

**Freeman v Knowles**

2015 NY Slip Op 32832(U)

August 19, 2015

Supreme Court, Dutchess County

Docket Number: 3336/13

Judge: Maria G. Rosa

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SUPREME COURT - STATE OF NEW YORK  
DUTCHESS COUNTY

DUTCHESS COUNTY  
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Present:

Hon. MARIA G. ROSA

Justice.

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DENNIS C. FREEMAN as Administrator of the  
Estate of KEVIN R. FREEMAN, deceased,  
Plaintiffs,

DECISION AND ORDER

-against-

Index No: 3336/13

KATRINA ANNE KNOWLES, M.D., SHAHEDA  
NOOR AZHER, M.D. and VASSAR BROTHERS  
HOSPITAL,  
Defendants.

\_\_\_\_\_ x

The following papers were read on defendants' motions for sanctions pursuant to CPLR §3126 and/or to compel and plaintiffs' cross-motion.

NOTICE OF MOTION  
AFFIRMATION IN SUPPORT  
EXHIBITS A-U

NOTICE OF CROSS-MOTION  
AFFIRMATION IN SUPPORT  
EXHIBITS A-C

AFFIRMATION IN SUPPORT  
EXHIBITS A&B

NOTICE OF CROSS-MOTION  
AFFIRMATION IN SUPPORT  
EXHIBITS A-Y

AFFIRMATION IN OPPOSITION  
REPLY AFFIRMATION  
EXHIBITS V&W

[\* 2]

This is a medical malpractice action in which the defendants move for sanctions or, in the alternative, to compel, alleging the plaintiff (the father of the decedent) has failed to provide adequate responses to demands for a bill of particulars and paper discovery. The plaintiff cross-moves for an order pursuant to CPLR §§3101 and 3124 to compel the further deposition of defendant Dr. Katrina Anne Knowles.

Plaintiff commenced this action by serving a summons and complaint on May 31, 2013. Dr. Knowles answered the complaint on or about July 15, 2013. Accompanying her answer was a demand for a verified bill of particulars and combined discovery demands. Eight months later, on March 24, 2014, plaintiff served a verified bill of particulars. At a court conference on March 27, 2014 the defendants alleged there were deficiencies in the bill of particulars. The attorney present at the conference for the plaintiff was of counsel and unable to engage in a substantive discussion about the content of the bill of particulars. Thereafter various good-faith letters were sent to the plaintiff identifying the alleged deficiencies in the bill of particulars. Plaintiff served a supplemental bill of particulars by email on February 17, 2015 with a hard copy thereafter. Plaintiff alleges, however, that the supplemental bill of particulars was served in May 2014. Correspondence ensued in which the defendants claimed continued deficiencies in the bill of particulars. On April 7, 2015 plaintiff served a second supplemental bill of particulars. In subsequent correspondence and during a conference before this court (James V. Brands, J.S.C.) plaintiff clarified that his damage claims were limited to pecuniary losses of a funeral bill and lost inheritance, that the plaintiff/decedent's father and administrator was the decedent's sole distributee, but that in the event of plaintiff's death the decedent's two siblings would become the distributees. In a third supplemental verified bill of particulars dated May 29, 2015 plaintiff stated that decedent is survived by his father, as well as his brother Andrew Freeman and his sister Suzie Freeman.

The gravamen of defendants' claims derive from plaintiff's failure to provide any facts in his bill of particulars pertaining to the informed consent claim, inclusion of numerous non-specific allegations as to the alleged negligence, failure to articulate the basis for the pecuniary loss claim, and failure to provide paper discovery pertaining to the distributees of the decedent's estate and a social media website. The purpose of a bill of particulars is to amplify the pleadings, limit proof and prevent surprise at trial. See Kenler v. Weissbach, 61 AD2d 976 (2<sup>nd</sup> Dept. 1978). It is not an evidence-gathering device. Id. At trial, a defendant is only required to address and rebut the specific allegations of malpractice set forth in the plaintiff's complaint and bill of particulars. See Bhim v. Dourmashkin, 123 AD3d 862 (2<sup>nd</sup> Dept. 2014).

A lack of informed consent claim in a medical malpractice action requires a plaintiff to demonstrate that: (1) the practitioner failed to disclose the risks, benefits and alternatives to the procedure or treatment that a reasonable practitioner would have disclosed; and (2) a reasonable person in the plaintiff's position, fully informed, would have elected not to undergo the procedure or treatment. See Orphan v. Pilnik, 15 NY3d 907, 908 (2010); Public Health Law §2805-d(1). To establish such a claim, a plaintiff must demonstrate an affirmative violation of physical integrity. See Senatore v. Epstein, 128 AD3d 794 (2<sup>nd</sup> Dept. 2015). Thus, when a plaintiff asserts a lack of informed consent claim, to defend against such claim a defendant is entitled to know the basic facts

[\* 3]

underlying such claim, to wit: the procedure or treatment underlying such claim and/or the conduct that is alleged to have been a violation of the plaintiff's physical integrity. In this case, plaintiff has refused to disclose such facts. Instead, plaintiff merely asserts that the defendant failed to obtain informed consent as it pertained to care and treatment and was not informed in "lay person's terms" as to the status of his condition. As plaintiff fails to allege any specific facts relative to the alleged procedure or treatment rendered or the conduct constituting an alleged violation of the decedent's physical integrity, the bill of particulars is deficient.

According, it is hereby

ORDERED that defendants' motions are granted to the extent that within fourteen (14) days of the date of this decision and order, plaintiff shall serve a fourth supplemental bill of particulars consistent with the foregoing. Should plaintiff fail to adequately articulate the facts underlying the lack of informed consent claim, defendants are hereby granted leave to submit supplemental affidavits and a proposed order on notice in furtherance of their motions to preclude.

Plaintiff's bill of particulars is also deficient to the extent that it asserts numerous vague, and general allegations of negligence without any underlying facts. Paragraph 2 of the bill of particulars is replete with general allegations of negligence devoid of factual assertions. Based on the foregoing, it is hereby

ORDERED that defendants' motion is granted to the extent that within fourteen (14) days of the date of this decision and order plaintiff shall serve defendants with a fourth supplemental bill of particulars in which he make specific factual allegations in support of the request for information as to the acts and omissions constituting the defendants' alleged negligence. Should plaintiff fail to adequately articulate the facts underlying the lack of informed consent claim, defendants are hereby granted leave to submit supplemental affidavits and a proposed order in furtherance of their motions to preclude.

The foregoing analysis also applies to plaintiff's responses to demand number 3 requesting plaintiff to articulate the condition or conditions it is claimed that defendant Knowles undertook to treat. The court rejects plaintiff's assertions that such request is for evidentiary material. Just because a request demands factual information to amplify a claim does not transform it into an improper use of a demand for a bill of particulars as an evidence-gathering device. Fundamental due process and the discovery rules set forth in CPLR Article 31 require a plaintiff to provide certain factual information so that the defendants have notice as to the claims being asserted against them and can properly prepare a defense. Such procedures prevent trial by ambush. Similarly, as plaintiff claims that defendant Knowles failed to perform her professional duties in accordance with rules, regulations, laws and ordinances, plaintiff is required to articulate those laws, rules or regulations. Finally, while plaintiff has made representations in court and in correspondence pertaining to the basis for his pecuniary loss claim, proper procedure requires him to supplement his bill of particulars to state that his claims of pecuniary loss will be limited to claims for reimbursement for funeral expenses and loss of inheritance. Based on the foregoing, it is hereby

ORDERED that plaintiff shall serve a fourth supplemental bill of particulars within fourteen (14) days of the date of this decision and order providing renewed responses to demands three, seven, eight and nineteen of defendant Knowles' demand for a bill of particulars. It is further

ORDERED that plaintiff shall provide defendants with copies of the decedent's marriage certificate and/or divorce decree for the purpose of enabling the defendants to ascertain the decedent's proper distributees. While plaintiff has made an allegation that the decedent's father is the sole distributee, defendants are not required to rely on that assertion and are entitled to discovery to defend against plaintiff's claim for pecuniary loss based on his alleged status as the beneficiary in this wrongful death action. See generally Gotlin v. Kabeeruddin, 814 NYS2d 561 (NY Sup. 2006); EPTL 5-4.3. It is further

ORDERED that defendants' motion to compel production of social media information is denied. Plaintiff's bill of particulars alleges that defendants' negligent acts and/or omissions occurred at Vassar Brothers Hospital beginning on June 2, 2011. Decedent died the following day on June 3, 2011. On such facts, defendants fail to articulate how the social media information requested pertaining to decedent's activities is likely to lead to relevant or discoverable evidence in this wrongful death action. Such discovery has no bearing on any claim on behalf of the decedent for his pain and suffering prior to his death resulting from the alleged negligence. It is further

ORDERED that plaintiff's cross-motion to compel a further deposition of defendant Knowles is denied. The application appears premised upon a letter defense counsel sent to plaintiff following defendant Knowles' deposition in which she expressed concern with the accuracy of the transcript. In returning the transcript, Dr. Knowles apparently made five pages of corrections. The letter further indicates that defendant intends to make a motion *in limine* prior to trial to limit the reading of the transcript and deem those parts of the transcript as amended by the errata sheets to be the correct transcript. In moving to re-depose defendant Knowles, plaintiff recognizes procedures set forth in CPLR §3116 by which a witness may make changes in form or substance to a deposition transcript after the deposition is completed. The request to conduct another deposition of Dr. Knowles appears to be based upon one specific answer that defendant Knowles indicated she "cannot decipher." Thus, her corrections to the transcript did not address that specific answer. Thus, plaintiff asserts that this response effectively leaves the transcript "open" as to that answer and plaintiff should not have to wait until trial to determine Dr. Knowles' answer to that question. In view of the fact that both parties recognize that Dr. Knowles followed the procedures set forth in CPLR §3116 to make corrections of the transcript with the exception of one answer, a further deposition of defendant Knowles is not warranted based on a single question. The court will, however, permit plaintiff to serve a single interrogatory on Dr. Knowles identical to the question at issue as set forth on page 166 of her deposition transcript, within fourteen (14) days of the date of this order. Dr. Knowles shall provide a verified response to the single interrogatory within fourteen (14) days of receipt thereof. In reaching this determination, the court disagrees with plaintiff's assertion that an inability to re-depose Dr. Knowles based on her failure to certify the correctness of her answer to this single question has caused severe prejudice. It is further

[\* 5]  
ORDERED that defendants' motions to preclude and for further sanctions pursuant to CPLR §3126 are denied subject to plaintiff's service of a fourth supplemental bill of particulars as set forth above. It is further

ORDERED that defendants' motions for attorney's fees and costs are denied. It is further

ORDERED that plaintiff's motion for sanctions is denied.

Counsel are directed to appear for a compliance conference on September 2, 2015 at 9:45 a.m.

This constitutes the decision and order of this court.

Dated: August 19, 2015  
Poughkeepsie, New York

ENTER:

  
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Pursuant to CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.