

Sweeten v Teperman
2010 NY Slip Op 30314(U)
February 4, 2010
Supreme Court, New York County
Docket Number: 100425/06
Judge: Joan B. Lobis
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SCANNED ON 2/17/2010

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

PRESENT: LOBIS
Justice

PART 6

ERIN SWOBSTEN

- v -

LEWIS T. BERMAN, M.D.

INDEX NO. 100425/06
MOTION DATE _____
MOTION SEQ. NO. 1
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-7

8-14

15-16

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

FILED

FEB 17 2010

NEW YORK COUNTY CLERK'S OFFICE
THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

Dated: 2/11/10

JBL
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: 1AS PART 6**

-----X
ERIN SWEETEN,

Plaintiff,

Index No. 100425/06

-against-

Decision and Order

LEWIS W. TEPERMAN, M.D., GLYN R. MORGAN, MD.,
and NEW YORK UNIVERSITY MEDICAL CENTER

Defendants.

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

Plaintiff moves, by order to show cause, for leave to amend her bill of particulars in accordance with the proposed amended bill annexed to the moving papers. Defendants oppose the application. For the reasons stated below, the application is granted.

The underlying action is for medical malpractice. The allegations arise from a procedure known as a donor liver transplant (right hepatic lobectomy) that Lewis Teperman, M.D., and Glyn Morgan, M.D., performed on Erin Sweeten on October 21, 2002 at New York University Medical Center. The proposed amended bill seeks to add new theories of liability as well as expand on claims that were listed in the first bill of particulars. Plaintiff seeks to add claims that defendants failed to properly consider the consequences of doing the procedure once defendants were aware of a large accessory right hepatic vein and other vascular abnormalities. The proposed amended bill provides additional specific ways that plaintiff was not properly informed of the risks and details a number of alleged acts of negligence in the preparation of plaintiff for the procedure and in the course of the operation. She also adds claims of physical injury and economic loss. Plaintiff does not contest that she is offering new theories of recovery and seeks leave of the court to present these

*3]
claims at trial.

The case was commenced on January 12, 2006 and assigned to the Hon. Eileen Bransten. Plaintiff's verified bill of particulars were served on June 30, 2006. A preliminary conference order was signed on July 31, 2006, and a note of issue was filed on July 13, 2007. A pre-trial conference was held on January 8, 2008. A second pre-trial conference date was scheduled for May 13, 2008, and the trial was to commence on September 8, 2008.

In May 2008, after Justice Bransten was reassigned to the commercial division, the case was assigned to me. On May 13, 2008, the parties appeared and the trial date was rescheduled to September 29, 2008. A final settlement conference was held on August 12, 2008, and a new trial date of October 30, 2008 was given. Due to problems with scheduling the trial, the case was adjourned to February 3, 2009 for a further pre-trial conference and the trial was rescheduled for March 2009. In preparation for trial, plaintiff served C.P.L.R. § 3101(d) notices for a gastroenterology/liver fellow ("Expert A") and a liver/transplant Surgeon ("Expert B"), both dated February 13, 2009, and an economist, dated April 23, 2009. These disclosure notices contained new material not included in the bill of particulars.

At the February 14, 2009 conference, an attorney for defendant objected to the notices to the extent that plaintiff was offering new theories of liability and new injuries without seeking leave of court to amend her pleadings. To allow plaintiff time to take steps to include the new claims, the trial was adjourned until June 8, 2009. Plaintiff served another set of expert disclosure

notices, which were rejected because they contained claims not set forth in plaintiff's bills of particulars. The parties agreed to another adjournment of the trial, because of conflicts with defendant's trial counsel's schedule, until early October. On October 13, 2009, at a conference prior to jury selection, plaintiff's attorney presented an amended and supplemental bill of particulars, without first seeking leave of court, containing new categories of liability and damages. Defendants objected. Plaintiff asked to take the matter off the trial calendar in order to make the within motion.

Plaintiff argues that the motion should be granted because leave to amend should be freely granted absent prejudice or surprise. Fahey v. Ontario County, 44 N.Y.2d 934, 935 (1978); Murray v. City of New York, 51 A.D.3d 502, 503 (1st Dep't 2008); see also C.P.L.R. § 3025 (b) (allowing amendments to be freely given upon such terms as the court dictates as just). Plaintiff urges that the court exercise its discretion since the claims are meritorious. Sclafani v. City of New York, 271 A.D.2d 430, 431 (2d Dep't 2000) citing Banfi Products Corp. v. Gentile, 236 A.D.2d 348, 349 (2d Dep't 1997). Plaintiff argues that any delay in seeking leave to amend is excusable, because the procedure performed was uncommon and the injuries involved were complex. Counsel argues that any delay was due to difficulty in retaining appropriate experts. Plaintiff asserts that there is no prejudice to defendants, since plaintiff will not object to any discovery that defendant reasonably requests.

Defendants object to the motion. They argue that they are prejudiced by this eve-of-trial motion and that plaintiff has not offered a reasonable excuse for the delay in seeking leave of court. Wolfer v. 184 Fifth Ave LLC, 27 A.D.3d 280, 281 (1st Dep't); Kassis v. Teachers Inc. and

Annuity Associates, 258 A.D.2d 271 (1st Dep't 1999). They also argue that some of the new claims are improper in any event, because they are not meritorious. Defendants argue that this case involves such an inordinate delay that plaintiff must show "extraordinary circumstances" to be granted the relief she seeks. Schrieber-Cross v. State of New York, 57 A.D.3d 881, 884 (2d Dep't 2008). They argue that the length of time that has transpired without plaintiff moving to amend her bill of particulars establishes prejudice.

The motion is granted. Delay alone is not sufficient to establish prejudice. See Barbour v. Hospital for Special Surgery, 169 A.D.2d 385, 386 (1st Dep't 1991). In medical malpractice cases, where medical charts memorialize many of the events at issue, defendants' recollection of events is aided by evidence that is ordinarily available and admitted into the record. Because defendants had notice of the new claims for approximately a year, the matter is no longer on the trial calendar, and defendants shall be given time to do additional discovery, defendants have not established prejudice. Moreover, there is no indication that the new claims are clearly without merit. Id. Plaintiff has offered as an explanation for her delay that she had difficulty in locating an appropriate expert.¹ Defendants have had adequate notice of the claims to adequately prepare for trial and are entitled to more discovery. Plaintiff will be allowed to prove her new claims at trial.

Leave to amend is granted and the annexed amended supplemental bill is deemed served. The parties shall appear for a conference in Part 6 on February 23, 2010, to schedule further

¹ Defendant has objected to the use of an affirmation by an out-of-state physician in violation of C.P.L.R. § 2106. But this has been corrected by the submission of an affidavit.

discovery and set a new trial date. This constitutes the decision and order of the court.

Dated: February 4, 2010



JOAN B. LOBIS, J.S.C.

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COUNTY CLERK'S OFFICE