

Hothan v Mercy Med. Ctr.

2011 NY Slip Op 32295(U)

August 17, 2011

Supreme Court, Nassau County

Docket Number: 14345/06

Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

COLLEEN ANN HOTHAN, as Temporary Administratrix
of the Estate of PHILOMINA KELLY,

Plaintiff,

- against -

MERCY MEDICAL CENTER and NORTH SHORE
UNIVERSITY HOSPITAL,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 14345/06
Motion Seq. Nos.: 08, 09, 10
Motion Dates: 06/21/11
06/21/11
06/21/11

The following papers have been read on these motions:

	Papers Numbered
Notice of Motion (Seq. No. 08), Affirmation and Exhibits	1
Notice of Motion (Seq. No. 09), Affirmation and Exhibits	2
Notice of Cross-Motion (Seq. No. 10), Affirmation and Exhibits	3
Reply Affirmation (Seq. No. 08) and Affirmation in Opposition to Cross-Motion and Exhibit	4
Reply Affirmation (Seq. No. 09)	5
Reply Affirmation (Seq. No. 10)	6

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Plaintiff moves (Seq. No. 08), pursuant to CPLR § 3025(b), for an order granting her leave to amend the Verified Complaint, and moves, pursuant to CPLR § 3124, for an order directing that defendant Mercy Medical Center (“Mercy”) accept the supplemental Bill of Particulars dated January 5, 2011. Plaintiff additionally moves (Seq. No. 09), pursuant to CPLR § 3025(b), for an order granting her leave to supplement the Verified Bill of Particulars to

respond to certain directives contained in the Preliminary Conference Order of September 18, 2007. Defendant Mercy opposes plaintiff's motions and cross-moves (Seq. No. 10), pursuant to 22 NYCRR 130-1.1, for an order determining that the conduct of plaintiff in continually making the identical motion in the face of repeated denial of said request for relief is frivolous and warrants the awarding of costs and attorneys' fees to the moving defendant and the imposition of sanctions; moves, pursuant to CPLR § 8303(a) for an order awarding costs and attorneys' fees to the moving defendant in the sum of \$10,000.00 based upon plaintiff's continual pattern of frivolous conduct; and, moves for an order dismissing plaintiff's Verified Complaint based upon the continual harassing and frivolous engagement in motion practice which is completely without merit in law. Plaintiff opposes defendant Mercy's cross-motion.

The plaintiff in this action seeks to recover damages for the pain and suffering of her mother, decedent Philomina Kelly, while Mrs. Kelly was a patient at the two defendant hospitals. The Court notes that the action against defendant North Shore University Hospital ("North Shore") was settled and discontinued on June 1, 2011, so only the case against defendant Mercy remains. Decedent Kelly was a patient at defendant Mercy from July 16, 2004 through the time of her death on September 10, 2004. The instant action was commenced by plaintiff with the filing of a Summons and Verified Complaint on September 7, 2006. A Note of Issue was filed by plaintiff on October 28, 2008. Said Note of Issue was thereafter vacated and a second Note of Issue filed. The case was re-certified on July 22, 2009.

On or about January 2, 2011, plaintiff moved, by Order to Show Cause, for an order that defendants be compelled to accept plaintiff's supplemental expert responses. In a conference before Nassau County Supreme Court Justice Thomas Feinman on January 6, 2011, plaintiff

agreed to withdraw said Order to Show Cause. Jury selection in the instant action was commenced on or about January 17, 2011 and completed on February 4, 2011. The trial in the instant matter was to commence on February 7, 2011, before Nassau County Supreme Court Justice Thomas Feinman, but, on that day, both defendants filed motions *in limine* requesting that the Court not hear testimony regarding pecuniary loss to decedent Kelly's estate on the ground that it had not been properly pled. The trial was adjourned to February 10, 2011. Plaintiff was given until February 8, 2011 to submit opposition to the motions *in limine*, which she did. On February 9, 2011, plaintiff faxed to the Court a further opposition to the motions *in limine* and a cross-motion requesting that plaintiff be permitted to amend the Verified Complaint. On February 10, 2011, Justice Feinman denied plaintiff's cross-motion as late and granted defendants' motions with regard to the claim for pecuniary loss. The trial was thereafter commenced, but a mistrial was declared on February 17, 2011.

Plaintiff now argues that Justice Feinman's rulings on the motions *in limine* were trial rulings and, as such, are no longer binding at a future trial. Plaintiff further contends that, in view of the prior motions *in limine*, it is believed that the issue of sufficiency of the original Verified Complaint needs to be clarified and therefore she requests that she be permitted to amend the Verified Complaint to state a separate cause of action for wrongful death. Plaintiff adds that, since discovery has been full and complete with respect to claims for conscious pain and suffering and with regard to wrongful death, there would be no reason to reject the proposed amendment. Plaintiff argues that the original Verified Complaint had only one cause of action which encompassed both a claim for recovery for the conscious pain and suffering of decedent Kelly and one for wrongful death. The Proposed Amended Verified Complaint separates the two

claims into two separate causes of action. Plaintiff contends that the language in the original Verified Complaint and the proposed Amended Verified Complaint are both substantially similar. Plaintiff further contends that no prejudice or surprise accrues to defendant Mercy as the result of permitting the instant amendment.

With respect to plaintiff's request that the Court order defendant to accept the supplemental Bill of Particulars dated January 5, 2011, plaintiff argues that even though, on January 6, 2011, plaintiff withdrew a motion requesting said relief, defendant Mercy has now had over five months in which to review the proposed changes to the Bill of Particulars prior to trial and any prejudice which would have been attendant at the time would appear no longer to be present. Plaintiff adds that there is no reason for defendant Mercy not to accept the proposed changes as there is no prejudice nor surprise.

Plaintiff additionally moves (Seq. No. 09) for an order permitting plaintiff to supplement her Verified Bill of Particulars in order to provide defendant Mercy with the names of the agents, servants and employees of defendant Mercy who were negligent in their care and treatment of decedent Kelly, as plaintiff had been directed to do so in the Preliminary Conference Order dated September 18, 2007.

In the instant action, plaintiff alleges that defendant Mercy is liable for the actions and inactions of its staff. Plaintiff has not yet provided the identities of those persons as such information was not available to her, but submits that the actual identities can be determined by defendant Mercy based upon the claims set forth in plaintiff's various Bills of Particulars and expert disclosures. Plaintiff contends that the Preliminary Conference Order requires that plaintiff provide the identity of the agents, servants, employees negligent to the extent of plaintiff's knowledge. Plaintiff submits that she failed to provide said information because said

information was never within her knowledge.

Plaintiff now argues that permitting her to supplement her Bill of Particulars to respond to certain directives contained in the September 18, 2007 Preliminary Conference Order does not cause defendant Mercy any surprise or prejudice because defendant Mercy is in a better position than plaintiff to identify the individuals who worked on the various states and various shifts as alleged in the Bill of Particulars.

In opposition to plaintiff's motions, defendant Mercy submits that, in said motions, plaintiff recites some, but not all of the procedural history of this case. Defendant Mercy states that, on February 17, 2011, plaintiff made an application for a mistrial after counsel for plaintiff had agreed (and plaintiff herself had also agreed) to settle the case against both defendant Mercy and defendant North Shore. Defendant Mercy contends that "counsel for the plaintiff engineered a mistrial on February 17, 2011 after having initially agreed to settle the case." On that same February 17, 2011 date, after all counsel left Justice Feinman's courtroom, the instant matter was conferenced with Nassau County Supreme Court Justice Bruce R. Cozzens at which time a trial was re-scheduled for March 10, 2011. A conference was held on March 10, 2011, at which time the trial was adjourned to June 1, 2011. On May 9, 2011, counsel for plaintiff submitted an Order to Show Cause which resulted in counsel for the parties appearing before Nassau County Supreme Court Justice Arthur M. Diamond on May 10, 2011. Defendant Mercy states that the Order to Show Cause that was before Justice Diamond on the May 11, 2011 date consisted of an application for leave to amend plaintiff's Verified Complaint to assert a wrongful death cause of action, which defendant Mercy argues was the same application Justice Feinman had denied on February 10, 2011. On May 10, 2011, defendants argued before Justice Diamond that the application plaintiff's counsel sought leave to make had been previously litigated before Justice

Feinman, had previously been denied and that the doctrine of “law of the case”/ “*res judicata*” precluded the proposed application. After hearing all parties, Justice Diamond declined to sign plaintiff’s submitted Order to Show Cause finding that it was nothing more than the same application previously made before Justice Feinman, whose decision was *res judicata* or law of the case. *See* Defendant Mercy’s Affirmation in Opposition Exhibit C. Defendant Mercy adds that, on May 17, 2011, plaintiff, once again, presented an Order to Show Cause to Nassau County Supreme Court. All parties were directed to appear before Justice Feinman on May 18, 2011 with respect to said Order to Show Cause, which defendant Mercy classifies as plaintiff’s third attempt at the same motion. Due to Justice Feinman’s unavailability on May 18, 2011, the parties were all directed to appear on May 19, 2011. It was on May 19, 2011, that Justice Feinman refused to sign plaintiff’s Order to Show Cause. On June 1, 2011, plaintiff and defendant North Shore placed their Stipulation of Settlement on the record and, thereafter, plaintiff and defendant Mercy, while conferencing with Justice Cozzens, agreed that jury selection would be adjourned to June 21, 2011. Defendant Mercy submits that, at no time during the conference with Justice Cozzens, did plaintiff ever express any intent to make yet another motion seeking to amend the Verified Complaint and add a cause of action.

Defendant Mercy argues that the doctrine of law of the case stands for the concept that, once a decision on a particular issue in a case has been rendered, that issue cannot be re-litigated by the parties in any other court of coordinate jurisdiction. Defendant Mercy contends that what plaintiff seeks to do (for the fourth time) in the motion (Seq. No. 08) is have this Court, a court of coordinate jurisdiction re-visit and undo the decision Justice Feinman made at trial on February 10, 2011, when he denied plaintiff’s application to amend her Verified Complaint and add a cause of action for wrongful death.

With respect to plaintiff's application to compel defendant Mercy to accept her Supplemental Verified Bill of Particulars dated January 5, 2011, defendant Mercy submits that "[p]laintiff's Verified Supplemental Bill of Particulars concerns the nature of plaintiff's proof at trial....service of the Supplemental Bill of Particulars on the eve of trial in January, 2011 was late. To the extent that any issues arise concerning the content of plaintiff's Supplemental Bill of Particulars at any subsequent trial of this matter, those decisions are most appropriated left to the trial Court. There is nothing in the CPLR or the Court rules which allows this Court to issue an order which 'compels' the defendant Mercy to accept the Supplemental Verified Bill of Particulars and the content thereof. Such matters are more appropriately left to the trial Court."

With respect to plaintiff's motion (Seq. No. 09) to be permitted to supplement her Bill of Particulars to respond to certain directives in the September 18, 2007 Preliminary Conference Order, defendant Mercy argues that plaintiff's application is late and that the prejudice to the preparation of defendant Mercy's defense in allowing the proposed Supplemental Verified Bill of Particulars is manifest. Defendant Mercy states that, "[p]laintiff had an obligation to identify potential tort feasons it was going to claim Mercy was vicariously responsible for pursuant to the terms of the preliminary conference order. Plaintiff's lawyer failed to do so. It is too late to do so now....The preliminary conference order constitutes a stipulation to which plaintiff's lawyer was bound. He failed to comply. It is too late to do so now."

Defendant Mercy cross-moves (Seq. No. 10) for an award of costs and attorneys' fees and the imposition of sanctions based upon its argument that plaintiff's motion is clearly frivolous. Defendant Mercy contends that plaintiff's three attempts to undue Justice Feinman's decision constitute harassment of defendant Mercy and serve no purpose other than to prolong the case of delay resolution of the case. Defendant Mercy states that it "has put to the cost of

numerous hours and time and expense continually responding to plaintiff's frivolous attempt to have a motion previously denied again heard by a Court of coordinate jurisdiction. There have been three separate Court appearances and now the necessity to respond in writing to plaintiff's motion made via notice. The conduct of plaintiff and her lawyer have put the defendant Mercy to great cost and expense meriting the awarding of costs to the defendant Mercy from plaintiff and her lawyer in the sum of \$10,000.00."

Defendant Mercy adds that "[p]laintiff's arguments, made in the two prior Orders to Show Cause which were submitted and rejected by Judges of coordinate jurisdiction, to the effect that Justice Feinman's decision denying plaintiff's motion to amend and add a wrongful death cause of action were a function of the defendant's Motions In Limine at the time of trial are just plain wrong. It cannot be said that Justice Feinman's decision denying plaintiff's application to amend his (*sic*) complaint was an evidentiary decision limited to the four squares of the prior trial. Rather, plaintiff's separate cross motion submitted to the Court on February 10, 2011 was for actual substantive relief which motion was denied. Justice Feinman's decision denying plaintiff's application on February 10, 2011 was not an evidentiary ruling. It was a substantive ruling concerning the nature and extend of plaintiff's causes of action."

In opposition to defendant Mercy's cross-motion, plaintiff's counsel submits that he "has at all times acted responsibly and diligently in an effort to have the wrongful death claim restored to the case." He adds that, "although the motion filed June 6th sought permission to amend as did the February 9th cross-motion before Judge Feinman, the fact that is the procedural context of both motions was entirely different. The February 9th motion was made with a jury waiting, because Mercy has only first moved via motion in limine two days earlier. The June 6th motion was made weeks in advance of jury selection. Moreover, the decision of Justice Feinman

granting Mercy's motion in limine was never reduced to writing. Further it is submitted that the June 6th motion was entirely proper as neither order to show cause had been signed so that if plaintiff was to receive relief, or even an (*sic*) appealable papers, plaintiff needed to move again for permission to amend. With regard to Mercy's claim that it has been put to undue expense in defending plaintiff's several motions, the fact is Mercy failed to serve upon plaintiff any paper directed to the May 6th or May 16th orders to show cause. True, counsel for Mercy was in court one afternoon before Judge Diamond and one morning before Judge Feinman. But that is it."

The Court will first address plaintiff's motion (Seq. No. 08) to amend her Verified Complaint. Based upon the evidence and argument before it, this Court finds that the applications made by plaintiff in said motion had previously been made and ruled upon by Nassau County Supreme Court Justice Thomas Feinman on February 10, 2011. *See* Defendant's Affirmation in Opposition Exhibit A. The ruling made by Justice Feinman with respect to plaintiff's application to amend her Verified Complaint was based upon the cross-motion brought by plaintiff's counsel. Justice Feinman's ruling on said issue was not part of any type of ruling on defendants' motions *in limine*. Justice Feinman's decision denying plaintiff's cross-motion to amend was not an evidentiary decision limited to the four squares of the prior trial, but rather a substantive ruling concerning the nature and extent of plaintiff's causes of action. Plaintiff's cross-motion, submitted to the Court on February 10, 2011, was for substantive relief and said relief was denied. When presented with the Order to Show Cause by plaintiff seeking the same relief sought in her prior cross-motion before Justice Feinman (specifically to amend her Verified Complaint) Justice Diamond found that Justice Feinman's February 10, 2011 decision constituted *res judicata* or law of the case. *See* Defendant Mercy's Affirmation in Opposition Exhibit C. This Court finds the same. This Court is a court of coordinate jurisdiction

with Justice Feinman, as well as Justice Diamond, not an appellate court, and, as such, cannot revisit the decision made by said Justices. This Court is constrained by the doctrine of the law of the case/ *res judicata*. The Court has read the decision in *Wahl v. American Honda Motor Company*, 181 Misc.2d 396, 693 N.Y.S.2d 875 (Supreme Ct. Suffolk County 1999), the case relied upon by plaintiff in support of her argument “that Judge Feinman’s ruling of the motions in limine were trial rulings and as such are no longer binding at a future trial.” Nowhere in said decision does this Court find *any* support for plaintiff’s argument and plaintiff’s reliance on said decision is incorrect (emphasis added). The *Wahl* decision deals with how the Court’s role under the *Daubert v. Merrell Dow Pharmaceuticals Inc.* standards for admission of expert scientific testimony is limited to that of a gatekeeper and the Court must screen expert testimony for trustworthiness and reliability to determine whether such evidence may be presented to, and considered by, the jury. Nowhere in said decision is the issue of motions *in limine* even addressed. Therefore the *Wahl* decision has absolutely no bearing on the instant motion before this Court.

Consequently, as the doctrine of *res judicata* precludes this Court from re-examining the issue of plaintiff’s request to amend her Verified Complaint, plaintiff’s application for this relief in her instant motion is hereby **DENIED**.

Additionally, plaintiff’s application that the Court direct defendant Mercy to accept plaintiff’s January 5, 2011 Supplemental Verified Bill of Particulars is also hereby **DENIED**. There is nothing in the CPLR or the Court rules which allows this Court to issue an order which compels defendant Mercy to accept said Supplemental Verified Bill of Particulars and the content thereof. CPLR § 3124, which is relied upon by plaintiff in requesting this relief, is inapplicable as it deals with failure to disclose; motion to compel. To the extent that any issues

arise concerning the content of plaintiff's Supplemental Verified Bill of Particulars at any subsequent trial of this matter, decisions on said issues are most appropriately left to the trial court.

Accordingly, plaintiff's motion (Seq. No. 08) is hereby **DENIED** in its entirety.

The Court will now address plaintiff's motion (Seq. No. 09) to be permitted to supplement her Bill of Particulars to respond to certain directives in the September 18, 2007 Preliminary Conference Order. Pursuant to CPLR § 3025(b), "[a] party may amend his pleadings, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties." Plaintiff's proposed Supplemental Verified Bill of Particulars fails to set forth additional or subsequent transactions or occurrences. Instead, plaintiff's proposed Supplemental Bill of Particulars seeks to provide defendant Mercy with the names of the agents, servants and employees of defendant Mercy who were allegedly negligent in their care of decedent Kelly. Said witnesses were individuals whom plaintiff's counsel was to identify within forty-five days after the conclusion of all depositions and prior to certifying the instant matter ready for trial by filing the Note of Issue. The Court finds that defendant Mercy would be prejudiced if plaintiff was permitted to now supplement her Verified Bill of Particulars with information that should have been provided to it almost two years ago.

Therefore, plaintiff's motion (Seq. No. 09), pursuant to CPLR § 3025(b), for an order granting her leave to supplement the Verified Bill of Particulars to respond to certain directives contained in the Preliminary Conference Order of September 18, 2007, is also hereby **DENIED**.

With respect to defendant Mercy's cross-motion (Seq. No. 10) for an award of costs and attorneys' fees, as well as the imposition of sanctions, the Court does not find that the actions of plaintiff's counsel by bringing the motion to amend the Verified Complaint constituted frivolous

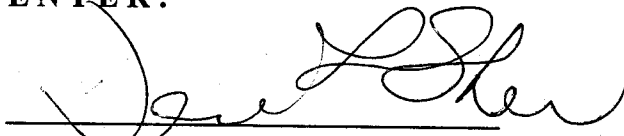
conduct. While unsuccessful in his legal arguments, plaintiff's counsel was diligently trying to represent his client, not to harass defendant Mercy. Plaintiff's counsel relied upon case law in the motion to amend the Verified Complaint which he believed was applicable to his position and did so in an attempt best argue his client's position. The Court does not find that plaintiff's counsel's intention in bringing the motion to Amend the Verified Complaint was to harass or prolong litigation or resolution of litigation and therefore does not warrant the imposition of sanctions and the granting of costs and attorneys fees to defendant Mercy.

Consequently, defendant Mercy's cross-motion (Seq. No. 10) is hereby **DENIED** in its entirety.

All parties shall appear for Trial in Nassau County Supreme Court, Central Jury Part, at 100 Supreme Court Drive, Mineola, New York, on September 14, 2011, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
August 17, 2011

ENTERED
AUG 22 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE