

**Simmons v Fok**

2010 NY Slip Op 34008(U)

May 12, 2010

Supreme Court, Kings County

Docket Number: 29374/04

Judge: Gerard H. Rosenberg

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part MMTRP of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York on the 12<sup>th</sup> day of May, 2010.

PRESENT:

HON. GERARD H. ROSENBERG  
Justice.

**COPY**

-----X  
Brian Simmons, an Infant under the age of fourteen (14) years, by his Mother and Natural Guardian, Elsa Peralta,

**DECISION & ORDER**

Index No. 29374/04

Motion Seq. Nos. 005, 006, 007

*Plaintiff(s).*

- against -

Eric Chi-Cheung Fok, M.D., New Life Ob/Gyn Group, L.L.P. and Lutheran Medical Center,

*Defendant(s).*

-----X  
The following papers numbered 1 to 6 read on this motion:

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_  
Opposing Affidavits (Affirmations) \_\_\_\_\_  
Reply Affidavits (Affirmations) \_\_\_\_\_

Papers Numbered

1 - 2, 3 - 5, 7 - 8  
6  
\_\_\_\_\_

Upon the foregoing papers, and upon oral argument, defendant Lutheran Medical Center moves pursuant to CPLR 3042(b) for an order striking plaintiff's purported Supplemental Bill of Particulars on the grounds that it is truly an Amended Bill of Particulars served without leave of the court which puts forth new theories of liability while this matter is on the trial calendar (Motion Sequence No. 005). Plaintiff cross-moves (1) pursuant to

CPLR 3025(b) for an order granting leave to serve a supplemental and/or amended bill of particulars in the form attached to the cross-motion; and (2) pursuant to CPLR 3108 for an order directing the Clerk of the Court to issue an open commission addressed to the Court of Common Pleas of the State of Pennsylvania, County of Montgomery, to order the deposition of Lisa Gall-Kochanik, M.D. (Motion Sequence No. 006). Defendant Eric Fok, M.D. (Dr. Fok) moves for an order marking the case off the trial calendar or staying trial, due to plaintiff's failure to provide updated authorizations and failure to submit to a physical examination by Dr. Ballaban-Gil (Motion Sequence No. 007).

### *Background*

This is a medical malpractice action dealing with care and treatment rendered by the defendants to plaintiff Elsa Peralta during her pregnancy in 2000 and during her admission to Lutheran Medical Center on September 27, 2000 for labor and delivery after experiencing leakage of amniotic fluid. Plaintiff was treated at the hospital by defendant Dr. Fok, along with a number of Lutheran Medical Center physicians. Plaintiff alleges, inter alia, that the defendants failed to perform a cesarean section at or about 2:00 p.m. on September 28, 2000 in the face of fetal heart strips which indicated fetal stress, instead persisting in the plan for a vaginal delivery which took place by 8:05 p.m. Plaintiff alleges that as a result of this delay the infant plaintiff suffered injuries including, inter alia, respiratory distress syndrome; metabolic and respiratory acidosis; bradycardia; permanent static encephalopathy; seizure disorder; behavioral deficits; white matter leukodystrophy; demyelinating brain injury; severe cognitive and intellectual impairment; developmental delay; and attention deficit.

hyperactivity disorder.

#### *The Original Bill of Particulars*

The plaintiff's original verified bill of particulars as to Lutheran Medical Center is dated December 30, 2004, wherein plaintiff alleged in part that Lutheran departed from accepted standards of medical practice by failing to adequately train, supervise and manage its employees, including the medical and nursing staff; in failing to have the plaintiff attended by a competent obstetrician, maternal/fetal medicine specialist, neonatologist, pediatric neurologist, and other medical specialists; in failing to properly treat infant plaintiff's perinatal and prenatal distress; in failing to heed objective signs including tachycardia and variable decelerations of fetal heart monitoring; in failing to timely perform a cesarean section due to fetal distress; in failing to timely and properly treat nuchal cord; and in failing to timely and properly treat infant plaintiff's perinatal respiratory distress (Verified Bill of Particulars, Response 2). Plaintiff alleged that the alleged malpractice began in the prenatal period on or about September 25, 2000, and continuing during the labor on or about September 27-28, 2000, and during the birth and immediate post-natal period of infant plaintiff until his discharge from the hospital on September 30, 2000.

#### *Plaintiff's Supplemental Bill of Particulars*

The plaintiff's supplemental verified bill of particulars as to Lutheran Medical Center is dated March 26, 2009, some 8 months after the filing of the note of issue. In it plaintiff expands on allegations made in the original bill as to the prenatal period and the perinatal period involving labor and delivery. In addition, plaintiff adds allegations of pediatric

departures for the first time, including the failure to notify the pediatric department in a timely manner to be present at delivery, and the failure to perform a multitude of tests, assessments, procedures and treatment upon the newborn infant, which plaintiff alleges should have been performed by the pediatric department. It is these post-birth allegations regarding the pediatric department which is the focus of the motion by defendant Lutheran Medical Center.

#### *Discussion*

Portions of these motions have been rendered moot by developments in this case. For example, this matter was stricken from the trial calendar after these motions were filed so that additional discovery could take place, thereby rendering that portion of Dr. Fok's motion which was to strike the case from the trial calendar moot. In addition, plaintiff has commenced a separate action against Lisa Gall-Kochanik, M.D. As a consequence, Dr. Gall-Kochanik will presumably be subject to deposition as a party, thereby rendering moot that portion of plaintiff's cross-motion which sought an open commission to conduct her deposition in Pennsylvania.

The balance of the motions and cross-motion are decided as follows.

The Appellate Division, Second Department has recognized that "[l]eave to amend a bill of particulars is ordinarily freely given in the absence of prejudice or surprise resulting directly from the delay (*Andre-Long v Verizon Corp.*, 31 AD3d 353, 354-355 [2006]) [internal citations omitted]; see also *Maloney Carpentry, Inc. v Budnik*, 37 AD3d 558, 558 [2007] ["l]eave to amend or supplement pleadings should be freely granted unless the amendment

sought is palpably improper or insufficient as a matter of law, or unless prejudice and surprise directly result from the delay in seeking the amendment”} [internal citations omitted]; see also, *Lucido v Mancuso*, 49 AD3d 220 [2008]). Considering the delay’s extent and reasonableness of the excuse for the delay also affect the motion which “is committed to the court’s discretion” (*Edenwald Contracting Co., Inc. v City of New York*, 60 NY2d 957, 959 [1983]). However, where the application for leave to amend is made long after the action has been certified for trial, judicial discretion in allowing such amendments should be discrete, circumspect, prudent and cautious, and when made on the eve of trial judicial discretion should be exercised sparingly (*Morris v Queens Long Island Med. Group*, 49 AD3d 827 [2008]).

This matter is not currently on the trial calendar, and additional discovery is being and may continue to be conducted. In addition, the existing bill of particulars is worded in such a way as to put the defendants on notice that injury from negligently managed labor and delivery, as well as perinatal care,<sup>1</sup> is alleged, and defendant, like the opposing party in the *Maloney Carpentry* case, “cannot claim prejudice or surprise since the proposed amendments arise out of the same facts as those underlying the action brought by the plaintiff” (37 AD3d 558, 558-559 [internal citations omitted]; see also *Beverage Marketing USA, Inc. v South Beach Beverage Co., Inc.*, 20 AD3d 439, 440 [2005] [“since the proposed amendment merely seeks to add a new theory of recovery, without alleging new or different transactions, the

<sup>1</sup> Plaintiff contends, and Lutheran Medical Center does not contest, that the perinatal period is defined as that which covers care and treatment up to the infant’s 28<sup>th</sup> day of life (Affirmation of Michael J. Noonan, Esq. in Support of Cross-Motion and in Opposition to Motion, ¶12).

