

Conklin v Venkataramanappa
2014 NY Slip Op 33760(U)
May 7, 2014
Supreme Court, Orange County
Docket Number: 7793/2013
Judge: Sandra B. Sciortino
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ORIGINAL

To commence the statutory time 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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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IRA D. CONKLIN, III,
Plaintiff,

DECISION AND ORDER
INDEX NO.: 7793/2013
Motion Date: 3/17/14
Sequence No. 1

-against-

VANI VENKATARAMANAPPA, M.D. And
MID-HUDSON ANESTHESIOLOGISTS, P.C.
Defendants.

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SCIORTINO, J.

The following papers numbered 1 to 12 were considered in connection with defendants' motion for an order pursuant to Civil Practice Law & Rules §3042(d) striking plaintiff's bill of particulars and precluding plaintiff from offering proof thereon at trial or, alternatively, directing plaintiff to provide amended bills of particulars as to each defendant separately:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Affirmation/Exhibits A-F	1 - 8
Defendants' Memorandum of Law	9
Affirmation in Opposition/Exhibit A	10 - 11
Reply Affirmation	12

Background

This action for medical malpractice arises out of a medical procedure performed on February 4, 2013 at St. Luke's Cornwall Hospital. On that date, it is alleged that plaintiff underwent a lithotripsy procedure and was administered laryngeal mask airway (LMA) anesthesia in connection therewith. Defendant Venkataramanappa was the anesthesiologist and is alleged to be an employee

or principal of defendant Mid-Hudson. Plaintiff asserts that defendant failed to question the plaintiff about his history of acid reflux and/or symptoms of acid reflux, a contraindication to the LMA procedure. Plaintiff claims to have suffered injury as a result of the negligence of defendants in providing anesthesiology care.

Plaintiff filed a Summons and Complaint on or about September 23, 2013 (Exhibit A to moving papers). An Answer on behalf of both defendants (Exhibit B), together with a Demand for a Bill of Particulars (the Demand, Exhibit C), was served on or about October 22, 2013. A Bill of Particulars (Exhibit D) was served on or about November 14, 2013 (erroneously cited as January 16, 2008 in the moving papers).

By letters dated November 16, 2013 and January 7, 2014 (Exhibit E), defendants objected to certain responses contained in the Bill of Particulars. Plaintiff responded, defending its response, by letter dated January 14, 2014. (Exhibit F)

This motion, filed February 6, 2014, followed.

Defendants claim that the Bill of Particulars served by plaintiff is overly broad, overly vague and fails to reasonably apprise defendants of plaintiff's claims. Specifically, defendants object to the responses to paragraphs 4 and 7 of the Bill of Particulars.

Paragraph 4 of the Demand calls for "[a] statement of every act or omission which you will claim as the basis of the alleged malpractice". In response, plaintiff stated:

1. Failing to take, and to document, a detailed and appropriate history from plaintiff prior to performing an LMA anesthesia procedure;
2. Failing to specifically question, and document the questioning of Ira Conklin as to whether he had a history of acid reflux and/or symptoms of acid reflux as part of the pre-anesthesia assessment;
3. Negligently, unskillfully, improperly and incorrectly failing to use and/or utilize good and accepted custom and proper medical practice and procedure of the medical

- profession in the community where the care and treatment was rendered;
4. In failing to use reasonable and proper skill and care in the treatment of the plaintiff;
 5. In failing to perform and document an adequate and complete physical examination of the plaintiff;
 6. In failing to inform the plaintiff of the risks of an LMA procedure;
 7. In failing to contemporaneously chart and document the pre-anesthesia assessment; and
 8. In failing to use and utilize approved methods in general use in the care and treatment of the plaintiff, Ira D. Conklin, III.
- (Exhibit D to moving papers)

Defendants argue that allegations such as “improperly and incorrectly failing to use and/or utilize good and accepted custom and proper medical practice and procedure of the medical profession in the community where the care and treatment was rendered;” “failing to use reasonable and proper skill and care in the treatment of the plaintiff;” and “negligently and carefully [sic] failing to use and/or utilize approved methods in general use in the care and treatment of the plaintiff” are “boiler plate” definitions of medical malpractice inappropriate for a Bill of Particulars. Defendants argue that those portions of the Bill of Particulars must be stricken and replaced by an amended Bill of Particulars.

Defendants’ Question 7 asked:

In respect to the cause of action for lack of informed consent; as to each defendant, separately:

- (A) the procedure(s) of treatment(s) for which said defendant failed to obtain informed consent;
- (B) those known or reasonably foreseeable risks surrounding each procedure or treatment of the plaintiff which it is claimed each defendant failed to disclose;
- (C) the alternative mode of treatment, if any, which it is claimed would have been chosen had such disclosure been made;
- (D) the date on which it is claimed informed consent should have been obtained;
- (E) all information imparted by each defendant to plaintiff;
- (F) all information not imparted by each defendant which should have been imparted in order to afford the plaintiff an opportunity to give informed consent to the proposed

- procedure or treatment;
- (G) all information known to plaintiff as a risk or complication of the proposed procedure or treatment prior to consulting each defendant;
 - (H) set forth the risks or complications of the proposed procedure or treatment which, if known to the plaintiff, would have caused the plaintiff to withhold his or her consent to the proposed procedure or treatment.

Plaintiff responded to that demand as follows:

Plaintiff(s) object to this demand as same seeks evidentiary information which is improper. Notwithstanding said objection, it is claimed that the defendant(s) failed to provide appropriate information to IRA CONKLIN as to the risks, benefits and alternatives of an LMA procedure on the date the procedure was performed, February 4, 2013.

Defendants assert that this information is in plaintiff's exclusive possession and knowledge, is relevant to the claims, and seeks factual information about plaintiff's claims, thus making it a proper demand.

In response, plaintiff claims that the response to Demand #4, together with the Summons and Complaint, clearly delineate the claims of plaintiff and that the Bill of Particulars is fully responsive to the Demand. With respect to Demand #7, plaintiff asserts that the demand sought evidentiary information improper to a Bill of Particulars; but, notwithstanding that objection, plaintiff nevertheless provided appropriate information regarding the nature of the acts and omissions of defendant claimed by plaintiff with respect to the LMA procedure.

Plaintiff argues that the Bill of Particulars amplifies the pleading in this matter, and adequately provided defendants with notice as to the nature of the claims of negligence asserted by plaintiff.

The Court has fully considered the submissions of the parties.

Discussion

Civil Practice Law & Rules §3042 requires service of a bill of particulars complying with each item in the demand, except any item to which a party objects, in which case, the reasons for the objection shall be stated with reasonable particularity. Section 3043(a), relating to personal injury actions, requires, in relevant part, disclosure of the date and time of the occurrence, its approximate location, and a general statement of the acts or omissions constituting the claimed negligence.

The object of a bill of particulars is to amplify the pleadings, limit the proof and prevent surprise at trial. A party is entitled to particulars of his specific acts where such acts are claimed to be negligent. *Bergman v. General Motors Corp.*, 74 AD2d 886 (2nd Dep't 1980), citing, *Paldino v. E.J. Korvettes, Inc.*, 65 AD2d 617 (2nd Dep't 1978) Liberality in granting bills of particulars and full disclosure is the policy of this State. *Paldino, supra*, 65 AD2d at 617

Thus, where the Bill of Particulars is overbroad or vague, a party may be compelled to particularize the facts on which he or she intends to rely in order to avoid prejudice or surprise at trial. *Id.*; *Ritt v. Lenox Hill Hospital*, 182 AD2d 560 (1st Dep't 1992) (“improper prenatal, pre-labor, labor delivery and post-delivery procedures” constituted a vague response to a Demand) A general or conclusory response is insufficient. *Bergman, supra*, 74 AD2d at 886

Similarly, where a phrase in plaintiff's Bill of Particulars is “open-ended,” it should be stricken as such responses are inconsistent with the purpose of a Bill of Particulars. *Padro v. Boulevard Hospital*, 92 AD2d 888 (2nd Dep't 1983) (assertions that defendants' treatment was careless, negligent and reckless “in other ways” should be stricken).

Defendants assert that the portion of the response to Demand #4 claiming that defendants

“improperly and incorrectly [failed] to use and/or utilize good and accepted custom and proper medical practice and procedure of the medical profession in the community where the care and treatment was rendered”; “failing to use reasonable and proper skill and care in the treatment of the plaintiff”; and “negligently and carefully [sic] [failed] to use and/or utilize approved methods in general use in the care and treatment of the plaintiff constitutes such conclusory, broad, open-ended or vague pleading.

However, the Second Department has made it clear that a plaintiff asserting medical malpractice need not set forth the manner in which the physician failed to act in accordance with good and accepted medical practice, since a physician is chargeable with knowing those medically accepted standards applicable to plaintiff’s proper care and treatment. *Toth v. Bloshtinsky*, 39 AD3d 848 (2nd Dep’t 2007) A plaintiff must provide a general statement of the acts or omissions constituting the alleged negligence. *Id.*, citing *Kaplan v. Rosiello*, 16 AD3d 626 (2nd Dep’t 2005) Thus, the response proffered by plaintiff to Demand #4 is sufficient, as a matter of law.

A Bill of Particulars is not a form of disclosure. It is of limited scope and may not be used to obtain evidentiary material. *Bouton v. County of Suffolk*, 125 AD2d 620 (2nd Dep’t 1986) Plaintiff asserts that Demand #7 calls for such evidentiary information, and is thus objectionable.

A Demand for a Bill of Particulars that requests “alternative” designs that plaintiff claimed should have been used, requires expert testimony and is evidentiary in nature. *Bouton, supra*, 125 AD2d at 621 Similarly, a demand for alternative modes of treatment which plaintiff claims should have been used is similarly inappropriate. As such, the demand is improper.

Defendants rely on *Heyward v Ellenville Community Hospital*, 215 AD2d 967 (3d Dep’t 1995) in support of their argument that defendants are entitled to a Bill of Particulars sufficiently

narrowing the issues to permit a reasonable defense. However, the Court in *Heyward* found that a demand for statements of accepted medical practices, customs and standards allegedly violated and specific ways in which defendants allegedly did so is beyond the scope of a bill of particulars. To answer the demand, plaintiff would have to provide evidentiary material in the form of, or gleaned from, expert testimony. *Id.* at 967

The Court finds that, except as provided hereinbelow, the response to Demand #7, over the objection to the demand itself, contains an “adequate number of claimed negligent acts of commission or omission” and sets forth the condition or conditions that defendants improperly treated or failed to treat. *Mahr v. Perry*, 74 AD3d 1030 (2nd Dep’t 2010)

However, the Bill of Particulars insufficiently identifies to whom those acts or failures to act which are alleged to have been committed are attributed. Plaintiff should indicate, with reasonable particularity, acts or omissions for which each defendant is being held accountable. *Heyward, supra*, 115 AD2d at 967.

On the basis of the foregoing, it is ORDERED that, within 20 days of the service of a copy of this Decision and Order with notice of entry, plaintiff shall serve an amended Bill of Particulars, setting forth the acts of negligence allegedly attributable to each individual defendant.

In all other respects, the motion is denied.

This decision shall constitute the order of the Court.

Dated: May 7, 2014
Goshen, New York

ENTER:



HON. SANDRA B. SCIORTINO, J.S.C.