

**Browning v Sorgen**

2014 NY Slip Op 33702(U)

May 12, 2014

Supreme Court, Westchester County

Docket Number: 22575/09

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

**FILED  
AND  
ENTERED**  
ON 5-13 2014  
**WESTCHESTER  
COUNTY CLERK**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER - COMPLIANCE PART**

-----X  
JAYDEN RUSSELL BROWNING, An Infant by  
CANDICE BROWNING His Parent and Natural  
Guardian and CANDICE BROWNING, Individually,

Plaintiffs,

-against-

CARL D. SORGEN, ADOLFO GRIEG, HERSCHEL  
LESSIN, NHAN TUE TAI, THE CHILDREN'S MEDICAL  
GROUP, PLLC, VASSAR BROTHERS HOSPITAL,  
HUDSON VALLEY NEWBORN PHYSICIAN  
SERVICES, PLLC and VASSAR BROTHERS CARE  
CENTER,

Defendants.

-----X  
LEFKOWITZ, J.

**DECISION & ORDER**

Index No. 22575/09  
Motion Date: Mar. 17, 2014

Seq. no. 10

**FILED**  
MAY 13 2014  
TIMOTHY C. IDONI  
COUNTY CLERK  
COUNTY OF WESTCHESTER

The following papers numbered 1-34 were read on this motion by defendants Adolfo Grieg ("Dr. Grieg"), Nhan Tue Tai ("Dr. Tai") and Hudson Valley Newborn Physician Services, PLLC (hereinafter "HVNPS") for an order precluding plaintiffs from offering certain evidence at trial or, alternatively, vacating the note of issue, striking the action from the trial calendar pursuant to Uniform Rules for Trial Courts [22 NYCRR] §202.21(e), and compelling plaintiffs to provide further bills of particulars.

- Order to Show Cause - Affirmations in Support - Exhibits A-X 1-26
- Affirmation in Opposition - Exhibits 1-5 28-33
- Affidavits of Service 27, 34
- Filed Papers: Decision and Order (Jamieson, J.) dated April 23, 2014

Upon the foregoing papers and the proceedings held on March 17, 2014, the motion is decided as follows:

In the present medical malpractice action, plaintiffs generally allege in their verified complaint that defendants provided improper medical care and treatment or failed to provide medical care causing infant plaintiff Jayden Russell Browning to sustain severe, serious and permanent personal injuries. Plaintiffs further allege, inter alia, that infant plaintiff sustained his



injuries due to carelessness, negligence and departures from accepted and proper medical, obstetrical and other good practices by defendants and their agents and/or employees. Plaintiffs also allege a cause of action for lack of informed consent.

Plaintiff Candice Browning received prenatal care at defendant Vassar Brothers Hospital and Dr. Tai was her obstetrician. Infant plaintiff was born December 19, 2008 and was examined by defendant Dr. Carl D. Sorgen ("Dr. Sorgen") in the hospital. After being discharged from the hospital, infant plaintiff was examined by defendant Dr. Herschel Lessin at defendant The Children's Medical Group, PLLC. Dr. Grieg is a neonatologist at Vassar Brothers Hospital, who Dr. Lessin allegedly contacted about infant plaintiff's blood pressure.

By order dated August 1, 2013 and entered August 2, 2013, this court, inter alia, directed plaintiffs to supplement their bill of particulars as to certain demands in moving defendants' demand for a bill of particulars, including demands 2, 5, 9, 10 and 16. Thereafter, plaintiffs served each moving defendant with a Fourth Supplemental Verified Bill of Particulars dated August 15, 2013. On August 20, 2013, the parties appeared for a certification conference. At the conference, defense counsel acknowledged receiving the supplemental bill of particulars, but advised the court that they had not had an opportunity to review it and reserved their rights as to the sufficiency of the supplemental bill of particulars. On that date, the court issued a Trial Readiness Order and plaintiffs filed a note of issue on August 28, 2013. In December, 2013 and January, 2014, plaintiffs served expert witness exchange, including expert affirmations and reports.

In the present motion, moving defendants now seek relief as to five demands for a bill of particulars which they contend plaintiffs failed to sufficiently supplement. Moving defendants contend that plaintiffs failed to sufficiently supplement their responses to demands 2, 9, 10 and 16 as to all moving defendants and as to demand 5 with respect to Dr. Tai. Demands 2 and 9 requested particulars as to any claims that defendants violated any manuals, laws, rules, codes, regulations or contracts. Moving defendants contend that insofar as plaintiffs in their Fourth Supplemental Verified Bill of Particulars alleged that Dr. Grieg and HVNPS, through Dr. Grieg, its agent, violated Neonatal Intensive Care Unit (N.I.C.U.) admission protocols and procedures as to treatment of out patients, as well as N.I.C.U. policies, guidelines and procedures concerning the N.I.C.U. nursing staff, they are entitled to know what protocols and procedures plaintiffs claim were violated. As to demand 5, moving defendants contend that plaintiffs failed to sufficiently particularize plaintiff Candice Brown's condition or conditions which Dr. Tai undertook to treat. Demand 10 requested particulars as to any claim for failure to obtain informed consent. Moving defendants contend that plaintiffs failed to set forth in their response any affirmative treatment or testing which defendants allegedly failed to obtain informed consent. Demand 16 sought particulars as to plaintiffs' claimed special damages. Moving defendants contend that plaintiffs' response to the demand of "[n]ot known at the present time" failed to provide any responsive information. Moving defendants further contend that insofar as this action has been pending for four years, "it strains credulity to assert that plaintiffs do not possess any responsive information." Accordingly, moving defendants seek an order precluding plaintiffs from offering evidence as to those demands which they failed to sufficiently respond, or an order vacating the note of issue and compelling plaintiffs to provide further responses.

Plaintiffs oppose the motion and contend that they have complied with this court's order and sufficiently supplemented their responses. Plaintiffs further contend that their expert affirmations, which were served on defendants in December, 2013 and January, 2014, contain clear and concise details of their negligence claims against defendants. Plaintiffs further note that their opposition to moving defendants' motion for summary judgment, which was pending at the time the present motion was made, contains a recitation of the facts and the claims being asserted against moving defendants. Plaintiffs, however, failed to address or acknowledge in their opposition papers moving defendants' objections as to their supplemental responses to demands 5 and 10, which seek specifics as to plaintiff mother's conditions allegedly treated by Dr. Tai and as to lack of informed consent, respectively. Further, in the opposition papers, plaintiffs note that they did not serve an expert affirmation with respect to defendant Dr. Tai.

At oral argument, plaintiffs informed the court that they had not opposed the summary judgment motions of Dr. Tai and Dr. Sorgen. Plaintiffs further seemed to indicate that they did not oppose the summary judgment motions with respect to the claim of informed consent. In response to questioning from the court, plaintiffs also asserted that they had not incurred any special damages to date. Plaintiffs further argued as to the remaining claims, other than those alleged against Dr. Tai and Dr. Sorgen and the claim of lack of informed consent, that they could not provide any further supplemental responses. At oral argument, moving defendants asserted that plaintiffs should be required to further supplement their response regarding the alleged policies and procedures violated by moving defendants.

Thereafter, by decision and order dated April 23, 2014, the court (Jamieson, J.), inter alia, granted summary judgment in favor of Dr. Tai and Dr. Sorgen and dismissed the action insofar as alleged against them. The court also dismissed those claims alleged against Vassar Brothers Hospital and Vassar Brothers Care Center for vicarious liability as to Dr. Tai and Dr. Sorgen. The court, however, denied the motions for summary judgment of Dr. Grieg, HVNPS, Dr. Lessin and the Children's Medical Group. In the order, the court did not specifically address or dismiss plaintiffs' claim of lack of informed consent.

In view of the dismissal of the claims against Dr. Tai, those branches of the motion challenging plaintiffs' responses as to Dr. Tai are denied as moot. Notably, moving defendants only challenged plaintiffs' response to demand 5 as to Dr. Tai. Accordingly, the court need not determine whether plaintiffs' response to demand 5 was sufficient.

That branch of the motion which challenges plaintiffs' responses to demands 2 and 9, which seek particulars as to any claim that Dr. Grieg and HVNPS violated any manuals, laws, rules, codes, regulations, or contracts is denied. The role of a bill of particulars is to amplify a pleading "by setting forth in greater detail the nature of the allegations and what the party making them intends to prove" in order to limit proof and prevent surprise at trial (*Northway Eng'g v Felix Indus.*, 77 NY2d 332, 334 [1991]; see *Jurado v Kalache*, 93 AD3d 759, 760 [2d Dept 2012]). In response to demands 2 and 9, plaintiffs responded that those defendants violated N.I.C.U.

admission protocols and procedures as to treatment of out patients and violated N.I.C.U. policies, guidelines and procedures concerning the N.I.C.U. nursing staff assessing, examining and treating out patient neonates without proper oversight and supervision. This response was sufficient to apprise the moving defendants as to the nature of plaintiffs' allegations and sufficiently amplified plaintiffs' claim regarding defendants' alleged violations.

As to plaintiffs' response to demand 10, which seeks information as to plaintiffs' claim for lack of informed consent, the court notes that although plaintiffs did not address the issue in their opposition papers and, at oral argument, counsel for plaintiffs seemed to indicate that plaintiffs had not opposed summary judgment on the claim of lack of informed consent, the claim has not yet been dismissed or discontinued by plaintiffs. Accordingly, the branch of the motion as to demand 10 is not moot and is still before this court for determination. Demand 10 seeks specifics as to the procedures or treatment performed as to which defendants failed to obtain informed consent. Plaintiffs in their Fourth Supplemental Verified Bill of Particulars, despite this court's prior order directing plaintiffs to provide a supplemental response to the demand, again objected to the demand as improper, evidentiary and beyond the scope of a bill of particulars. Plaintiffs, however, without waiving their objections, also responded as follows with respect to Dr. Grieg and HVNPS:

“failed to obtain informed consent on December 26, 2008 when they failed to advise that a nurse would be the only person assessing Infant-Plaintiff; when they failed to inform the Plaintiff, CANDICE BROWNING, of the difficulties in properly and accurately assessing and recording the vital signs of the Infant-Plaintiff; when they failed to advise of the potential for unaccounted beat variations in the pulses, and inappropriate management of an oscillometric device when performing an assessment on a neonate of the size of Infant-Plaintiff.”

Contrary to moving defendants' contention, plaintiffs sufficiently identified a procedure for which they alleged defendants failed to obtain informed consent, namely the assessment of infant plaintiff by a nurse in the N.I.C.U. Accordingly, it cannot be said that plaintiffs' response to demand 10 was insufficient. Although defendants disagree with plaintiffs as to whether such an allegation is sufficient to state a claim for lack of informed consent, such an issue is properly determined on a motion to dismiss pursuant to CPLR 3211 or 3212, and not on the instant motion. That branch of defendants' motion with respect to demand 10, therefore, is denied.

Plaintiffs' response to demand 16, which sought information as to special damages for: psychologists or other mental health providers; ambulance services; special education, emotional or vocational training or schooling; and any other special damages claimed but not already set forth in the bills of particulars as to special damages, that they were “[n]ot known at the present time” was insufficient. However, in the affirmation in opposition, plaintiffs' counsel asserted that no special damages in those categories have been incurred to date. Additionally, at oral argument, plaintiffs' counsel again asserted that no special damages had been incurred to date. Accordingly, the branch of the motion with respect to demand 16 is granted to the extent that plaintiffs are precluded from offering evidence at trial as to special damages incurred prior to

March 28, 2014, the date of oral argument of this motion, and not already set forth in the bill of particulars. The court notes that as to special damages, CPLR 3043 (b) provides that a party may serve a supplemental bill of particulars with respect to claims of continuing special damages and disabilities without leave of court "at any time, but not less than 30 days prior to trial."

In view of the foregoing, it is

ORDERED that the branches of the motion seeking to compel further supplemental responses to Dr. Tai's demand for a bill of particulars are denied as moot in view of the court order granting Dr. Tai summary judgment in his favor and dismissing plaintiffs' claims insofar as alleged against him; and it is further

ORDERED that the branches of the motion with respect to demands 2, 9 and 10 are denied as plaintiffs' supplemental responses to those demands were sufficient; and it is further

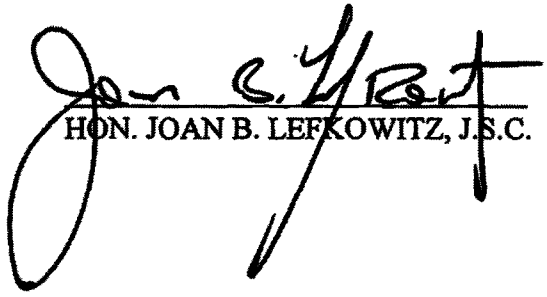
ORDERED that the branch of the motion with respect to demand 16 is granted to the extent that plaintiffs are precluded from offering evidence at trial as to special damages which were incurred prior to March 28, 2014, the date of oral argument of this motion, and not already set forth in the bill of particulars; and it is further

ORDERED that counsel are directed to appear for a conference in the Settlement Conference Part, Courtroom 1600, on June 18, 2014 at 9:30 A.M., as previously scheduled; and it is further

ORDERED that moving defendants shall serve a copy of this order with notice of entry upon all parties within 10 days of entry.

The foregoing constitutes the decision and order of this court.

Dated: White Plains, New York  
May 12, 2014

  
HON. JOAN B. LEFKOWITZ, J.S.C.

TO:

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