

**Orloff v Hahn**

2012 NY Slip Op 33238(U)

August 24, 2012

Sup Ct, NY County

Docket Number: 800164/10

Judge: Joan B. Lobis

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

JUAN B. LOBIS

PRESENT: \_\_\_\_\_  
Justice

PART 6

Index Number : 800164/2010  
ORLOFF, TATIANA  
vs.  
HAHN, YOUNG S.  
SEQUENCE NUMBER : 001  
PRECLUDE

INDEX NO. \_\_\_\_\_  
MOTION DATE 7-10-12  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to 22, were read on this motion to for Strike affirmative defense.

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s) 1-14  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s) 15-16; 17-18  
Replying Affidavits \_\_\_\_\_ | No(s) 19-22

Upon the foregoing papers, it is ordered that this motion is

**FILED**  
AUG 29 2012  
COUNTY CLERK'S OFFICE  
NEW YORK

THIS MOTION IS DECIDED IN ACCORDANCE  
WITH THE ACCOMPANYING MEMORANDUM DECISION  
*and Order*

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

Dated: 8/24/12

JBL  
JUAN B. LOBIS J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

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

-----X  
TATIANA ORLOFF,

Plaintiff,

Index No. 800164/10

-against-

Decision and Order

YOUNG S. HAHN, M.D., STEPHEN J. HAUG, M.D.,  
QUEENS-LONG ISLAND MEDICAL GROUP, P.C.,  
ELIZABETH A. MAHER, M.D., SUNIL RAO, M.D.,  
JONATHAN FEISTMAN, M.D., JONATHAN  
FEISTMAN, M.D., P.C., JANE DOE, a nurse or other  
employee/agent of The New York Eye and Ear Infirmary  
who took care of patients waiting to go for surgery and  
gave plaintiff apple juice, JOHN OR MARY DOE, M.D.,  
who gave the order to hydrate the plaintiff with apple juice,  
and THE NEW YORK EYE AND EAR INFIRMARY,

Defendants.

**FILED**  
AUG 29 2012  
COUNTY CLERK'S OFFICE  
NEW YORK

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

Plaintiff Tatiana Orloff moves, pursuant to C.P.L.R. Rules 3042(b), 3211(b), and § 3126, for an order striking those portions of defendants' answers in which they assert the affirmative defense of culpable conduct on the part of plaintiff, and precluding defendants from offering evidence with regard to culpable conduct at trial. Since making the motion, plaintiff has discontinued the action against defendants Sunil Rao, M.D., Jonathan Feistman, M.D., Jonathan Feistman, M.D., P.C., and the New York Eye and Ear Infirmary, rendering her motion moot as to these defendants (see stipulation of discontinuance dated August 7, 2012), and defendants Stephen J. Haug, M.D., and Queens-Long Island Medical Group, P.C., have withdrawn their affirmative defenses. Young S. Hahn, M.D., is the only defendant still maintaining the affirmative defense of culpable conduct and opposes the motion.

This action sounds in medical malpractice, wherein plaintiff alleges that defendants were negligent in treating plaintiff for a detaching retina. Dr. Hahn asserted the affirmative defense of culpable conduct and, pursuant to plaintiff's demand, served a bill of particulars as to this claim. Plaintiff rejected his initial bill of particulars as lacking in specificity. On May 31, 2011, the parties appeared for a preliminary conference, which resulted in an order directing all defendants to serve plaintiff with supplemental verified bills of particulars as to the affirmative defense of culpable conduct within twenty (20) days of plaintiff's deposition. On November 29, 2011, plaintiff was deposed. On January 10, 2012, the parties appeared for a status conference, which resulted in a second order directing defendants to serve supplemental bills of particulars as to their affirmative defense no later than January 27, 2012.

Plaintiff now seeks an order striking Dr. Hahn's affirmative defense of culpable conduct and precluding him from asserting said defense at trial on the grounds that he violated two court orders. In opposition, Dr. Hahn argues that his affirmative defense should not be stricken because his behavior has in no way been willful or contumacious, and annexes to his papers an amended verified bill of particulars as to his affirmative defense. In reply, plaintiff argues that Dr. Hahn's opposition is untimely and that the amended verified bill of particulars is still inadequate.

As to plaintiff's claim that Dr. Hahn's opposition is untimely, the court recognizes that it was served on or about July 5, 2012. Plaintiff filed this motion on or about June 15, 2012, with a return date of July 10, 2012. For his opposition to be timely pursuant to C.P.L.R. Rule 2214, Dr. Hahn should have served his opposition by July 3, 2012 (which is seven [7] days prior to July

10, 2012). While Dr. Hahn's attorney failed to comply with his obligation to timely mail the papers, the two-day delay is de minimus, as plaintiff was able to submit her reply papers and has demonstrated no prejudice from the delay. Accordingly, the court will consider Dr. Hahn's opposition papers.

As to plaintiff's motion to strike Dr. Hahn's affirmative defense as to culpable conduct, C.P.L.R. § 3126 sets forth that "[i]f any party . . . refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed . . . the court may . . . [make] an order striking out pleadings . . . [.]". A court may strike a pleading where plaintiff's failure to comply with orders is "willful, contumacious or in bad faith." Fish & Richardson, P.C. v Schindler, 75 A.D.3d 219 (1st Dep't 2010) (internal quotation marks and citation omitted). Here, although Dr. Hahn has violated two court orders directing him to serve plaintiff with supplemental verified bill of particulars, it cannot be said that his behavior amounts to willfulness or contumaciousness, warranting the drastic remedy of preclusion at this time. However, Dr. Hahn's amended bill of particulars lacks the specificity required by law. "The purpose of the bill of particulars is to amplify the pleadings, limit the proof and prevent surprise at trial." Twiddy v. Standard Marine Transp. Servs., Inc., 162 A.D.2d 264, 265 (1st Dep't 1990). Specifically, Dr. Hahn states that he "reserves his right to prove the negligent acts and/or omissions which constitute the claimed culpable conduct of the plaintiff," and then lists a broad range of departures. Dr. Hahn fails to particularize the allegations with relevant facts. Even if Dr. Hahn intended to supplement his bill of particulars once information became known, that time has since passed because plaintiff's deposition over eight (8) months ago. As it stands, Dr. Hahn's bill of particulars is inadequate and

does little to limit surprise at trial. Dr. Hahn is allowed twenty (20) additional days to cure this defect, and his failure to comply with this order will result in the striking of his defense of culpable conduct and in his being precluded from offering at trial any evidence with regard to said defense. Accordingly, it is hereby

ORDERED that the motion is denied as moot as to defendants Sunil Rao, M.D., Jonathan Feistman, M.D., Jonathan Feistman, M.D., P.C., the New York Eye and Ear Infirmary, Stephen J. Haug, M.D., and Queens-Long Island Medical Group, P.C.; and it is further


ORDERED that the motion is granted as to defendant Young S. Hahn, M.D., unless, within twenty (20) days from service of a copy of this order with notice of entry, Dr. Hahn serves a further amended verified bill of particulars, which sets out the specific behavior upon which Dr. Hahn relies to assert his affirmative defense of culpable conduct; and it is further

ORDERED the parties shall appear for their previously scheduled status conference on October 23, 2012, at 9:30 a.m.

Dated: August 24, 2012

**FILED**  
AUG 29 2012  
COUNTY CLERK'S OFFICE  
NEW YORK

ENTER:

  
JOAN B. LOBIS, J.S.C.