

<b>Domoroski v Dreznick</b>
2013 NY Slip Op 33650(U)
October 25, 2013
Sup Ct, Suffolk County
Docket Number: 44762/08
Judge: Paul J. Baisley
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SUPREME COURT - STATE OF NEW YORK  
CALENDAR CONTROL PART - SUFFOLK COUNTY

**PUBLISHED**

**PRESENT:**

**HON. PAUL J. BAISLEY, JR., J.S.C.**

-----X  
JEANNE DOMOROSKI,

Plaintiff,

-against-

ELLIOTT B. DREZNICK, M.D.,

Defendant.

-----X

INDEX NO.: 44762/08

CALENDAR NO.: 201200590MM

MOTION DATE: 10/9/13

MOTION SEQ. NO.: 012 MOT D

**PLAINTIFF'S ATTORNEY:**

JOHN H. MULVEHILL, ESQ.

220 Cambon Avenue

Saint James, New York 11780

**DEFENDANT'S ATTORNEY:**

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100 Quentin Roosevelt Blvd.

Garden City, New York 11530

Upon the following papers numbered 1 to 27 read on this motion to strike complaint and cross-motion to dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1-14 ; Notice of Cross Motion and supporting papers 15-18 ; Answering Affidavits and supporting papers \_\_\_; Replying Affidavits and supporting papers 19-23; 24-27; Other \_\_\_ ; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that this motion by plaintiff Jeanne Domoroski (Domoroski) seeking an order pursuant to CPLR 3043(b), 3101(d) & 3126 & 22 NYCRR 130-1.1(a): 1) striking defendant's Supplemental Bill of Particulars dated August 30, 2013 and defendant's expert witness Supplemental Exchange of Information dated August 30, 2013; and 2) striking defendant's demands for medical authorizations; and 3) imposing sanctions in the form of awarding costs to the plaintiff is granted solely to the extent that defendant's Supplemental Bill of Particulars dated August 30, 2013 is hereby stricken; and it is further

**ORDERED** that plaintiff's remaining requests for relief are denied; and it is further

**ORDERED** that the cross motion by defendant Elliott B. Dreznick, M.D. (Dreznick), seeking an order pursuant to CPLR 3126 & 3101(d) dismissing plaintiff's complaint based upon plaintiff's intentional failure to provide court-ordered discovery or, in the alternative, compelling the plaintiff to provide all outstanding trial and Arons' authorizations, and compelling the plaintiff to provide additional details concerning her proposed expert witness is granted to the extent that the plaintiff is directed to provide HIPAA-compliant trial authorizations and Arons' authorizations for plaintiff's treating physicians and to provide a supplementary expert notice detailing plaintiff's proposed expert's qualifications consistent with the requirements of CPLR 3101(d) within ten days of service of a copy of this order with notice of entry; and it is further

**ORDERED** that defendant's remaining requests for relief are denied.

On October 14, 2008 defendant Dr. Dreznick allegedly perforated plaintiff Jeanne Domoroski's (Domoroski) cecum while performing a colonoscopy. Plaintiff's complaint seeks

damages for personal injuries allegedly sustained as a result of the defendant's medical malpractice. A note of issue was filed on March 20, 2012. The action is scheduled on the Calendar Control Part jury selection calendar for November 25, 2013.

By short form order dated April 9, 2013 defendant Dreznick's motion for an order directing the plaintiff to provide HIPAA-compliant trial authorizations and HIPAA-compliant Arons' authorizations for plaintiff's treating physicians was granted. Since entry of that order the action has appeared on the trial calendar for jury selection five times. These motions (applications 12 & 13) involve some of the same post-note of issue discovery issues addressed in the April 9, 2013 order, together with additional issues concerning expert disclosure and defendant's service of an August 30, 2013 supplemental bill of particulars.

Plaintiff claims that defendant's supplemental bill of particulars and Dreznick's expert witness exchange must be stricken since each is untimely, unresponsive, lacks specificity and (with respect to the expert witness notice) fails to include reasonable details concerning the facts and opinions on which defendant's expert is expected to testify. Plaintiff objects to providing any further trial authorizations claiming: 1) she has previously supplied to the defendant all relevant authorizations to which he is entitled; 2) defendant is not entitled to information from four medical doctors since the records sought are either not relevant or in the case of two doctors seek records from doctors unknown to Domoroski; and 3) authorizations sought to attach to subpoenaed records are unnecessary pursuant to CPLR 2302. Plaintiff also objects to providing any further Arons' authorizations claiming that she has served such authorizations for all treating physicians and the remaining Arons' authorization demands seek interviews from physicians who have not treated or been seen by Domoroski since the note of issue was filed. Finally plaintiff argues that costs should be imposed against the defendant based upon counsel's frivolous conduct.

In opposition and in support of the cross motion, defendant asserts that plaintiff's complaint must be dismissed based upon her wilful failure to comply with the court's April 9, 2013 order directing the plaintiff to provide trial authorizations and Arons' authorizations. Defendant claims that he remains entitled to authorizations for the medical records sought which will provide relevant information required to properly defend this case at trial. Defendant claims that no basis exists to strike the supplemental bill of particulars or the expert witness exchange. Defendant also claims that plaintiff's expert witness exchange is deficient since it fails to provide her expert's qualifications. Defendant maintains that no basis exists to impose costs and therefore plaintiff's motion should be denied in its entirety.

22 NYCRR 202.21 (e) provides, in relevant part, that within 20 days after service of a note of issue and certificate of readiness, any party to the action may move to vacate the note of issue "upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect." A party seeking additional discovery after expiration of the 20-day period provided in 22 NYCRR 202.21(d), however must show "unusual or unanticipated circumstances developed subsequent to the filing of the note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice." (22 NYCRR 202.21(d); see *Utica Mutual Insurance Company v. P.M.A. Corporation*, 34 AD3d 793, 826 NYS2d 138 (2<sup>nd</sup> Dept., 2006); *Audiovox Corporation v. Benyamini*, 265 AD2d 135, 707 NYS2d 137 (2<sup>nd</sup> Dept., 2000)).

CPLR 3042 (b) provides:

**Procedure for bill of particulars.**

(b) Amendment. In any action or proceeding in a court in which a note of issue is required to be filed, a party may amend the bill of particulars once as of course prior to the filing of a note of issue.

Leave to amend a pleading may be granted at any time, including prior to or during trial, absent prejudice or surprise to the opposing party, unless the proposed amendment is palpably insufficient or patently devoid of merit (*see Galarraga v. City of New York*, 54 AD3d 308, 863 NYS2d 47 (2<sup>nd</sup> Dept., 2008)). Leave to amend is entrusted to the sound discretion of the court (*see Arcuri v. Ramos*, 7 AD3d 741, 776 NYS2d 895 (2<sup>nd</sup> Dept., 2005)). Where the application is made long after the action is certified for trial, “judicial discretion in allowing such amendments should be discrete, circumspect, prudent and cautious” (*Morris v. Queens Long Island Medical Group, P.C.*, 49 AD3d 827, 854 NYS2d 222 (2<sup>nd</sup> Dept., 2008)). Where the amendment is sought on the eve of trial the court should consider how long the party seeking the amendment was aware of the facts upon which the motion is predicated; whether a reasonable excuse for the delay was offered; and whether prejudice has resulted from the delay (*Alrose Oceanside, LLC v. Mueller*, 81 AD3d 574, 915 NYS2d 643 (2<sup>nd</sup> Dept., 2011)).

Although the defendant has made no formal application seeking leave to amend or supplement his bill of particulars, the law is clear that any party seeking leave to amend a pleading twenty days after a note of issue has been filed must demonstrate unusual or unanticipated circumstances. Defendant has provided no reasonable excuse for attempting to serve a supplemental bill of particulars on the eve of trial. Accordingly defendant’s Supplemental Bill of Particulars dated August 30, 2013 must be stricken.

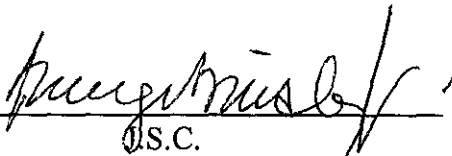
CPLR 3101(d)(1)(m) states “upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert’s opinion.” The statute does not obligate a party to retain an expert by a specific time or mandate that a party be precluded from offering expert testimony at trial based on noncompliance with such statute “unless there is evidence of intentional or willful failure to disclose and a showing of prejudice by the opposing party” (*Aversa v. Taubes*, 194 AD2d 580, 582, 598 NYS2d 801 (2<sup>nd</sup> Dept., 1993); *Martin v. Triborough Bridge and Tunnel Authority*, 73 AD3d 481, 901 NYS2d 193 (1<sup>st</sup> Dept., 2010); leave to appeal denied 15 NY3d 713, 912 NYS2d 578 (2010); *Ocampo v. Pagan*, 68 Ad3d 1077, 892 NYS2d 452 (2<sup>nd</sup> Dept., 2009)).

There is no evidence of “intentional or willful failure to disclose”, or a showing of prejudice to the plaintiff’s ability to prepare her case for trial, sufficient to justify striking the defendant’s expert witness disclosure notice. Moreover the notice itself provides sufficient detail concerning subject matter and the substance of facts and opinions on which the defendant’s expert witness is expected to testify. Accordingly plaintiff’s application to strike the defendant’s expert witness

exchange must be denied. Defendant's cross motion seeking to compel the plaintiff to provide her expert's qualifications is granted since the defendant is entitled to such information under the terms of the statute (CPLR 3101(d)(1)).

Finally with respect to the issue of trial authorizations and Arons' authorizations, the April 9, 2013 order clearly directed that the plaintiff provide all relevant HIPAA-compliant trial authorizations and Arons' authorizations sought by the defendant. To the extent that the plaintiff has failed to comply, those authorizations for relevant medical records to be used at trial and for plaintiff's treating physicians consistent with the requirements of the Court of Appeals ruling in *Arons v. Jutkowitz*, 9 NY3d 393, 850 NYS2d 345 (2007)(which includes all plaintiff's treating physicians) shall be provided to the defendant within ten days of service of a copy of this order with notice of entry. Further in accordance with the April 9, 2013 order, the plaintiff is not required to provide additional medical authorizations for records which should have been obtained during discovery.

Dated: October 25, 2013

  
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J.S.C.  
HON. PAUL J. BAISLEY JR.