

Radoncic v Velcek

2007 NY Slip Op 31885(U)

June 21, 2007

Supreme Court, New York County

Docket Number: 0104403/2006

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HON. EILEEN BRANSTEN**

PART 6

Index Number : 104403/2006

RADONCIC, ESAD

vs

VELCEK, M.D. DAMIR

Sequence Number : 001

COMPEL NOTICE OF MEDICAL MAL.

INDEX NO. 104403/06

MOTION DATE 4/24/07

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

The following papers, numbered 1 to 4 were read on this motion to/for Compel bill of particulars

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED
<u>1</u>
<u>2</u>
<u>3,4</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
 JUN 29 2007
 NEW YORK
 COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH
 THE ACCOMPANYING MEMORANDUM DECISION.**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 6-21-07



 J.S.C.

HON. EILEEN BRANSTEN

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART SIX

-----X
ESAD RADONCIC and MAIDA RADONCIC,

Plaintiffs,

-against-

DAMIR VELCEK, M.D. and LENOX HILL HOSPITAL,

Defendants.

-----X
PRESENT: EILEEN BRANSTEN, J.

Index No. 104403/06
Motion Date: 4/24/07
Motion Seq. No.: 01

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Plaintiffs Esad Radoncic ("Mr. Radoncic") and Maida Radoncic collectively "Plaintiffs") made this motion for leave to file a late notice of medical malpractice action. Pursuant to a stipulation by the parties that was so-ordered by the Court, the time to file a notice of medical malpractice action was extended and the motion was withdrawn. See, Stipulation dated January 29, 2007.

Pursuant to CPLR 3124, defendants Damir Velcek, M.D. ("Dr. Velcek") and Lenox Hill Hospital (collectively "Defendants") cross-move for an Order compelling provision of a responsive bill of particulars. Plaintiffs oppose the motion.

Background

Plaintiffs commenced this medical malpractice action against Defendants in March 2006. Affirmation in Support of Cross-Motion ("Supp."), at ¶ 3. In their Verified Amended Complaint, they allege:

- “From in or about April 2003 until in or about November 2003, plaintiff Esad Radoncic was a patient of defendant Damir Velcek, M.D. * * * for diagnosis and treatment of a bilateral inguinal hernia, and for post-surgical treatment thereof.
- “On October 6, 2003 [Mr. Radoncic] was admitted as a patient at defendant Lenox Hill Hospital for repair surgery on his bilateral inguinal hernia on the right side, which surgery was to have been day surgery allowing for his discharge that day. However, [Mr. Radoncic] remained as an in-patient through October 11, 2003 as a result of significant post-surgical complications and the treatment thereof.
- “Defendants, their agents, servants and/or employees failed to properly examine plaintiff; failed to properly perform the appropriate surgical procedures; failed to properly apprise [Mr. Radoncic] of and perform alternative surgical procedures available (including but not limited to laparoscopic surgical procedures); failed to properly utilize the appropriate medical tools and equipment in performing the surgeries they did perform (including but not limited to the use of mesh), and/or failed to ensure that such appropriate medical tools and equipment were available before commencing the surgeries; failed to properly perform procedures in response to complications that occurred during said surgeries; failed to properly abort and/or alter the surgical procedures initiated after it became apparent to defendants that they did not have the appropriate staff, equipment, tools, training and/or medical expertise to properly continue and/or complete the surgical procedures they had undertaken; failed to properly protect plaintiff’s arteries while performing said surgical procedures causing blood flow to be permanently impaired; failed to properly examine and screen plaintiff prior to performing such surgery; failed to properly monitor and treat plaintiff post-operatively; and failed to properly and timely diagnose and treat his severe injuries and complications.

- “By reason of the foregoing, [Mr. Radoncic] sustained severe and serious personal injuries, including bilateral testicular atrophy, androgen insufficiency requiring life long testosterone replacement therapy; increased susceptibility to osteoporosis; sexual dysfunction; muscle wasting as a result of androgen insufficiency; hypogonadism; testicular failure; severe and serious injuries to his groin, testicles and phallus; abnormal hormone levels; and was caused to and continues to suffer severe physical pain, mental anguish, emotional distress, and loss of physical function as a result thereof; and was caused to and continues to suffer severe physical pain, mental anguish, emotional distress, and loss of physical function as a result thereof; and was caused to and continues to be unable to engage in normal sexual activities and relations, all of which has substantially and dramatically impacted his marriage in an adverse and detrimental manner. Upon information and belief, the aforesaid injuries and conditions are permanent in nature.”

Opposition to Cross-Motion (“Opp.”), Ex. A, Verified Amended Complaint, at ¶¶ 10-13.

Plaintiffs further assert a claim for lack of informed consent, setting forth, among other things, that Mr. Radoncic “would not have undergone the bilateral inguinal hernia repair surgical procedures and treatments rendered if he had been fully informed of the risks, hazards, and alternatives connected with said procedures and treatments.” *Id.*, at ¶ 19. They also claim that Lenox Hill Hospital failed to properly investigate the “qualifications, competence, capacity, abilities and capabilities” of its residents, nurses and employees. *Id.*, at ¶ 24.

On May 26, 2006, Defendants served demands for bills of particulars. Plaintiffs responded approximately one month later, providing a single bill of particulars. On August 16, 2006, Defendants informed Plaintiffs by letter “we formally reject the Bill of Particulars.” Supp., Ex. B.

Defendants now move to compel a further bill of particulars, arguing that Plaintiffs single response “is grossly deficient and contains no information particularizing their claims as required by the CPLR.” Supp., at ¶ 4. Defendants ask the Court to go through Plaintiffs’ responses virtually one by one to ensure compliance. For example, Defendants refer to their first demand, “which requested information pertaining to the manner and respect in which it was claimed that defendants were negligent, careless and unskillful,” and complain that “Plaintiffs objected to this demand and directed Defendants to the Verified Complaint.” *Id.*, at ¶ 6.

Plaintiffs concede that each defendant was entitled to a separate bill of particulars and served supplemental separate bills of particulars. Opp., Exs. G, H. In all other regards, they contend that no further amplification is required by the CPLR. Overall, Plaintiffs are correct.

Analysis

A bill of particulars is intended “to amplify the pleadings, limit the proof and prevent surprise at trial.’ * * * It need not set forth a matter that is evidentiary in nature, which is more appropriately obtained through depositions and expert disclosure.” *Harris v. Ariel Transp. Corp.*, 37 A.D.3d 308, 309 (1st Dept. 2007); *see also, Arroyo v. Fourteen Estusia Corp.*, 194 A.D.2d 309 (1st Dep’t 1993). In fact, when a demand for a bill of particulars improperly requests material that is evidentiary in nature, the court may vacate the entire demand. *Arroyo v. Fourteen Estusia Corp.*, 194 A.D.2d, at 309 (court vacated 22-page demand that requested evidentiary material); *Phillip Bros. Export Corp. v. Acero Peruano S.A.*, 88 A.D.2d 529 (1st Dep’t 1982) (court vacated 36-page demand).

This Court is absolutely amazed by Defendants’ cross-motion. Undoubtedly, Defendants have sufficient information to proceed with discovery in this case. By and large, they have not established that they are entitled to any more information than that already provided by Plaintiffs at this early stage in the case.

At the outset, several of Defendants’ demands exceed the scope of CPLR 3043, which sets forth the scope of a bill of particulars in a personal-injury action. With respect to their lack-of-informed-consent claim, for example, Plaintiffs need not respond to Defendants’ demand that they set forth “additional information, if any, which

defendant should have provided the patient concerning the procedure and/or treatment.” Such information is clearly evidentiary and will ultimately be obtained through Plaintiffs’ expert disclosure.

Additionally, Defendants have not established that in their bills of particulars Plaintiffs are required to specify “claimant’s occupation at the time of the alleged negligence” or “gross earnings for any calendar year(s) during which it will be claimed the claimant was incapacitated from work.” *See*, CPLR 3043(a). Surely, these are matters of proper inquiry but the appropriate manner of obtaining the information is through use of the CPLR’s disclosure devices not a demand for particularization of the complaint.

Furthermore, on numerous occasions Defendants mischaracterize Plaintiffs’ responses. Defendants, for example, complain that Plaintiffs “provided no information” in response to their inquiry about whether the alleged malpractice occurred during emergency treatment. *Supp.*, at ¶ 8. In reality, Plaintiffs answered that “the relevant surgeries were scheduled in advance of their performance.” *Supp.*, Ex. A. Defendants also accuse Plaintiffs of providing “no information” about the dates of treatment claimed to have been rendered by Defendants and the date of each act of negligence claimed to have been committed by the Defendants.” *Supp.*, at ¶ 11. Plaintiffs in fact responded

that negligence was committed on “all dates on which [Mr. Radoncic] was seen by and/or received diagnoses, medical care (including surgical care), and/or treatment (including pre-and post-operative treatment from Defendants in connection with (a) his bilateral inguinal hernia, (b) the two surgeries he underwent in connection therewith (dates of surgical procedures included in Plaintiffs’ complaint), and (c) any and all complications arising from surgeries and treatment for the bilateral inguinal hernia.” Supp., Ex. B.

Defendants, moreover, charge Plaintiffs with failing to “provide any allegations of negligence.” Reply Affirmation (“Reply”), at ¶ 3. They entirely ignore the allegations contained in the Verified Amended Complaint itself, which do not require any further particularization at this stage. Indeed, Plaintiffs specify departures such as negligence in the performance of the surgical procedures and failure to properly use appropriate tools and equipment (including mesh). *See*, Opp., Ex. A, at ¶ 12.

Plaintiffs erred, however, in failing to address Lenox Hill Hospital in their supplemental responses to the hospital’s demand for a bill of particulars. In the first request set forth by Lenox Hill Hospital Plaintiffs were asked about the hospital’s negligence, not the negligence of Dr. Velcek whose alleged departures are the subject of Plaintiffs’ response. *See*, Opp., Ex. G. Although it is possible, at this early stage, that

there will be a tremendous amount of overlap with respect to the acts of negligence applicable to each defendant--Plaintiffs may not yet know which defendant is responsible for which act or omission--Plaintiffs did not answer the demand with respect to Lenox Hill Hospital and must do so. Indeed, in their bills of particulars Plaintiffs must delineate which acts of negligence apply to which each defendant (even if they are the same acts contained in the Verified Amended Complaint) so that each defendant knows particularly what is being alleged in its regard (even if, in good faith, the same allegations are made against each defendant).

In sum, there is no indication here that Plaintiffs failed to provide any information that they are required to provide. Perhaps after disclosure is complete, Plaintiffs will uncover additional negligence or be able to further specify alleged departures more particularly as to each defendant. At that stage, Plaintiffs can amend their bills of particulars in accordance with the CPLR. In the end, failure to include negligence theories in the pleadings or bills of particulars puts Plaintiffs at peril because they will not be permitted to raise anything surprising or new at trial.

Accordingly, it is

ORDERED that Plaintiffs' motion for an extension of time to file a notice of medical malpractice action has been withdrawn by the parties in accordance with their stipulation; it is further

ORDERED that Defendants' cross-motion to compel further bills of particulars is granted to the limited extent that within 14 days, Plaintiffs must provide amended bills of particulars answering the first request as to each defendant. In all other respects Defendants' motion is denied; and it is further

ORDERED that the parties are to appear for a compliance conference on July 31, 2007, at 9:30 a.m., having fully complied with their Preliminary Conference Order.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
June 21, 2007

ENTER



Hon. Eileen Bransten

FILED
JUN 29 2007
NEW YORK
COUNTY CLERKS OFFICE