

Bergin v Jackson

2014 NY Slip Op 33915(U)

October 21, 2014

Supreme Court, Suffolk County

Docket Number: 7349/09

Judge: Paul J. Baisley, Jr.

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
CALENDAR CONTROL PART - SUFFOLK COUNTY

PRESENT:

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

PUBLISHED

-----X
EILEEN BERGIN, as Administratrix of the Estate of
LAWRENCE BERGIN, deceased and EILEEN
BERGIN, individually,

INDEX NO.: 7349/09
CALENDAR NO.: 201301285MM
MOTION DATE: 10/1/14
MOTION SEQ. NO.: 012 MOT D; 014 MOT D

Plaintiff,

-against-

DEFENDANTS' ATTORNEYS:
FUMUSO, KELLY, DeVERNA, SNYDER,
SWART & FARRELL, LLP
110 Marcus Blvd., Suite 500
Hauppauge, New York 11788-3704

DAVID JACKSON, R.P.A., KAREN EYNON, M.D.,
CARL GOODMAN, M.D., CHRISTINE KAM, M.D.,
U.S. RADIOLOGY ON-CALL, RANDOLPH
PHILLIPS, M.D., PATRICIA PICCIANO, R.N.,
BROOKHAVEN MEMORIAL HOSPITAL, DENISE
ABSELET, D.O., PORT JEFFERSON INTERNAL
MEDICINE ASSOCIATES, P.C., ALEXANDER
WEINGARTEN, M.D., PHILLIP FYMAN, M.D.,
ALEXANDER WEINGARTEN, M.D., P.C., LOUIS
MALESARDI, PA-C, PHILLIP N. FYMAN, M.D.,
COMPREHENSIVE PAIN MANAGEMENT
ASSOCIATES, RICHARD D. HINDES, M.D.,
RICHARD D. HINDES, M.D., P.C., ORTHOPEDIC
ASSOCIATES OF LONG ISLAND, LLP and
RICHARD BALTER, M.D.,

LAWRENCE, WORDEN, RAINIS
& BARD, P.C.
225 Broad Hollow Road, Suite 105E
Melville, New York 11747

ALBANESE & ALBANESE, LLP
1050 Franklin Ave., Suite 500
Garden City, New York 11530

KELLY, RODE & KELLY, ESQS.
330 Old Country Rd., Suite 305
Mineola, New York 11501

Defendants.

SHAUB, AHMUTY, CITRIN & SPRATT
1983 Marcus Ave., Suite 206
Lake Success, New York 11042-1056

-----X
PLAINTIFF'S ATTORNEY:
SULLIVAN, PAPAN, BLOCK, MCGRATH &
CANNAVO, P.C.
1140 Franklin Ave., Suite 200
Garden City, New York 11530

LEWIS JOHS AVALLONE AVILES, LLP
21 East Second St.
Riverhead, New York 11901

Upon the following papers numbered 1 to 21 read on this motion to preclude and amend bill of particulars: Notice of Motion/ Order to Show Cause and supporting papers 1-6; Notice of Cross Motion and supporting papers 7-19; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers 20-21; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by defendants Phillip Fyman (Fyman) and Alexander Weingarten, M.D., P.C. (Weingarten) s/h/a Phillip Fyman, M.D., Alexander Weingarten, M.D., P.C., Phillip Fyman and Alexander Weingarten, M.D., P.C., d/b/a Comprehensive Pain Management Associates s/h/a Comprehensive Pain Management Associates (Comprehensive) seeking an order pursuant to CPLR 3101(d) striking those portions of plaintiff's expert disclosure that assert allegations of negligence outside the scope of plaintiff's bills of particulars is denied; and it is further

ORDERED that the cross motion by plaintiff Eileen P. Bergin, as the Administratrix of the Estate of Lawrence Bergin, deceased, and Eileen Bergin, Individually (Bergin) seeking an order denying the defendants' motion or, in the alternative, granting the plaintiff permission to amend the bills of particulars to include the specific claims which are objected to by the defendants in plaintiff's expert response is granted. The proposed "Second Supplemental/Amended Verified Bill of Particulars" dated September 16, 2014 which is annexed to plaintiff's motion papers is deemed served nunc pro tunc to the date of service of plaintiff's cross motion; and it is further

ORDERED that defendants' application in the nature of a motion in limine for an order precluding plaintiff's expert from testifying at trial concerning the legal requirements assigned to a physician while supervising a physician's assistant is respectfully referred for determination to the trial court assigned to oversee the trial of this action.

Plaintiff's medical malpractice complaint asserts that the Comprehensive defendants were negligent and committed acts of medical malpractice while treating the plaintiff/decedent Bergin for pain emanating from his back, groin and leg from March 25, 2003 until November 16, 2006. The gravamen of plaintiff's claims concern the Comprehensive defendants' failure to properly identify and treat Bergin for an infection in his right hip known as Methicillin Resistant Staphylococcus Aureus (MRSA).

Plaintiff served Bergin's expert witness identification disclosure dated July 10, 2013 from plaintiff's expert in Pain Management and Neurology. The defendants had previously received the same expert's identical 34 page affirmation on or about March 17, 2013 in opposition to two summary judgment motions submitted by the Comprehensive defendants and defendant Louis Malesardi, PA-C. Defendants claim that certain of the plaintiff's expert's allegations were not included in Bergin's bills of particulars and therefore the proposed expert's testimony must be precluded at trial. Defendants' motion seeks an order striking the new allegations of negligence set forth in plaintiff's expert disclosure notice.

Among the new allegations claimed by the defendants to not have been included in the bills of particulars are:

- 1) defendants' copying and repetition of the same diagnosis and history even as the decedent's condition deteriorated and new & stronger medications were prescribed;
- 2) defendants' failure to test for a urinary tract infection or to insure that others had done so;
- 3) the disparity between the defendants' records and the physical therapists' records;
- 4) defendants' deviation from proper care during a three year course of treatment;
- 5) defendants' failure to insure that an MRI was done or to document the plaintiff/decedent's failure or refusal to have an MRI done;
- 6) defendants' failure to refer the decedent for an emergency MRI on or before November 7, 2006;
- 7) defendants' deviation by prescribing medications not documented in their records and by ordering physical therapy without making any notes for same.

The defendants also object to the plaintiff's expert's proposed testimony concerning the legal requirements assigned to a physician while supervising a physician's assistant. Defendants claim that those rules are regulated pursuant to 10 NYCRR 94.2 and therefore plaintiff's expert is precluded from testifying about the application and/or interpretation of the statute since those functions are explicitly reserved to the trial court.

In opposition and in support of the cross motion, plaintiff submits an attorney's affirmation and claims that there are no new allegations set forth in Bergin's expert witness disclosure notice which have not already been alleged in the bills of particulars. Plaintiff claims that the bills of particulars clearly state Bergin's theory of liability which includes negligence in evaluation, diagnosis, follow up, documentation and treatment of the decedent which includes the injection of drugs by Comprehensive's employees. Plaintiff argues in the alternative that, if the Court determines that new allegations have been made in plaintiff's expert's lengthy 34 page affirmation, that plaintiff should be permitted to amend the bills of particulars to include these additional claims particularly since the defendants were served with the expert's disclosure in March, 2013. Plaintiff asserts that no prejudice would result to the defendants' ability to prepare their defense, since the defendants waited nearly 18 months before submitting this motion to preclude Bergin's expert. Plaintiff submits a proposed "Second Supplemental/Amended Bill of Particulars To Phillip Fyman, M.D.- Alexander Weingarten, M.D., P.C. and Comprehensive Pain Management Associates".

CPLR Section 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 (2nd Dept., 1993); *Martin v. Triborough Bridge and Tunnel Authority*, 73 AD3d 481, 901 NYS2d 193 (1st Dept., 2010); leave to appeal denied 15 NY3d 713, 912 NYS2d 578 (2010); *Ocampo v. Pagan*, 68 AD3d 1077, 892 NYS2d 452 (2nd Dept., 2009); *Rowan v. Cross Country Ski & Skate, Inc.*, 42 AD3d 563, 840 NYS2d 414 (2nd Dept., 2007)).

The purpose of a bill of particulars is to amplify the pleadings, limit the proof and prevent surprise at trial (*Fremont Investment & Loan v. Gentile*, 94 AD3d 1046, 943 NYS2d 182 (2nd Dept., 2012); *Ferrigno v. General Motors Corp.*, 134 AD2d 479, 521 NYS2d 263 (2nd Dept., 1987)). In a medical malpractice action, as in any action for personal injuries, a bill of particulars requires only a general statement of the complained of acts or omissions (*Stidham v. Clerk*, 57 AD3d 1369, 870 NYS2d 682 (4th Dept., 2008); *Rockefeller v. Hwang*, 106 AD2d 817, 484 NYS2d 206 (3rd Dept., 1984)).

CPLR 3043(b) provides:

(b) Supplemental bill of particulars without leave. 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 thirty days prior to trial. Provided

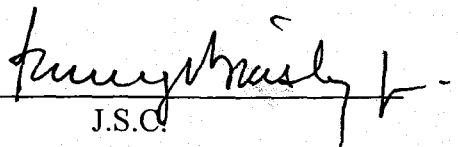
however that no new cause of action may be alleged or new injury claimed and that the other party shall upon seven days notice, be entitled to newly exercise any and all rights of discovery, but only with respect to such continuing special damages and disabilities.

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 (2nd Dept., 2008)). Leave to amend is entrusted to the sound discretion of the court (*see Arcuri v. Ramos*, 7 AD3d 741, 776 NYS2d 895 (2nd Dept., 2004)). 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" (*see Morris v. Queens Long Island Medical Group, P.C.*, 49 AD3d 827, 854 NYS2d 222 (2nd 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 resulted from the delay (*Alrose Oceanside, LLC v. Mueller*, 81 AD3d 574, 915 NYS2d 643 (2nd Dept., 2011); *Sewkarran v. DeBellis*, 11 AD3d 445, 782 NYS2d 758 (2nd Dept., 2004)).

A review of those portions of plaintiff's expert witness disclosure claims which the defendants assert are beyond the claims set forth in the bill of particulars shows that plaintiff's expert has alleged some very specific, additional acts of negligence committed by the defendants which are more precisely identified and beyond those previously set forth in plaintiff's prior bills of particulars. However given the undisputed fact that plaintiff served the detailed expert disclosure initially in March, 2013 and again in July, 2013, it's clear that the defendants have had ample notice of these more precise claims for the past 17 months. Based upon these circumstances there has been no showing of an intentional failure to disclose by the plaintiff or of prejudice to the defendants' ability to prepare their defense sufficient to justify preclusion of the plaintiff's expert's ability to testify at trial concerning these claims. Accordingly defendants' motion for an order of preclusion is denied and plaintiff's cross motion seeking leave to amend her bill of particulars in the form submitted as an exhibit to her motion papers is granted. Plaintiff's "Second/Amended Verified Bill of Particulars to Phillip Fyman, M.D. - Alexander Weingarten, M.D., P.C. and Comprehensive Pain Management Associates" shall be deemed served nunc pro tunc to the date of service of plaintiff's cross motion.

Finally with respect to the defendants' application for an order in limine seeking preclusion of plaintiff's expert's proposed testimony concerning the legal requirements assigned to a physician while supervising a physician's assistant, the Court respectfully refers the determination of that issue to the trial court assigned to the trial of this action as that court will be in the best position to determine whether the proposed expert testimony is relevant and admissible during the trial of this action (*see State of New York v. Hickox*, 64 AD2d 412, 410 NYS2d 81 (1st Dept., 1978); *Rockland County Social Services v. Brian McM*, 193 AD2d 121, 602 NYS2d 416 (2nd Dept., 1993); *Ayobo v. Eastman Kodak Co.*, 158 AD2d 641, 551 NYS2d 944 (2nd Dept., 1990)).

Dated: October 21, 2014


J.S.C.

HON. PAUL J. BAISLEY JR.