

Sanchez v Gandolfi

2007 NY Slip Op 34311(U)

December 28, 2007

Supreme Court, Suffolk County

Docket Number: 0015562/2004

Judge: Joseph Farneti

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SHORT FORM ORDER

INDEX NO. 15562/2004

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
 Acting Justice Supreme Court

 HARRIET C. SANCHEZ,

Plaintiff,

-against-

ALAN MARK GANDOLFI, M.D.,
 SOUTHAMPTON HOSPITAL, ROSELYN
 RICE, M.D., RUSSELL CANCELIERI, M.D.,
 and CANCELIERI & CANCELIERI, P.C.,

Defendants.

ORIG. RETURN DATE: JULY 17, 2007
 FINAL SUBMISSION DATE: AUGUST 2, 2007
 MTN. SEQ. #: 001
 MOTION: MD

ORIG. RETURN DATE: JULY 17, 2007
 FINAL SUBMISSION DATE: AUGUST 2, 2007
 MTN. SEQ. #: 002
 CROSS-MOTION: XMD

ORIG. RETURN DATE: JULY 17, 2007
 FINAL SUBMISSION DATE: AUGUST 2, 2007
 MTN. SEQ. #: 003
 MOTION: MOT D

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Upon the following papers numbered 1 to 19 read on these motions _____
TO STRIKE BILL OF PARTICULARS AND TO STRIKE ANSWER _____.

Notice of Motion and supporting papers 1-3; Notice of Cross-motion and supporting papers 4-6; Affirmation in Opposition and supporting papers 7; Reply Affirmation and supporting papers 8; Attorney Affirmation 9; Attorney Affirmation 10; Order to Show Cause and supporting papers 11-13; Affirmation in Opposition and supporting papers 14-15; Replying Affidavits and supporting papers 16, 17; Attorney Affirmation 18; Sur Reply 19; it is,

ORDERED that this motion by defendant SOUTHAMPTON HOSPITAL ("SOUTHAMPTON") and cross-motion by defendant ALAN MARK GANDOLFI, M.D. ("GANDOLFI") for an Order, pursuant to CPLR 3043, striking plaintiff's Supplemental Bill of Particulars dated May 31, 2007, as it allegedly raises new assertions of malpractice and additional injuries not enumerated in plaintiff's original Bill of Particulars dated November 3, 2004, or in the alternative, an Order: (1) vacating the within Compliance Conference Order with Certification and permitting defendants to conduct a further deposition of plaintiff regarding the new allegations and injuries; (2) permitting defendants to obtain relevant authorizations and records in support of the new allegations and injuries; (3) requiring plaintiff to submit an affidavit from a medical professional attesting to the nexus of the new allegations and injuries to the care and treatment rendered in this matter; and (4) permitting defendants, at their discretion, to have a medical examination of plaintiff conducted, are both hereby **DENIED** for the reasons set forth hereinafter; and it is further

ORDERED that this motion by plaintiff for an Order, pursuant to CPLR 3124 and 3126, striking the answer of SOUTHAMPTON for its alleged failure to exchange relevant, material and necessary documents in response to discovery demands, for failing to comply with the disclosure Orders in this matter, including the within preliminary conference stipulation and Order, dated January 13, 2005, requiring production of the documents, for delaying the prosecution of this action, and for necessitating the instant motion practice, is hereby **GRANTED** solely to the extent provided hereinafter.

This is an action sounding in medical malpractice wherein plaintiff alleges a failure on the part of defendants to diagnose and treat coronary artery disease and an impending myocardial infarction that plaintiff suffered. As a consequence of the alleged negligence of the defendants, plaintiff alleges that she sustained injuries, including a massive myocardial infarction requiring an

emergent triple artery coronary bypass graft, the insertion of an implantable defibrillator, extensive cardiac damage, and the need for intensive and prolonged rehabilitation.

After issue was joined, and in response to a demand by SOUTHAMPTON, plaintiff served a Verified Bill of Particulars dated November 3, 2004. In the ensuing years, discovery was conducted by the parties. On May 17, 2007, a compliance conference of the matter was held, and the parties entered into a Compliance Conference Order with Certification, as well as a stipulation with respect to four remaining items of discovery. Thereafter, on or about May 31, 2007, plaintiff served a Supplemental Bill of Particulars as to SOUTHAMPTON, as well as a Supplemental Bill of Particulars as to the remaining defendants.

SOUTHAMPTON has filed the instant motion to strike plaintiff's Supplemental Bill of Particulars, arguing that it is in actuality an "Amended" Bill of Particulars, as it raises new allegations of malpractice and claims additional injuries not enumerated in plaintiff's original Bill of Particulars. In the alternative, SOUTHAMPTON seeks an Order vacating the Compliance Conference Order, and permitting defendants to obtain further discovery regarding the new allegations and injuries, to wit: a deposition of plaintiff; authorizations and records in support thereof; an affidavit from a medical professional attesting to the nexus of the new allegations and injuries to the care and treatment rendered in this matter; and a medical examination of plaintiff. Defendant GANDOLFI has filed the instant cross-motion seeking the identical relief. GANDOLFI points out to the Court that many of the new allegations center around June 19, 2003, while the previous allegations center around June 17 and 18, 2003.

Defendants ROSELYN RICE, M.D., RUSSELL CANCELIERI, M.D., and CANCELIERI & CANCELIERI, P.C. have submitted affirmations in response to the instant motion and cross-motion, requesting that if the Court finds further discovery is warranted, these defendants be permitted to participate in the discovery process.

SOUTHAMPTON alerts the Court that in plaintiff's original Bill of Particulars, the allegations of negligence were recited in two and one-third pages, whereas in the Supplemental Bill, the allegations were recited in ten and one-third pages. SOUTHAMPTON contends that the new allegations are distinct claims which were not raised in the previous Bill, and which change the nature of the

alleged malpractice and concern different medical disciplines. Further, SOUTHAMPTON alleges that the Supplemental Bill of Particulars asserts additional injuries, i.e., a loss of chance of elective treatment of coronary artery disease, including angioplasty, stenting and/or elective coronary artery bypass graft, dependent edema, congestive heart failure, ischemic cardiomyopathy, need for implantable defibrillator, akinetic and/or dyskinetic wall motion, heart damage and extension of myocardial infarction. As such, SOUTHAMPTON and GANDOLFI seek an Order striking the Supplemental Bill of Particulars, or in the alternative, permitting defendants to conduct further discovery regarding the new allegations and injuries so as to minimize any undue prejudice to defendants.

In opposition, plaintiff claims that defendants are not entitled to the relief they are seeking. Plaintiff argues that the Supplemental Bill of Particulars is “just an extensive amplification of what plaintiff has alleged from the start.” Plaintiff alleges that she has similarly taken the opportunity to supplement the injuries she suffered due to the negligence of the defendants. Plaintiff claims that all of the injuries are contained in the medical records plaintiff has supplied and for which authorizations have been given, and about which plaintiff testified at her deposition. In the alternative, plaintiff argues that if the Supplemental Bill of Particulars is deemed an Amended Bill of Particulars, as the moving defendants urge, it is authorized pursuant to CPLR 3042(b). That section provides “[i]n 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” (CPLR 3042[b]). The Court notes that a note of issue had yet to be filed when the Supplemental Bill of Particulars was served.

Initially, as this motion relates to disclosure, defendants were required to submit an affirmation indicating that defendants’ counsel has conferred with plaintiff’s counsel in a good faith effort to resolve the issues raised in the motion (22 NYCRR § 202.7[a]; *Amherst Synagogue v Schuele Paint Co., Inc.*, 30 AD3d 1055 [2006]; *Dunlop Dev. Corp. v Spitzer*, 26 AD3d 180 [2006]; *Cestaro v Mun Yuen Roger Chin*, 20 AD3d 500 [2005]; *Diel v Rosenfeld*, 12 AD3d 558 [2004]). Such affirmation must indicate the time, place and nature of the consultation, the issues discussed and any resolutions, or must show good cause why no such conferral with plaintiff’s counsel was held (22 NYCRR § 202.7[c]). Section 202.7(a) specifically provides that the requirement to submit a good faith affirmation is applicable to motions relating to a bill of particulars (22 NYCRR § 202.7[a]; see Siegel, 1995 Supp Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, C3042:1). As SOUTHAMPTON and GANDOLFI

have failed to annex such an affirmation of good faith, the Court finds the instant applications are procedurally defective. In any event, the movants argue that plaintiff's Supplemental Bill is in actuality an Amended Bill. Therefore, based upon the movants' own argument, plaintiff was permitted to serve such an Amended Bill of Particulars at any time prior to the filing of a note of issue, pursuant to CPLR 3042(b). In contrast, CPLR 3043(b) is applicable only in personal injury actions and relates to claims of continuing special damages and disabilities which is distinguishable from the case at bar (see CPLR 3043[b]; *Martinovics v N.Y. City Health & Hosps. Corp.*, 285 AD2d 532 [2001]; see also *Sicignano v Town of Islip*, 41 AD3d 830 [2007]; *Geller v Port Jefferson Obstetrics & Gynecology, P.C.*, 294 AD2d 537 [2002]). Accordingly, this motion and cross-motion are both **DENIED**.

With respect to plaintiff's application to strike the answer of SOUTHAMPTON for its alleged failure to exchange relevant, material and necessary documents in response to discovery demands, and for failing to comply with disclosure Orders in this matter, including the within preliminary conference stipulation and Order, dated January 13, 2005, requiring production of the documents, plaintiff alleges that on or about December 2, 2004, she served a Notice for Discovery and Inspection requesting, among other things, any and all records, reports and/or writings in SOUTHAMPTON's possession concerning plaintiff; SOUTHAMPTON's emergency room records for treatment rendered to plaintiff in June 2001 and February/March 2002; and a complete copy of all records of plaintiff maintained by each defendant. Plaintiff further alleges that the preliminary conference stipulation and Order required SOUTHAMPTON to provide a response to the aforementioned Notice for Discovery and Inspection within thirty (30) days thereof, and to provide a complete copy of its records.

By letter dated March 2, 2006, counsel for SOUTHAMPTON forwarded records concerning plaintiff's admission of February 7 and 8, 2002. However, plaintiff alleges that the production was deficient, in that it failed to produce, among other things, records for plaintiff's treatment in SOUTHAMPTON's emergency room on February 16, 2001; admission records for October 27, 2001; additional records concerning plaintiff's admission of February 7 and 8, 2002; and records from plaintiff's stay in "Room 224-1." Thereafter, counsel for SOUTHAMPTON advised that the records concerning plaintiff's admission of February 7 and 8, 2002 were missing, as the records department was unable to locate the documents. At a status conference of the matter held on February 22, 2007, a stipulation was entered into by the parties in

which SOUTHAMPTON agreed to produce all outstanding discovery, to the extent available, by March 7, 2007, or if unable to produce, then an affidavit by March 7, 2007 or an EBT from one with knowledge was to be produced on or before March 23, 2007. On or about March 23, 2007, plaintiff alleges that SOUTHAMPTON provided an affidavit of SHARON DISUNNO, Vice President of the Quality Assurance Program for SOUTHAMPTON, who averred that the subject records for the admission of February 7 and 8, 2002 were not yet located, but that the search was continuing. Ms. DiSunno further averred that if the records were found, they would be provided to counsel.

In view of the foregoing, plaintiff has filed the instant motion to strike SOUTHAMPTON's answer for failing to produce the records concerning the admission of February 7 and 8, 2002. Plaintiff argues that SOUTHAMPTON's willfulness may be inferred by its repeated failure to produce the records despite multiple discovery demands and disclosure Orders. Further, plaintiff alleges that SOUTHAMPTON breached its duty to maintain the records for at least six years from the date of discharge pursuant to 10 NYCRR § 405.10(a)(4). Moreover, plaintiff alleges that SOUTHAMPTON may have intentionally or negligently engaged in spoliation of the evidence, which evidence is central to proving plaintiff's case against SOUTHAMPTON. As such, plaintiff seeks an Order striking SOUTHAMPTON's answer as a sanction for not preserving the records.

In opposition, SOUTHAMPTON alleges that it has produced all discovery requested relative to the February 7 and 8, 2002 admission, "other than a few missing pages." SOUTHAMPTON argues that plaintiff's contention that the records are crucial to her case is misleading, as the complained of negligence is said to have occurred from June 16, 2003 until June 20, 2003. SOUTHAMPTON claims that since the preliminary conference held in January of 2005 through March of 2007, diligent efforts were made to locate the missing pages, but to no avail. In addition, SOUTHAMPTON argues that plaintiff has not submitted a medical affidavit supporting her claim that the missing pages are relevant to her assertions of malpractice. Further, SOUTHAMPTON indicates that it provided additional voluminous materials to plaintiff following the status conference of February 22, 2007, and has annexed same to its opposition papers.

CPLR 3126 provides that a court may, in its discretion, impose a wide range of penalties upon a party which either (a) refuses to obey an order for disclosure; or (b) willfully fails to disclose information which the court finds ought to have been disclosed (CPLR 3126). The penalties proposed by the statute

include: (1) deciding the disputed issue in favor of the prejudiced party; (2) precluding the disobedient party from producing evidence at trial on the disputed issue; or (3) either striking the pleadings of the disobedient party, or staying the proceedings until the ordered discovery is produced, or rendering a default judgment against the disobedient party (CPLR 3126). It is appropriate to strike a defendant's answer where there is a clear showing that its failure to comply with discovery demands is wilful, contumacious, or in bad faith (see *Denoyelles v Gallagher*, 40 AD3d 1027 [2007]; *Fellin v Sahgal*, 268 AD2d 456 [2000]; *Harris v City of New York*, 211 AD2d 663 [1995]). Generally, "willfulness" is inferred from a party's repeated failure to respond to demands and/or to comply with disclosure orders, coupled with inadequate excuses for its defaults (see *Siegmán v Rosen*, 270 AD2d 14 [2000]; *DiDomenico v C & S Aeromatik Supplies, Inc.*, 252 AD2d 41 [1998]; *Frias v Fortini*, 240 AD2d 467 [1997]).

Similarly, under the common-law doctrine of spoliation, where a party destroys essential physical evidence and the party seeking that physical evidence is "prejudicially bereft of appropriate means to [prosecute] a claim with incisive evidence," the spoliator may be sanctioned by the striking of its pleading (*New York Cent. Mut. Fire Ins. Co. v Turnerson's Elec.*, 280 AD2d 652 [2001], quoting *DiDomenico v C & S Aeromatik Supplies*, 252 AD2d 41, *supra*; *Kirkland v New York City Hous. Auth.*, 236 AD2d 170 [1997]; see *Long Is. Diagnostic Imaging v Stony Brook Diagnostic Assoc.*, 286 AD2d 320 [2001]). Where the evidence lost is not central to the case or its destruction is not prejudicial, the striking of a pleading is not warranted (see *Knightner v Custom Window & Door Prods.*, 289 AD2d 455 [2001]; *Chiu Ping Chung v Caravan Coach Co.*, 285 AD2d 621 [2001]; *Tawedros v St. Vincent's Hosp. of N.Y.*, 281 AD2d 184 [2001]).

Here, the Court finds that the sanction of striking SOUTHAMPTON's answer is not warranted. On this record, plaintiff failed to establish that SOUTHAMPTON's failure to comply with discovery demands and disclosure Orders was wilful, contumacious, or in bad faith, and deprived her of the means of proving her claim (see *Chiu Ping Chung v Caravan Coach Co.*, 285 AD2d 621, *supra*). The Court notes that SOUTHAMPTON has produced discovery on numerous occasions, including the production of voluminous medical records and other documentation. Further, the Court finds that the missing records concerning plaintiff's admission on February 7 and 8, 2002 are not crucial to proving her case against SOUTHAMPTON, as the complained of negligence of SOUTHAMPTON, as amplified by plaintiff's "Supplemental Bill of Particulars," is claimed to have occurred from June 16, 2003 until June 20, 2003. However,

SOUTHAMPTON has acknowledged that the records at issue are currently not in its possession, which is a violation of its duty, pursuant to 10 NYCRR § 405.10(a)(4), to maintain the records for at least six years from the date of discharge. "A court has broad discretion in determining the sanction for spoliation of evidence and may, under the appropriate circumstances, impose a sanction if the destruction occurred through negligence rather than willfulness" (*Molinari v Smith*, 39 AD3d 607 [2007]). In view of the foregoing, this application is granted to the extent that a negative inference charge shall be given at the trial of this action (see *Tomasello v 64 Franklin, Inc.*, 2007 NY Slip Op 8506; *Molinari v Smith*, 39 AD3d 607, *supra*).

The foregoing constitutes the decision and Order of the Court.

Dated: December 28, 2007



HON. JOSEPH FARNETI
Acting Justice Supreme Court