

**Rivera v Smith**

2010 NY Slip Op 33812(U)

September 8, 2010

Sup Ct, Bronx County

Docket Number: 303030/10

Judge: Mark Friedlander

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**NEW YORK SUPREME COURT - COUNTY OF BRONX  
PART IA-25**

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YAZMIN RIVERA,

Plaintiff,

-against-

**MEMORANDUM DECISION/  
ORDER**

Index No. 303030/10

ALOYSIUS G. SMITH, VICTOR FONTANA, MIKHAIL  
JOUTOVSKY, and SAINT BARNABAS HOSPITAL,

Defendants.

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HON. MARK FRIEDLANDER:

Defendants Mikhail Joutovsky ("MJ") and St. Barnabas Hospital ("SBH") move, pursuant to CPLR section 3024(b), for an order correcting a pleading; more specifically, for an order striking out paragraphs 87, 88, and 89 of plaintiff's complaint, on the ground that such paragraphs contain scandalous or prejudicial matter unnecessarily inserted in a pleading. Their motion was served on June 4, 2010 and submitted on July 8, 2010. Thereafter, defendant Victor Fontana ("VF") moved for the identical relief, in a motion served on July 7, 2010 and submitted on August 5, 2010. Because the motions are nearly identical, they will be resolved jointly in the instant Decision.

Defendants in this medical malpractice action are a hospital and several physicians who are charged in the complaint with various departures from accepted medical practice. Defendants MJ and SBH were served with the complaint on May 11, 2010, and defendant VF was served on or about July 1, 2010. In addition to the usual assertions as to medical malpractice, the instant complaint asserts in paragraph 87 that defendants are jointly and severally liable because their "wrongful conduct was intentional." In paragraph 88, the complaint asserts that defendants are jointly and severally liable because defendants "acted with reckless disregard to the safety of others." Finally, in paragraph 89, the complaint asserts that defendants are jointly and severally liable because they "acted knowingly or intentionally and in concert, to cause the acts or failures which are a proximate cause of plaintiff's injuries."

Plaintiff seeks denial of the motion by MJ and SBH on the ground that it was served late. CPLR 3024 requires service of a motion to strike or correct a pleading within twenty days after service of such pleading. Because MJ and

SBH were served on May 11, their motion, served on June 4, was four days late. Plaintiff invokes the strict attitude of the Court of Appeals, as set forth in Brill v. NYC, 2 N.Y.3d 648. Defendants respond with citations confirming the court's discretion to enlarge the time for this motion, but the Court notes that most of the decisions cited by movants pre-date the decision in Brill.

Nevertheless, the Court, in the exercise of discretion, finds the motion of MJ and SBH to be timely. The twenty day window for this motion is an extremely short one, ending even before the time to answer has run out. Further, the delay of four days is truly de minimus, and even counsel for plaintiff cannot think to cite any possible prejudice sustained by plaintiff as a result of the brief delay. Also, because the rule in Brill was set forth only as to the timing of summary judgment motions, and because its effect is fairly drastic, this Court will not assume that the Court of Appeals meant the rule to be extended to all types of motions, unless the Court of Appeals specifically so states. Finally, the timeliness of summary judgment motions has a significant impact on court administration, because matters cannot be brought to trial, or conferenced with a view to settlement, while summary judgment motions are still pending. Here, by contrast, a minor lateness in an early corrective motion causes no such burden to the courts.

For all of the above reasons, the Court finds that it has the discretion to entertain this four day late motion, and that, given the nature of the motion, the minimal delay and the lack of prejudice to the plaintiff, it is appropriate to exercise such discretion and accept the motion. It is also to be noted that the issue of untimeliness does not affect VF's motion, because he was served with the complaint on or about July 1 and served his motion on July 7. Therefore, the Court would have to deal with these issues in any event, in deciding VF's motion on the merits, and it would seem inappropriately inconsistent to arrive at a different result with regard to the complaint against VF, than would pertain to the complaint against MJ and SBH.

Movants all note correctly that, in deciding whether to strike portions of a pleading pursuant to CPLR 3024(b), the standard is whether such portion is relevant to deciding the issues raised in the complaint. In other words, what becomes "scandalous" or "prejudicial" in the context of a document which is expected to be critical of its target, is whether such material has a reasonable purpose. If irrelevant, such matter becomes properly subject to the motion.

Movants point out that the complaint sounds in medical malpractice, a form of negligence. They argue that

assertions of intentional acts, reckless acts, or knowing acts are not part of a negligence claim and therefore irrelevant. They also point out that intentional or knowing acts by the defendants would constitute an intentional tort, such as an assault, which would carry a one-year statute of limitation. Such limitation period had already expired by the time this action was filed.

In response, plaintiff counters that he is not charging defendants with an intentional tort. He also points out the purpose of his use of the contested language. This purpose, plainly set forth in the subject paragraphs, is to enable plaintiff to pursue each of the defendants individually for the full amount of any jury award, regardless of their proportion of fault as adjudged by the jury. In the event that one of the defendants, who may be found to have less than 50% of the fault, has sufficient insurance coverage to pay the award, while the "more negligent actors" do not, a finding by the jury of any of the acts claimed in the three paragraphs would subject the "less negligent actor" to being pursued for the full recovery, under CPLR 1602(5), 1602(7) and 1602(11).

Plaintiff's contention that he is not making a claim of intentional tort is clearly absurd. The word intentional has a specific meaning, and its import in the complaint cannot be obfuscated as plaintiff seems to desire. In addition, the Court notes that a showing of an intentional act is not only irrelevant to a showing of a negligent act, as movants contend, but is antithetical to it, negligence being, by its nature, something other than an intended act. Plaintiff responds to the motions by effectively explaining his motivation for including the contested language in the complaint, but plaintiff's opposition fails entirely to address movants' claims as to the plain import of "intentional," the effect of such wording on the statute of limitations, and the reasonableness of including such seemingly irrelevant concepts in a medical malpractice action. Plaintiff makes no affirmative offer of proof as to any possible basis for expecting that acts of this type may be proven, in the context of this medical malpractice claim.

The Court cannot condone the use of obfuscatory argument to mislead a defendant into permitting an otherwise time-barred claim. If a claim as to intentional tort is already untimely (as it is here), plaintiff cannot lull a defendant into accepting it by claiming that he is not asserting an intentional tort, while still inserting wording into the pleading that does just that.

Defendants, in their reply, do not respond to plaintiff's argument concerning their reason for inserting the

contested language. Defendants set forth no arguments regarding the propriety or impropriety of plaintiff's seeking a complete recovery against each individual defendant by use of the exceptions contained in the above subsections of CPLR 1602. If defendants concede the propriety of plaintiff's argument on this subject, it could open the door to a claim that the contested language is "relevant" to plaintiff's claims.

In the final analysis, it seems to the Court that the proper course is to split the difference, not as a matter of compromise, but because logic would so dictate. The divergence between negligent acts and intentional or knowing acts is so great, and the showing of any basis for expected proof of same so lacking, that paragraphs 87 and 89 of the complaint, asserting such acts, must be deleted. The prospect that physicians knowingly or intentionally harmed their patients goes so far beyond the proof of negligence as adduced in nearly every medical malpractice action that, without some special showing, the Court does find it to meet the criterion for scandalous material, as well as irrelevant material.

By contrast, paragraph 88, alleging reckless disregard, may remain. Reckless disregard is no more than a higher degree of negligent act, and adducing proof as its existence does not constitute a contradiction of the facts normally adduced to show departures from accepted practice, but calls more for a heightening, or extreme version, of such showing. Further, and significantly, the preservation of paragraph 88 of the complaint would permit plaintiff to preserve his rights under CPLR 1602, in the manner he desires. Plaintiff need only prove one of the categories set forth in the three paragraphs in order to attain his stated goal, and paragraph 88 (which calls for proof arguably more attainable than that required in the other paragraphs) suffices for the purpose.

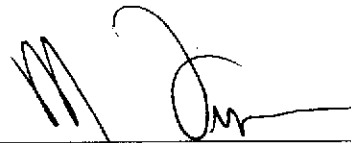
The Court notes in passing that many medical malpractice policies have exclusions for intentional acts. If this were to become an issue, a plaintiff proving such acts might have lesser, rather than greater, chances of recovering a whole judgment from a defendant, because the insurance policy might be withheld and the defendant personally unable to satisfy the judgment. Under these circumstances, plaintiff's inclusion of the contested language as to intent may be conceived for a purpose other than that stated by him, i.e., not to satisfy CPLR 1602, but instead to elicit a feeling of dread in defendant that insurance may not cover any judgment and that early capitulation is required. If plaintiff's unadmitted purpose is to "terrorize" defendants in this manner, it is an improper use of the contested terminology, for which plaintiff has produced no evidentiary justification.

Finally, the effect of this ruling is limited because, whatever the proof shows at trial, plaintiff can later move to conform the pleading to the proof. Nothing herein is intended to preclude plaintiff from doing so, should plaintiff improbably adduce proof of the types of acts now alleged in paragraphs 87 and 89 of the complaint.

By reason of the foregoing, the motion of defendants MJ and SBH, and the motion of defendant VF, are both granted solely to the extent of striking paragraphs 87 and 89 of plaintiff's complaint, and, in all other respects, the motions are denied.

This constitutes the Decision and Order of the Court.

Dated: 9/8/10



**MARK FRIEDLANDER, J.S.C.**