

Davis v Alarcon

2018 NY Slip Op 31267(U)

June 6, 2018

Supreme Court, New York County

Docket Number: 805042/2017

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 11

INDEX NO.: 805042/2017

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MICHAEL DAVIS and ALYSSA DAVIS,

Plaintiffs,

-against-

GABRIEL ALARCON, D.O., COLUMBIA MEMORIAL
FAMILY CARE-VALATIE, THE COLUMBIA MEMORIAL
HOSPITAL, LISA GALATI, M.D., STEVEN PARNES,
M.D., UNIVERSITY EAR NOSE & THROAT OF
NORTHEASTERN NEW YORK, LLP, MICHAEL
KORTBUS, M.D., HUDSON ENT, PC, TODD DOYLE,
M.D., NEW YORK ONCOLOGY HEMATOLOGY, PC,
ALBANY MEDICAL CENTER HOSPITAL and
MEMORIAL HOSPITAL FOR THE TREATMENT OF
CANCER AND ALLIED DISEASES,

Defendants.

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JOAN A. MADDEN

In this medical malpractice action, defendants Todd Doyle, M.D. and New York
Oncology Hematology, P.C. (“NYOH”) move, and defendants Albany Medical Center Hospital
 (“Albany Medical”), Lisa Galati, M.D. and Steven Parnes, M.D. cross move, for an order (a)
pursuant to CPLR 3042(d) and 3126 dismissing the Verified Complaint against them with
prejudice or, alternatively, (b) pursuant to CPLR 3211(a)(7) dismissing the complaint for failure
to state a cause of action (motion seq. no. 001). Defendants Gabriel Alarcon, D.O. and Columbia
Memorial Hospital (“Columbia Hospital”) move for an order pursuant to CPLR 3042(d) and
3126 striking the plaintiff’s Bills of Particulars and dismissing the Verified Complaint (motion
seq. no. 002), and defendant Memorial Hospital for Cancer and Allied Diseases s/h/a Memorial
Hospital for the Treatment of Cancer and Allied Diseases (together “Memorial”) and defendants
Michael Koribus, M.D. and Hudson ENT, P.C. (“Hudson ENT”) separately move for the same

relief (motion seq. 003 and 004, respectively).¹ Plaintiffs oppose defendants' motions and cross motion.

Background

This medical malpractice action arises out of allegations related to care and treatment of plaintiff Michael Davis (Davis), in connection with a diagnosis of throat cancer. Plaintiffs served their first Verified Bill of Particulars on defendants on July 7, 2017. Defendants objected to the Bill of Particulars, on various grounds, including that plaintiffs' responses to defendants' Demands for a Verified Bill of Particulars failed to specify and particularize the individual defendants' alleged negligence/malpractice.

Pursuant to the court's preliminary conference order dated August 17, 2017, plaintiffs were required to provide, within 30 days, a further Verified Bill of Particulars:

setting forth the specific allegations of negligence/malpractice, including all acts and/or omissions as to each party individually, also to include allegations as to lack of informed consent to the extent such allegations apply.

Plaintiffs served a Supplemental Bill of Particulars on October 23, 2017. At the compliance conference held on October 26, 2017, the court issued an order directing plaintiffs to provide each defendant with a further Bill of Particulars. Specifically, it was ordered that on or before November 30, 2017 that plaintiffs are:

to respond separately to each defendant's demand for a [Bill of Particulars], responding to each demand as numbered. [Plaintiffs are] to be as specific as current knowledge permits (including through medical records). [Plaintiffs are] to also comply with the language of the PC order, [regarding] Bill of Particulars. [Plaintiffs agree] to deem the supplemental BP as an amended BP.

Plaintiffs served a Second Supplemental Verified Bill of Particulars on November 1,

¹Motion sequence nos. 001, 002, 003 and 004 are consolidated for disposition.

2017.² Various defendants sent plaintiffs' counsel letters objecting to the plaintiffs' latest Bills of Particulars. A status conference was held on January 4, 2018, at which the sufficiency of the Second Supplemental Bill of Particulars was addressed. The court directed plaintiffs to serve a Third Supplemental Bill of Particulars, which defendants subsequently objected to as insufficient.

In the meantime, defendants made the motions and cross motion now before the court which variously seek to strike plaintiffs' Bills of Particulars and to dismiss the complaint on the grounds that Bills of Particulars provided by plaintiffs insufficiently specify and individualize plaintiffs' claims of negligence and malpractice, and the basis for vicarious liability, and to dismiss the complaint for failure to state a claim.

In opposition to the motions and cross motion, plaintiffs argue that their Third Supplemental Bill of Particulars provides specific and general allegations of negligence/malpractice which are sufficient to put each defendant on notice of the claims against them, and which all relate to Davis' invasive squamous cell carcinoma of the throat that defendants all failed to treat properly.

In support of their position, plaintiffs point to certain allegations in each of the Bills of Particulars which they assert relate specifically to the negligence/malpractice of a particular defendant. Plaintiffs also identify in opposition papers the various defendants' alleged roles in Davis' diagnosis and treatment for throat cancer. In particular, plaintiffs indicate that Dr. Alarcon was Davis' primary care physician; that Dr. Kortbus was an otolaryngologist treating

²In his cover letter, counsel to plaintiff states that the Bills of Particulars "were supplemental rather than amended because plaintiff is not changing his theory of liability, but rather adding more particular information."

Davis, and that both doctors are associated with Columbia, while Dr. Kortbus is also associated with Hudson ENT. Plaintiffs indicate that Dr. Galati and Dr. Parnes are both otolaryngologists associated with Albany Hospital who treated Davis, that Dr. Galati treated Davis with radiation therapy. Dr. Doyle is identified as an otolaryngologist³ who treated Davis with radiation therapy and is associated with defendant NYOH. Memorial is asserted to have provided medical treatment to Davis including plastic and reconstructive surgery. Notably, however, as previously noted, while in opposition plaintiffs identify defendants' roles in Davis treatment, such roles are not specified in, nor apparent from, the generalized allegations in the Bills of Particulars.

Discussion

"Responses to a demand for a bill [of particulars] must clearly detail the specific acts of negligence attributed to each defendant." Suits v. Wyckoff Hgts. Med. Ctr., 84 AD3d 487, 489 (1st Dept), appeal withdrawn 17 NY3d 804 (2011), quoting Miccarelli v. Fleiss, 219 AD2d 469, 470 (1st Dept. 1995). Courts have found responses to demands to be insufficient when they are "overly broad and factually vague... fail to particularize and amplify pleadings, and will not limit the proof or prevent surprise at trial." Castellano v. Norwegian Christian Home and Health Ctr., Inc., 24 AD3d 490, 491 (2d Dept. 2005) (internal citations omitted). Thus, for example, a bill of particulars is impermissibly vague when it alleges negligence in "failing to perform unknown contraindicated and indicated procedures, failing to properly evaluate plaintiff's condition, failing to prescribe 'appropriate' medication and failing to make proper recommendations concerning plaintiff's treatment." See Morris v. Fein, 177 AD2d 915, 916 (3d Dept 1991).

³In their opposition papers, Dr. Doyle and NYOH assert that Dr. Doyle is not an otolaryngologist, but a radiation oncologist.

In addition, allegations in a bill of particulars are insufficient when they are "essentially identical" between parties, even where it is "obvious" that the roles of each party are different. Batson v. La Guardia Hosp., 194 AD2d 705, 706 (2d Dept 1993), citing Byrnes v. New York Coll. Hosp., 91 AD2d 907, 907 (1st Dept 1983); see also Berger v. Feinerman, 203 AD2d 407, 408 (2d Dept. 1994)(a "plaintiff must provide a bill of particulars distinguishing between the alleged acts committed by each of the defendants and their purported agents") . Moreover, bills of particulars must "distinguish between the acts allegedly committed by the hospital and those committed by the co-defendants" and factually specify the basis for any claims of vicarious liability. Id at 203.

Here, while plaintiffs served Third Supplemental Bills of Particulars for each of the named defendants, they fail to adequately particularize which of the individual defendants are alleged to have committed which acts or omissions. In fact, in many instances, despite their various roles in Davis' diagnosis and treatment, many of the defendants are alleged to have committed the same acts and/or omissions, including, *inter alia*, "failing to properly diagnose the severity of Davis' condition and provide appropriate treatment therefore, failing to warn of the risks of treatment provided and/or treatment not provided to Davis' tumors and/or abscess(es); failing to timely, properly and effectively conduct appropriate diagnostic tests and procedures to detect the tumor." And, significantly, many of the allegations cover a broad variety of potential malpractice claims and claims for lack of informed consent. Thus, for example, it is alleged, *inter alia*, that Dr. Galati was negligent in:

failing to refer [Davis] for appropriate treatment from other medical professionals for his medical condition; in failing to timely and appropriately diagnose and/or treat [Davis]; in failing to timely refer [Davis] for surgery; in failing to consult with the named co-defendants regarding [Davis'] care and treatment; in failing and neglecting to fully

inform and advise [Davis] and/or his family of the care and treatment given to him and to obtain his informed consent so that a reasonably prudent person in the patient's position would not have undergone the treatment/diagnosis/procedure for his tumor(s) and/or abscess(es) if he had been fully informed on [specified dates] ...in failing to warn of the risks of the treatment provided and/or treatment not provided for [Davis'] tumor(s) and/or absces (es); in failing to warn of the risks of delay of appropriate treatment for [Davis'] tumor(s) and/or abscess(es); in failing to conduct timely and appropriate diagnostic studies and/or perform appropriate surgical intervention and/or administer appropriate treatment for [Davis'] tumor(s) and/or abscess(es) and/or medical condition(s); in causing, permitting and allowing [Davis] to remain improperly treated....

At this stage of the action, plaintiff should be able, at a minimum, to identify, based on the nature of the services and/or treatment provided, the grounds for allegations of malpractice as to each defendant without incorporating all possible claims. In this regard, claims based on informed consent should be specific as to such claims as against each defendant.

That said, at this juncture, plaintiffs have adequately alleged the basis for vicarious liability and/or have indicated that they have insufficient information to provide such information.⁴ In particular, plaintiffs allege that (1) Columbia's liability is vicarious and as the result of treatment of Dr. Alarcon and Dr. Kortbus; (2) Hudson ENT's liability is vicarious as a result of the treatment of Dr. Kortbus (3) NYOH's liability is vicarious as a result of the treatment of Dr. Doyle, and (4) Albany Medical's liability is vicarious as a result of the treatment of Dr. Galati and Dr. Parnes.

Next, to the extent the motions and cross motion seek expert information, plaintiffs are not required to provide such information at this time. Moreover, there is no basis on this record

⁴In this regard, plaintiffs respond to the demand regarding the identity of those who performed the alleged acts or failure to act, by objecting that the information is "in the possession of the defendants, their agents, servants and/or employees [and that] this information cannot be ascertained by [p]laintiffs until the conclusion of pre-trial discovery."

to dismiss the complaint for failure to state a cause of action.

Accordingly, as directed below, plaintiffs are to provide a Fourth Supplemental Bill of Particulars in which plaintiffs shall particularize as to the specific medical services provided by individual defendants and specify the nature of the allegations of negligence/ malpractice and/or lack of informed consent as against each defendant. With respect to plaintiffs' contention that they do not have all necessary information to provide a complete Bill of Particulars, plaintiffs shall be as responsive as possible based on presently known information, and shall state their inability to respond if that is the case and, upon obtaining such information, plaintiffs will serve an amended bill of particulars. If plaintiffs fail to comply with this order, sanctions, including the costs of ^{the} instant motions and cross motion and future motions, may be imposed.

Conclusion

In view of the above, it is

ORDERED that defendants' motions and cross motion are granted only to the extent of directing that within 30 days of e-filing of this order, plaintiffs shall efile and serve on defendants a Fourth Supplemental Bill of Particulars consistent with this decision and order; and it is further

ORDERED that defendants' motions and cross motion are otherwise denied; and it is further

ORDERED that a status conference shall be held in Part 11, room 351, 60 Centre Street, New York, NY on July 19, 2018 at 9:30 am.

DATED: June 16, 2018


J.S.C.

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