

**Burgher v Chong**

2016 NY Slip Op 31389(U)

July 14, 2016

Supreme Court, New York County

Docket Number: 805352/14

Judge: Martin Shulman

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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK

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 SADIE BURGHER, as Administratrix of the Estate  
 of MILLICENT BURGHER, deceased,

Index No. 805352/14

Plaintiff,

-against-

**Decision & Order**

DAVID H. CHONG, M.D. and NEW YORK-  
 PRESBYTERIAN HEALTHCARE SYSTEM, INC.  
 d/b/a NEW YORK-PRESBYTERIAN HOSPITAL,

Defendants.

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**Martin Shulman, J.:**

In this medical malpractice action, defendants, David H. Chong, M.D. ("Chong") and The New York and Presbyterian Hospital s/h/a New York-Presbyterian Healthcare Systems, Inc. d/b/a New York-Presbyterian Hospital ("NYPH")(collectively "defendants"), move pursuant to CPLR 3124 to compel plaintiff Sadie Burgher, as Administratrix of the Estate of Millicent Burgher, deceased ("plaintiff") to respond to and comply with outstanding discovery requests and prior court orders. Plaintiff opposes the motion.

**Background**

Plaintiff commenced this action by filing the summons and verified complaint on October 2, 2014. Motion at Exh. A. NYPH served its initial demands for written discovery, requests for authorizations and bills of particulars simultaneously with their answer on December 3, 2014. *Id.* at Exh. B. Plaintiff subsequently filed an amended summons and amended verified complaint on December 15, 2014. *Id.* at Exh. C. Both defendants served various discovery

demands, including demands for verified bills of particulars (the "demands") simultaneously with their joint answer on January 22, 2015. *Id.* at Exh. D.

Plaintiff filed a notice of medical malpractice action on February 20, 2015, attaching her verified bills of particulars as to each defendant thereto. *Id.* at Exhs. E, F and G. Defendants state that plaintiff also served authorizations for Medicare, Medicaid, the Social Security Administration, Chong, NYPH and the Medical Examiner, but no others. Defendants served another demand for authorizations on or about July 6, 2015 seeking 50 authorizations. *Id.* at Exh. H.

Counsel for the parties attended a preliminary conference on July 15, 2015 and entered into a preliminary conference order ("PCO"). *Id.* at Exh. J. Prior to the conference, defense counsel sent plaintiff's counsel a letter dated July 14, 2015 requesting supplemental bills of particulars. *Id.* at Exh. I. The PCO provides in pertinent part that plaintiff was "to provide a response" to the July 14, 2015 letter and the July 6, 2015 demand for authorizations within 30 days.

By letter dated November 18, 2015 (which was not served within 30 days of the July 15, 2015 PCO) plaintiff's counsel advised that she declined to serve supplemental bills of particulars, citing CPLR 3043. *Id.* at Exh. K. This letter did not address the July 6, 2015 demand for authorizations. Plaintiff provided no authorizations or response to defendants demand therefor until on or about April 13, 2016, after this motion was served, providing 27 of 50 demanded authorizations. Exh. B to Hong-Aff. in Opp.

### Arguments

Defendants argue that plaintiff's bills of particulars must be supplemented because they fail to "provide any context for the claims of medical malpractice", other than to state that the alleged malpractice took place during the approximately four month period of plaintiff decedent's hospitalization (from December 26, 2012 until plaintiff decedent's death on April 22, 2013), and provide only generic information indicating that the alleged injury involves decubitus ulcers. Defendants emphasize that the medical records from the decedent plaintiff's four month hospital admission at NYPH exceed 19,000 pages and they should not be relegated to review same to attempt to determine plaintiff's possible theories of negligence. Defendants further note this court's opinion, expressed at the preliminary conference and reiterated at a January 13, 2015 compliance conference (and undisputed in plaintiff's opposition), that their demands for particulars are not unreasonable. Finally, defendants note that plaintiffs' bills of particulars add death as an injury and funeral expenses as special damages, despite the fact that the complaint alleges no cause of action for wrongful death.

In opposition, plaintiff's counsel relies upon CPLR 3043 which provides that particulars in personal injury actions may be required as to general, as opposed to specific, acts or omissions constituting the claimed negligence. See CPLR 3043(a)(3). Plaintiff argues defendants' demands improperly seek

particulars as to specific rather than general acts of negligence<sup>1</sup> and/or materials that are evidentiary in nature. Plaintiff claims that the bills of particulars served contain such a general statement in full compliance with CPLR 3043. She further contends that the PCO only required a response to defendants' July 14, 2015 letter, rather than service of supplemental bills of particulars, which the November 18, 2015 letter provides. Finally, as to the demanded authorizations, plaintiff's counsel's opposing affirmation includes a simultaneously served response to defendants' July 6, 2015 demand. Exh. B to Hong Aff. in Opp.

In reply, defendants attempt to characterize this court's observations made during conferences as "law of the case." However, this court expressly declined to make a ruling, hence the instant motion. Defendants dispute that plaintiff's bills of particulars contain even a "general statement" of the acts or omissions constituting the alleged negligence, as they only specify the dates of plaintiff decedent's admission to NYPH. As to the authorizations plaintiff belatedly provided after this motion was served, defendants note that all demanded authorizations were not provided and their reply addresses certain of plaintiff's objections.

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<sup>1</sup> For instance, demands 2 through 6 seek specific dates, times, places and further information in the event plaintiff charges defendants with: a misdiagnosis (2); failure to administer diagnostic tests or procedures (3); failure to administer a particular course of therapy (4); administering contraindicated medicines, treatments, tests and procedures (5); and negligently administering a medicine, treatment, test or procedure (6). Plaintiff also objects to defendants' requests to "narrow the scope of the date of alleged negligence" and to specify when the decubitus ulcer first formed and became infected.

## Discussion

### **A. Supplemental Bills of Particulars**

Defendants move under CPLR 3124, which permits a party seeking disclosure to move to compel compliance or a response upon the failure to respond to or comply with any request, notice, interrogatory, demand, question or order (other than a notice to admit). With respect to demands for bills of particulars, as stated in *Cirelli v Victory Mem. Hosp.*, 45 AD2d 856, 856-857 (2d Dept 1974), "the purpose of a bill of particulars is to amplify the pleadings, limit the proof and prevent surprise at trial, but not to provide evidentiary material (citations omitted)."

As plaintiff correctly argues, CPLR 3043(a)(3) requires a "[g]eneral statement of the acts or omissions constituting the negligence claimed". And as plaintiff further acknowledges, for purposes of determining compliance with this statutory provision, medical malpractice actions are not treated differently from other personal injury actions. *Cirelli*, 45 AD2d at 856 ("We apprehend no beneficial reason to put the plaintiff in a malpractice action [who most often is less likely than the defendant to have knowledge of proper 'surgical procedures', 'medicines', and 'tests'] to a greater burden than plaintiffs in other types of personal injury actions.").

Notwithstanding the foregoing, CPLR 3043[c] grants the courts broad discretion with respect to the particulars listed in CPLR 3043[a] and which "may be required":

Discretion of court. Nothing contained in the foregoing shall be deemed to limit the court in denying in a proper case, any one or more of the foregoing particulars, **or in a proper case, in granting other, further or different particulars.** (Emphasis added)

From the foregoing, it is evident that determinations as to the propriety of demanded particulars must be made on a case by case basis.

In *Nelson v New York Univ. Med. Ctr.*, 51 AD2d 352, 355 (1<sup>st</sup> Dept 1976), the court specifically rejected the notion, advanced by plaintiff herein, that certain demands are always to be permitted (or stricken as improper, as the case may be).<sup>2</sup> There, the court observed that the complaints at issue were "so general and uninformative as to raise a serious question as to whether they are designed to conceal rather than to inform", and noted that the practice of serving "boilerplate" complaints was typical in medical malpractice cases. *Id.* at 354. Under such circumstances where a complaint fails to meet CPLR §3013's basic pleading requirements,<sup>3</sup> the court found that defendants should be granted "the fullest bill of particulars, and . . . the court should err on the side of requiring more rather than less information to be furnished". Notwithstanding the foregoing, the *Nelson* court further recognized that in technical malpractice cases plaintiffs simply may not have some information, in which event a statement to such effect

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<sup>2</sup> *Nelson* was a consolidated appeal of conflicting decisions from two different Supreme Court Justices as to the propriety of a hospital defendant's identical demands for a bill of particulars served by the same defense firm in two separate cases.

<sup>3</sup> CPLR §3013 requires statements in pleadings to be "sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense."

may be allowed, followed by a supplemental bill of particulars when such information is obtained. *Id.* at 355.

Although the specific demands at issue are not set forth in *Nelson*, of concern to the First Department was its observation that the complaints in those cases were so general as to allege only medical malpractice causes of action, with nothing more:

It is impossible to ascertain from the complaint whether the alleged malpractice was in diagnosis or treatment, or in what respects; what the condition sought to be treated or the nature of the treatment was, not even whether it was medical, surgical, psychiatric, . . . etc.; what is claimed to have gone wrong; or what plaintiff's condition was before the treatment or has become since.

*Id.* at 354. The complaint in the case at bar is only slightly more detailed than those at issue in *Nelson*, containing only brief references to alleged failures to prevent the development and deterioration of decubiti ulcers. Amended Verified Complaint, at Exh. C to Motion, ¶¶ 19, 30 and 38. Plaintiff's notice of medical malpractice action contains slightly more, identifying the substance of the claim as being "[p]ain and [s]uffering resulting from the development and deterioration of multiple pressure ulcers, infection and ultimately death due to defendants' negligence and medical malpractice while plaintiff's decedent was under the defendants' care and treatment". *Id.* at Exh. E. The only other relevant facts that can be gleaned from plaintiff's bills of particulars are the dates of her admission to NYPH; the condition sought to be treated (abdominal pain and fever); and plaintiff's decedent's alleged injuries (including ulcer locations, sepsis, infection,

nerve damage, scarring, pain and suffering and death). See Motion at Exhs. F (¶¶ 10 through 13) and G (¶¶ 14 through 17).

As the foregoing indicates, it is impossible to discern from plaintiff's sparse allegations *inter alia* whether the claimed malpractice was in diagnosis or treatment, or in what respects; what the nature of the treatment was; and what is claimed to have gone wrong and when. See *Nelson, supra*. Accordingly, plaintiff is directed as follows:

- to supplement her bills of particulars (Chong BP - items 2, 3, 4, 5, 6, 10 and 13; NYPH BP - items 2, 3, 4, 5, 6, 14 and 17);
- to the extent that she has not already done so, to provide responses to those demands for which plaintiff's bills of particulars indicate that a response would be provided under separate cover (Chong BP - items 7, 8, 9, 20 and 22; NYPH BP - items 8, 12, 13, 24 and 26); and
- to delete references to death and funeral expenses until such time as the complaint may be amended to add a cause of action for wrongful death (Chong BP - items 13 and 19; NYPH BP - items 17 and 23).

Plaintiff shall comply with the foregoing within thirty (30) days of this court's electronic filing of this decision and order.

#### **B. Authorizations**

Defendants' motion to compel is granted as to the authorizations for Health First (38), Dr. Leonard Stern (42 and 47), Dr. Ashmi Patel (43) and Dr. Andrew Steven Bombback (48). Plaintiff's objections thereto lack merit. Plaintiff is directed to provide such authorizations within thirty (30) days of this court's electronic filing of this decision and order.

As to those authorizations to which plaintiff objected, defendants' motion to compel is denied. Defendants only broadly allege that plaintiff's decedent

presented to NYPH with "significant co-morbidities" and thus her prior medical history is relevant to evaluate her claims of pain and suffering. Deaner Aff. in Supp. of Motion, ¶25. At this juncture, where the only allegation is that defendants treated plaintiff's decedent for abdominal pain and fever and such treatment resulted in the development and deterioration of pressure ulcers, this court is unable to evaluate the relevance of the demands for authorizations for the following records: psychiatric (1); gynecological (2, 3, 8, 9, 11, 16); New York City Board of Education (6); dental (10); optical (19); and car services (44). This record is insufficient to warrant such a sweeping turnover of potentially sensitive records. Such denial is without prejudice to defendants' right to demand such authorizations in the future, upon a proper showing of relevance.

Finally, plaintiff's counsel's response indicates that items 7, 24, 27 and 45 of defendants' demand for authorizations sought records for providers unknown and/or unascertainable to plaintiff. This court finds that plaintiff's counsel, whose response confirms that internet searches for such providers were performed, responded to these demands to the best of their knowledge.

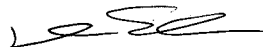
For the foregoing reasons, it is

ORDERED that defendants' motion to compel is granted in part and denied in part in accordance with the directives detailed herein above.

Counsel for the parties are directed to appear for a status conference on August 2, 2016 at 9:30 a.m., at 60 Centre St., Room 325, New York, New York.

The foregoing constitutes this court's decision and order.

Dated: New York, New York  
July 14, 2016



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Martin Shulman, J.S.C.