

Letizia v Wong

2009 NY Slip Op 30879(U)

April 15, 2009

Supreme Court, New York County

Docket Number: 115384/07

Judge: Joan B. Carey

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

PRESENT: Honorable Joan B. Carey
Justice

PART 29

LAWRENCE LETIZIA and MARIE
LETIZIA,
Plaintiffs,

INDEX NO. 115384/07

Motion Sequence

-v-

S. CHIU WONG, M.D., "JOHN" GADE,
M.D., ALEXANDER J. SLOTWINER, M.D.
and NEW YORK PRESBYTERIAN
HOSPITAL,

Defendants.

FILED
APR 20 2009
COUNTY CLERKS OFFICE
NEW YORK

The following papers, 1- 19, were read on this motion by defendants S. Chiu Wong, M.D., "John" Gade, M.D., Alexander J. Slotwiner, M.D. and New York Presbyterian Hospital to dismiss the complaint pursuant to, inter alia, CPLR §3126, based upon plaintiffs' failure to comply with several Court orders directing them to provide defendants with supplemental bills of particulars with more specific allegations of the alleged negligence on the part of the defendants and the dates of such negligence, as well their failure to respond to various other discovery demands.

Notice of Motion - Affidavits - Exhibits
Affirmation in Opposition - Affidavits - Exhibits
Replying Affirmation -

Papers Numbered

1-12
13-17
18-19

Cross-Motion: Yes No

Plaintiffs commenced the instant action to recover damages for medical malpractice on or about November 16, 2007. Defendants S. Chiu Wong, M.D., "John" Gade, M.D., Alexander J. Slotwiner, M.D. and New York Presbyterian Hospital, respectively, answered the complaint on December 13, 2007. Along with their answers, the aforementioned defendants served several discovery demands, including demands for bills of particulars. At the time of the preliminary conference, on October 10, 2008, plaintiff had not yet served a bill of particulars with respect to New York Presbyterian Hospital. Further, the bills of particulars relating to the individual physicians named as defendants herein were deficient, in that the allegations of negligence were not set forth with sufficient particularity, and the dates of such alleged negligence were not provided. Plaintiffs were directed to serve, forthwith, a bill of particulars as to New York

Presbyterian Hospital, and supplemental bills of particulars as to the remaining doctors that address the deficiencies of the initial bills of particulars. The preliminary conference was adjourned until October, 24, 2008.

On October 24, 2008, plaintiff failed to appear for the preliminary conference. Defendants advised that they had not been served with the bills of particulars, as was directed at the prior conference. The Court issued a written order directing plaintiffs to serve the bills of particulars upon defendants on or before November 3, 2008, and appear for a preliminary conference on November 14, 2008. A copy of the order was mailed to plaintiffs' counsel. Prior to the November 14, 2008, preliminary conference date, plaintiffs' counsel telephoned the Court requesting an adjournment of the conference. Apparently plaintiffs' counsel assigned the preparation of the bills of particulars in this case to an attorney at his office who had accepted another job position, and had not been meeting her obligations any longer at the office of plaintiffs' counsel. The Court adjourned the preliminary conference to December 5, 2008. At the time of the December 5, 2008 conference, plaintiffs' counsel had not yet served supplemental bills of particulars as to the individual doctors, and, although a supplemental bill of particulars as to New York Presbyterian Hospital was served, it was found to be deficient, by the Court, at this conference. Plaintiffs counsel was, once again, directed to serve adequate bill of particulars upon defendants no later than December 8, 2008.

Defendants contend that the bills of particulars served upon them on December 8, 2008, are still insufficient and move to dismiss the complaint pursuant to, inter alia, CPLR §3126, based upon plaintiffs' failure to comply with several Court order's directing them to provide defendants with supplemental bills of particulars with more specific allegations of the alleged negligence on the part of the defendants and the dates of such negligence, as well their failure to respond to various other discovery demands. CPLR §3126 permits the court to dismiss an action or to preclude a plaintiff from offering testimony or evidence, which would effectively result in dismissal, where it is determined that a plaintiff's conduct in failing to provide discovery was willful or contumacious (see Patterson v. New York City Health and Hospitals Corp., *supra*, quoting Cianciolo v. Trism Specialized Carriers, 274 AD2d 369 [2d Dept. 2000]; Lowitt v. Korelitz, *supra*). It is noted that these extreme sanctions may be warranted even where a noncompliant party has not violated a discovery order of the court (see Wolfson v. Nassau County Medical Center, 141 AD2d 815 [2d Dept. 1988]). Notwithstanding, the nature and degree of the penalty imposed under CPLR §3126 is within the discretion of the Court (see Patterson v. New York City Health and Hospitals Corp., 284 AD2d 516 [2d Dept. 2001]; Lowitt v. Korelitz, 152 AD2d 506 [1st Dept. 1989]).

In the instant action, plaintiffs' willful and contumacious conduct may be inferred from the extensive nature of their failure to comply with or object to defendants' demands (see Ranfort v. Peak Tours, Inc., [2d Dept. 1998]). Plaintiffs do not dispute the fact that they have not responded to defendants discovery demands or the orders of this Court in a timely manner. However, they contend that such failure on their part was not willful, and was the result of the mishandling of this case by the attorney at plaintiffs' counsel's office who had been assigned the task of providing defendants with discovery. According to plaintiff, the drastic remedy of dismissal is not warranted herein. The Court notes that the drastic remedy of striking a pleading is not warranted where a party's failure to comply with a discovery order is simply the result of law office failure, and not proven to be willful. (see Mateo v. City of New York, 274 AD2d 337 [1st Dept. 2000]). However, the repeated failures on the part of plaintiffs' counsel herein may be sufficient to demonstrate some

level of bad faith on the part of plaintiffs in not complying with defendants discovery demands and the orders of this Court. Nevertheless, in the exercise of discretion, and in view of the policy favoring resolution of disputes on their merits (see Colucci v. Jennifer Convertibles Inc., 283 AD2d 224 [1st Dept. 2001]), the plaintiffs complaint will not be dismissed.¹

The Court now turns to the adequacy of the bills of particulars served upon defendants on December 8, 2008. It is well settled that “[t]he purpose of a bill of particulars is to amplify the pleadings, limit the proof and prevent surprise at the trial” (Twiddy v. Standard Mar. Transp. Servs., 278 AD2d 578 [1st Dept. 1990]; see also Garrett v. Comm. Gen. Hosp. Of Greater Syracuse, 288 AD2d 928 [4th Dept. 2001]; Graves v. County of Albany, 278 AD2d 578 [3d Dept. 2000]; Bouton v. County of Suffolk, 125 AD2d 620 [2d Dept. 1986]). Further, a bill of particulars must clearly detail the specific acts of negligence attributed to each defendant (see Felock v. Albany Med. Ctr. Hosp., 258 AD2d 772 [3d Dept. 1999]; Miccarelli v. Fleiss, 219 AD2d 469 [1st Dept. 1995]). A bill of particulars need not, however, provide evidentiary material or information gleaned from expert testimony, such as the exact departures of a defendant in a medical malpractice action (see Dellaglio v. Paul, 250 AD2d 806 [2d Dept. 1998] [Demands for specific departures from good and accepted medical practices are improper as they seek evidentiary material]; Liddell v. Cree, 233 AD2d 593 [3d Dept. 1996] [Demands relating to a claim for lack of informed consent which seeks information that plaintiff alleges should have been provided by a physician, or any alternative treatment that should have been identified are improper as such information is highly technical in nature and may only be revealed through expert testimony]; Heyward v. Ellenville Comm. Hosp., 215 AD2d 967 [3d Dept. 1995] [Demands seeking statements of the accepted medical practices, customs and standards alleged to have been violated by defendants and the specific ways in which such customs and standards were violated were beyond the scope of a bill of particulars]).

Defendants have now been served with separate bills of particulars, and supplemental bills of particulars as to each defendant, as well as second supplemental bills of particulars as to the individually named defendant physicians, i.e., Drs. Wong, Gade, and Slotwiner. A review of the plaintiffs’ bills of particulars indicates that plaintiffs’ allege that Drs. Wong, Gade, and Slotwiner were negligent in the manner in which they performed a cardiac catheterization on injured plaintiff on or about May 11, 2005. Injured plaintiff was to have an aortic valve replacement and possible coronary artery bypass and was sent to the cardiac catheterization lab at New York Presbyterian Hospital for catheterization prior to that surgery. It is specifically alleged that the aortic valve was crossed with a catheter, and a left ventriculogram was performed by Dr. Wong, along with Drs. Gade, and Slotwiner, despite a request by Dr. Zola, presumably injured plaintiff’s heart surgeon, that such “prohibited acts” not be done. Plaintiffs further allege that an introduction of dye during the catheterization caused a lethal arrhythmia. It is alleged that the negligence of the defendant physicians caused injured plaintiff to suffer a myocardial infarction, a prolonged hospital stay in the intensive care unit at New York Presbyterian Hospital, and lasting heart problems resulting in reduced ability for activity

¹ In seeking dismissal of plaintiffs’ action, defendants rely heavily on Valentine v. Armor Elevator Company, 155 AD2d 597 [2d Dept. 1989]. However, the Court finds this case distinguishable, as plaintiff in Valentine violated “the court’s numerous conditional orders of preclusion.” Plaintiffs herein have not violated any conditional orders of preclusion.

The acts of negligence alleged against Drs. Wong, Gade, and Slotwiner, as set forth in the bills of particulars, are virtually identical. However, it appears that because injured plaintiff was under general anesthesia during the course of the catheterization, and little in terms of discovery has been done in this case, plaintiffs have yet to determine the specific role of each of these physicians in the performance of the catheterization. It is the view of this Court that the bills of particulars as to the individually named defendant doctors are adequate to proceed with discovery, as the allegations of negligence are specific enough to permit these defendants to properly formulate any defense in this case as they proceed through discovery and avoid surprise at trial. Notwithstanding, plaintiffs are directed to further supplement their bills of particulars within fourteen (14) after the completion of the final defendant's examination before trial, setting forth with greater specificity the allegations of negligence of each of these defendants in the context of their role in the performance of the catheterization at issue.

With respect to the bills of particulars as to New York Presbyterian Hospital, again, these bills of particulars are virtually identical to those relating to the individually named defendant doctors. The Court takes this to mean that the plaintiffs seek only to hold New York Presbyterian Hospital vicariously liable for the alleged acts of negligence of the individually named defendant doctors, and does not allege any independent acts of negligence on its part, through the acts or omissions of any employees other than these physicians. If, in fact, plaintiffs do seek to allege that New York Presbyterian Hospital was negligent as a result of the acts or omissions of any employees other than the individually named defendant doctors, plaintiffs are directed to further supplement their bill of particulars as to New York Presbyterian Hospital, setting forth with sufficient specificity, such negligent acts or omissions. In the event that plaintiffs do not supplement the bill of particulars as to New York Presbyterian Hospital, as set forth above, within fourteen (14) days from the date of service, upon plaintiffs by defendants, of this decision and order, with notice of entry, plaintiffs shall be precluded from offering testimony or evidence relating to any acts or omissions of any employees, other than the individually named defendant doctors, upon the trial of this action.

Lastly, with respect to any remaining discovery that is owed to defendants, such as authorizations to obtain medical records, plaintiffs are directed to provide defendants with such discovery within fourteen (14) days from the date of service, upon plaintiffs by defendants, of this decision and order, with notice of entry.

Based on the foregoing, it is hereby

ORDERED that motion by defendants S. Chiu Wong, M.D., "John" Gade, M.D., Alexander J. Slotwiner, M.D. and New York Presbyterian Hospital motion to dismiss the complaint pursuant to, *inter alia*, CPLR §3126, based upon plaintiffs' failure to comply with several Court orders directing them to provide defendants with supplemental bills of particulars with more specific allegations of the alleged negligence on the part of the defendants and the dates of such negligence, as well their failure to respond to various other discovery demands is denied. Notwithstanding, it is further

ORDERED that if plaintiffs do seek to allege that New York Presbyterian Hospital was negligent as a result of the acts or omissions of any employees other than the individually named defendant doctors, plaintiffs are directed to further supplement their bill of particulars as to New

York Presbyterian Hospital, setting forth with sufficient specificity, such negligent acts or omissions within fourteen (14) days from the date of service, upon plaintiffs by defendants, of this decision and order, with notice of entry, or plaintiffs shall be precluded from offering testimony or evidence relating to any acts or omissions of any employees, other than the individually named defendant doctors, upon the trial of this action; and it is further

ORDERED that plaintiffs are directed to provide defendants with any outstanding authorizations, or other discovery demands, within fourteen (14) days from the date of service of this decision and order, with notice of entry upon them by defendants ; and it is further

ORDERED that counsel for all parties are to appear before the court on May 15, 2009, at 9:30am, at 60 Centre Street, room 228, Part 29, for a preliminary conference.

Dated: 4/15/2009

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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APR 20 2009
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