

**Mastrion v Applied Med. Research**

2007 NY Slip Op 30755(U)

March 28, 2007

Supreme Court, Kings County

Docket Number: 0040883/1999

Judge: Gerard H. Rosenberg

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At an I.A.S. Part MMTRP 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 28<sup>th</sup> day of March, 2007.

P R E S E N T:

HON. GERARD H. ROSENBERG,

Justice.

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RONALD MASTRION as ADMINISTRATOR  
of the ESTATES of JOHN MASTRION, deceased,  
and JANE MASTRION, deceased,

*Plaintiffs,*

*-against-*

APPLIED MEDICAL RESEARCH, DIALYSIS  
CLINIC, INC., STATEN ISLAND ARTIFICIAL  
KIDNEY CENTER, JOHN PEPE, M.D.,  
NAMALA LUKE MANOHAR, M.D., DENISE  
C. BALUYO, R.N., SARUP G. NARIANI, M.D.  
and STATEN ISLAND MEDICAL GROUP, P.C.,

*Defendants.*

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**DECISION & ORDER**

Index No. 40883/99

Cal. No. 2006-006313T

Motion Seq. Nos. 019, 020,  
021, 022

The following papers numbered 1 to 15 read on this motion.

	Papers Numbered
Notice(s) of Motion, Affirmation(s)/Affidavit(s) and Exhibits Annexed _____	1 - 3
Notice(s) of Cross-Motion, Affirmation(s)/Affidavit(s) and Exhibits Annexed _____	4-5, 6-8, 9-10
Affirmation(s) in Opposition and Exhibits Annexed _____	11
Reply Affirmation(s) and Exhibits Annexed _____	12, 13, 14, 15

[Motion Sequence Numbers 019, 020, 021 and 022 are consolidated for the purpose of disposition].

Upon the foregoing papers, and upon oral argument, motions and a cross-motion are made by defendant Namal Luke Manohar, M.D. (Dr. Manohar) (Motion Seq. No. 019);

defendant Sarup G. Nariani, M.D. (Dr. Nariani) and Staten Island Medical Group, P.C. (SIMG) (Motion Seq. No. 021); and defendant John Pepe., M.D. (Dr. Pepe) (Motion Seq. No. 022), pursuant to CPLR 3042 and 3043 for an order striking plaintiff's Third Supplemental Bill of Particulars.

Defendants Dialysis Clinic, Inc. (DCI), Staten Island Artificial Kidney Center, Applied Medical Research and Denise C. Baluyo, R.N. (Nurse Baluyo) (collectively, the Dialysis Clinic defendants) cross-move for an order striking plaintiff's Third Supplemental Bill of Particulars as to new allegations and statutory and regulatory violations, or, in the alternative, compelling further specification of plaintiff's allegations of statutory and regulatory violations by each defendant (Motion Seq. No. 020).

### ***Factual Background***

This is a medical malpractice action. It is claimed that John Mastrion, the plaintiff's decedent, had for some time been under the care of Dr. Nariani (internal medicine) and Dr. Pepe (nephrology), including being under the care of Dr. Pepe since approximately 1995 for renal insufficiency. In March of 1997 decedent underwent vascular surgery in preparation for hemodialysis. On May 19, 1997 decedent was hospitalized at St. Vincent's Hospital of Richmond due to acute renal failure. Following his discharge Dr. Pepe referred decedent to DCI (also known as the Staten Island Artificial Kidney Center) where Nurse Baluyo was the Nursing Administrator.

Decedent underwent hemodialysis on an outpatient basis three times per week

commencing May 26, 1997. During a hemodialysis treatment on June 6, 1997 decedent sustained a cardiac arrhythmia known as a ventricular fibrillation. It is claimed that DCI nurses “rinsed back” the decedent by returning his blood back into his body from the hemodialysis equipment and administered basic life support/CPR until New York City EMS personnel arrived and took over resuscitation efforts. Decedent was transported to Staten Island University Hospital (SIUH), where plaintiff claims decedent was at first comatose for a while and then paralyzed. Decedent was eventually discharged from SIUH on June 30, 1997, and was either confined to his home, to the Vanderbilt Nursing Home, or to the hospital until his death on October 26, 1997.

#### ***Procedural Background Regarding Discovery***

The Court feels it appropriate to preface its discussion of the present motions and cross-motions with a brief history of the discovery proceedings in this case.

Plaintiff served a 65-page Bill of Particulars on or about August 22, 2000, containing factual allegations as to each of the defendants as well as listing the injuries caused by the defendants’ alleged malpractice. While there were some individual allegations with respect to each defendant, the bulk of the claims of malpractice and injuries were the same as to each defendant. At the Preliminary Conference (PC) held on September 1, 2000 defendants objected to the Bill of Particulars as unsatisfactory. As a result, the PC order required the plaintiff to provide a supplemental Bill of Particulars within 30 days as to some of the paragraphs in defendants’ demands for the Bill of Particulars, and within 30 days of

completion of depositions as to others.

A second discovery order was issued on March 28, 2001 (Levine, J.) requiring plaintiff to provide a Supplemental Bill of Particulars within 30 days of completion of EBT's as per the PC order; and in particular as to items 18, 22, 23, 27 & 28 as to defendants DCI and Nurse Baluyo, and as to items 1-4, 9-13, 16-19, 23-24, 26-30, 32 & 33 as to defendant Nariani. In addition, inter alia, all parties were directed to respond to outstanding demands in the PC order within 30 days, and a new deposition schedule was set up, which was to conclude by August 9, 2001.

A third discovery order was issued on September 20, 2002 (Ruditzky, J.) requiring in part that all outstanding responses to discovery and inspection be provided within 20 days; that the depositions of the defendants were to commence on or before November 15, 2002, and continue every two weeks until completed; that plaintiff was to provide all outstanding discovery and inspection and demands for authorizations within 30 days; and that plaintiff was to file the Note of Issue on or before April 15, 2003.

Plaintiff filed the first Note of Issue in this action on or about June 27, 2003. Defendants then moved to vacate the Note and strike the case from the trial calendar. In deciding those motions, a fourth discovery-related order was issued on September 5, 2003 (Levine, J.) striking the Note of Issue, and providing for restoration on 5 days notice after completion of all depositions. In addition, plaintiff was required to comply with all prior court orders and provide discovery items relating to pecuniary loss within 30 days, and

defendants were to provide dates for depositions of the defendant doctors within 20 days.

A fifth discovery order was issued on January 27, 2004 (M. Garson, J.) indicating that all depositions had been held, requiring plaintiff to file a Note of Issue on or before April 15, 2004 and requiring all parties to respond to all outstanding discovery requests within 30 days. The statement that all depositions had been held is significant, insofar as according to the terms of the PC order and subsequent orders plaintiff was required to serve Supplemental Bills of Particulars within 30 days of completion of depositions. Since the January 27, 2004 order indicates that all party depositions had been held, plaintiff was required to provide the supplemental Bills of Particulars at the most no later than February 27, 2004.<sup>1</sup> Plaintiff filed the second Note of Issue in this action on April 14, 2004.

In response to motions to strike the Note of Issue, and to preclude and/or compel, a sixth discovery-related order was issued on or about June 21, 2004 (Ruditzky, J.) requiring plaintiff to supply responses to Supplemental Bill of Particulars demands as per the September 5, 2003 order; to produce Gladys Mastrion for a non-party deposition<sup>2</sup>; to again furnish IRS authorizations for decedent and for Jane Mastrion<sup>3</sup>, with a copy of letters of administration; to provide numerous authorizations; to re-send all previously provided discovery; to provide a response to DCI's April 3, 2001 notice for discovery and inspection

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<sup>1</sup> According to defendants DCI and Nurse Baluyo, the final deposition of the defendants was held on December 5, 2003.

<sup>2</sup> It appears that the deposition of Gladys Mastrion was held in December of 2004.

<sup>3</sup> Jane Mastrion has since deceased.

concerning pecuniary loss; and to send affirmations with affidavits of service to defendants regarding discovery previously provided.

A seventh discovery relater order was issued on March 28, 2005 (Rosenberg, J.). The second Note of Issue was vacated, this case was stricken from the trial calendar, and the case was sent to the Central Compliance Part (CCP) “in order to arrange and conduct and complete discovery with respect to the items raised in plaintiff’s Second Supplemental Bills of Particulars and the claims of pecuniary loss and special damages.” Plaintiff was directed to provide all outstanding items of discovery, or affidavits of non-existence, which had previously been ordered in the six prior orders enumerated above, and to provide Affidavit(s) of Merit as to any new allegations of acts and omissions contained in the Second Supplemental Bills of Particulars. The case next appeared in CCP on June 27, 2005.

An eighth discovery order was issued in CCP on October 12, 2005 (Silverman, J.) directing further discovery, authorizations, etc. Plaintiff was directed to format a letter dated August 1, 2005 into a Verified Supplemental Bill of Particulars by November 11, 2005.

A further order, the ninth, was issued in CCP on February 15, 2006 (Kurtz, J.) directing plaintiff to file a Note of Issue on or before April 15, 2006 and, insofar as applicable to the instant motions, directing plaintiff to “provide a Supplemental Bill of Particulars, as to all parties, in compliance with all prior court orders, within 30 days.” This means that the Supplemental Bills were to be provided by March 17, 2006.

Plaintiff timely filed the third Note of Issue in this action on April 14, 2006, and also

served what he entitled a “Third Supplemental Bill of Particulars” as to each defendant. Each defendant argues that what plaintiff has denominated “Supplemental” are in reality “Amended” Bills of Particulars, which add new theories and/or causes of action and which were served after filing of the Note of Issue without leave of the court, in contravention of CPLR 3042 and 3043.

As is typical with the course of this case, counsel disagree whether plaintiff served the “Third Supplemental Bills” with or after the note of issue. The Third Supplemental Bill of Particulars as to the Dialysis Clinic defendants is dated April 14, 2006, as is the attorney verification, which as noted is the date the most recent Note of Issue was filed. However, the Third Supplemental Bills of Particulars as to Dr. Manohar and Dr. Pepe are each dated April 21, 2006, as are the attorney verifications, and the Third Supplemental Bill of Particulars as to Dr. Nariani and SIMG is dated April 14, 2006, but the attorney verification is dated April 24, 2006, and it was received by counsel for these defendants on April 26, 2006. As all of the Supplemental Bills were provided approximately one month beyond the court-imposed deadline of March 17, 2006, they were not provided in compliance with the order of Justice Kurtz.

***The Motion by Dr. Manohar (Motion Seq. No. 019)***

Dr. Manohar points to 16 new allegations of departures from accepted medical practice in the Third Supplemental Bill of Particulars. While some of these 16 allegations might be seen as clarifying claims previously made, others are in the court’s view clearly new

allegations raised for the first time.

Most significantly, Dr. Manohar claims that plaintiff has now added a totally new cause of action founded in allegations of violations of Federal and New York State laws, rules and regulations. Specifically, the Third Supplemental Bill of Particulars as to Dr. Manohar (at paragraph 9) contains a claim that the:

**“defendant’s collectively and individually violated Public Health Law §2803 §715. Provisions of the NYCRR §715.2 et. seq., §757.2 et. seq., and all other applicable provisions relating to free standing dialysis centers and personnel needed to operate defibrillator equipment and to call emergency codes”** (emphasis added).

The Court has examined all prior Bills of Particulars and has found no prior reference to this section of the Public Health Law or to the cited New York Codes, Rules & Regulations.

*The Motion by Dr. Nariani and SIMG (Motion Seq. No. 021)*

These defendants claim that plaintiff has added five allegations which are completely new and were not mentioned in any of the prior Bills of Particulars, and adopt and incorporate by reference the arguments of co-defendant Dr. Manohar.

*The Cross-Motion by Dr. Pepe (Motion Seq. No. 022)*

Dr. Pepe claims that plaintiff has added multiple allegations<sup>4</sup> which are completely new and were not mentioned in any of the prior Bills of Particulars, and also adopts and incorporates by reference the arguments of co-defendant Dr. Manohar

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<sup>4</sup> By the court’s count, approximately 27 allegations are listed by Dr. Pepe.

***The Cross-Motion by the Dialysis Clinic Defendants (Motion Seq. No. 020)***

The Dialysis Clinic defendants claim that plaintiff has added thirteen new allegations in the Third Supplemental Bill of Particulars which had not previously been alleged. In addition, the Dialysis Clinic defendants cite the alleged violations by all the defendants of Public Health Law §2803 and various provisions of the NYCodes, Rules & Regulations which are contained in the Third Supplemental Bill of Particulars provided to Dr. Manohar. The Dialysis Clinic defendants claim that this allegation is so vague as to be meaningless, since plaintiff is in effect seeking to include multiple sections of the Code of Federal Regulations (CFR), which are incorporated by reference in the cited sections of the NYCRR, as statutory and regulatory violations by defendants.

While plaintiff completely fails to provide the correct citations to the rules and regulations to which he is referring, it appears that he is referring to 10 NYCRR 715, 10 NYCRR 715.2 et seq., and 10 NYCRR 757.2 et seq.

On-line analysis of the 2007 versions of these regulations reveals that 10 NYCRR 715 states New York's Department of Health's Standards of Construction for New Diagnostic or Treatment Centers. General provisions are set forth (10 NYCRR 715.1); as well as provisions specific to renal dialysis centers (10 NYCRR 715.2); ambulatory surgery facilities (10 NYCRR 715.3); and freestanding birthing centers (10 NYCRR 715.4).

10 NYCRR Part 757 refers and incorporates by reference numerous sections of the federal Code of Federal Regulations. 10 NYCRR 757.1 requires that chronic renal dialysis

services provided in renal dialysis facilities shall comply with the regulations for end-stage renal disease services contained in Title 42 of the Code of Federal Regulations, Public Health, Part 405, Sub-Part U - Conditions of Coverage of Suppliers of End-Stage Renal Disease (ESRD) Services (42 CFR Part 405), 1988 edition. 10 NYCRR 757.2 states the general requirements for providers of chronic renal dialysis services.

### *Analysis*

The February 16, 2006 order of Justice Kurtz which directed plaintiff to serve these Supplemental Bills of Particulars as to all parties was done in the context of continuing discovery difficulties which had been addressed on numerous occasions by several different judges of this court. These difficulties were so vexing that this court, a Trial Readiness Part, took the unusual step of holding a discovery compliance conference with all parties, reviewing virtually each allegation in each Bill of Particulars in an effort to resolve these conflicts. Following said conference this court found it necessary to vacate the second Note of Issue filed in this action, strike it from the Trial Calendar, and return it to the Central Compliance Part.

This medical malpractice action had its genesis in the treatment and death of plaintiff's decedent in 1997. An action was commenced by the filing of the summons and complaint in October of 1999, and the original Bills of Particulars were served in August of 2000. While giving consideration to the fact that Jane Mastrion, the plaintiff's decedent's spouse, has passed away during the pendency of this action, thereby staying proceedings for

a time, this matter has nevertheless been pending for over seven years.

The February 15, 2006 order required plaintiff to provide a Supplemental Bill of Particulars as to all parties **within 30 days**, meaning that the Third Supplemental Bills of Particulars were to be provided no later than March 17, 2006, which is approximately one month prior to the deadline set for the filing of the Note of Issue. Nevertheless, plaintiff's "Third Supplemental Bill of Particulars" as to Dr. Manohar is dated April 21, 2006, as is the attorney verification, which is after the Note of Issue was filed on April 14, 2006 and over one month past the deadline set by Justice Kurtz. This Bill of Particulars, clearly served after the filing of the Note of Issue, and containing references to the Public Health Law and various provisions of Title 10 of the New York Codes, Rules & Regulations, alleges new theories and causes of action which were not raised either in the complaint or in the previous bills of particulars. Plaintiff therefore served not supplemental bills, but amended bills (*Bartkus v N.Y. Methodist Hosp.*, 294 AD2d 455 [2002]), without leave of the court.

While leave to amend a bill of particulars is ordinarily to be freely given in the absence of prejudice or surprise (*see* CPLR 3025 [b]), when, as here, leave is sought on the eve of trial, judicial discretion should be exercised sparingly (*see Torres v Educational Alliance*, 300 AD2d 469, 470 [2002]). Moreover, where, as here, there has been an unreasonable delay in seeking leave to amend, the plaintiff must establish a reasonable excuse for the delay and submit an affidavit to establish the merits of the proposed amendment (*see Torres v Educational Alliance, supra; Volpe v Good Samaritan Hosp.*, 213

AD2d 398, 399[1995]). In this case, the plaintiff failed to satisfy either requirement (see, *Rosse-Glickman v. Beth Isr. Med. Center-Kings Highway Div.*, 309 AD2d 846 [2003]).

This court is “not required to separate the permissible from the impermissible elements of the pleading” (see, *Societe Nationale D'Exploitation Industrielle Des Tabacs Et Allumettes v Salomon Bros. Int.*, 268 AD2d 373, 374 [2000]). Therefore, since the Third Supplemental Bill of Particulars as to each defendant contains new allegations, including causes of action based on those sections of the Public Health Law and Title 10 of the New York Code, Rules and Regulations just discussed, they are improper.

This case has a long and tortuous history. The last time the Note of Issue was vacated it took almost two years for this matter to return to the Trial Calendar. To permit plaintiff to add new statutory and regulatory violations at this late stage, after the filing of the Note of Issue, would create new and significant delays in the orderly processing of this case to trial.

### ***Conclusion***

Accordingly, the court, in the exercise of its judicial discretion, grants the motions and cross-motions by all of the defendants. The Third Supplemental Bills of Particulars are stricken pursuant to CPLR 3024 and 3043.

This constitutes the decision and order of the court.

ENTER, 

HON. GERARD H. ROSENBERG

J. S. C.