

Zirbes v John T. Mather Mem. Hosp.

2015 NY Slip Op 30730(U)

April 28, 2015

Supreme Court, Suffolk County

Docket Number: 29141/2010

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

CLAUDETTE ZIRBES,

Plaintiff,

-against-

JOHN T. MATHER MEMORIAL HOSPITAL,
 STONY BROOK UNIVERSITY MEDICAL
 CENTER, THOMAS STAVOLA, M.D.,
 RAVINA BALCHANDANI, M.D. and HENRY
 JAMES BEST, IV, M.D.,

Defendants.

ORIG. RETURN DATE: DECEMBER 23, 2013
 FINAL SUBMISSION DATE: MARCH 6, 2014
 MTN. SEQ. #: 006
 MOTION: MOT D

ORIG. RETURN DATE: JANUARY 9, 2014
 FINAL SUBMISSION DATE: MARCH 6, 2014
 MTN. SEQ. #: 007
 CROSS-MOTION: XMOT D

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Upon the following papers numbered 1 to 11 read on these motions TO DISQUALIFY ATTORNEY AND STRIKE LANGUAGE FROM BILLS OF PARTICULARS.
 Notice of Motion and supporting papers 1-3; Notice of Cross-Motion and supporting papers 4-6; Affirmation in Opposition 7; Reply Affirmation and supporting papers 8, 9; Reply Affirmation and supporting papers 10, 11; it is,

ORDERED that this motion (seq. #006) by defendant, THOMAS STAVOLA, M.D. ("Dr. Stavola"), for an Order: (1) removing Peter Zirbes, Esq. as counsel for plaintiff, CLAUDETTE ZIRBES; and (2) striking certain language from the Bill of Particulars sounding in lack of informed consent as to Dr. Stavola, is hereby **GRANTED** solely to the extent set forth hereinafter; and it is further

ORDERED that this cross-motion (seq. #007) by defendant, HENRY JAMES BEST IV, M.D. ("Dr. Best"), for an Order: (1) removing Peter Zirbes, Esq. as attorney for plaintiff, CLAUDETTE ZIRBES; and (2) striking that language sounding in lack of informed consent from the Bill of Particulars as to HENRY JAMES BEST IV, M.D., is hereby similarly **GRANTED** solely to the extent set forth hereinafter.

The Court has received an affirmation in opposition to both applications at bar from plaintiff CLAUDETTE ZIRBES.

This is a medical malpractice action in which it is alleged that on or about February 22, 2008, defendants improperly performed a catheterization procedure, causing a piece of plaque in plaintiff's blood stream to break loose and lodge in one of the blood vessels in plaintiff's left eye, allegedly causing permanent blindness.

By Order dated May 16, 2011, this Court granted an unopposed motion by defendant JOHN T. MATHER MEMORIAL HOSPITAL to dismiss the complaint and all cross-claims against it based upon improper service of process. The action was severed and continued against the remaining defendants.

Dr. Stavola and Dr. Best have now filed the instant applications seeking to disqualify plaintiff's attorney, Peter M. Zirbes, Esq., from representing plaintiff herein. Mr. Zirbes is plaintiff's husband. These defendants allege that Mr. Zirbes had discussions with Dr. Stavola regarding the subject care and treatment that was rendered to plaintiff. In particular, it is alleged that Dr. Stavola had discussions with Mr. Zirbes regarding the risks and benefits of the cardiac catheterization procedure, which discussions are reflected in Dr. Stavola's consult note. As such, defendants argue that Mr. Zirbes is a witness to the events giving rise to this action. Moreover, defendants indicate that they intend to seek the non-party deposition of Mr. Zirbes.

Furthermore, defendants seek to strike certain language from plaintiff's Verified Bills of Particulars, both dated March 31, 2012, sounding in lack of informed consent as to Dr. Stavola and Dr. Best, arguing that plaintiff failed to plead a cause of action for lack of informed consent in her complaint, and the applicable statute of limitations has now run.

In opposition hereto, Mr. Zirbes contends that his testimony on the informed consent "claim" is not necessary herein, in that there were many nurses and other health care professionals present with plaintiff the morning of her procedure who can testify as to her condition when she signed the consent form. Moreover, Mr. Zirbes opposes the striking of the informed consent language from plaintiff's Bills of Particulars, arguing that a medical malpractice cause of action can be based upon a lack of informed consent claim.

With respect to the informed consent language contained in plaintiff's Verified Bills of Particulars, the Court has reviewed the within complaint and finds that plaintiff has failed to plead a cause of action alleging lack of informed consent. Such cause of action is statutory pursuant to Public Health Law § 2805-d, and is an independent cause of action which requires proof of facts not contemplated by an action based merely on allegations of negligence (see Public Health Law § 2805-d; *Walker v Saint Vincent Catholic Med. Ctrs.*, 114 AD3d 669 [2014]; *Evans v Kringstein*, 193 AD2d 714 [1993]; *Barkakos v Avellini*, 185 AD2d 805 [1992]; *Pagan v State*, 124 Misc 2d 366 [Ct Cl 1984]; *Montagnino v Inamed Corp.*, 35 Misc 3d 1229[A] [Sup Ct, Nassau County 2012]). Accordingly, the language in the Bills of Particulars sounding in lack of informed consent must be stricken, as the purpose of a bill of particulars is to fill gaps in a claim, not to state a separate cause of action; it should amplify the pleading, not serve as a substitute for it (see *Bryant v New York*, 188 AD2d 447 [1992]; *Willinger v Greenburgh*, 169 AD2d 715 [1991]; *Pagan*, 124 Misc 2d 366; *Lynch v Baker*, 2014 NY Slip Op 31149[U] [Sup Ct, Suffolk County 2014]).

Therefore, those branches of the instant motions to strike the language from plaintiff's Bills of Particulars dated March 31, 2012 sounding in lack of informed consent as to Dr. Stavola and Dr. Best, is **GRANTED**.

Regarding the applications to disqualify Mr. Zirbes as plaintiff's attorney herein, courts, in determining whether a party's lawyer, at its adversary's instance, should be disqualified during litigation, must also consider such factors

as the party's valued right to choose its own counsel, and the fairness and effect in the particular factual setting of granting disqualification or continuing representation (*S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437 [1987]). A party's entitlement to be represented in ongoing litigation by counsel of his or her own choosing is a valid right which should not be abridged absent a clear showing that disqualification is warranted (see *Gulino v Gulino*, 35 AD3d 812 [2006]; *Aryeh v Aryeh*, 14 AD3d 634 [2005]; *Dominguez v Community Health Plan of Suffolk*, 284 AD2d 294 [2001]). While the right to choose one's counsel is not absolute, disqualification of legal counsel during litigation implicates not only ethics of the profession but also the parties' substantive rights, thus requiring any restrictions to be carefully scrutinized (see *S&S Hotel Ventures Ltd. Partnership*, 69 NY2d 437; *Gulino*, 35 AD3d 812). The party seeking to disqualify a law firm or an attorney bears the burden to show sufficient proof to warrant such a determination (see *Gulino*, 35 AD3d 812; *Aryeh*, 14 AD3d 634).

Further, disqualification of counsel may be required only when it is likely that the testimony to be given by the witness is necessary, and that such testimony is or may be prejudicial to the client (see *S & S Hotel Ventures Ltd. Partnership*, 69 NY2d 437; *Goldberger v Eisner*, 21 AD3d 401 [2005]; *Daniel Gale Assoc. v George*, 8 AD3d 608 [2004]). A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence (*S & S Hotel Ventures Ltd. Partnership*, 69 NY2d 437; *Matter of Porter*, 35 AD3d 477 [2006]).

After reviewing the papers submitted, balancing the aforementioned factors, and in light of the Court's ruling herein on the lack of informed consent issue, the Court finds that disqualification of Mr. Zirbes is not warranted. As noted, plaintiff failed to plead a cause of action based upon lack of informed consent, and merely pleaded a sole cause of action sounding in medical malpractice. The requisite elements of proof in a medical malpractice action are: (1) a deviation or departure from accepted practice; and (2) evidence that such departure was a proximate cause of injury or damage (*Holton v Sprain Brook Manor Nursing Home*, 253 AD2d 852 [1998], *app denied* 92 NY2d 818 [1999]). To prove a *prima facie* case of medical malpractice, a plaintiff must establish that a defendant's negligence was a substantial factor in producing the alleged injury (see *Derdiarian v Felix Contracting Corp.*, 51 NY2d 308 [1980]; *Prete v Rafla-Demetrious*, 221 AD2d 674 [1996]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to

prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of a plaintiff's injury (see *Fiore v Galang*, 64 NY2d 999 [1985]; *Lyons v McCauley*, 252 AD2d 516 [1998], *app denied* 92 NY2d 814 [1998]; *Bloom v City of New York*, 202 AD2d 465 [1994]). Thus, the Court finds that the moving defendants have failed to demonstrate that Mr. Zirbes' testimony is necessary to establish the medical malpractice cause of action alleged, which would warrant disqualification of Mr. Zirbes herein.

In view of the foregoing, those branches of the instant motions to disqualify Peter Zirbes, Esq. from representing plaintiff herein is **DENIED**.

The foregoing constitutes the decision and Order of the Court.

Dated: April 28, 2015



HON JOSEPH FARNETI
Acting Justice Supreme Court

_____ FINAL DISPOSITION

 X NON-FINAL DISPOSITION