

**Castellano v Norwegian Christian Home and Health  
Center, Inc.**

2005 NY Slip Op 30202(U)

January 3, 2005

Supreme Court, Kings County

Docket Number: 0026652/2003

Judge: Gloria Dabiri

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At an IAS Term, Part 39 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 3<sup>rd</sup> day of January 2005

P R E S E N T:

HON. GLORIA M. DABIRI,

Justice.

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FLORENCE CASTELLANO, AS EXECUTRIX OF THE ESTATE OF HILDA CORREIA, DECEASED,

Plaintiff,

- against -

**Index No. 26652/03**

NORWEGIAN CHRISTIAN HOME AND HEALTH CENTER, INC., INDIVIDUALLY AND D/B/A NORWEGIAN CHRISTIAN HOME AND HEALTH CENTER AND NORWEGIAN CHRISTIAN HOME AND HEALTH CENTER,

Defendant.

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The following papers numbered 1 to 8 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	_____ 1-4 _____
Opposing Affidavits (Affirmations) _____	_____ 5-6 _____
Reply Affidavits (Affirmations) _____	_____ 7-8 _____
_____ Affidavit (Affirmation) _____	_____ _____
Other Papers _____	_____ _____

Upon the foregoing papers, defendant Norwegian Christian Home and Health Center, Inc., (“Norwegian”) cross-moves for an order, pursuant to CPLR 3042 (c) vacating certain

language contained in items numbered 9, 13, and 17 of plaintiff's Bill of Particulars.<sup>1</sup> Plaintiff Florence Castellano, as Executrix of the Estate of Hilda Correia, deceased, moves for an order, pursuant to CPLR 3126, striking defendant's answer for failure to comply with discovery or, alternatively, for an order, pursuant to CPLR 3124, compelling defendant to comply with plaintiff's requests for disclosure. Defendant cross-moves, pursuant to CPLR 3103, for a protective order pertaining to certain documents demanded by plaintiff.

Plaintiff's deceased resided at Norwegian, a nursing home, from May 23, 2002 through June 28, 2002, and again from July 10, 2002 through April 27, 2003. On April 27, 2003, plaintiff's deceased was transferred to New York Methodist Hospital, where she died on May 24, 2003. In the within action, plaintiff alleges that defendant was negligent in its care of plaintiff's deceased, and that such negligence ultimately resulted in or contributed to her death.

Plaintiff commenced this action on or about July 18, 2003, and defendant answered on or about October 8, 2003. On or about March 26, 2004, Florence Castellano was appointed Executrix of the Estate of Hilda Correia. A preliminary conference was held on May 7, 2004, which resulted in an order creating a schedule for pre-trial discovery. In such

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<sup>1</sup>This cross motion was made in response to plaintiff's motion, dated April 20, 2004, to amend the caption of this case to reflect the appointment of Florence Castellano as Executrix of the Estate of Hilda Correia. Such motion was granted on June 9, 2004. That portion of defendant's cross motion which requested leave to amend defendant's answer to assert an additional affirmative defense was also granted by this court on June 9, 2004. The remainder of the cross motion, to vacate certain portions of the plaintiff's Bill of Particulars, was marked "submitted" on October 6, 2004, and is decided herein.

order, defendant reserved its right to resolve by motion issues relating to plaintiff's Bill of Particulars. In support of its within cross motion to vacate allegedly improper allegations contained in items 9, 13, and 17 of plaintiff's Bill of Particulars, defendant asserts that plaintiff's responses are vague, overbroad, and inconsistent with the purpose of a Bill of Particulars. Specifically, defendant argues that item 9 of plaintiff's Bill of Particulars, a response to defendant's request to provide a precise statement of the acts and omissions constituting defendant's alleged negligence, contains six pages of overbroad, vague and indefinite boilerplate allegations which are intended to allow plaintiff to avoid limitations on the scope of proof to be offered at trial. Defendant asserts that such vague and overbroad allegations are inappropriate for a Bill of Particulars.

Defendant also asserts that plaintiff's responses, contained in items 13 and 17 of plaintiff's Bill of Particulars, to defendant's requests for all statutes, ordinances, and regulations, including all federal and state laws and regulations pertaining to nursing home care, which plaintiff is alleging were violated by defendant, are overbroad since they contain a "laundry list" of more than 150 rules, ordinances and regulations and 15 federal statutes. Defendant argues that the purpose of a Bill of Particulars is to amplify the pleadings and provide specificity, and that the plaintiff's Bill of Particulars contains boilerplate allegations that are not specific to this matter.

In opposition to defendant's cross motion, plaintiff argues that defendant cannot limit plaintiff's allegations of negligence by striking them at this point in the litigation. Plaintiff

further asserts that the portions of the Bill of Particulars complained of are more specific than caselaw requires and serve to amplify the pleadings in a sufficient and appropriate manner. Although defendant claims that items 13 and 17 are improper because they name too many statutes and regulations, plaintiff argues that the items should not be stricken just because defendant believes the statutes and regulations cited to be too numerous; plaintiff asserts that she fulfilled the purpose of the Bill of Particulars by detailing precisely which regulations and statutes were violated by defendant.

The purpose of a Bill of Particulars is to amplify the pleadings, limit the proof, and prevent surprise at trial, and is intended to afford the adverse party a more detailed picture of the claim (*see Linker v County of Westchester*, 214 AD2d 652 [1995]). The plaintiff's allegations in a Bill of Particulars should provide defendant with sufficient information to conduct depositions and prepare a defense (*see Graves v County of Albany*, 278 AD2d 578 [2000]). CPLR 3043 (a) (3) provides that a "[g]eneral statement of the acts or omissions constituting the negligence claimed" may be required in a Bill of Particulars. Where a plaintiff's responses are vague and unnecessarily broad, the Bill of Particulars will not serve its purpose of amplifying the pleadings and preventing surprise at trial (*see Batson v La Guardia Hospital*, 194 AD2d 705 [1993]). Vague boilerplate language which does not provide specific responses to defendant's demands is not sufficient (*see Hanlon v Rosenthal*, 7 AD3d 758 [2004] [plaintiff provided a time period of 17 months in response to defendant's demands for dates and times of day of alleged negligent acts]). Courts have held that open-

ended allegations such as that defendant has been “in other ways...careless, negligent and reckless,” or “otherwise negligent” are inappropriate (*see Ohnemus v Rosenthal*, 126 AD2d 614 [1987]; *Padro v Boulevard Hosp.*, 92 AD2d 888 [1983]). Where a complaint is factually vague, “each defendant is entitled to a Bill of Particulars that narrows the issues sufficiently to permit a reasonable defense” (*Heyward v Ellenville Comm. Hosp.*, 215 AD2d 967, 968 [1995]).

In the instant matter, plaintiff has provided extensive, detailed answers to the defendant’s demands. While defendant objects to plaintiff’s response in item 9, the allegedly vague language, which defendant highlighted in bold text in its cross motion, includes, *inter alia*, statements such as “failing to report the results of all investigations to the administrator of defendant’s nursing home,” “failing to adequately and appropriately conduct quarterly review assessments,” and “failing to provide each resident with a nourishing, well-balanced diet.” While the volume of plaintiff’s allegations in item 9 is expansive, most of the allegations themselves are quite specific and cannot be considered open-ended or vague. Nowhere does plaintiff use over-inclusive language such as “otherwise negligent.” Similarly, plaintiff’s responses contained in items 13 and 17, which name the statutes, rules, ordinances, and regulations which defendant is alleged to have violated, are not vague or overbroad; no limit exists as to the number of statutes plaintiff may allege that defendant violated. Plaintiff did not respond to defendant’s demands in a vague, nonspecific manner (*see Hayes v Kearney*, 237 AD2d 769 [1997]; *Ohnemus*, 126 AD2d at 614; *Padro*, 92 AD2d

at 888; *see also*, *Rotondi v Vaughan*, 28 Misc2d 656, [the inclusion of conclusory statements with specific allegations is considered surplusage or as amplification of the claimed negligent acts]). Plaintiff's responses in her Bill of Particulars are sufficient to enable defendant to prepare a defense to this action (*see Harrell v County of Nassau*, 227 AD2d 590 [1996]). Since items 9, 13, and 17 of plaintiff's Bill of Particulars set forth "a general statement of the acts or omissions constituting the negligence" claimed in this action, such items are proper responses (*see Rahming v Jewish Hosp. and Med. Ctr.*, 130 AD2d 473, 474 [1987]).

In plaintiff's motion for an order striking defendant's answer, plaintiff argues that defendant has not responded to the demands and directives contained in the Preliminary Conference Order ("PC Order") of May 7, 2004, which demands were originally made on April 6, 2004. Plaintiff asserts that defendant's response to plaintiff's demands in the PC Order consisted of 34 objections to the 35 requests and a promise to provide documents in response to one item. Furthermore, plaintiff argues that since defendant did not respond to plaintiff's demands within 20 days, defendant's objections to such discovery can only be sustained on the ground that the requested discovery is palpably improper or privileged. Plaintiff asserts that defendant has not presented an affidavit from anyone with personal knowledge of the contents of the requested documents stating that such documents are privileged. Plaintiff also argues that the court should order defendant to produce all personnel files of all employees of Norwegian, including its administrator.

Defendant opposes plaintiff's motion to strike its answer and asserts a cross motion requesting a protective order. Defendant argues that plaintiff's Notice for Discovery and

Inspection, dated April 6, 2004, demands thousands of pages of irrelevant material. Defendant asserts that it provided a good-faith response dated May 17, 2004, which included witness, insurance and party statement disclosure, that it provided the decedent's complete resident care record, and that it appropriately objected to plaintiff's remaining demands. Defendant asserts that plaintiff is not entitled to the personnel records of all of its staff members, nor to the records of other patients.

CPLR 3126 (3) allows for the striking of pleadings as a remedy for willful noncompliance with discovery. While the decision concerning whether or not to strike a pleading lies in the discretion of the trial court, striking a pleading is a drastic remedy which will be used only where the failure to comply was willful, contumacious or in bad faith (*see Mangiapane v Brookhaven Beach Health Rel. Fac.*, 305 AD2d 642 [2003]).

Here, while defendant wilfully refused to respond to certain discovery requests made by plaintiff, it does not appear that defendant did so in bad faith; rather, the defendant has a good faith belief that the plaintiff is not entitled to the discovery demands to which it refused to respond. Thus, the drastic remedy of striking a pleading is not warranted.

Defendant objects to plaintiff's request for all personnel files, punch cards, sign in sheets and records related to treatment of other residents and the names of every Norwegian employee, without any limitation as to the time period or connection to the decedent. Defendant argues that plaintiff should inquire about the names of particular employees when taking the deposition of Norwegian's director of nursing. After plaintiff has identified which employees possess knowledge related to plaintiff's case, then defendant will provide records

related to those employees. Defendant asserts that plaintiff is conducting a “fishing expedition” by serving overbroad and onerous requests.

“CPLR 3101 is to be liberally construed to require disclosure when the matter sought to be disclosed will assist in trial preparation by sharpening the issues” (*see Titleserv, Inc. v Zenobio*, 210 A.D.2d 314, 315 [1994]). Pretrial discovery is to be encouraged, and restricted only by a test for reasonableness and usefulness (*Id.*; *see also, U.S. Ice Cream Corp. v Carvel Corp.*, 190 AD2d 788 [1993]). However, discovery requests that seek overbroad or confidential, private information not relevant to the issues in the case are palpably improper (*see Holness v Chrysler Corp.*, 220 AD2d 721 [1995]; *Sullivan v Brooklyn-Caledonian Hosp.*, 213 AD2d 474 [1995]).

Here, defendant has objected to all but one of plaintiff’s 35 requests under the “Additional Demands for Production” section of Plaintiff’s Notice of Discovery and Inspection. After an inspection of plaintiff’s demands, this court finds that items 1, 2, 4 (to the extent not already provided), 6, 7, 8 (to the extent not already provided), 9, 10, 18, 19, 20, 23, 26, 27 and 29 are relevant and appropriate and orders defendant to respond to such demands. The remaining items, 3, 5, 11-17, 21, 22, 24, 25, 28, 30-35, are either overbroad, vague, or irrelevant. As to such items, a protective order is hereby issued to defendant. Accordingly, it is

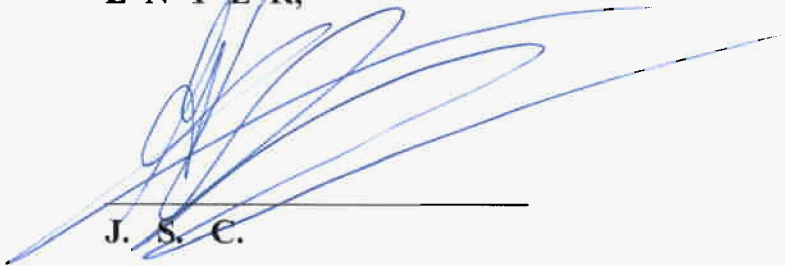
ORDERED, that defendant’s cross motion to strike certain items from plaintiff’s Bill of Particulars is denied; and it is further

ORDERED, that the portion of plaintiff's motion as seeks to strike defendant's answer is denied; and it is further

ORDERED, that the branch of plaintiff's motion as seeks to compel discovery is granted to the extent that defendant is hereby directed to serve responses to items 1, 2, 4, 6, 7, 8, 9, 10, 18, 19, 20, 23, 26, 27, and 29 of the "Additional Demands for Production section of plaintiff's Notice of Discovery and Inspection within 60 days of service of a copy of this order with notice of entry; and it is further

ORDERED, that defendant's cross motion for a protective order is granted as to items 3, 5, 11-17, 21, 22, 24, 25, 28, 30-35 only, without prejudice to plaintiff to serve a new set of discovery requests that are more narrowly drawn and demonstrably material and necessary to plaintiff's pursuit of her claim.

**E N T E R,**



J. S. C.