Munoz v New York Presbyt. Hosp.
2017 NY Slip Op 33258(U)
May 11, 2017
Supreme Court, New York County
Docket Number: 112223/09
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

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MARISOL MUNOZ, Index No. 112223/09

Plaintiff,

-against-

NEW YORK PRESBYTERIAN HOSPITAL, MELVIN ROSENWASSER, M.D., RA'KEERY RAHMAN, M.D., DOUGLAS NOWAK, M.D., MAURIZIO MIGLIETTA, M.D., MICHAEL ARCARESE, M.D., MARY ELLEN BASS, M.D., and STEVEN D. MEED, M.D.,

Defendants.

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JOAN A. MADDEN, J.

Defendants move for an order (i) precluding certain of plaintiff's fact witnesses that had not been previously identified in response to defendants' demand for witnesses and are allegedly cumulative of other fact witnesses, (ii) precluding plaintiff's surgical expert for plaintiff's purported failure to disclose in reasonable detail the subject matter of his/her testimony, (iii) limiting plaintiff's expert economist for lack of foundation and, upon limiting the testimony, dismissing the claim for loss of services. Plaintiff opposes the motion and cross moves to preclude defendants from using a medical expert asserting defendants' failure to serve a timely 3101(d) disclosure as ordered by the court.

In this medical malpractice action plaintiff alleges that a delay in diagnosing and treating compartment syndrome, or the accumulation of blood or edema (fluid resulting from inflammation) in her right ankle/foot, due to a misdiagnosis of rheumatoid arthritis, which resulted in plaintiff suffering from life threatening necrotizing fasciitis. At the April 6, 2017 argument of the motion, the court decided with respect to defendants' motion to preclude certain

of plaintiff's fact witnesses that such witnesses could be deposed post-note of issue, and that plaintiff's expert disclosure for her economist was sufficient. Accordingly, the issues remaining concern the motion to preclude plaintiff's surgical expert on the ground that the 3101(d) disclosure for such expert is insufficient, and the cross motion to preclude defendant's medical expert based on the ground that the 3101(d) disclosure was untimely.

As for 3101(d) disclosure for plaintiff's surgical expert, it states that he is expected to testify regarding defendants' failure to treat plaintiff's necrotizing fasciitis at all times between her admission to New York Presbyterian Hospital ("NYPH") on March 25, 2007 and her surgery on March 27, 2007. Specifically, it states, *inter alia*, that the expert is expected to testify:

> (1) as to plaintiff's admission to the emergency department of NYPH with tachycardia, and acute onset of severe, stabbing right ankle/foot pain and swelling and increased white blood cell count and medical findings indicating a severe infection, and as to defendants' failure to timely evaluate plaintiff's condition based on medication rendered to plaintiff including three drugs designed to suppress the immune system; (2) in light of plaintiff's symptoms presented on admission and soon after defendants failed to surgically address plaintiff's progressive and spreading infection and failed to render early surgical decompression, debridement and fasciotomy to avoid significant morbidity from necrotizing fasciitis; (3) had the diagnosis and treatment been timely made by defendants, much of the morbidity could have been ameliorated or avoided completely; (4) defendants' failure to timely treat plaintiff before she was critically ill and going into septic shock resulted in plaintiff having life saving painful debridements of her right leg, external fixator, skin grafts, treatment for pulmonary embolism and a prolonged critical illness and this failure was proximately caused by the defendants' negligent delay and treatment of necrotizing fasciitis; (5) defendants failed to use due and reasonable care in treating plaintiff; failed to follow standard and acceptable medical practices and procedures, thus causing, permitting and allow plaintiff's injuries and complications that plaintiff suffered; (6) the care, diagnosis, and services rendered to plaintiff by defendants was rendered carelessly, unskillfully, negligently and not in accordance with accepted standards of medical care, diagnosis and treatment of plaintiff and that defendants failed to timely diagnose and treat plaintiff's life threatening necrotizing

> fasciitis, characterized by necrosis of the fascia and subcutaneious tissue, and accompanied by severe toxicity; (7) as to eleven enumerated failures by defendants, including the failure to properly read and respond to medical records, to properly medicate and treat infected area in timely manner, to timely provide a proper diagnosis; (8) in his opinion, with a reasonable of medical certainty, the departures alleged by plaintiff against defendants allowed, caused, contributed and exacerbated and/or permitted irreparable injury to plaintiff; the defendants failed to provide appropriate care and treatment and not within the applicable standard of care; the injuries and damages claimed by plaintiff were independently and solely caused by the improper care and treatment rendered by defendants.

Defendants argue that the 3101(d) disclosure fails to provide reasonable detail as required by statute. Specifically, they argue that although plaintiff particularized a 36-hour time period in which she alleges defendants mis-diagnosed her based on her symptoms, the disclosure "fails to specify what defendants did wrong or what symptoms they misinterpreted [and that] the disclosure is merely a cut and paste of those same generalities." Defendants also assert that "critically absent from the disclosure is any explication of what could have been done differently..." Plaintiff counters that the disclosure provides sufficient detail as to the expert's testimony including the defendants' approximately 36 hour delay in diagnosing plaintiff's life threatening infection following her admission the defendant hospital.

CPLR 3101(d)(1)(i) requires that an expert disclosure statement "disclose in reasonable detail...the substance of the facts and opinions on which each expert is expected to testify." See Rivera v. Montefiore Med. Ctr., 123 AD3d 424, 426 (1st Dept 2014), aff'd 28 NY3d 999 (2016). Under this standard, the disclosure cannot be so "so general and nonspecific that the [other side] has not been enlightened to any appreciable degree about the content of this expert's anticipated testimony." Chapman v. State, 189 AD2d 1075, 1075 (3d Dept 1993); see also, Carter v. Isabella Geriatric Center, Inc., 71 AD3d 443, 444 (1st Dept 2010)(dismissing action where challenged

expert disclosure provided the same "verbose generalities contained in the complaint and bill of particulars and essentially tell defendants nothing about what they are suppose to be defending")(internal quotations omitted).

That said, however, a 3101(d) disclosure has been found sufficient where it gives sufficient notice of the substance of the expert's testimony, even though it does not contain every detail regarding such testimony.[1] See e.g. Reid v. City of New York, 304 AD2d 1, 8-9 (1st Dept), lv denied 100 NY2d 503 (2003)(experts' testimony that brain injuries placed pedestrian at risk for Alzheimer's disease, epilepsy, seizures, and dementia was properly admitted even though future disabilities were not mentioned in pretrial medical expert reports or pedestrian's bill of particulars as defendants were on notice that a serious, degenerative brain injury was claimed); Genza v. Richardson, 95 AD3d 704, 705 (1st Dept 2012)(trial court providently exercised its discretion in permitting defendant's expert to testify as to plaintiff's pre-existing brain injury as "defendants adequately informed plaintiff that their neurologist would provide such testimony"); Maldonado v. Cotter, 256 AD2d 1073 (4th Dept 1998)("Allegations [in 3101(d) disclosure] that the expert would testify that they deviated from acceptable standards of care by failing 'to monitor the infant after removing him from the operating room' and 'fail[ing] to appreciate changes in [his] respiratory rate and to properly access, monitor and respond to those changes" gave defendants sufficient notice of theory of continuous electronic monitoring).

Here, a review of the 3101(d) disclosure for plaintiff's surgical expert reveals that it is

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[1]Notably, even when an expert disclosure is found to be too general to satisfy CPLR 3101(d), preclusion is not required absent "evidence of intentional or willful failure to disclose and a showing of prejudice by the opposing party." Rowan v. Cross County Ski & Skate, 42 AD3d 563, 564 (2d Dept 2007).

sufficiently detailed to provide defendants with notice of his expected testimony as to defendants' departures in connection with their failure to diagnose plaintiff's infection for approximately 36 hours after plaintiff first arrived at the defendant hospital, and the complications that arose as a result of the delay.

As for plaintiff's cross motion to preclude defendants from using a medical expert based on defendants' failure to comply with the court imposed September 20, 2016 deadline for providing expert disclosure, the court notes that CPLR 3101(d)(1)(i) does not require expert disclosure at any particular time and does not mandate preclusion for noncompliance. Moreover, while defendants did not serve the disclosure until January 3, 2017, there has been no showing that the delay in disclosing their expert information was intentional or willful, or the delay resulted in prejudice to defendants, particularly as the information was provided within a sufficient amount of time before trial. Under these circumstances, the cross motion is denied. See Ramsen A. v. New York City Housing Authority, 112 AD3d 439 (1st Dept 2013)(court did not improvidently exercise its discretion in denying defendant's motion to preclude plaintiffs' expert from testifying even though plaintiffs substituted experts after filing of note of issue and plaintiffs were permitted to substitute their medical expert after their prior expert died, since newly substituted expert's testimony was materially similar to original expert's testimony which was provided two months before trial); Rivers v. Birnbaum, 102 AD3d 26, 37-38 (2d Dept 2012)(noting that "even where one party requests trial expert disclosure during discovery pursuant to CPLR 3101(d)(1)(i), a recipient party who does not respond to the request until after the filing of the note of issue and certificate of readiness will not automatically be subject to preclusion of its expert's trial testimony").

In view of the above, it is

ORDERED that defendants' motion to preclude plaintiff's surgical expert is denied; and it is further

ORDERED that defendants' motion to preclude certain of plaintiff's fact witnesses is denied; and it is further

ORDERED that defendants' motion to limit plaintiff's economist and to dismiss the claim for loss of consortium is denied; and it is further

ORDERED that plaintiff's cross motion to preclude defendants from using a medical expert is denied.

Dated: May 11, 2017

J.S.C.

HON. JOAN A. MADDEN
J.S.C.