

Menkes v Beth Abraham Health Servs.

2008 NY Slip Op 33678(U)

May 23, 2008

Supreme Court, Bronx County

Docket Number: 29302/2002

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 16

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SHERYL MENKES, as Administratrix of
the Estate of DITA MENKES,

Index No. 29302/2002

Plaintiff

- against -

DECISION AND ORDER

BETH ABRAHAM HEALTH SERVICES,

Defendant

-----X

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff sues to recover damages for her deceased mother's personal injuries and death caused by defendant nursing home while under its care. Plaintiff moved to restore the action to the calendar after the action was marked off the calendar due to nonappearance by plaintiff, an attorney, who then was representing herself. 22 N.Y.C.R.R. § 202.27. The court (Tuitt, J.) granted plaintiff's motion March 29, 2007. Defendant cross-moved for summary judgment dismissing the complaint, C.P.L.R. § 3212(b), on the ground that defendant's departures from medical standards alleged by plaintiff did not contribute to the decedent's injury or death. Subsequently, plaintiff moved to amend her bill of particulars, C.P.L.R. § 3025(b), to add factual allegations of further injuries to the decedent and violations by defendant of various regulations prohibiting fraud and establishing nursing home patients' rights. Upon oral arguments, the court grants plaintiff's motion to amend in part and grants

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defendant's cross-motion in part, but otherwise denies the motions, for the reasons explained below.

II. PLAINTIFF'S MOTION TO AMEND HER BILL OF PARTICULARS

C.P.L.R. § 3025(b) permits amendment to pleadings, including bills of particulars, as long it does not unfairly surprise or otherwise substantially prejudice the opponent, Cherebin v. Empress Ambulance Serv., Inc., 43 A.D.3d 364, 365 (1st Dep't 2007); Katechis v. Our Lady of Mercy Med. Ctr., 36 A.D.3d 514, 516 (1st Dep't 2007); Thompson v. Cooper, 24 A.D.3d 203, 205 (1st Dep't 2005); Zaid Theatre Corp. v. Sona Realty Co., 18 A.D.3d 352, 354-55 (1st Dep't 2005), and the proposed claim has merit. Sabo v. Alan B. Brill, P.C., 25 A.D.3d 420, 421 (1st Dep't 2006); Thompson v. Cooper, 24 A.D.3d at 205; Zaid Theatre Corp. v. Sona Realty Co., 18 A.D.3d at 355; Watts v. Wing, 308 A.D.2d 391, 392 (1st Dep't 2003). The party seeking to amend must demonstrate the proposed claim's merit through admissible evidence. Zaid Theatre Corp. v. Sona Realty Co., 18 A.D.3d at 355; Pacheco v. Fifteen Twenty Seven Assoc., 275 A.D.2d 282, 284 (1st Dep't 2000); Non-Linear Trading Co. v. Braddis Assocs., 243 A.D.2d 107, 116 (1st Dep't 1998). See Spence v. Bear Stearns & Co., 264 A.D.2d 601, 602 (1st Dep't 1999).

A. Absence of Prejudice to Defendant

When an amended pleading would change an opponent's position or hinder a defense, causing an effect that would have been avoided if the amendment had been pleaded originally, the effect may be prejudicial. Whalen v. Kawasaki Motors Corp., U.S.A., 92

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N.Y.2d 288, 293 (1998); Loomis v. Civetta Corinno Constr. Corp., 54 N.Y.2d 18, 23 (1981); Cherebin v. Empress Ambulance Serv., Inc., 43 A.D.3d at 365; Valdes v. Marbrose Realty, 289 A.D.2d 28, 29 (1st Dep't 2001). Here, plaintiff's original bill of particulars merely alleged defendant's negligence without framing it as violations of federal and state regulations and omitted a right trochanteric pressure ulcer among the injuries the decedent sustained under defendant's care. Since plaintiff's claims regarding the pressure ulcer are based on the same factual allegations in the original bill of particulars and on information from defendant's own records, defendant does not demonstrate prejudice or surprise from any newly alleged facts. Cherebin v. Empress Ambulance Serv., Inc., 43 A.D.3d at 365; Gambles v. Davis, 32 A.D.3d 224, 226 (1st Dep't 2006); Schwartz v. Montefiore Hosp. & Med. Ctr., 305 A.D.2d 174 (1st Dep't 2003); Abdelnabi v. New York City Tr. Auth., 273 A.D.2d 114, 115 (1st Dep't 2000). See Jankie-Alli v. Mount Sinai Med. Ctr., 262 A.D.2d 188 (1st Dep't 1999); Sahdala v. New York City Health & Hosps. Corp., 251 A.D.2d 70 (1st Dep't 1998). Likewise, plaintiff's claims of regulatory violations are based on the factual allegations in the original bill of particulars. 42 C.F.R. §§ 483.1 et seq.; 10 N.Y.C.R.R. §§ 415.1 et seq.; Foley v. City of New York, 43 A.D.3d 702, 704 (1st Dep't 2007); Valdes v. Mabrose Realty, 289 A.D.2d at 29. See Fisher v. City of New York, 48 A.D.3d 303, 304 (1st Dep't 2008). In addition, the complaint alleged violations of the state statutes that the newly

alleged state regulations implement, specifying duties and rights parallel to the newly alleged federal regulations' provisions. N.Y. Pub. Health Law §§ 2801-d, 2803-c. Finally, despite many adjournments and the passage of several years, disclosure nevertheless remains incomplete. See Antwerpse Diamantbank N.V. v. Nissel, 27 A.D.3d 207, 208 (1st Dep't 2006); Fernandez v. Kinsey, 205 A.D.2d 448 (1st Dep't 1994); Seda v. New York City Hous. Auth., 181 A.D.2d 469, 470 (1st Dep't 1992).

B. Excuse for the Delay

Although plaintiff now seeks to allege an injury not alleged in the bill of particulars filed in September 2003, she explains that the delay resulted from her prior counsel's unsatisfactory performance, eventually causing plaintiff to assume prosecution of the action, and her own ensuing health problems. Specifically as to the delay in alleging a right trochanteric pressure ulcer, plaintiff points to the decedent's incomplete treatment records and plaintiff's difficulty ascertaining who treated the ulcer. Plaintiff learned of the condition only after receiving the decedent's complete medical chart from defendant following a delay. These combined factors provide a reasonable excuse for plaintiff's delay in moving to amend. Wynter v. Our Lady of Mercy Med. Ctr., 3 A.D.3d 376, 378 (1st Dep't 2004); Schwartz v. Montefiore Hosp. & Med. Ctr., 305 A.D.2d at 176. Moreover, while the original bill of particulars did not cite to any regulations violated, defendant's demand for a bill of particulars did not seek any such claims.

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C. The Amendments' Merit

To support the amendment to allege a right trochanteric pressure ulcer, plaintiff presents the affidavit of JoMarie Zeleznik M.D., the decedent's treating physician, and Debra Crum, a registered nurse. Dr. Zeleznik and Ms. Crum set forth how the decedent developed pressure ulcers from various treatment departures while under care at defendant facility. Thus plaintiff establishes merit to her proposed amendment. Smith v. Tyras, 265 A.D.2d 217 (1st Dep't 1999); Detrinca v. De Fillippo, 165 A.D.2d 505, 512 (1st Dep't 1991).

Insofar as plaintiff claims defendant committed fraud by indicating in the decedent's chart that defendant fed the decedent a milkshake May 17, 1997, the date she was admitted to the facility, that claim is time barred. An action based on fraud is timely if commenced within six years from the claimed fraud or two years from when it could have been discovered with reasonable diligence. C.P.L.R. § 213(8); Kaufman v. Cohen, 307 A.D.2d at 122. Since defendant ceased caring for the decedent upon her death in 1999, any fraud claim expired at the latest in 2005 and is now time barred. The amendment does not relate back to plaintiff's complaint November 14, 2002, or bill of particulars September 12, 2003, as neither gave any notice of a fraud claim. C.P.L.R. § 203(f); Murray Hill Invs. v. Parker Chapin Flattau & Klimpl, 305 A.D.2d 228, 229 (1st Dep't 2003); DeRossi v. Rubinstein, 233 A.D.2d 220, 221 (1st Dep't 1996).

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III. DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

To obtain summary judgment, defendant must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence eliminating all material issues of fact. C.P.L.R. § 3212(b); JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d 373, 384 (2005); Forrest v. Jewish Guild for the Blind, 3 N.Y.3d 295, 315 (2004); Giuffrida v. Citibank Corp., 100 N.Y.2d 72, 81 (2003). If defendant satisfies this standard, the burden shifts to plaintiff to rebut that prima facie showing, by producing evidence, in admissible form, sufficient to require a trial of material factual issues. Hyman v. Queens County Bancorp, Inc., 3 N.Y.3d 743, 744 (2004); Forrest v. Jewish Guild for the Blind, 3 N.Y.3d at 315. In evaluating the evidence for purposes of defendant's motion, the court must accept plaintiff's version of the facts as true and construe the evidence in the light most favorable to plaintiff. Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d 35, 37 (2004); Forrest v. Jewish Guild for the Blind, 3 N.Y.3d at 315. The court must deny summary judgment if defendant fails to meet its initial burden, despite any insufficiency in the opposition. Roman v. Hudson Tel. Assoc., 15 A.D.3d 227, 228 (1st Dep't 2005); Potter v. NYC Partnership Hous. Dev. Fund Co., Inc., 13 A.D.3d 83, 85 (1st Dep't 2004).

A. Defendant's Evidence

Defendant presents the affidavit of Gisele Wolf-Klein M.D., who reviewed the decedent's treatment records at defendant facility, as well as 2,192 pages of authenticated treatment

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records, including blood analyses, radiological reports, and routine care records, on a compact disc. Dr. Wolf-Klein concludes, with a reasonable degree of medical certainty, that the treatment and preventive care defendant provided to the decedent for sacral ulcers, contractures of her shoulders, elbows, hips, and ankles, urinary tract infection, aspiration, nutrition, hydration, and protection from falls were within accepted medical practice and did not cause her injury or death. Thus defendant meets its initial burden of demonstrating entitlement to summary judgment on plaintiff's claims relating to those conditions. Rivera v. Anilesh, 32 A.D.3d 202, 204 (1st Dep't 2006); DeFilippo v. New York Downtown Hosp., 10 A.D.3d 521, 523 (1st Dep't 2004); Carrera v. Mount Sinai Hosp., 294 A.D.2d 154 (1st Dep't 2002).

Nevertheless, defendant fails to address plaintiff's claims regarding the decedent's right trochanteric pressure ulcer or defendant's regulatory violations. While defendant replied to plaintiff's opposition, defendant disregarded these claims because they were not in plaintiff's bill of particulars. If these claims were in plaintiff's action, however, defendant would not satisfy its initial burden of demonstrating entitlement to summary judgment on them. See Wasserman v. Carella, 307 A.D.2d 225, 226 (1st Dep't 2003). Since these claims were added only after the court granted plaintiff leave to amend, and defendant declined to make a new motion or supplement the pending cross-motion, the court denies defendant's cross-motion insofar as it

8] relates to plaintiff's claims regarding the right trochanteric pressure ulcer and regulatory violations. This denial is without prejudice to a future timely summary judgment motion on these claims. C.P.L.R. §3212(a); Brill v. City of New York, 2 N.Y.3d 648, 651 (2004); Filannino v. Triborough Bridge & Tunnel Auth., 34 A.D.3d 280, 281 (1st Dep't 2006).

B. Plaintiff's Rebuttal

Plaintiff opposes defendant's cross-motion with the same affidavits by Dr. Zeleznik and Ms. Crum as demonstrate merit to the amended bill of particulars. Dr. Zeleznik, who treated the decedent, sets forth defendant's departures from accepted medical practice in preventing and treating her trochanteric pressure ulcer and finds that this condition injured her and caused her death. Thus plaintiff raises factual issues precluding summary judgment on her medical malpractice claim arising from that condition.

Since plaintiff fails to rebut defendant's showing of entitlement to summary judgment on claims arising from sacral ulcers, contractures, urinary tract infection, aspiration, nutrition, hydration, and protection from falls, the court grants defendant summary judgment on plaintiff's claims relating to those conditions and dismisses those claims. Polcari v. Dottino, 35 A.D.3d 190 (1st Dep't 2006); Wiesenthal v. Weinberg, 17 A.D.3d 270 (1st Dep't 2005); Carrera v. Mount Sinai Hosp., 294 A.D.2d at 154-55; Shipman v. Mount Sinai Hosp., 290 A.D.2d 294, 295 (1st Dep't 2002). Plaintiff voluntarily discontinued her lack of

9] informed consent claim on the record July 10, 2007. Transcript of Proceedings at 13, 15 (July 10, 2007).

IV. CONCLUSION

For the above reasons, the court grants plaintiff's motion to amend her bill of particulars to the extent of allowing claims based on the decedent Dita Menkes's right trochanteric pressure ulcer and on violations of federal and state regulations governing nursing home residents, 42 C.F.R. §§ 483.1 et seq.; 10 N.Y.C.R.R. §§ 415.1 et seq. The court denies plaintiff's motion to the extent it proposes a fraud claim. C.P.L.R. §§ 203(f), 213(8), 3025(b).

The court also grants defendant's cross-motion for summary judgment to the extent of dismissing plaintiff's claims regarding defendant's failures in preventing and treating sacral ulcers, contractures, urinary tract infection, and aspiration and in providing nutrition, hydration, and protection from falls. The court otherwise denies defendant's cross-motion without prejudice to a future timely motion for summary judgment on the newly added claims. C.P.L.R. § 3212(a), (b), and (e).

This decision constitutes the court's order. The court will deliver copies to the parties' attorneys.

DATED: May 23, 2008

Lucy Billings

LUCY BILLINGS, J.S.C.

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