

**Winiker v Veloso**

2010 NY Slip Op 31606(U)

June 22, 2010

Supreme Court, Nassau County

Docket Number: 2038/09

Judge: Ute W. Lally

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SCAN

SHORT FORM ORDER

mg, mg

SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU - PART 4

Present: HON. UTE WOLFF LALLY  
Justice

KATHY MANKES WINIKER and BARRY A.  
WINIKER,

Motion Sequence #2, #3  
Submitted May 27, 2010

Plaintiffs,

-against-

INDEX NO: 2038/09

MANUEL A. VELOSO, JR., M.D., ROBERT E.  
CANTER, M.D., NATIONAL EMERGENCY SERVICES,  
INC., MATTHEW DIAMENT, M.D., LONG ISLAND  
RADIOLOGY ASSOCIATES, P.C., GLENN SCHWARTZ,  
M.D., JOEL LOEWENSTEIN, M.D., LOEWENSTEIN  
ENDOSCOPY OFFICE P.C. and LONG BEACH  
MEDICAL CENTER,

Defendants.

The following papers were read on these motions for dismissal:

Notice of Motion and Affs.....	1-3
Notice of Cross-Motion and Affs.....	4-6
Affs in Opposition.....	7&8
Affs in Reply.....	9-12

Upon the foregoing papers, it is ordered that this motion by the defendants Matthew Diament, M.D., Long Island Radiology Associates, P.C., and Glenn Schwartz, M.D. and cross motion by the defendant Long Beach Medical Center for an order pursuant to CPLR 3042(c),(d) and 3126(3) dismissing the plaintiffs' complaint in its entirety or, in the alternative, an order pursuant to CPLR 3124, 3042(c),(d) compelling the plaintiffs to further

respond to their Demands for Bill of Particulars is disposed of as follows:

The plaintiffs in this action seek to recover money damages for medical malpractice based upon the defendants' alleged delay in diagnosing and treating the plaintiff Kathy Mankes Winiker's uterine cancer. The defendants, Dr. Diament, Long Island Radiology, Dr. Schwartz and Long Beach Island Medical Center, herein seek dismissal of the plaintiffs' complaint pursuant to CPLR 3042(c),(d), 3126(3). In the alternative, they seek to compel the plaintiffs' production of the allegedly outstanding discovery pursuant to CPLR 3042(c), 3124 and to preclude the plaintiffs from offering such evidence in the event that it is not produced within 30 days as well as an order conditionally dismissing the complaint on that ground.

The defendants, Drs. Diament and Schwartz and Long Island Radiology Associates, served their original Demand for a Bill of Particulars with their Answer on February 24, 2009. The plaintiffs served their Response to said Demand on or about August 5, 2009, which, these defendants maintain, mirrored their Response to co-defendants Dr. Veloso, Dr. Canter, National Emergency Services, Inc., Dr. Loewenstein, Loewenstein Endoscopy Office P.C., and Long Beach Memorial Medical Center's Demands. The defendant Long Beach Medical Center served its Demand for a Bill of Particulars along with its Answer on March 5, 2009. Again, the Response served by the plaintiffs on or about August 5, 2009 allegedly mirrored their other Responses.

Drs. Diament and Schwartz and Long Island Radiology Associates' Demand for a Bill of Particulars requested the plaintiffs to provide the exact dates of their alleged negligence, the location thereof and the acts of negligence themselves.

Long Beach Medical Center's Demand for a Bill of Particulars requested the plaintiffs to specify the dates and times of plaintiffs alleged negligence as well as their exact location. In their original Bill of Particulars, the plaintiffs identified the dates of Long Beach Medical Center's alleged negligence as February 7, 2007 to March 31, 2008 and the location to be Long Beach Medical Center and stated that the dates and locations of omissions could not be stated.

Upon entering into a Preliminary Conference order dated August 13, 2009, the parties stipulated that the plaintiffs would provide a "Supplementary Bill of Particulars as per additional directives." Those additional directives required the plaintiffs to, *inter alia*, supplement their negligence paragraph by identifying "agents, servants and employees;" "what 'signs and symptoms' " and "what other tr[eatment] healthcare provided." The plaintiff also agreed to and was directed to supplement "dates of further home confinement when/if such dates are known;" "further medical expenses if such amounts are known;" "claim for negligent hiring, if any . . ." and "to provide separate and distinct BPs specifically regarding negligence as to each defendant and [to] provide exact dates of alleged negligence as to each defendant . . ." In addition, the plaintiffs were directed to and agreed to identify the " 'rules, regulations, protocols, standards/or guidelines of Long Beach Medical Center' each defendant failed to follow; what 'signs and symptoms' each defendant failed to properly and timely assess, diagnose, monitor and treat; what 'diagnostic studies' each defendant failed to properly and timely order, perform, review, evaluate and analyze [and] to provide 'supplement BP specifying dates of omission.' "

The plaintiffs served a supplemental Bill of Particulars on the defendants Drs. Diament and Schwartz and Long Island Radiology Associates as well as Long Beach

Medical Center on August 14, 2009.

With respect to exact dates of alleged negligence by Drs. Diament and Schwartz and Long Island Radiology Associates, the plaintiffs modified their response from "February 7, 2007 through March 31, 2008" to "August 22, 2007 through March 31, 2008," despite the fact that these defendants only contact with the plaintiff Kathy Mankes Winiker occurred on August 22<sup>nd</sup> and 23<sup>rd</sup>, 2007 when CT scans were done. The plaintiffs did not identify the location of those defendants' alleged negligence, despite the fact that Long Beach Medical Center is where those CT scans were done. Similarly, in setting forth those defendants' specific acts of negligence, the plaintiffs identify the doctors as radiologists, but advance a litany of negligent acts which ordinarily do not pertain to radiologists, to wit: the failure to properly obtain informed consent; the failure to assess the risk factors and follow inadequate treatment plan; [and,] the failure to provide appropriate information regarding proposed operation, procedures and/or medications and/or alternatives. And, they again allege in general that these defendants failed to follow Long Beach Medical Center's rules, regulations, standards and/or guidelines.

As to Long Beach Medical Center, the plaintiffs also narrowed the dates of alleged negligence to August 22, 2007 through March 31, 2008 despite the fact that the plaintiff Kathy Mankes Winiker was only treated there on August 22<sup>nd</sup> and August 23<sup>rd</sup>, 2007. They further alleged that the location of the omissions could not be identified because "by definition, they did not occur at any particular place."

The plaintiffs have continued to fail to specifically identify the various defendants' specific acts of negligence, as well as their times and places.

“Although actions should be resolved on the merits whenever possible, the court may, among other things, issue an order ‘striking out pleadings or parts thereof’ (CPLR 3126[3]) when a party ‘refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed’ (CPLR 3126).” *Ingoglia v Barnes & Noble College Booksellers, Inc.*, 48 AD3d 636, 636-637, citing *Gillen v Utica First Ins. Co.*, 41 AD3d 647; *Cruzatti v St. Mary’s Hosp.*, 193 AD2d 579; see also, *Xiao Yang Chen v Fischer*, \_\_\_AD3d\_\_\_, 2010 WL 2106238 (2<sup>nd</sup> Dept. 2010); *DiDomenico v C & S Aeromatik Supplies*, 252 AD2d 41. “Furthermore, ‘when a party fails to comply with a court order and frustrates the disclosure scheme set forth in the CPLR, it is well within the Trial Judge’s discretion to dismiss the complaint.’” (*Xiao Yang Chen v Fischer, supra*, quoting *Kihl v Pfeffer*, 94 NY2d 118, 122). “Striking a pleading in its entirety may be warranted where the offending party’s conduct was wilful or contumacious” (*Chen v Fischer, supra*; citing *Geffner v North Shore Univ. Hosp.*, 57 AD3d 839, 841).

Via the Bill of Particulars, a party is entitled to amplification of the pleadings and particularized alleged acts of negligence, not “vague and overboard” or “sundry allegations.” (*Batson v LaGuardia Hosp.*, 194 AD2d 705; see also, *Ramondi v Paramount Fee, LP*, 30 AD3d 396; *Castellano v Norwegian Christian Home and Health Center, Inc.*, 24 AD3d 490. “To this end, a Bill of Particulars must specify the acts or omissions attributed to each defendant and the statutes, regulations or ordinances alleged to have been violated by each defendant. (*Neissel v Rensselaer Polytechnic Institute*, 30 AD3d 881, 882, citing *Graves v County of Albany*, 278 AD2d 578; *Felock ex rel. Felock v Albany Medical Center Hosp.*, 258 AD2d 772; *Hayes v Kearney*, 237 AD2d 769).

In supplementing their responses to the moving defendants' Demands for Bills of Particulars, the plaintiffs have failed to comply with this Court's Preliminary Conference Order. More specifically, they have failed to precisely identify the dates, locations and specific acts of negligence allegedly committed by the moving defendants, as well as the Hospital's rules and regulations allegedly violated. The plaintiffs are directed to do so within 30 days of service of a copy of this order upon its attorney, and if they fail to comply they shall be precluded from offering any evidence in support of the claims upon which particulars have been demanded.

Dated: June 22, 2010

  
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UTE WOLFF LALLY, J.S.C.

TO: Andrew Rosner & Associates  
Attorneys for Plaintiffs  
600 Old Country Road, Suite 520  
Garden City, NY 11530

Barlett, McDonough, Bastone & Monaghan, LLP  
Attorneys for Defendants Matthew Diament, MD, Long Island Radiology Associates  
and Glenn Schwartz, MD  
300 Old Country Road  
Mineola, NY 11501

Geisler & Gabriele, LLP  
Attorneys for Defendant Long Beach Medical Center  
100 Quentin Roosevelt Boulevard  
Garden City, NY 11530

**ENTERED**  
JUN 25 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE

winiker-veloso,#2,#3/cplr