Beer v Goldfarb
2014 NY Slip Op 30805(U)
March 24, 2014
Sup Ct, Suffolk County
Docket Number: 07-22202
Judge: Jeffrey Arlen Spinner
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SHORT FORM ORDER

INDEX No. 07-22202

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

COPY

***PRESENT*:**

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 2-14-11 (#006)
MOTION DATE 3-16-11 (#007)
ADJ. DATE 8-7-13
Mot. Seq. # 006 - MD
007 - MotD

KENNETH R. BEER and WENDY BEER GANLEY, as Co-Executors of the Estate of BETH L. STARKAND, deceased and GARY STARKAND, individually,

Plaintiffs,

- against -

STEVEN R. GOLDFARB, M.D.,

Defendant.

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Upon the following papers numbered 1 to 56 read on this motion for trial preference and this motion to vacate note of issue; Notice of Motion/ Order to Show Cause and supporting papers 1 - 18; 19 - 33; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 34 - 35; 36 - 51; Replying Affidavits and supporting papers 52 - 56; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#006) by plaintiffs Kenneth Beer and Wendy Beer Ganley, as co-executors of the estate of Beth Starkand, and Gary Starkand, and the motion (#007) by defendant Steven Goldfarb, M.D., hereby are consolidated for the purposes of this determination; and it is

ORDERED that the motion by plaintiffs for an order, inter alia, granting a trial preference is denied, as moot; and it is further

ORDERED that the motion by defendant for, inter alia, an order vacating the note of issue and certificate of readiness is decided as follows.

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[* 2]

On July 27, 2007, Beth Starkand and her husband, plaintiff Gary Starkand, commenced this action to recover damages for, inter alia, medical malpractice against defendants Steven Goldfarb, M.D., and MDVIP, Inc. By order (Baisley, J.), dated April 16, 2010, the Court granted MDVIP, Inc.'s motion to dismiss the complaint against it and granted Dr. Golbfarb's cross motion to the extent that the causes of action sounding in deceptive business practices, false advertising, breach of contract and fraud were dismissed. On February 11, 2011, Beth Starkand passed away from stage IV adenocarcinoma lung cancer, and the instant matter was stayed. Thereafter, by order of the Circuit Court for Palm Beach County, Florida, dated April 19, 2011, Kenneth Beer and Wendy Beer Ganley were appointed executors of Beth Starkand's estate. Subsequently, by order of this Court, dated July 25, 2012, Kenneth Beer and Wendy Beer Ganley, as co-executors of the estate of Beth Starkand, were substituted as plaintiffs, and the caption was amended to reflect such substitution.

Beth Starkand became a member of MDVIP, a concierge medical care group, to receive treatment from Dr. Goldfarb, who came highly recommended by a friend, and she met with Dr. Goldfarb at his private office on November 8, 2005. At that visit, Beth Starkand presented with complaints of sciatica, asthma, and back and leg pain, and Dr. Golbfarb performed a physical examination, which included an electrocardiogram ("EKG"). At the conclusion of the visit, Dr. Goldfarb prescribed pain medication for the pain in Beth Starkand's legs and back. In late June 2006, Beth Starkand was sent for an x-ray after she sustained an injury to her ribs, and it was discovered that there was a 4.5 centimeter mass in her right lung. On June 26, 2006, Beth Starkand was diagnosed with metastatic poorly-differentiated non-small cell carcinoma of the right lung. Thereafter, she ceased all medical treatment with Dr. Goldfarb and sought treatment for her cancer at Massachusetts General in Boston, Massachusetts. In January 2010, Beth Starkand underwent brain surgery at Massachusetts General to treat the metastasis of her cancer, which had metastasized from her right lung into her brain. Following her brain surgery, she underwent treatment for metastatic disease involving the brain, bones, lymphatics, and the left lung.

Plaintiffs' motion for an order, pursuant to CPLR 3403(a)(6), based upon the alleged terminal condition of Beth Starkand has been rendered academic, since she passed way as a result of her illness. Accordingly, the motion for a special trial preference is denied.

Dr. Goldfarb moves for an order vacating the note of issue and striking the matter from the trial calendar, arguing the certificate of readiness contains a material defect, because discovery is not complete in this matter. In particular, Dr. Goldfarb contends that plaintiffs have failed to respond to his Centers for Medicare and Medicaid Services ("CMS") demand, dated December 6, 2010, requesting duly executed Health Insurance Portability and Accountability Act ("HIPAA") compliant authorizations for Beth Starkand's medical records from the medical providers and medical facilities that treated her metastatic lung carcinoma. Plaintiffs oppose the motion on the ground that they already have fully complied with Dr. Goldfarb's CMS demand. Plaintiffs also assert that the note of issue and certificate of readiness already have been filed and discovery is complete.

CPLR 3402 (a) provides that the note of issue may be filed at any time after issue is joined or 40 days after service of the summons irrespective of the joinder of issue, and must be accompanied by whatever date is required by the applicable rules of the court. The purpose of a note of issue and

certificate of readiness is to assure that cases which appear on the court's trial calendar are, in fact, ready for trial (***Tirado v Miller***, 75 AD3d 153, 156, 901 NYS2d 358 [2d Dept 2010], *quoting* ***Mazzara v Town of Pittsford***, 30 AD2d 634, 634, 290 NYS2d 435 [4th Dept 1968]). Moreover, a certificate of readiness certifies that all discovery is complete, waived or not required, and that the action is ready for trial (*see* 22 NYCRR § 202.21[b]). "The effect of a statement of readiness is to ordinarily foreclose further discovery" (***Tirado v Miller***, 75 AD3d 153, 156, 901 NYS2d 358 [2d Dept 2010]).

Vacatur of the note of issue is governed by Section 202.21 of the Uniform Rules for Trial Courts. This provision states, in pertinent part, that where a party timely moves, upon affidavit, to vacate the note of issue, the party only needs to show that "a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of 22 NYCRR§ 202.21(e) in some material respect" (***Vargas v Villa Josefa Realty Corp.***, 28 AD3d 389, 390, 815 NYS2d 30 [1st Dept 2006]; *see* ***Witherspoon v Surat Realty Corp.***, 82 AD3d 1087, 918 NYS2d 889 [2d Dept 2011]; ***Shoop v Augst***, 305 AD2d 1016, 758 NYS2d 747 [4th Dept 2003]; ***Aviles v 938 SCY Ltd.***, 283 AD2d 935, 725 NYS2d 256 [4th Dept 2001]; *cf.* ***Audiovox Corp. v Benyamini***, 265 AD2d 135, 707 NYS2d 137 [2d Dept 2000]).

Here, Dr. Goldberg failed to submit any proof that he actually made the requested discovery demands, including the CMS demand dated December 6, 2010, upon plaintiffs or that requests for HIPAA-complaint authorizations for Beth Starkand's medical records from the medical providers and medical facilities that treated her metastatic lung carcinoma were served upon plaintiffs (*see* ***Savin v Brooklyn Mar. Park Dev. Corp.***, 61 AD3d 954, 878 NYS2d 178 [2d Dept 2009]; ***Joseph v Propst***, 306 AD2d 246, 760 NYS2d 359 [2d Dept 2003]; ***Matter of Long Is. Light. Co. v Assessor Town of Brookhaven***, 122 AD2d 794, 505 NYS2d 679 [2d Dept 1986]; *cf.* ***Lynch v Vollono***, 6 AD3d 505; 774 NYS2d 433 [2d Dept 2004]). Furthermore, the affirmation of good faith included with the moving papers is deficient in that it fails to state what good-faith efforts were made to resolve the discovery dispute at issue prior to seeking judicial intervention (*see* 22 NYCRR §202.7 [a], [c]; CPLR 3124; ***Tine v Courtview Owners Corp.***, 40 AD3d 966, 838 NYS2d 92 [2d Dept 2007]; ***Chevin v Macura***, 28 AD3d 600, 813 NYS2d 746 [2d Dept 2006]; ***Barnes v NYNEX, Inc.***, 274 AD2d 368, 711 NYS2d 893 [2d Dept 2000]). The affirmation of good faith included with the papers merely states that "authorizations remain outstanding, that plaintiffs refused to furnish the authorizations, and that the amended and supplemental bill was objected to by telephone call and email, and, despite these good faith efforts, no resolution of this matter could be agreed upon between respective counsel." Accordingly, the branch of the motion by Dr. Goldfarb to vacate the note of issue is denied without prejudice to renew upon proper papers.

Dr. Goldfarb also seeks to have stricken from the amended and supplemental bill of particulars plaintiffs' allegations that he "fail[ed] to provide exceptional results as advertised and promised; fail[ed] to provide the best care possible and a higher standard of medical care and treatment and services as advertised and promises; fail[ed] to fulfill the promises and/or representations made by this defendant and MDVIP; fail[ed] to fulfill his own promises and/or representations made; and fail[ed] to fulfill the promises and/or representations made in any and all literature, pamphlets, and internet websites of MDVIP and this defendant." Dr. Goldfarb contends that these claims already were dismissed by the

April 16, 2012 order of Justice Baisley. Plaintiffs argue, in opposition, that the allegations at issue are proper and simply seek to amplify the medical malpractice cause of action against Dr. Goldfarb.

A bill of particulars is not itself a pleading (*see* ***Linker v County of Westchester***, 214 AD2d 652, 625 NYS2d 289 [2d Dept 1995]) and, as a rule, may not be employed to supply allegations that are missing from the complaint (*see* ***Sullivan v St. Francis Hosp.***, 45 AD3d 833,846 NYS2d 228 [2d Dept 2007]; ***Melino v Tougher Heating & Plumbing Co.***, 23 AD2d 616, 256 NYS2d 885 [2d Dept 1965]). Nor may it be used to add or substitute a new theory or cause of action or defense (*see* ***Willinger v Greenburgh***, 169 AD2d 715, 564 NYS2d 466 [2d Dept 1991]). The function of a bill of particulars is to amplify or supplement the pleadings, to limit proof, and to assist in the preparation for trial so as to avoid surprise at trial (*see* ***Harmon v Alfred Peats***, 243 NY 473, 243 NYS 473 [1926]; ***Fremont Inv. & Loan v Gentile***, 94 AD3d 1046, 943 NYS2d 182 [2d Dept 2012]; ***Jones v LeFrance Leasing L.P.***, 81 AD3d 900, 917 NYS2d 261 [2d Dept 2011]). The scope of a bill of particular is limited to matters on which the requested party has the burden of proof (*see* ***Northway Engineering, Inc. v Felix Indus., Inc.***, 77 NY2d 332, 567 NYS2d 634 [1991]). Additionally, a supplemental bill of particulars may be served without leave of court at any time, but not less than thirty days prior to trial provided that no new cause of action may be alleged or new injury claimed (*see* CPLR 3042(b); ***Jurado v Kalache***, 93 AD3d 759, 940 NYS2d 300 [2d Dept 2012]). Moreover, the court has broad discretion to grant or deny any further or different bills of particulars (*see* CPLR 3042(b); ***Grande v Peteroy***, 39 AD3d 500, 833 NYS2d 615 [2d Dept 2007]), and, as long as there is no prejudice demonstrated, a supplemental bill of particulars may be permitted at the discretion of the court (*see* CPLR 3025[c]; ***Nociforo v Pena***, 42AD3d 514, 840 NYS2d 396 [2d Dept 2007]). The opposing party has the burden of demonstrating prejudice (*see* ***Danne v Otis Elevator Corp.***, 276 AD2d 581, 714 NYS2d 316 [2d Dept 2000]). Finally, a bill of particulars in a medical malpractice action "must provide a general statement of the acts or omissions constituting the alleged negligence" (***Contreras v Adeyemi***, 102 AD3d 720, 958 NYS2d 430 [2d Dept 2013], quoting ***Toth v Bolshinsky***, 39 AD3d 848, 849, 835 NYS2d 301 [2d Dept 2007]).

Here, Dr. Goldfarb has demonstrated that the claims at issue in plaintiffs' amended and supplemental bill of particulars, which plaintiffs assert demonstrate Dr. Goldfarb's heightened standard of care and amplify the medical malpractice cause of action, essentially are the same claims that were dismissed by the court's order dated April 16, 2010 (*see* CPLR 3042; ***Castleton v Broadway mall Props., Inc.***, 41 AD3d 410, 837 NYS2d 732 [2d Dept 2007]; *see also* CPLR §§ 3126, 3043). Contrary to plaintiffs' contentions, the claims at issue were improperly included in the amended and supplemental bill of particulars because they do not simply amplify the original medical malpractice claim (*see* ***Jurado v Kalache***, *supra*; *see also* ***Clare-Hallo v Finger Lakes Ambulance EMS, Inc.***, 99 AD3d 1199, 952 NYS2d 350 [4th Dept 2012]; ***Dalrymple v Koke***, 295 AD2d 469, 744 NYS2d 427 [2d Dept 2002]). By order of the Court dated April 16, 2010, Justice Baisley granted the branch of Dr. Goldfarb's cross motion for dismissal of the complaint regarding plaintiffs' claims for General Business Law § 349 (deceptive business practices), General Business Law §350 (false advertising), breach of contract and fraud, but denied the branch seeking dismissal of the causes of action for medical malpractice, lack of informed consent and the derivative claim for loss of services. The Court determined the causes of action based upon the General Business Law required a showing that the acts in questions impacted upon consumers at large and that, in the context of a medical practice action, such causes of action were not intended to supplant or augment what is essentially a medical malpractice claim. The Court further

determined that the causes of action for breach of contract and fraud were inappropriate in the medical malpractice action. However, the Court stated, in denying dismissal of the medical malpractice claim, that Dr. Goldfarb was the treating physician, and it was his medical services that were the basis for the medical malpractice claim. Accordingly, the branch of Dr. Goldfarb's motion to strike the allegations in the amended and supplemental verified bill of particulars at issue is granted.

Lastly, Dr. Goldfarb seeks an order, pursuant to CPLR 3124, compelling plaintiffs to produce HIPAA-complaint authorizations for the psychological/psychiatric medical records of Beth Starkand's son and for the employment records of Beth Starkand's jewelry-making business. Specifically, Dr. Goldfarb contends that he is entitled to the psychological/psychiatric medical records of Beth Starkand's son, since she alleged that her relationship with her son was strained, and that he is entitled to her employment records, because she alleged that, as a result of his medical malpractice, she was unable to continue producing jewelry as a source of income.

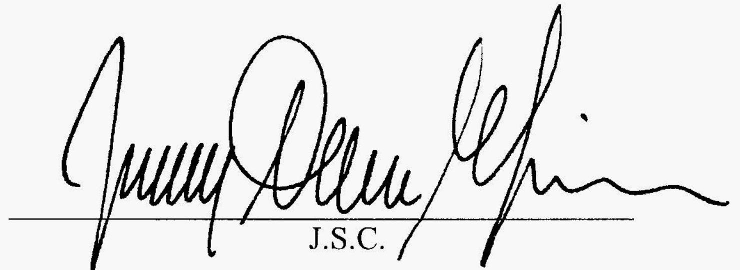
Plaintiffs oppose this branch of the motion on the grounds that they did not receive a written demand for such information and, more importantly, that Dr. Goldfarb is not entitled to such information because Beth Starkand's son is a minor and is not a party to the action. In addition, plaintiffs assert that Beth Starkand testified in her deposition as to how her relationship with her son had been affected by her illness. Plaintiffs also assert that they never received a written demand for authorizations for Beth Starkand's employment records for the jewelry-making business, but they are in the process of performing a search to determine if any such records exist, and, if they do not, they will withdraw the claim for lost income. Plaintiffs, in opposition, submit the deposition transcript of Beth Starkand.

The branch of Dr. Goldfarb's motion for an order compelling plaintiffs to provide HIPAA-complaint authorizations for the psychological/psychiatric medical records of Beth Starkand's son is denied. The son is not a party to the action and disclosure of such records will invade his privacy in violation of the physician-patient privilege (*see* CPLR 4504(a); ***McNeill v Town of Islip***, 112 AD3d 587, 977 NYS2d 892 [2d Dept 2013]; ***Scipio v Upsell***, 1 AD3d 500, 767 NYS2d 254 [2d Dept 2003]; ***Muniz v Preferred Assocs***, 189 AD2d 738, 592 NYS2d 734 [1st Dept 1983]; *see also* CPLR 3101). Moreover, the fact Beth Starkand alleges in her amended and supplemental bill of particulars that her relationship with her son was strained due to her illness does not place her son's mental or psychological condition in issue (*see* ***Lamy v Pierre***, 31 AD3d 613, 818 NYS2d 610 [2d Dept 2006]), nor has her minor son placed in issue his mental or psychiatric condition "either by way of counterclaim or to excuse the conduct complained of by the plaintiff in the pending matter" (***Fox v Marshall***, 91 AD3d 710, 710, 936 NYS2d 307 [2d Dept 2012]). Additionally, Dr. Goldfarb has failed to demonstrate that the information sought is material and necessary to the defense of the action (*see* ***Tannenbaum v Tenenbaum***, 8 AD3d 360, 777 NYS2d 769 [2d Dept 2004]). Furthermore, as previously stated, the affirmation of good faith included with the motion papers is deficient, and any motion relating to disclosure must be supported by an affirmation that counsel "has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion." (*see* Uniform Rules for Trial Courts [22 NYCRR] §202.7 [c]; *see also* ***Mironer v City of New York***, 79 AD3d 1106, 915 NYS2d 279 [2d Dept 2010]).

In addition, the filing of the note of issue denotes the completion of discovery, not the occasion to launch another phase of it (*see* 22 NYCRR §202.21 (d); ***Arons v Jutkowitz***, 9 NY3d 393, 850 NYS2d

345 [2007]). Dr. Goldfarb has failed to demonstrate the existence of unusual or unanticipated circumstances that developed subsequent to the filing of the note of issue, which requires additional pretrial proceedings to prevent substantial prejudice to his case (*see* ***Matthew v City of New York***, 90 AD3d 1002, 934 NYS2d 859 [2d Dept 2011]; ***Wigand v Modlin***, 82 AD3d 1213, 919 NYS2d 868 [2d Dept 2011]; ***Owen v Lester***, 79 AD3d 992, 915 NYS2d 277 [2010]). Finally, Dr. Goldfarb failed to include a copy of the demand for the HIPAA-complaint authorizations for the psychological/psychiatric records of Beth Starkand's infant son. Pursuant to CPLR 3101(a)(4), where the disclosure is sought from a nonparty, the nonparty shall be given notice stating the circumstances or reasons such disclosure is sought or required (*see* ***Tenore v Tenore***, 45 AD3d 571, 844 NYS2d 704 [2d Dept 2007]). The purpose of such requirement is to afford a nonparty, who has no idea about the subject matter of the litigation, the opportunity to decide how to respond to said request (*see* ***Matter of American Express Prop. Cas. Co v Vinci***, 63 AD3d 1055, 881 NYS2d 484 [2d Dept 2009]; ***Wolf v Wolf***, 300 AD2d 473, 751 NYS2d 425 [2d Dept 2002]).

Dated: March 24, 2014



J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**