

Spencer v Northern Westchester Hosp.
2013 NY Slip Op 34034(U)
October 7, 2013
Supreme Court, Westchester County
Docket Number: 56717/11
Judge: Joan B. Lefkowitz
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

-----X

HAZEL SPENCER,

Plaintiff,

DECISION & ORDER

-against-

Index No. 56717/11
Motion Date: Oct 7, 2013

NORTHERN WESTCHESTER HOSPITAL, MOUNT
KISCO MEDICAL GROUP, P.C., EUGENE TOLUNSKY
and EUGENE SPAGNUOLO,

Seq. No. 2

Defendants.

-----X

LEFKOWITZ, J.

The following papers were read on this motion by defendants Mount Kisco Medical Group ("MKMG") and Eugene Tolunsky, M.D. (hereinafter "moving defendants"), for an order compelling plaintiff to provide a more particularized bill of particulars in accordance with CPLR 3041, 3042 (c) and 3043 (a)(3).

- Order to Show Cause dated August 9, 2013
- Affirmation in Support
- Exhibits A-G
- Affirmation in Opposition

Upon the foregoing papers and the proceedings held on October 7, 2013, the motion is decided as follows:

In this medical malpractice action, plaintiff alleged in her verified complaint that the negligence and malpractice of defendants included, among other things, the following: failure and neglect to properly treat her; failure to treat her in accordance with the standards of care and treatment accepted in the community; deviation and departure from the customary standards of care; failure to promptly recognize and detect symptoms; failure to properly diagnose and treat her; failure to render proper care; and, the violation of applicable laws, statutes, regulations and/or rules. Moving defendants served an answer and a demand for a bill of particulars. Plaintiff served essentially identical verified bills of particulars as to each moving defendant in response to the demand.

In the two verified bills of particulars, one as to each of the moving defendants, both dated December 29, 2011, plaintiff responded that the acts of negligence and/or malpractice

occurred from February 23, 2010 to March 25, 2010. As to the demands for each and every alleged act of malpractice on part of each answering (moving) defendant, which it will be claimed constitutes malpractice as alleged in the complaint, plaintiff objected to the demands as “improper” citing multiple cases. Notwithstanding the objections, plaintiff responded to the demands by essentially setting forth the general allegations of negligence and malpractice set forth in the verified complaint, including the allegations that defendants failed to properly treat and care for plaintiff, failed to properly treat plaintiff in accordance with the standards of care in the community, deviated from accepted standards of care, failed to provide plaintiff with treatment, failed to diagnose plaintiff, failed to undertake proper corrective treatment, exposed plaintiff to harm and danger, and violated applicable laws, statutes, regulations and/or rules. With respect to the demands seeking “[a] statement of the standards of medical practice from which it is claimed that the answering defendant deviated,” plaintiff objected to the demands as “improper,” cited numerous cases, and referred to its answer to the demand regarding the acts of negligence and/or malpractice.

Previously, moving defendants sought an order compelling plaintiff to provide more particularized bills of particulars. This Court (Lefkowitz, J.), by order dated February 25, 2013, denied the previous motion with leave to renew upon the completion of discovery. In so doing, the Court then noted that as a whole, plaintiff’s bills of particulars sufficiently set forth a general statement as to the acts and omissions which constituted moving defendants’ alleged medical malpractice. The Court also noted that plaintiff’s allegations that moving defendants failed to properly treat and diagnose her and deviated from the accepted standards of medical care, when read in conjunction with her allegations in the bills of particulars that she sustained specified personal injuries, including a ruptured choroidal artery aneurysm, left facial droop, and difficulty ambulating, satisfied the purpose of the bill of particulars. Additionally, the Court noted that under the circumstances of this action and prior to the completion of discovery, plaintiff was unable to provide more particularized allegations regarding the acts and omissions of the defendants which constitute the alleged malpractice.

After the completion of discovery, plaintiff served an amended bill of particulars, dated July 24, 2013. Therein, plaintiff noted that her previous bill of particulars dated December 29, 2011, was amended to state that defendant MKMG is vicariously liable for the physicians who treated plaintiff from March 13, 2010 until March 25, 2010, including but not limited to Dr. Tolunsky (one of the moving defendants), Dr. Margaret Lenci, Dr. Deborah Benzil and Dr. Alexandra McBride, as well as the support staff of MKMG including but not limited to those staff members who were supposed to arrange for plaintiff to undergo an angiogram following her office visit on March 15, 2010. Plaintiff stated that her injuries included: stroke, cognitive deficits, memory loss, urinary incontinence, disturbed sensation and difficulty swallowing.

Presently moving defendants seek an order pursuant to CPLR 3041, 3042 (c) and 3043 (a)(3) compelling plaintiff to provide a more particularized bill of particulars. Moving defendants assert that plaintiff’s amended bill of particulars does not indicate which paragraphs of the original bill are being amended and it does not contain any additional language specifying

acts and omissions of moving defendants. It is unclear to them whether the original bill is being amended or supplemented. They note that plaintiff never sought depositions of Dr. Margaret Lenci, Dr. Alexandra McBride or any support staff. They also note that it is unclear whether the list of injuries is meant to amend and replace the injuries set forth in the original bill or rather meant to supplement the injuries set forth in the original bill. Moving defendants note that although plaintiff alleged vicarious liability she failed to delineate acts as to each individual for which the vicarious liability is claimed. Moving defendants also note that as to each of them the bills of particulars are identical in their allegations. Moving defendants seek a bill of particulars distinguishing between the alleged acts committed by each defendant and their purported agents. Moving defendants seek an order striking plaintiff's bills of particulars and directing plaintiff to provide proper bills of particulars.

This motion is opposed by plaintiff. Plaintiff states that there is no need for her to set forth the manner in which each defendant physician failed to act in accordance with good and accepted medical practice since the physician himself is chargeable with that very knowledge. Plaintiff notes that she was specific as to each defendant regarding dates of treatment which constituted the malpractice claimed. In her amended bill she states that MKMG is vicariously liable for the physicians who treated her from March 13, 2010 to March 25, 2010. In her original bill plaintiff stated that moving defendant Tolunsky negligently treated her between February 23, 2010 until March 25, 2010. Regarding co-defendants Northern Westchester Hospital and Dr. Spagnuolo, in her original bills, plaintiff stated that they negligently treated her on March 13, 2010. In other words, plaintiff asserts that she has been specific as to dates of malpractice as to each defendant. Plaintiff asserts that, regarding MKMG and its employees, she is not required to create a time line of each and every interaction and negligent act. In answer to the question posed by moving defendants, plaintiff states that the amended bill of particulars does not replace the original bills of particulars. Regarding moving defendants' concern that she failed to depose each doctor she named in the amended bill, plaintiff states that she believes the depositions already taken sufficiently establish the malpractice claimed.

Generally speaking, CPLR 3043 (a)(3) provides that in an action to recover for personal injuries, including a medical malpractice action, the bill of particulars should provide a general statement of the acts or omissions constituting the negligence claimed. The purpose of the bill of particulars is to amplify pleadings, limit the proof and prevent surprise at trial (*Contreras v Adeyemi*, 102 AD3d 720 [2d Dept 2013]).

Moving defendants correctly note that the amended bill of particulars does not indicate which paragraphs of the two original bills are being changed. The Court accepts plaintiff's assertion that the amended bill doesn't replace the two original bills at issue here. Nonetheless, the plaintiff should provide to each moving defendant a bill of particulars that clearly responds to each moving defendant's demand for a bill.

The two original bills, read in conjunction with the amended bill, do not sufficiently detail with specificity the particular acts and omissions of each moving defendant. In

light of the fact that discovery in this matter has been conducted, plaintiff should set forth with greater specificity its allegations in paragraph 3 of the original bills of particulars regarding the acts and omissions alleged as to each moving defendant. For example, when plaintiff states that Tolunsky failed to provide her with the proper care which her condition required, she should state what condition that was; when plaintiff states that Tolunsky failed to properly and adequately diagnose her, she should state what the diagnosis was (*Mahr v Perry*, 74 AD3d 1030 [2d Dept 2010]; *Caudy v Rivkin*, 109 AD2d 725 [2d Dept 1985]); also, when plaintiff states that moving defendants failed to properly care for and advise her, she should state of what specific treatment(s) (risks, benefits and alternatives) moving defendants failed to inform her.

Moving defendants note that although plaintiff alleged vicarious liability she failed to delineate acts as to each individual for which the vicarious liability is claimed. As to the issue of vicarious liability, in the amended bill of particulars, plaintiff sets forth the names of four doctors for whose actions MKMG is allegedly vicariously liable and “those staff members who were supposed to arrange for plaintiff to undergo an angiogram following her March 15, 2012 office visit”. That response is unacceptable. It is vague and fails to apprise defendants as to specifically whom it is claimed MKMG is vicariously liable and for what (*see Gannotta v Long Island Coll. Hosp.*, 92 AD2d 930 [2d Dept 1983]; *Crispino v Anderson*, 33 Misc3d 1204 (A) [Sup Ct, Nassau County 2011; court stated that defendant was entitled to the identification of the particular agents as well as the particulars of the claims asserted against those individuals]). The words “as well as support staff of MKMG” should be further clarified and the words, “including but not limited to ...staff members..” should be specified.

CPLR 3043 (a)(1) provides that in actions to recover for personal injuries, particulars “may be required” as to “[t]he date and approximate time of day of the occurrence.” However, where the negligent or otherwise tortious acts or omissions are ongoing, plaintiff may provide a range of dates in response to a demand for the date and time of day of the occurrence (*Harrell v County of Nassau*, 227 AD2d 590 [2d Dept 1996] [response that repeated assaults took place on a continual basis from May 1992 through August 7, 1992, proper]; *see generally Dickstein v Dogali*, 303 AD2d 443 [2d Dept 2003] [plaintiff entitled to amend bill of particulars to enlarge dates of hospital’s alleged negligence]). Here, plaintiff’s responses regarding the date(s) of all defendants’ alleged negligent acts and omissions were sufficient to apprise the defendants of the allegations against them and to allow them to prepare a defense.

CPLR 3043 (c) grants the Court the discretion to direct further and different particulars that are not specifically set forth in CPLR 3043 (a). Plaintiff should provide the updated amount(s) sought for each item for which she is claiming special damages.

In light of the foregoing, it is:

ORDERED that the motion of moving defendants for an order compelling plaintiff to provide more particularized bills of particulars as to each of them is granted as follows:

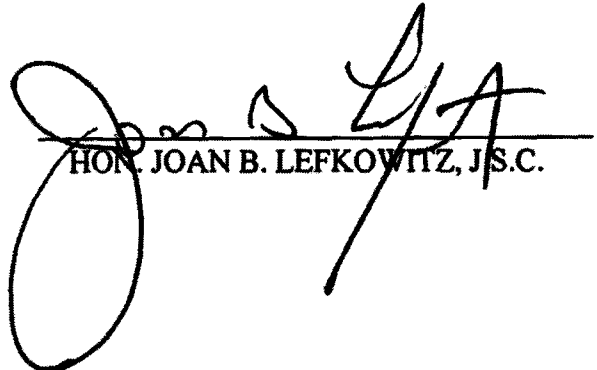
ORDERED that plaintiff's two original bills of particulars relating to moving defendants, each dated December 29, 2011, as well as the amended bill of particulars dated July 24, 2013, are stricken and ; it is further,

ORDERED that plaintiff is directed to provide to each moving defendant, on or before October 21, 2013, a proper, more particularized bill of particulars, which sets forth with greater specificity its allegations in paragraph 3 of the original bills of particulars regarding the acts and omissions alleged as to each moving defendant and which, among other specifications (1) clearly outlines and states how defendant(s) failed to provide her with proper care and for which conditions; of which condition did defendant(s) fail to properly diagnose her; and of which treatments did defendant(s) fail to inform her; (2) appries moving defendants as to specifically whom it is claimed MKMG is vicariously liable and for what, and the words "support staff of MKMG" should be further clarified and the words, "including but not limited to ...staff members.." should be specified; and, (3) provides the updated amount for each item for which she is claiming as special damages; and it is further,

ORDERED that moving defendants are directed to serve all parties with a copy of this order with notice of entry within ten (10) days of entry; and it is further,

ORDERED that the parties are directed to appear for a conference in the Compliance Part, Room 800, on October 30, 2013, at 9:30 A.M.

Dated: White Plains, New York
October 7, 2013



HON. JOAN B. LEFKOWITZ, J.S.C.

TO:

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