

Kanaly v DeMartino

2016 NY Slip Op 32935(U)

October 20, 2016

Supreme Court, Saratoga County

Docket Number: 2013-973

Judge: Robert J. Chauvin

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STATE OF NEW YORK
SUPREME COURT COUNTY OF SARATOGA

ORIGINAL

DIANNE KANALY, Individually and as Administratrix of the
Estate of Mary Bronwen Owens,

Plaintiff,

DECISION AND ORDER

-against-

Index No: 2013-973
RJI No: 45-1-2013-1948

WENDY ANNE DEMARTINO, M.D., JOHN KRISA, M.D.,
SAMUEL ONWUKA ANAMEZE, M.D., JENNIFER LYNN
WHITE, D.O., MEMORIAL HOSPITAL, ALBANY, N.Y.,
ALBANY MEMORIAL HOSPITAL and NORTHEAST
HEALTH, INC.,

Defendants.

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SARATOGA COUNTY
CLERK'S OFFICE
BALLSTON SPA, NY

FILED

Appearances:

For Plaintiff:

Matthew I. Fahrenkopf, Esq.
LaFave, Wein & Frament PLLC
2400 Western Avenue
Guilderland, NY 12084

For Defendants, John Krisa, M.D. and Samuel Onwuka Anameze, M.D.:

Anne M. Hurley, Esq.
O'Connor, O'Connor, Bresee & First PC
20 Corporate Woods Boulevard
Albany, NY 12211

For Defendant, Wendy Anne DeMartino, M.D.:

Joseph B. Slater, Esq.
Phelan, Phelan & Danek, LLP
300 Great Oaks Blvd., Suite 315
Albany, NY 12203-7911

For Defendants, Memorial Hospital, Albany Memorial Hospital and Northeast Health, Inc.:

Kathleen M. Ryan, Esq.
Thorn, Gershon, Tymann and Bonanni LLP
5 Wembley Court - New Karner Road
Albany, NY 12212-5054

Before: Hon. Robert J. Chauvin, J.S.C.

By notice of motion dated June 27, 2016 defendants John Krisa, M.D. and Samuel
Onwuka Anameze, M.D. seek an order striking plaintiff's second supplemental bill of particulars

served in this matter. In support of such motion said defendants submitted the affirmation of Anne M. Hurley, Esq. dated June 27, 2016 along with annexed exhibits "A" through "H" including copies of the summons and complaint; verified answer interposed by said defendants; medical records; plaintiff's verified bill of particulars in response to the demand of said defendants; a stipulation of discontinuance; plaintiff's second supplemental bill of particulars; and correspondence.

By notice of motion dated June 28, 2016 defendant, Wendy Anne DeMartino, M.D., also seeks an order striking plaintiff's second supplemental bill of particulars served in this matter. In support of such motion said defendants submitted the undated affirmation of Joseph B. Slater, Esq. along with annexed exhibits "A" through "M" including copies of the summons and complaint; verified answer interposed by said defendant; plaintiff's verified bill of particulars in response to the demand of said defendant; plaintiff's first supplemental verified bill of particulars; plaintiff's second supplemental bill of particulars; note of issue; correspondence; excerpts of deposition testimony; and medical records.

By notice of motion dated June 29, 2016 defendants, Memorial Hospital, Albany Memorial Hospital and Northeast Health, Inc., seek an order of the court requiring plaintiff to seek leave to file an amended bill of particulars and striking the responses set forth in plaintiff's previously served bills of particulars in paragraphs 3, 9, 22, 28-35, 37 and 38. In support of such motion said defendants submitted the affidavit of Kathleen Ryan, Esq. dated June 29, 2016 along with annexed exhibits "A" through "K" including copies of the verified complaint; answer interposed on behalf of said defendants; demand for a bill of particulars; plaintiff's verified bill of particulars in response to the demand of said defendants; plaintiff's first supplemental bill of particulars; plaintiff's second supplemental bill of particulars; note of issue; and correspondence. Said defendants also submitted a memo of law dated June 29, 2016.

By notice of cross-motion dated July 20, 2016, plaintiff seeks an order of the court denying the relief sought by each defendant and, in the alternative, an order permitting plaintiff to amend and serve an amended bill of particulars. In support of the cross-motion plaintiff submitted the affirmation of Matthew T. Fahrenkopf, Esq. dated July 20, 2016 along with annexed exhibits "A" through "H" including copies of medical records and correspondence. Plaintiff also submitted a memorandum of law dated July 20, 2016.

Finally each defendant submitted an affirmation in opposition to plaintiff's cross-motion including the affirmation of Joseph B. Slater, Esq. dated July 27, 2016; the affirmation of Anne M. Hurley, Esq. dated July 28, 2016; and the affidavit of Kathleen Ryan, Esq. dated July 28, 2016.

All motions were made returnable by the court on August 5, 2016.

The above referenced action is a medical malpractice action commenced by plaintiff's filing of a summons and complaint on March 15, 2013. Factually such action concerns the medical care and treatment of decedent, Mary Bronwen Owens, in June, 2011.

As pertinent to the motions herein during the pendency of the proceedings the plaintiff submitted a bill or particulars in response to the demands of each defendant, as well as, a supplemental bill of particulars and most recently a second supplemental bill of particulars. As concerns the most recent version of plaintiff's bill of particulars it is noted that such was served only five days before plaintiff filed a note of issue and after discovery had been completed.

The primary variance between the various versions of plaintiff's bills of particular concerns plaintiff's allegations of the manner in which the defendants committed malpractice and specific acts thereof, including the repetition of such contentions in other responses. Although the specific responses and number of alleged acts varies from defendant to defendant, in rough terms the number of alleged acts range from thirty-nine (39) to forty-three (43) as set forth in the first bill of particulars and the first supplemental bill of particulars to one hundred and thirty (130) to one hundred and thirty-six (136) as set forth in the second supplemental bill of particulars. Further it is noted that in response to the demands of defendants, Memorial Hospital, Albany Memorial Hospital and Northeast Health, Inc., the plaintiff reiterates the alleged acts of negligence in response to demands for every act of negligence as concerns each individual defendant.

However, although the specific acts of negligence set forth in the plaintiff's bills of particulars have increased, as set forth in the complaint, notice of malpractice action and each bill of particulars, the basic theory of liability has remained the same, i.e. that the defendants negligently prescribed and administered a drug, that being fentanyl. Such theory of liability has remained consistent and has not changed. In addition, other than general contentions that discovery is complete and the alleged acts of negligence are overly broad, no defendant has

set forth specifically how they have been prejudiced in the submission of the last supplemental bill of particulars nor has any defendant expressly specified facts which do not support the contentions contained within said bill of particulars.

Now by motion defendants John Krisa, M.D., Samuel Onwuka Anameze, M.D. and Wendy Anne DeMartino, M.D. have moved to strike the second supplemental bill of particulars contending that plaintiff's supplemental bill of particulars was, in fact, an amended bill of particulars and that plaintiff's second supplemental bill of particulars is, in fact, a further amended bill of particulars for which plaintiff must have leave of the court to serve. Defendants further argue that leave to serve a further amended bill of particulars should not be permitted as discovery has been completed and a note of issue has been filed. Defendants, Memorial Hospital, Albany Memorial Hospital and Northeast Health, Inc., also move for an order requiring plaintiff to seek leave of the court to serve the second supplemental bill of particulars upon the same contention and further that certain responses should be stricken as not sufficiently specific. In this regard the court notes that the paragraphs complained of involve the voluminous acts of alleged malpractice and the repetition of such acts in response to other demands.

In opposition, plaintiff argues that the supplemental bills of particular are actually an amplification of the prior bill of particulars and that, no matter how they are termed, are permissible. In the alternative, plaintiff cross-moves for leave to submit a second amended bill of particulars.

CPLR § 3042 permits a plaintiff to amend a bill of particulars without leave once at any time prior to the filing of a note of issue. Leave of the court is required in order to file a further amended bill of particulars or file an amended bill of particulars following the filing of a note of issue. CPLR § 3043 (b) permits the service of a supplemental bill of particulars without leave at any time, but not later than thirty (30) days before trial, but such statute specifically limits the purpose of a supplemental bill of particulars to the issues of special damages and disabilities.

Further, it has clearly been held that the discretion to permit the service of an amended bill of particulars and the discretion to deny leave to serve an amended bill of particulars is within the sound discretion of the trial court (*Harris v Jim's Porcelan Service, Inc.*, 34 AD3d 1009 [3d Dept. 2006]). However it has likewise been held that, as in the amendment of pleadings, the permission to serve an amended bill of particulars is to be freely granted (*Persira v*

NAB Const., 256 AD2d 395 [2d Dept. 1985]; *Koch v St. Francis Hosp.*, 112 AD2d 142 [2d Dept. 1998]).

In the present matter the court certainly agrees with the defendants that the so called supplemental bills of particulars were, in fact, amended bills of particulars. As noted above the primary changes made each time did not involve the issues of special damages or disabilities, but rather broadened the alleged particular manner by which the various defendants committed the alleged negligence.

However, on the other hand and as noted above, although the alleged specific acts by which the alleged negligence was committed has broadened the basic contention of malpractice, the allegations concerning the prescription and administration of fentanyl has not changed and remains consistent. Further the court notes that, despite the general assertion that discovery has been completed, no defendant has set forth a specific manner of prejudice effected by permitting the service of a second amended bill of particulars. In this regard the court notes that it will entertain any further motion for additional discovery by any of the defendants herein.

In addition, despite the contention that the voluminous responses are not specific and overly broad, the court finds plaintiff's allegations as very specific and sufficiently responsive to the defendants' respective demands. In this regard, although certain responses seem excessively redundant they do not lack specificity. Further, again, no defendant has set forth any specific basis of prejudice nor has any defendant expressly specified facts which show that such alleged acts are not supported by or contrary to the underlying facts and circumstances of the action.

As such, plaintiff's cross-motion for leave to serve a second amended bill of particulars, the so called second supplemental bill of particulars, is **GRANTED** and all of the various motions of each defendant to strike said bill of particulars or any response set forth therein is **DENIED**.

In accordance with such ruling defendants', Memorial Hospital, Albany Memorial Hospital and Northeast Health, Inc., motion to require plaintiff to seek leave to serve an amended bill of particulars is moot.

This memorandum shall constitute the decision and order of the court. The original decision and order and the underlying papers are being delivered directly to the Saratoga County Clerk for filing. The signing of this decision and order and the delivery of this decision and order

to the Saratoga County Clerk shall not constitute notice of entry under CPLR § 2220, and the parties are not relieved from the applicable provisions of that rule regarding service of notice of entry.

DATED: October 20, 2016
Ballston Spa, NY 12020

Robert J. Chauvin
HON. ROBERT J. CHAUVIN
SUPREME COURT JUSTICE

ENTERED
Craig A. Hayner

Craig A. Hayner
Saratoga County Clerk

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SARATOGA COUNTY
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BALLSTON SPA, NY

ENTERED

The following papers were read and considered:

1. Notice of Motion dated June 27, 2016;
2. Affidavit of Anne M. Hurley, Esq. dated June 27, 2016 with attached exhibits through "H";
3. Notice of Motion dated June 28, 2016;
4. Undated Affirmation of Joseph B. Slater, Esq. with attached exhibits "A" through "M";
5. Notice of Motion dated June 29, 2016;
6. Affidavit of Kathleen Ryan, Esq. dated June 29, 2016 with attached exhibits "A" through "K";
7. Memorandum of Law dated June 29, 2016;
8. Notice of Cross Motion dated July 20, 2016;
9. Affirmation of Matthew T. Fahrenkopf, Esq. dated July 20, 2016 with attached exhibits "A" through "H";
10. Memorandum of Law dated July 20, 2016;
11. Affirmation in Opposition of Joseph B. Slater, Esq. dated July 27, 2016;
12. Affirmation in Opposition and Reply of Anne M. Hurley, Esq. dated July 28, 2016; and
13. Affirmation in Opposition of Kathleen Ryan, Esq. dated July 28, 2016.