails to give the items ordered. *Foster v Curtis*, 121 A.D. 689, 106 N.Y.S. 388, 1907 N.Y. App. Div. LEXIS 1877 (N.Y. App. Div. 1907).

Judgment was reversed for failure of a bill of particulars fairly to apprise the defendant of the ground of recovery on which the plaintiff would rely. *Nadalin v T. Hogan & Sons, Inc.*, 220 A.D. 748, 222 N.Y.S. 859, 1927 N.Y. App. Div. LEXIS 9852 (N.Y. App. Div. 1927).

Litigant should not be penalized by preclusion order in effect dismissing complaint for failure of his attorney to comply with RCP 115. *Kamp v Syracuse Transit Corp.* (1954) *Seehase v Webster*, 284 A.D. 1028, 135 N.Y.S.2d 763, 1954 N.Y. App. Div. LEXIS 4426 (N.Y. App. Div. 1954).

Where motion to dismiss on the ground that no cause of action was stated was reinforced by demand for and failure of plaintiff to furnish a bill of particulars, dismissal was warranted. *Schachter v Night & Day Press, Inc.*, 210 N.Y.S. 423, 125 Misc. 172, 1925 N.Y. Misc. LEXIS 854 (N.Y. App. Term 1925).

The order may direct that on failure to furnish the bill of particulars, the counterclaim which it concerns will be stricken out. *Wilson v Fowler*, 44 Hun 89, 7, 7 N.Y. St. 446 (N.Y.).

A court of limited, qualified or statutory jurisdiction has no power to strike out a pleading for failure to serve a bill of particulars, but can only deprive the party refusing from giving evidence

of the facts as to which such bill of particulars was refused. *Bloom v Huyck*, 25 N.Y.S. 7, 71 Hun 252 (1893).

Research References & Practice Aids

Federal Aspects:

Pretrial conference; formulating issues, USCS Court Rules, Federal Rules of Civil Procedure, Rule 16.

General provisions governing discovery, USCS Court Rules, Federal Rules of Civil Procedure, Rule 26.

Fees in United States Supreme Court, USCS Court Rules, Federal Rules of Civil Procedure, Rule 38.

Fees and costs, 28 USCS §§ 1911 et seq., 2412.

Jurisprudences:

1 NY Jur 2d Accounts and Accounting § 9. .

6A NY Jur 2d Article 78 and Related Proceedings § 323. .

23 NY Jur 2d Conversion, and Action for Recovery of Chattel § 83. .

24 NY Jur 2d Costs in Civil Actions § 37. .

76 NY Jur 2d Malpractice §§ 274, 275.

84 NY Jur 2d Pleading §§ 288, 301, 304, 305, 308, 312, 315, 321.

61A Am Jur 2d, Pleading §§ 739.– 742.

Law Reviews:

Legislation: pre-trial motion practice. 29 Brook. L. Rev. 300.

Motion practice under the CPLR. 9 NY L Forum 317.

Treatises

Matthew Bender's New York Civil Practice:

Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 3042, Procedure for Bill of Particulars.

2 Carrieri, Lansner, New York Civil Practice: Family Court Proceedings §§ 19.06, 19.08.

2 Lansner, Reichler, New York Civil Practice: Matrimonial Actions §§ 34.02, 35.02.

3 Cox, Arenson, Medina, New York Civil Practice: SCPA ¶ 1403.06, 1404.11; 5 Cox, Arenson, Medina, New York Civil Practice: SCPA ¶ 2103.12, 2104.08, 2210.12., 2211.04.

Matthew Bender's New York CPLR Manual:

CPLR Manual § 19.17. Bill of particulars.

Matthew Bender's New York AnswerGuides:

LexisNexis AnswerGuide New York Civil Litigation § 6.04. Responding to Demand for Bill of Particulars.

LexisNexis AnswerGuide New York Civil Litigation § 6.05. Amending Bill of Particulars.

LexisNexis AnswerGuide New York Civil Litigation § 6.06. Moving to Compel Response.

LexisNexis AnswerGuide New York Negligence § 2.17. Preparing Answer.

LexisNexis AnswerGuide New York Negligence § 5.27. Drafting Bill of Particulars.

LexisNexis AnswerGuide New York Negligence § 7.25. Defining Elements of Cause of Action and Necessary Allegations.

Matthew Bender's New York Evidence:

1 Bender's New York Evidence 101AppA.06. Persons From Whom Disclosure May Be Obtained.

Matthew Bender's New York Checklists:

Checklist for Bill of Particulars LexisNexis AnswerGuide New York Civil Litigation § 6.02.

Checklist for Disclosure Motions LexisNexis AnswerGuide New York Civil Litigation § 7.14.

Checklist for Filing Note of Issue and Certificate of Readiness LexisNexis AnswerGuide New York Civil Litigation § 8.02.

Forms:

Bender's Forms for the Civil Practice Form No. CPLR 3042:1 et seq.

LexisNexis Forms FORM 75-CPLR 3042:1.—Demand for a Bill of Particulars Skeleton Form.

LexisNexis Forms FORM 75-CPLR 3042:10.—Particulars Demanded in Action by Minority Shareholder of Closely Held Corporation for Dissipation of Corporate Assets.

LexisNexis Forms FORM 75-CPLR 3042:11.—Particulars Demanded as to Defense of Plaintiff's Culpable Acts.

LexisNexis Forms FORM 75-CPLR 3042:12.—Demanded Particulars of Defenses of Justification for Discharge and of Fraudulent Representations in Action for Wrongful Discharge from Employment.

LexisNexis Forms FORM 75-CPLR 3042:13.—Particulars Demanded in Action Against Store for Damages for Detention of Customer as Shoplifter.

LexisNexis Forms FORM 75-CPLR 3042:14.—Particulars Demanded as to Goods Sold and Delivered.

LexisNexis Forms FORM 75-CPLR 3042:15.—Particulars Demanded as to Publication in Libel Action.

LexisNexis Forms FORM 75-CPLR 3042:16.—Particulars Requested by Defendant as to Publication in Libel Action.

LexisNexis Forms FORM 75-CPLR 3042:17.—Demanded Particulars in Action by Attorney Against Client for Unpaid Legal Fees.

LexisNexis Forms FORM 75-CPLR 3042:18.—Particulars Demanded in Action for Salesman's Commissions; Defense of Unfair Competition and Breach of Fidelity.

LexisNexis Forms FORM 75-CPLR 3042:19.—Particulars Demanded as to Warranty.

LexisNexis Forms FORM 75-CPLR 3042:1A.—Demand for a Verified Bill of Particulars.

LexisNexis Forms FORM 75-CPLR 3042:2.—Demand for Items of Account.

LexisNexis Forms FORM 75-CPLR 3042:20.—Particulars Demanded as to Work Performed.

LexisNexis Forms FORM 75-CPLR 3042:21.—Bill of Particulars; General Form.

LexisNexis Forms FORM 75-CPLR 3042:22.—Copy of Items of Account; General Form.

LexisNexis Forms FORM 75-CPLR 3042:23.—Order to Show Cause on Motion for Extension of Time to Serve Bill of Particulars.

LexisNexis Forms FORM 75-CPLR 3042:24.—General Form of Affidavit on Motion for Extension of Time to Serve Bill of Particulars.

LexisNexis Forms FORM 75-CPLR 3042:25.—Affidavit on Motion for Extension of Time to Serve Bill of Particulars; Personal Injury Action.

LexisNexis Forms FORM 75-CPLR 3042:26.—Order Extending Plaintiff's Time to Serve Bill of Particulars.

LexisNexis Forms FORM 75-CPLR 3042:27.—Introductory Statement Bill of Particulars Amended as of Course.

LexisNexis Forms FORM 75-CPLR 3042:28.—Affidavit in Support of Motion to Amend Bill of Particulars to Prove Negligence and Defective Design.

LexisNexis Forms FORM 75-CPLR 3042:29.—Plaintiff's Affidavit in Support of Motion to Amend Bill of Particulars for the Purpose of Proving Negligence and Defective Design .

LexisNexis Forms FORM 75-CPLR 3042:3.—Particulars Demanded in an Action for Improper Performance of Auditing and Accounting Procedures.

LexisNexis Forms FORM 75-CPLR 3042:30.—Engineer's Affidavit in Support of Motion to Amend Bill of Particulars for the Purpose of Proving Negligence and Defective Design .

LexisNexis Forms FORM 75-CPLR 3042:4.—Particulars Demanded in Action for Damages Where Automobile Was Stolen While Being Repaired at Automobile Repair Shop.

LexisNexis Forms FORM 75-CPLR 3042:5.—Particulars Demanded in Action for Broker's Commission.

LexisNexis Forms FORM 75-CPLR 3042:6.—Demand for a Bill of Particulars Contract Action.

LexisNexis Forms FORM 75-CPLR 3042:7.—Particulars Requested by Defendant in Breach of Employment Contract by Employer.

LexisNexis Forms FORM 75-CPLR 3042:8.—Particulars Demanded as to Services Performe.

LexisNexis Forms FORM 75-CPLR 3042:9.—Particulars Demanded in Action for Injunction Against Corporation for Action Taken at Shareholder's Meeting.

LexisNexis Forms FORM 521-15-11.—Demand for Bill of Particulars in Personal Injury Action Plaintiff Struck by Defective Revolving Door.

LexisNexis Forms FORM 521-15-12.—Plaintiff's Bill of Particulars in a Personal Injury Action Plaintiff Struck by Defective Revolving Door.

LexisNexis Forms FORM 521-15-13.—Bill of Particulars for Personal Injuries Resulting From Slip and Fall on Ice.

LexisNexis Forms FORM 521-15-14.—Order to Show Cause on Motion for Extension of Time to Serve Bill of Particulars.

LexisNexis Forms FORM 521-15-15.—Affidavit on Motion for Extension of Time to Serve Bill of Particulars.

LexisNexis Forms FORM 521-15-16.—Order Extending Plaintiff's Time to Serve Bill of Particulars.

LexisNexis Forms FORM 521-15-24.—Order Directing Further Bill of Particulars.

LexisNexis Forms FORM 521-15-25.—Further Bill of Particulars.

LexisNexis Forms FORM 521-15-26.—Bill of Particulars Amended as of Course.

LexisNexis Forms FORM 521-15-27.—Notice of Motion to Amend Bill of Particulars.

LexisNexis Forms FORM 521-15-28.—Affidavit in Support of Motion to Amend Bill of Particulars.

LexisNexis Forms FORM 521-15-29.—Order Permitting Amendment of Bill of Particulars.

LexisNexis Forms FORM 521-15-13A.—Bill of Particulars for Personal Injuries Resulting From Infant's Running Into Defective Gate.

LexisNexis Forms FORM 521-15-23A.—Defendant's Notice of Motion for Summary Judgment Based on Preclusion Order.

LexisNexis Forms FORM 521-15-23B.—Defense Counsel's Affirmation of Defendant's Attorney Support of Motion for Summary Judgment Based on Preclusion Order.

LexisNexis Forms FORM 521-15-1.—File Review for Preparation of Bill of Particulars.

LexisNexis Forms FORM 521-15-2.—Demand for Bill of Particulars; Skeletal Form.

LexisNexis Forms FORM 521-15-3.—Bill of Particulars; Skeletal Form.

LexisNexis Forms FORM 521-15-6.—Demand for Bill of Particulars Requesting Information as to Plaintiff's Eligibility to Sue for Non Economic Loss (Pain and Suffering) or for Economic Loss in Excess of Basic Economic Loss Under Insurance Law Section 5104(a).

LexisNexis Forms FORM 521-15-7.—Bill of Particulars of Information as to Plaintiff's Eligibility to Sue for Non Economic Loss (Pain and Suffering) or for Economic Loss in Excess of Basic Economic Loss Under Insurance Law Section 5104(a).

LexisNexis Forms FORM 1434-19148.—CPLR 3042: Demand for a Bill of Particulars - Skeleton Form.

LexisNexis Forms FORM 1434-19149.—CPLR 3042: Demand for a Verified Bill of Particulars - Skeleton Form.

LexisNexis Forms FORM 1434-19150.—CPLR 3042: Demand for a Bill of Particulars - Contract Action.

1 Medina's Bostwick Practice Manual (Matthew Bender), Forms CPLR 14:101 et seq .(remedies and pleadings).

Texts:

Warren's Negligence in the New York Courts § 11.07. Bill of particulars required when pleading diminution of damages.

Warren's Negligence in the New York Courts § 232.05. Damages must be stated in bill of particulars.

Hierarchy Notes:

NY CLS CPLR, Art. 30

New York Consolidated Laws Service

Copyright © 2025 All rights reserved.

End of Document