

**Piracci v Fernandez**

2008 NY Slip Op 30348(U)

January 31, 2008

Supreme Court, Nassau County

Docket Number: 4348-06/

Judge: William R. LaMarca

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU - PART 17**

**Present: HON. WILLIAM R. LaMARCA  
Justice**



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**RONNIE L. PIRACCI and MICHAEL I.  
PIRACCI,**

**Motion Sequence #1, #2  
Submitted November 2, 2007**

**Plaintiffs,**

**-against-**

**INDEX NO: 4348/06**

**HAROLD A. FERNANDEZ, M.D., ALAN  
GOODMAN, M.D., JAMES R. TAYLOR, M.D.  
& CARDIOTHORACIC SURGERY, P.C.,**

**Defendants.**

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**The following papers were read on these motions:**

<b>Notice of Motion.....</b>	<b>1</b>
<b>Amended Notice of Cross-Motion.....</b>	<b>2</b>
<b>Affirmation in Reply and in Opposition to Cross-Motion.....</b>	<b>3</b>
<b>Supplemental Affirmation and Reply on Cross-Motion.....</b>	<b>4</b>

**Requested Relief**

Defendants, HAROLD A. FERNANDEZ, M.D., ALAN GOLDMAN, M.D., JAMES R. TAYLOR, M.D. and CARDIOTHORACIC SURGERY, P.C., move for an order, pursuant to CPLR §3042(d), compelling plaintiff to provide complete and proper responses to defendants' discovery demands and demand for a verified bill of particular, or, in the alternative, *inter alia*, dismissing plaintiffs' action for failure to comply with prior Court

orders with respect to discovery and demands for authorizations. Counsel for the plaintiffs, RONNIE L. PIRACCI and MICHAEL I. PIRACCI, opposes the motion and cross-moves for an order, *inter alia*, directing defendants to appear for depositions, granting plaintiffs a protective order against any requirements for serving additional medical authorizations, and permitting plaintiffs to serve and file a Note of Issue with reservations to proceed with depositions subsequent to the filing of the Note of Issue or extending the time to file the Note of Issue. The motion and cross-motion are determined as follows:

### **Background**

This action arises from the alleged malpractice of the defendants in connection with the plaintiff, RONNIE L. PIRACCI's open heart surgery, during the period from July 7, 2004 through December 27, 2004, when it is alleged that defendants were negligent in the diagnosis and treatment of the plaintiff which resulted in a sternal wound remaining open, causing an infection which required surgical correction. In the complaint, plaintiffs reserve the right to rely on the doctrine of *res ipsa loquitur* with respect to relevant issues raised at the time of trial. The bill of particulars, dated August 3, 2006, reflects that plaintiff sustained a severe midline infection of the sternum which developed into a gangrenous condition requiring multiple surgical procedures and the resultant loss of approximately 75% of the sternum. Plaintiff asserts that she required plastic surgical reconstruction of the chest wall with muscle flaps from under the left arm, which caused "[s]evere pain and suffering from and around the muscles, tendons, ligaments and nerves in the affected areas and in other parts of the body" and "to this day, suffers from pain in and around the affected areas and other parts of the body and continues to suffer from loss of the full use

of her arm and upper body". (Bill of Particulars, dated August 3, 2006, ¶16). In §18 of the complaint, plaintiff also alleges that she suffers, and will continue to suffer, mental and physical pain, anguish and injures that will require her to continue to seek medical care and attention.

In support of the motion to compel discovery or, in the alternative, to dismiss the complaint or preclude plaintiffs from offering evidence at trial regarding items for which discovery responses have not been provided, counsel for defendants points out that counsel for plaintiffs has repeatedly failed to provide requested authorizations for medical care provided to Ms. PIRACCI or to properly detail plaintiffs specific allegations of negligence against each defendant in a separate bill of particular for each of the defendants, despite numerous letters to plaintiffs' counsel and the orders of the Court. Counsel for defendants states that, because of the plaintiffs incomplete responses to the demanded discovery, the adjournment of plaintiffs depositions has been necessary. Defendants' counsel states that, notwithstanding the Compliance Conference Order of the Court, dated August 7, 2007, which again directed plaintiffs' counsel to provide all authorizations in defendants demand of July 13, 2007, and to provide a bill of particulars with specific allegations of negligence as to each defendant, counsel for plaintiff only provided a portion of the requested authorizations because he deemed some to be too "remote in time" or because "plaintiff did not want her privacy invaded". Moreover, counsel for defendants contends that the separate bill of particulars served on the defendants were in fact word-for word identical with the original bill of particulars and defeated the purpose of serving separate bill of particulars on the individually named parties. It appears that, thereafter, counsel for defendants provided plaintiffs' counsel with a letter explaining the

source of the requested authorizations, by letter dated August 23, 2007, and the good faith basis for requesting same and that, after plaintiffs' counsel initially agreed to provide the specific authorizations requested in the August 23 correspondence, he thereafter changed his mind and refused to schedule a date for plaintiffs depositions. Counsel for defendants states that the explanation given by plaintiffs' counsel for his refusal to comply with defendants discovery demands and the orders of the Court was that he required firm dates for defendants depositions before he would provide authorizations for plaintiff's medical records. Counsel for defendants urges that they are entitled to disclosure of any document that usefully and reasonably will assist in preparation for trial, regardless of whether the document will be admissible for trial; that they are entitled to records of plaintiff's medical treatment and medical condition that would reveal the nature and extent of plaintiff's alleged injuries, as well as any pre-existing conditions related to those injuries; that they are entitled to a separate bill of particulars specifying the allegations against each individual party; and that plaintiffs' conduct in frustrating discovery warrants dismissal of the complaint or precluding plaintiffs from offering evidence at trial. It is defendants' position that plaintiffs have willfully refused to provide defendants with any specificity as to their negligent acts and, therefore, defendants have been prejudiced by an inability to fashion an adequate defense against plaintiffs' vague allegations.

In opposition to the motion, counsel for plaintiffs states that he has attempted to comply with all of defendants' demands, however, the attorney for defendants has continued to "inundate" the plaintiffs with demands for additional authorizations and has refused to set a firm date for any depositions despite numerous attempts by the plaintiffs to set dates. Counsel for plaintiffs states that the additional bill of particulars served were

tailored to each defendant and, despite numerous attempts to avoid motion practice, it appears that the time to complete discovery is running out and that he will not be able to file a timely note of issue. In the cross-motion, he seeks an order directing the defendants to schedule definite dates for depositions, granting plaintiffs a protective order against any further demands for medical authorizations, extending the time to file a note of issue, and directing defendants to furnish copies of all medical records obtained through the use of their authorizations.

### The Law

CPLR 3101(1) provides for “full disclosure of all matters material and necessary in the prosecution or defense of an action. . . .”. This provision has been liberally construed to require disclosure of any information or material reasonably related to the issues “which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason”. (*Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 288 NYS2d 449, 235 NE2d 430 [C.A. 1968]; see also *Titleserv, Inc. v Zenobio*, 210 AD2d 314, 619 NYS2d 769 [2<sup>nd</sup> Dept. 1994]). “If there is any possibility that the information is sought in good faith for possible use as evidence-in-chief or in rebuttal or for cross-examination, it should be considered evidence material . . . in the prosecution or defense”. (*Allen v Crowell-Collier Pub. Co.*, *supra*, [citations omitted]).

While the nature and degree of the penalty to be imposed pursuant to CPLR § 3126 are matters of discretion (*Morano v Westchester Paving & Sealing Corp.*, 7 AD3d 495, 776 NYS2d 83[2<sup>nd</sup> Dept. 2004]), it is well settled that the drastic remedy of striking an answer is inappropriate absent a clear showing that the failure to comply with discovery demands

[\* 6 ]

is willful, contumacious, or in bad faith. CPLR § 3126; *Foncette v LA Express*, 295 AD2d 471, 744 NYS2d 429 (2<sup>nd</sup> Dept. 2002). Where plaintiffs have failed to timely respond to court orders or provide any excuse for the delay, and then failed to supply adequate responses to discovery demands, such conduct may be considered willful and contumacious, warranting dismissal of the complaint (*Hanlon v Rosenthal*, 7 AD3d 758, 776 NYS2d 906 [2<sup>nd</sup> Dept. 2004]), or an order of preclusion (*Precise Court Reporting, Inc. v Karten*, 6 AD3d 412, 775 NYS2d 339 [2<sup>nd</sup> Dept. 2004]).

### Discussion

The Court is advised that, on the eve of the motions, the plaintiffs forwarded all of the requested authorizations that are the subject of the motion-in-chief and, therefore, that portion of defendants' motion which seeks to compel production of authorizations is withdrawn. However, defendants' request for separate bills of particular for each individual defendant and their opposition to plaintiffs' cross-motion for a protective order remains viable.

After a careful reading of the submissions herein, it appears to the Court that any delay in the movement of this matter can be attributed to the willful refusal of plaintiffs' counsel to timely provide authorizations demanded by defendants, and directed by the Court. Defendants are entitled to full disclosure of plaintiff's entire medical history to properly prepare for trial. When plaintiff places her physical condition into controversy, she cannot limit the controversy to the medical records she wishes to disclose. *Cf, Greuling v Breakey* 56 AD2d 540, 391 NYS2d 585 (1<sup>st</sup> Dept. 1977). By bringing an action and affirmatively placing her physical and mental condition in issue, a plaintiff waives the

doctor/patient privilege as said records are material and relevant to the issues in controversy. See, *St. Claire v Cattani*, 128 AD2d 766, 513 NYS2d 250 (2<sup>nd</sup> Dept. 1987); *Leichter v Cohen*, 124 AD2d 710, 508 NYS2d 222 (2<sup>nd</sup> Dept. 1986); *Pizzo v Bunora*, 89 AD2d 1013, 454 NYS2d 455 (2<sup>nd</sup> Dept. 1982). Indeed, even after certification of a case for trial, there remains an ongoing obligation that all parties provide upon request of another party additional authorizations for production of records maintained by health care providers and/or facilities.

Moreover, defendants are entitled to a bill of particulars for each defendant that provides information explaining each individual doctors alleged negligent acts. *Batson v LaGuardia Hospital*, 194 AD2d 705, 600 NYS2d 110 (2<sup>nd</sup> Dept. 1993); *Micarelli v Fleiss* 219 AD2d 469, 631 NYS2d 159 (3<sup>rd</sup> Dept. 1995); *Hayes v Kearney*, 237 AD2d 769, 655 NYS2d 170 (3<sup>rd</sup> Dept. 1997). It is inappropriate to serve identical bills of particular on defendants when the roles of the individual defendants differed. *Batson v LaGuardia Hospital, supra*; *Micarelli v Fleiss, supra*; *Hayes v Kearney, supra*; *Heward v Ellenville Community Hospital*, 215 AD2d 967 (3<sup>rd</sup> Dept. 1995). It is the judgment of the Court that the bills of particular served by plaintiffs are factually vague and insufficient and do not shed any light on the particular acts of the defendants (*Hayes v Kearney, supra*), to permit the defendants to format a reasonable defense (*Heward v Ellenville Community Hospital, supra*).

### **Conclusion**

Based on the foregoing, it is hereby

**ORDERED**, that defendants' motion to compel discovery or, in the alternative, to strike the complaint and dismiss the action is granted to the extent that , no later than ten

[\* 8 ]  
(10) days after service of a copy of this order, with notice of entry, the attorney for plaintiffs shall provide the attorney for the individual defendants with a bill of particulars for each defendant that provides sufficient details and information explaining each individual doctors alleged negligent acts. The bill of particulars should separately indicate the alleged acts or omissions of negligence for each defendant; and it is further

**ORDERED**, that plaintiffs' failure to follow the directions set forth herein and in the prior orders of the Court shall result in sanctions and an order of preclusion pursuant to CPLR §3126; and it is further

**ORDERED**, that plaintiffs' cross- motion for an order directing defendants to appear for depositions, granting plaintiffs a protective order against any requirements for serving additional medical authorizations, and permitting plaintiffs to serve and file a Note of Issue with reservations to proceed with depositions subsequent to the filing of the Note of Issue or extending the time to file the Note of Issue, is denied. Defendants have priority in the scheduling of depositions and once plaintiffs have been deposed, the depositions of the defendants shall follow; and it is further

**ORDERED**, that the parties shall appear for a previously scheduled Certification Conference, on February 14, 2008, at which time the time frame for filing the Note of Issue and any remaining discovery issues will be discussed.

All further requested relief not specifically granted is denied.

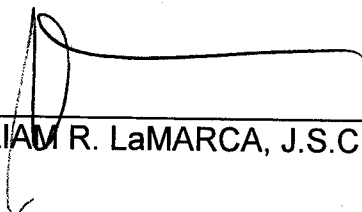
This constitutes the decision and order of the Court.

Dated: January 31, 2008

**ENTERED**

FEB 07 2008

**NASSAU COUNTY  
&  
COUNTY CLERK'S OFFICE**

  
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