

Carter v Isabella Geriatric Ctr., Inc.

2009 NY Slip Op 31919(U)

August 21, 2009

Supreme Court, New York County

Docket Number: 118304/04

Judge: Joan B. Lobis

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

PRESENT: JOAN B. LOBIS

PART 6

Index Number : 118304/2004
CARTER, REGINA
vs
ISABELLA GERIATRIC CENTER
Sequence Number : 004
PRECLUDE

INDEX NO. _____
MOTION DATE 8/4/09
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

_____ were read on this motion to/for _____

PAPERS NUMBERED

1-19
20-21
22-23

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

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

MOTION DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION AND ORDER

FILED

AUG 26 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/21/09

JBL
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

-----X
REGINA CARTER, as Administratrix of the
Estate of CLOVER CARTER, Deceased, and
REGINA CARTER, Individually,

Plaintiff,

Index No. 118304/04

-against-

Decision and Order

ISABELLA GERIATRIC CENTER, INC.,

Defendant

FILED
AUG 26 2009
COUNTY CLERK'S OFFICE
NEW YORK

-----X
JOAN B. LOBIS, J.S.C.:

Plaintiff moves for an order vacating the November 20, 2007 order (the "Dismissal Order") of the Hon. Sheila Abdus-Salaam, to whom this matter was assigned originally, which precluded plaintiff from calling expert medical witnesses at trial and dismissed the complaint in its entirety. The delay in bringing this motion was a result of the fact that plaintiff first took an appeal from the decision. In a decision and order dated March 19, 2009, the First Department held that the Dismissal Order was not an appealable order, as of right, because it was not decided as part of a motion made on notice. Carter v. Isabella Geriatric Ctr., Inc., 60 A.D.3d 520 (1st Dep't 2009). The Appellate Division declined to grant leave to appeal, and held that the remedy was a motion to vacate the Dismissal Order, which is what plaintiff has now brought.

This is an action for, inter alia, medical malpractice, negligence, and wrongful death against Isabella Geriatric Center, Inc. ("Isabella"). The decedent, Clover Carter, was a patient at Isabella from the summer of 2000 until October 24, 2003, when decedent was transferred to New York Presbyterian Hospital; she died at the hospital on October 31, 2003, at the age of 67. This action was commenced on December 30, 2004. The complaint alleges that plaintiff's decedent

sustained contusions, neck soreness, pain and discomfort, dehydration, and stage IV sacral decubitus ulcers, and that she ultimately died as a result of various acts or omissions by Isabella. Plaintiff asserts claims under Public Health Law §§ 2801-d and 2803-c. Claims are also asserted that Isabella failed to adequately hire, train, retain, and supervise qualified and appropriate employees and failed to exercise reasonable care to prevent abuse, neglect, and injuries. In addition, there are claims of breach of warranty and breach of contract.

The note of issue was filed on October 2, 2006. The trial was first scheduled for May 21, 2007. At a pre-trial conference on March 29, 2007, plaintiff was ordered to serve her C.P.L.R. § 3101(d) disclosure sixty (60) days before trial, but failed to do so. The matter was then scheduled for trial on June 18, 2007, but was adjourned because plaintiff failed to serve expert disclosure. By order dated June 7, 2007, Justice Abdus-Salaam directed plaintiff to serve responses by August 1, 2007, or be precluded. The trial was adjourned until October 15, 2007. Plaintiff served two § 3101(d) responses on July 27, 2007.¹ The disclosure sets forth that plaintiff intends to call a registered nurse and a licensed physician. Plaintiff does not identify the jurisdictions in which the experts are licensed. With respect to the subject matter of the disclosure, the response is identical for the nurse and the physician:

Plaintiff's expert is expected to testify on the areas of malpractice, causation and injury, including the deviations from good and accepted medical practice and standards, including but not limited to, standards of care on the part of the defendants, ISABELLA GERIATRIC CENTER, INC., their agents, servants, and/or employees. It is

¹ The two separate documents are essentially identical, although in one document, the right-side margin is justified. There does not appear to be any change in the substance of the information in the two documents.

anticipated that Plaintiffs' Expert will opine that CLOVER CARTER was completely dependent for all care, unable to assist in any of [the] activities of daily living or participate in her care. It is anticipated that Plaintiff's Expert will opine that CLOVER CARTER suffered Contusions; Neck soreness; Pain and discomfort; Dehydration; Stage four sacral decubitus ulcer [sic]; Systemic Sepsis Syndrome; UTI; Malnutrition; Diabetes Mellitos [sic] type II uncontrolled; Hypertension; weight loss; Systemic Sepsis Syndrome [sic- appears twice]; Death (October 31, 2003). It is anticipated that Plaintiff's expert will opine that the departures and deviations from standard and accepted practices by the defendants, their agents[,] servants and/or employees were the proximate cause and aggravating factors of the above[-]mentioned damages to plaintiff CLOVER CARTER. It is further anticipated that plaintiff]'s expert will rule out other possible sources of said damages.

After receipt of this document, defense counsel sent a letter to plaintiff's counsel, dated August 2, 2007, setting forth what defendant deemed to be deficiencies in the expert disclosure. Defense counsel inquired as to whether or not the physician is licensed to practice in the State of New York, since the disclosure was silent as to the jurisdiction of licensure. In addition, there was no information as to where the nursing expert is licensed. Finally, counsel contended that the disclosure failed to set forth what departures the experts will testify to were departures from the standard of care.

Having received no response to the letter, defense counsel sent a second letter, dated September 10, 2007, repeating the request for a supplement to the disclosure, as set forth in the prior letter. Again, there was no response. On October 15, plaintiff requested an adjournment of the trial; the trial was rescheduled for November 26.

On or about November 7, Isabella moved, by order to show cause, for an order to compel plaintiff to provide adequate and sufficient expert disclosure, pursuant to C.P.L.R. § 3101(d)

or, alternatively, to preclude plaintiff from presenting any expert testimony and dismissing the complaint. Justice Abdus-Salaam declined to sign the order to show cause. Instead, she called counsel into court and heard argument regarding the application on November 15, 2007. In an order issued that date (the "November 15 Order"), Justice Abdus-Salaam noted that the July 27, 2007 responses served by plaintiff were "insufficient and inadequate;" that the responses for a nurse and physician were identical, which is inappropriate; and, that the responses were "vague and conclusory," in that they do not "specify the departures that will be the subject of the experts' testimony." The judge additionally noted that plaintiff failed to identify the jurisdictions in which the experts are licensed to practice. The November 15 Order further pointed out that in letters dated August 2 and September 10, 2007, defense counsel alerted plaintiff to these deficiencies, but plaintiff failed to address them. The November 15 Order concluded with the following language:

Based upon the foregoing, plaintiff shall be precluded from offering any expert testimony and the complaint shall be dismissed unless plaintiff delivers supplemental expert disclosures that correct the aforementioned deficiencies, to defense counsel by November 19, 2007.

The matter was set down for a conference on November 20, 2007. Plaintiff's counsel was further directed to provide authorizations by November 19.

The amended disclosure sets forth the substance of what the nurse and physician will testify to in greater detail than the original disclosure, and is different for each expert. Without repeating the entire text of the disclosure here, the disclosure is substantially different from the original disclosure, both in length and substance. First, there were two separate disclosures for the nurse and the doctor. The disclosures set forth in far greater detail the testimony that the experts will give with respect to the claimed departures.

At the November 20 conference, Justice Abdus-Salaam acknowledged that authorizations were provided by November 19, and that supplemental § 3101(d) responses were served. She further acknowledged that the supplemental responses corrected one of the three prior deficiencies, in that plaintiff provided information relating to the qualifications of plaintiff's experts. But, in reviewing the responses, the Judge found that although more details were provided,

the details are among a sea of generalities that essentially duplicate what I'm led to believe are the bill of particular allegations and the allegations in the complaint and essentially tell the defendants nothing about what they are supposed to be defending on the case.

The Judge opined that there was no meaningful attempt to confer with an expert before the response was provided. Stating that this was essentially plaintiff's third² opportunity to provide a proper § 3101(d) response, and a preclusion order had already been issued, Justice Abdus-Salaam dismissed the case. In so doing, Justice Abdus-Salaam noted that there was a pattern of not providing adequate § 3101(d) responses dating back well before the November 15 order.

Courts are exceedingly reluctant to dismiss a case other than on the merits. Gibbs v. St. Barnabas Hosp., 61 A.D.3d 599 (1st Dep't 2009). Striking a pleading or issuing an order of preclusion is considered an extreme or drastic remedy, which should not be granted unless the failure to comply with disclosure was "willful, contumacious, or the result of bad faith" (Id. at 599), and there is a showing of prejudice to defendant. Busse v. Clark Equipment Co., 182 A.D.2d 525 (1st Dep't 1992). Before an order of preclusion is entered, a party should be afforded "a final

² Actually, defendant claimed it was the fourth: the first expert disclosure order required disclosure to be provided by April 18; the next date was prior to the June 18 jury selection date; and the third date was August 1.; The fourth time was the November 15 order to produce by November 19.

opportunity” to comply with the discovery demand. Id. Plaintiff was given numerous opportunities to comply with the § 3101(d)(1) disclosure demands. The next step was a conditional order of preclusion. Once Justice Abdus-Salaam issued the conditional order of preclusion, and plaintiff failed to comply with the order, in that plaintiff failed to set forth in “reasonable detail” the subject matter on which each expert was expected to testify and the substance of the facts and opinions of each, the conditional order of preclusion became absolute. Gholson v. County of Nassau, 274 A.D.2d 450 (2d Dep’t 2000). In order to be relieved from an order of preclusion, plaintiff was required to demonstrate “a reasonable excuse for the failure to comply with the condition and the existence of a meritorious cause of action.” Id. at 451 (citations omitted); Mir v. Saad, 54 A.D.3d 914 (2d Dep’t 2008). Once plaintiff failed to do so, the order became “absolute.” VSP Assocs. P.C. v. 46 Estates Corp., 243 A.D.2d 373 (1st Dep’t 1997).

The doctrine of “law of the case” does not bar this court from revisiting Justice Abdus-Salaam’s rulings. People v. Evans, 94 N.Y.2d 499, 503-05 (2000); Brothers v. Bunkoff Gen. Contrs., 296 A.D.2d 764, 765 (3d Dep’t 2002) (holding that the doctrine of law of the case “does not apply to rulings, such as case management decisions, which are based on the discretion of the court.” and therefore does not bar the court from revisiting a conditional preclusion order.); but see, Noble v. Cole, 267 A.D.2d 702, 703 (3d Dep’t 1999) (expert barred from testifying at first trial is barred by the doctrine of law of the case from testifying at re-trial after hung jury).

C.P.L.R. § 3101(d)(1)(i) provides, in relevant part, that

[u]pon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected

to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion.

Although the statute does not define "reasonable detail," nor does it set forth precisely what the disclosure must include, the disclosure cannot be ""so general and nonspecific that [defendants have] not been enlightened to any appreciable degree about the content of [the experts'] anticipated testimony."" Syracuse v. Diao, 272 A.D.2d 881, 881 (4th Dep't 2000) (citations omitted) (brackets in original). A recent decision of this court finds that it is sufficient to set forth the subject matter of the expert's facts and opinions, the substance of those facts and opinions, and a summary of the grounds of the opinions (which may include citations to medical literature that the experts intend to rely on at trial). C ex rel. Williams v. St. Luke's-Roosevelt Hosp. Center, 16 Misc. 3d 688, 697 (Sup. Ct. N.Y. Co. 2007) (Bransten, J.).

Given the fact that there is no bright line standard for what is acceptable disclosure, this court endeavored to find examples of recent cases which found the § 3101(d) disclosure inadequate and which found the disclosure acceptable. Two recent cases that rejected the disclosure did so on the basis that it was conclusory and meaningless. In Hara v. Levin, 2003 WL 1240518 (Sup. Ct. Bronx Co. 2003), the court ordered the plaintiff to provide a new § 3101(d) response or face preclusion of the plaintiff's expert, where the plaintiff's disclosure stated that

the grounds upon which testimony is expected concerns the deviation or departure from accepted practice which caused plaintiff's injuries which deviation can be found in the relevant medical records, the findings of the expert's independent examination, and the medical ophthalmic expert testimony at trial.

Id. at *4. Similarly, in Tavares v. New York City Health & Hosps. Corp., 2003 WL 22231534 (Sup.

Ct. Kings Co. 2003), the plaintiff's original disclosure set forth that the pediatric neurologist would testify

concerning the physical and mental condition of the infant plaintiff and the prognosis and the etiology of his condition. It is expected that this expert will testify that the infant suffered from a static encephalopathy and from cerebral palsy[] and that said conditions and injuries are causally related to events that occurred at or near the time of birth of the infant plaintiff, that the infant plaintiff's condition is permanent in nature and that the infant plaintiff has a normal life expectancy.

Id. at *5. Because the word "encephalopathy" is defined as any disorder of the brain, the court agreed with the defendant that this characterization of the infant's condition "gives defendant no idea as to plaintiffs' expert's opinion" regarding the type of brain injury from which the infant suffers. The court did not need to grant the defendant's motion to preclude, since the plaintiffs served amended disclosure which was more specific as to when and how the injuries were claimed to have occurred. Id. at *6.

In contrast, two recent cases which found the disclosure to be adequate, reflect that all that is required is a reasonable effort to set forth the subject matter of the expert testimony and the facts and opinions on which the testimony is based. In Rabinowitz v. Elimian, 55 A.D.3d 813, 814 (2d Dep't 2008), the court affirmed the lower court's denial of the defendant's preclusion motion, which allowed the plaintiff's expert to testify concerning the contention that the physician who performed a midline episiotomy improperly aligned the severed ends of the plaintiff's sphincter muscle. The disclosure statement recited only that the "expert will opine that the defendant utilized substandard technique with regard to the repair of a third degree extension of a midline episiotomy."

Id. The court found that “the expert witness [disclosure] statement was not so inadequate or inconsistent with the expert’s testimony as to have been misleading, or to have resulted in prejudice or surprise.” Id. (brackets in original), quoting Gagliardotto v. Huntington Hosp., 25 A.D.3d 758, 759 (2d Dep’t), lv. denied, 7 N.Y.3d 710 (2006). Similarly, in Gagliardotto, supra, the Second Department affirmed the lower court’s determination to allow an expert to testify as to the cause of Erb’s Palsy, even though the expert disclosure served by the defendant did not indicate specifically that the expert would testify that an infant’s rapid descent during the second stage of delivery could cause Erb’s Palsy. The court noted that the statement did disclose that defendant’s expert would testify that “maternal expulsive forces” could cause Erb’s Palsy. Moreover, as the court noted, the statement further set forth that the expert could be “expected to comment upon any and all testimony adduced at trial” by the plaintiff, and two of the plaintiffs’ witnesses offered opinions as to whether or not rapid descent could cause Erb’s Palsy. Id.

While it is true that the original disclosure statements were wholly inadequate and conclusory, the amended disclosure statements that plaintiff’s counsel served on November 16 are more akin to the disclosure statements in Rabinowitz and Gagliardotto, supra. The departures are set forth in greater detail, so that defendant cannot claim undue prejudice or surprise. Plaintiff has elaborated as to the alleged failures of defendant to properly care for the decedent, all of which are deviations from the standard of care with respect to nursing home patients. Contrary to defendant’s assertions, there does not appear to be any requirement in the case law that specific dates as to departures be set forth, nor is there a requirement that the disclosure set forth what should have been done to correct any alleged deficiencies in treatment. For these reasons, Justice Abdus-Salaam’s Dismissal Order is vacated in its entirety.

Even if this court declined to vacate the order as to the medical malpractice claims, this court would have vacated the order as to the non-medical malpractice claims. Plaintiff also asserts negligence claims and claims under the Public Health Law. The Appellate Division decision specifically declined to reach the issue of whether it was proper to dismiss the claims that did not sound in medical malpractice, noting that neither party made arguments or submitted evidence before Justice Abdus-Salaam “touching on the fact-based issue of which of plaintiff’s claims sound in ordinary negligence. . . . Relatedly, neither party made arguments or submitted evidence addressing which of plaintiff’s claims need to be supported by expert testimony and which do not.” Carter v. Isabella Geriatric Center, Inc., supra, 60 A.D.3d at 521 (citations omitted).

Here, there are claims sounding in negligence, as well as medical malpractice.³ Justice Abdus-Salaam did not address the negligence claims. On the record, she stated that she was precluding plaintiff’s expert from testifying, and then stated that “without an expert plaintiff will not be able to prove a prima facie case,” and that therefore, she was dismissing the complaint. Plaintiff’s counsel failed to argue orally that there were also claims sounding in negligence. He was not given the opportunity to submit papers, since this decision was rendered at a conference, after Justice Abdus-Salaam declined to sign the order to show cause.

³ “[W]hen the complaint does not allege negligence in furnishing medical treatment to a patient, but rather the failure of a medical provider in fulfilling a different duty, the claim sounds in negligence.” Rodriguez v. Saal, 43 A.D.3d 272, 274 (1st Dep’t 2007), citing Scott v. Uljanov, 74 N.Y.2d 673 (1989).

A claim for negligence does not require expert testimony. Osborne v. Rivington House, 19 Misc. 3d 1132A (Table) (Sup. Ct. N.Y. Co. 2008) (“Negligence principles are applicable where ‘the alleged negligent act may be readily determined by the trier of facts based on common knowledge.’”). Some of the allegations could be the result of actions by facility staff members and not medical professionals, and thus would sound in ordinary negligence. D’Elia v. Menorah Home & Hosp. for the Aged and Infirm, 51 A.D.3d 848, 851-52 (2d Dep’t 2008); Bush v. Cobble Hill Health Ctr., 17 Misc. 3d 1135(A) (Table) (Sup. Ct. Bronx Co. 2007). Therefore, even though the expert testimony is precluded, plaintiff may still be able to prove a prima facie case as to the negligence claims. Since Justice Abdus-Salaam did not address this portion of plaintiff’s claim, there is no bar to vacating that portion of her order to reinstate the claims that do not sound in medical malpractice.

Defendant argues that claims of violations of the Public Health Law necessitate expert testimony to show that the decedent’s body weight and protein levels were not acceptable. But the case defendant cites, Kolbert v. Maplewood Healthcare Ctr., Inc., 21 A.D.3d 1301 (4th Dep’t 2005), does not stand for this proposition. Although an expert was employed, the decision does not state that the expert was required. Conversely, Mosberg v. Elahi, 80 N.Y.2d 941 (1992) concerned an appeal from a denial of a motion to dismiss. It appears that defendant relies on a single sentence in the decision that a medical malpractice claim requires expert testimony, except “as to matters within the ordinary experience and knowledge of laypersons.” But, this is irrelevant to the proposition that a claim of negligence concerning treatment at a nursing home requires expert testimony. Although defendant now complains that plaintiff did not provide any particulars as to

these claims, defendant did not move to compel service of an amended bill of particulars, but only moved with respect to expert disclosure.

For all of the above reasons, the motion to vacate the Dismissal Order is granted. This matter shall be placed on the trial calendar. The parties are directed to appear for a pre-trial conference on Tuesday, October 20, 2009, at 10:00 a.m.

This constitutes the decision and order of the court.

Date: August 21, 2009


JOAN B. LOBIS, J.S.C.

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