

Kaffl v Glen Cove Hosp.
2018 NY Slip Op 34130(U)
May 29, 2018
Supreme Court, Nassau County
Docket Number: Index No. 606346/14
Judge: Denise L. Sher
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

GEORGE KAFFL and DOROTHY KAFFL,

Plaintiffs,

- against -

GLEN COVE HOSPITAL, ELENA BELKIN, M.D.,
GLENGARIFF HEALTHCARE CENTER, WINTHROP
UNIVERSITY HOSPITAL and NORTH SHORE
UNIVERSITY HOSPITAL,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 606346/14
Motion Seq. Nos.: 03, 04
Motion Dates: 03/15/18
03/15/18

The following papers have been read on these motions:

	Papers Numbered
<u>Notice of Motion (Seq. No. 03), Affirmations and Exhibits</u>	1
<u>Affirmation in Opposition to Motion (Seq. No. 03) and Exhibits</u>	2
<u>Reply Affirmation to Motion (Seq. No. 03) and Exhibits</u>	3
<u>Notice of Cross-Motion (Seq. No. 04), Affirmations and Exhibits</u>	4
<u>Affirmation in Opposition to Cross-Motion (Seq. No. 04) and Exhibits</u>	5
<u>Reply Affirmation to Cross-Motion (Seq. No. 04) and Exhibit</u>	6

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Defendant Winthrop University Hospital (“Winthrop”) moves (Seq. No. 03), pursuant to CPLR § 3126, for an order dismissing plaintiffs’ Verified Complaint for failure to comply with court ordered discovery and other demands; or, in the alternative, moves, pursuant to CPLR § 3124, for an order compelling plaintiffs to comply with court ordered discovery and other demands; and moves, pursuant to 22 NYCRR 202.21(e), for an order vacating plaintiffs’ Note of Issue and striking this action from the trial calendar. Plaintiffs oppose the motion.

Defendant Glengariff Healthcare Center (“Glengariff”) cross-moves (Seq. No. 04), pursuant to CPLR § 3126, for an order dismissing plaintiffs’ Verified Complaint and/or precluding plaintiffs from offering any evidence or testimony at the time of trial upon the grounds that plaintiffs have failed to comply with the Preliminary Conference Order, dated May 13, 2015, and with defendant Glengariff’s discovery demands; or, in the alternative, moves, pursuant to CPLR § 3124, for an order compelling plaintiffs to comply with the discovery demands, including a responsive Supplemental Verified Bill of Particulars; and moves, pursuant to 22 NYCRR 202.21(e), for an order vacating plaintiffs’ Note of Issue and Certificate of Readiness as this matter is not ready for trial. Plaintiffs oppose the cross-motion.

This is an action for medical malpractice and violation of the Public Health Law alleging the failure to properly and timely diagnose, treat and/or prevent the development and/or progression of a pressure ulcer on plaintiff George Kaffl’s buttocks and the sequelae therefrom. Plaintiffs commenced the action with the filing of a Summons and Verified Complaint on or about November 25, 2014. *See* Defendant Winthrop’s Affirmation in Support Exhibit A. Issue was joined by defendant Winthrop on or about December 18, 2014. *See id.* Issue was joined by defendant Glengariff on or about May 7, 2015. *See* Defendant Glengariff’s Affirmation in Support Exhibit A.

In support of defendant Winthrop’s motion (Seq. No. 03), its counsel submits, in pertinent part, that, “[t]he claims in this case do not focus on any treatment rendered within WINTHROP. Instead, the plaintiffs’ claims against WINTHROP involve dialysis treatments within the co-defendant, GLENGARIFF HEALTHCARE CENTER provided by WINTHROP medical personal. As part of the discovery in this matter, the plaintiffs have been provided with a copy of the record for the dialysis treatment. In addition, the Director of the unit that provided the dialysis treatments was deposed. As set forth in the Amended Verified Bill of Particulars ... at

paragraph '6' the claimed malpractice by WINTHROP took place over a four-month period between June 6, 2013 and October 4, 2013. During this span of time, the plaintiff, GEORGE KAFFL, received multiple dialysis treatments at the co-defendant GLENGARIFF HEALTHCARE CENTER. Accordingly, GEORGE KAFFL was seen by numerous healthcare professionals during each dialysis treatment. A Preliminary Conference was held on May 13, 2015. The Preliminary Conference Order called for plaintiff to supply a Supplemental Bill of Particulars that identifies those individuals that plaintiffs would allege WINTHROP is vicariously liable for.... Under the 'ADDITIONAL DIRECTIVES' portion of the Preliminary Conference Order, plaintiffs were directed to supplement the Bill of Particulars as to WINTHROP to identify individuals from Winthrop University Hospital plaintiff will allege committed malpractice and will allege Winthrop is responsible for prior to filing the Note of Issue.... Following the completion of all depositions, the plaintiffs' (*sic*) served an Amended Verified Bill of Particulars dated December 5, 2017. That pleading failed to identify the individuals the plaintiffs were alleging committed malpractice and the individual(s) plaintiffs were alleging WINTHROP would be vicariously responsible for.... Thereafter the plaintiffs served a Second Supplemental Bill of Particulars dated January 15, 2018.... That pleading also failed to provide the identity of the individuals that supposedly committed medical malpractice and the individual(s) plaintiffs will allege WINTHROP is vicariously responsible for. Instead, the pleading states that WINTHROP is responsible for, 'nurses, technicians, aides and/or physicians work (*sic*) at the aforesaid dialysis center.' While the Second Supplemental Bill of Particulars now provides a specialty of an individual, the plaintiffs' (*sic*) have still failed to provide the identity of the nurse, technician, aide and/or physicians that provided dialysis to the plaintiff, GEORGE KAFFL. Plaintiffs have failed to identify the specific individuals that allegedly provided inadequate care despite having had the relevant dialysis record (*sic*) and having deposed

the Director of the dialysis unit.... On or about February 1, 2018 the Note of Issue and Certificate of Readiness was (*sic*) filed with the Court.... The Certificate of Readiness indicates that all discovery is not yet completed. However, in the Affirmation of Compliance, plaintiffs' counsel asserts that the outstanding discovery owed is from the co-defendants. The plaintiffs have failed to apprise this Court of their failure to comply with the Preliminary Conference Order. In view of the discovery that has been obtained from WINTHROP, the plaintiffs have no excuse for failing to identify the individual that allegedly provided improper/inadequate care during the dialysis treatments. There is no excuse for plaintiffs' repeated failure to comply with the Preliminary Conference Order." *See* Defendant Winthrop's Affirmation in Support Exhibits B-E.

Counsel for defendant Winthrop adds that, "[i]t is clearly unduly burdensome and unfair to require counsel for WINTHROP to meet, and prepare, every nurse, technician, aide and/or physician that worked at the aforesaid dialysis center to prepare for trial. It is unfair for plaintiffs' counsel to know which individual they will target at the time of trial, but not identify that individual prior to trial. Such a tactic is akin to 'trial by ambush.' Defense counsel has no way of knowing which of the numerous individuals to have ready for trial until such time as plaintiffs identify which individuals supposedly did something wrong. Given the period of time in question (which is also selected by plaintiffs' counsel) it is unreasonable for plaintiffs' counsel to require defense counsel to undergo the burdensome task of meeting every individual that treated the plaintiff in the dialysis unit over a four month period."

In opposition to the motion (Seq. No. 04), counsel for plaintiffs argues, in pertinent part, that, "[t]his Court is well acquainted with this matter having conducted numerous compliance/status conferences with the attorneys in this matter. As the Court can see from her notes, on not one appearance did counsel for Winthrop University Hospital mention that there were any issues with the Plaintiffs' Bill of Particulars. On December 5, 2017 all parties appeared for a Certification Conference and counsel for the defendant, Winthrop University Hospital signed the Order confirming that all discovery was complete.... In addition, counsel for the

defendant, signed a stipulation regarding two outstanding issues: (1) defendant NSUH was directed to respond to plaintiff's (*sic*) outstanding Further Notice for Discovery and (2) defendants requested Arons Authorizations for two treating physicians.... No mention was made whatsoever about the adequacy of the plaintiffs' Bills of Particulars. Nonetheless, on January 23, 2018, Plaintiffs' (*sic*) served a Supplemental Verified Bill of Particulars as requested in the Preliminary Conference Order.... The plaintiff (*sic*) alleged in the Second Supplemental Verified Bill of Particulars as follows: Upon information and belief, the individuals involved include the Defendant, WINTHROP UNIVERSITY HOSPITAL's agents, servants, and/or employees, who were nurses, dialysis technicians and/or aides who were working at the defendant's dialysis center located at Glengariff Health Care Center, ... and/or any and all such persons involved with the administration of the dialysis treatment of the plaintiff as set forth in the plaintiff's medical records. The actual names of these individuals are within the knowledge and purview of the defendant, WINTHROP UNIVERSITY HOSPITAL and not the plaintiffs herein. Defendant, WINTHROP UNIVERSITY HOSPITAL is vicariously liable for all of the acts and omissions of its nurses, technicians, aides and/or physicians working at the aforesaid dialysis center. The defendant now claims that this is not adequate and does not provide them (*sic*) with the exact names of each and every individual who committed the alleged malpractice. That argument is sheer folly and seeks an impossibility upon the plaintiff.... The crux of the plaintiffs' claims against defendant, Winthrop University Hospital is that their employees working in the dialysis unit failed to turn and position the plaintiff during the 3-4 hours he would be seated in the recliner receiving dialysis.... Therefore, plaintiff (*sic*) alleged that each of the individuals who attended to the plaintiff during his dialysis treatment June 6, 2013 through October 4, 2013 were careless and negligent as set forth at length in the Second Supplemental Verified Bill of Particulars. It is a physical impossibility for the plaintiff to name each and every employee of the defendant, Winthrop University Hospital who attended to the plaintiff and who committed the acts of malpractice. The names of many of these employees are not even listed in

the medical records and were never provided to the plaintiffs.... [I]n a medical malpractice action, the plaintiff need only provide a general statement of the acts or omissions constituting the negligence claimed. The plaintiff need not provide evidentiary material. [citations omitted]. As the Court can see from reviewing plaintiffs' Second Supplemental Verified Bill of Particulars, the plaintiff (*sic*) provided the defendants with sufficient information regarding the nature of the injuries alleged, departures, negligence and individuals who committed the alleged acts. It is physically impossible for the plaintiff (*sic*) to name each and every nurse, technician, physician and/or aide who treated the plaintiff during the course of the four months at the defendant's dialysis center. Moreover, this is unduly burdensome and evidentiary in nature. There is no surprise or prejudice to the defendants since they are fully apprised of the claims of the plaintiffs herein.... If the Court requires the plaintiff to supplement the Bill of Particulars to set forth the full name of every physician, nurse, aide and technician at the dialysis unit, then the defendant should be required to identify the name and/or identify the signatures of each and every physician nurse, aide and technician who treated the plaintiff in the defendant's dialysis unit." *See* Plaintiffs' Affirmation in Opposition to Motion (Seq. No. 03) Exhibits A-C.

In reply to the opposition, counsel for defendant Winthrop submits, in pertinent part, that, "[t]he defendant has always maintained that plaintiffs' Bill of Particulars ('BOP'), amended Bill of Particulars ('ABOP'), and second Supplemental Bill of Particulars ('SBOP') were inadequate and in violation of the preliminary conference order ('the Order') dated May 13, 2015. To date, plaintiffs (*sic*) failed to provide an adequate response to the defendant's multiple demands that they provide an ABOP or SBOP in compliance with the Order. First, the defendant addressed the overly general and broad language in their BOP at the preliminary conference on May 13, 2015, which was resolved in the Order. The Order unequivocally states that plaintiffs were to supplement their BOP with the identity of the individuals for whom they allege that the defendant was vicariously liable. Plaintiffs served the defendant with an ABOP dated December 5, 2017, which, again, failed to comply with the Order. The defendant addressed plaintiffs'

non-compliance in a letter dated January 5, 2018. In the letter, the defendant notified plaintiffs that their ABOP did not comply with the Order and demanded that plaintiffs provide them with a compliant second amended Bill of Particulars. Plaintiffs responded with (*sic*) SBOP that again failed to comply with the Order by failing to identify the individuals for whom plaintiffs allege that the defendant is vicariously liable. Again, the defendant addressed the non-compliance issue in a letter dated January 29, 2018 in which the defendant objected to plaintiffs' SBOP and reserved their right to make a motion. The defendant has addressed the lack of specificity in plaintiffs' BOP on at least three separate occasions, and plaintiffs failed to appropriately respond or comply with the Order each time. Demanding that plaintiffs comply with the Order is far from folly as plaintiffs claim, and the defendant's demand for compliance is well within the defendant's scope of demand. The Second Department has held and maintained that a plaintiff's case lacks merit when a Bill of Particulars does not name any hospital personnel. [citations omitted].... [H]ere, the defendant is demanding that plaintiffs identify the individuals for whom they are alleging that the defendant should be vicariously liable in order to prevent prejudice or surprise at trial. This demand is not unduly burdensome or impossible as plaintiffs claim. Here, the defendant provided plaintiff with a copy of their records which contained physician progress notes and nursing progress notes.... Plaintiffs have failed to provide any evidence showing that they made any attempt to determine the identity of any of the 'individuals' for whom they allege the defendant is vicariously liable.... It is respectfully submitted that plaintiffs' attorneys have not submitted any legitimate opposition to the defendant's discovery demands or a reasonable reason for failing to comply with a court order. Therefore, plaintiffs should be ordered to provide the defendant with an amended Supplemental Bill of Particulars identifying the individuals for whom they allege that the defendant is vicariously liable."

In support of defendant Glengariff's cross-motion (Seq. No. 04), its counsel submits, in pertinent part, that, "[o]n May 13, 2015, a Preliminary Conference was held. Pursuant to the Preliminary Conference Order, the plaintiff (*sic*) was to provide the defendants with a

supplemental bill of particulars regarding the claims of vicarious liability by providing the identity of the individuals involved. Further, the plaintiff (*sic*) was to provide a supplemental bill of particulars regarding the sections of 42 CFR §683 (*sic*) that were allegedly violated by defendant Glengariff. The Preliminary Conference Order directed that the supplemental bill of particulars be provided prior to the filing of the Note of Issue.... Plaintiff (*sic*) served the defendants with a supplemental bill of particulars dated January 16, 2018. The supplemental bill of particulars failed to address the 42 CFR §683 (*sic*) claims. Further, the supplemental bill of particulars contained allegations that were ambiguous and/or were not applicable to Glengariff as a nursing home.... On February 1, 2018, plaintiff (*sic*) filed the Note of Issue and Statement of Readiness.... In a good faith effort to resolve any discovery issues, in a letter dated February 15, 2018, this office requested that plaintiff (*sic*) remove or clarify the improper allegations regarding the nursing home contained in the supplemental bill of particulars. Further, defendant requested that the plaintiff provide a response to the Preliminary Conference Order regarding supplementing the 42 CFR §483 (*sic*) claims. Defendant extended plaintiff (*sic*) with an additional seven days to provide a response. However, plaintiff (*sic*) did not provide a response within the given time.” See Defendant Glengariff’s Affirmation in Support Exhibits B-E.

In opposition to the cross-motion (Seq. No. 05), counsel for plaintiffs argues, in pertinent part, that, “[t]his Court is well acquainted with this matter having conducted numerous compliance/status conferences with the attorneys in this matter. As the Court can see from her notes, on not one appearance did counsel for defendant, GLENGARIFF mention that there were any issues with the Plaintiffs’ Bill of Particulars. On December 5, 2017 all parties appeared for a Certification Conference and counsel for the defendant, Glengariff Healthcare Center signed the Order confirming that all discovery was complete.... In addition, counsel for the defendant, signed a stipulation regarding two outstanding issues: (1) defendant NSUH was directed to respond to plaintiff’s (*sic*) outstanding Further Notice for Discovery and (2) defendants requested Arons Authorizations for two treating physicians.... No mention was made whatsoever about the

adequacy of the plaintiffs' Bills of Particulars. The only issue out (*sic*) alleged outstanding discovery from the defendant, GLENGARIFF HEALTHCARE CENTER is that they claim that they are not satisfied with the plaintiffs' Second Supplemental Verified Bill of Particulars. There are no other outstanding discovery issues raised by this defendant on its cross motion. On January 23, 2018, Plaintiffs' (*sic*) served a Second Supplemental Verified Bill of Particulars as requested in the Preliminary Conference Order.... The plaintiff alleged in the Second Supplemental Verified Bill of Particulars as follows: Upon information and belief, the individuals involved include the Defendant, GLENGARIFF HEALTHCARE CENTER's agents, servants, affiliated physicians and/or employees, nurses, resident physicians, aides, technicians, and/or any and all such persons involved with the treatment of the plaintiff during his admission to Glengariff Healthcare Center during the period of June 6, 2013 through October 4, 2013. The names of these individuals are within the knowledge and purview of the defendant, GLENGARIFF HEALTHCARE CENTER. It is further claimed that these answering Defendants are vicariously liable for all of the acts and omissions of such persons. The defendant now claims that this is not adequate and does not provide them (*sic*) with the exact names of each and every individual who committed the alleged malpractice. That argument is sheer folly and seeks an impossibility upon the plaintiff.... The crux of the plaintiffs' claims against defendant, GLENGARIFF HEALTHCARE CENTER is that their employees at GLENGARIFF failed to properly treat the plaintiff for his decubitus ulcers on his buttocks and sacrum. The plaintiff was caused and/or permitted to remain in one position lying on his buttocks and sacrum for extended periods of time without proper care, attention and offloading. Therefore, plaintiff (*sic*) alleged that each of the individuals who attended to the plaintiff during his admission from June 6, 2013 through October 4, 2013 were careless and negligent as set forth at length in the Second Supplemental Verified Bill of Particulars. It is a physical impossibility for the plaintiff (*sic*) to name each and every employee of the defendant, GLENGARIFF who attended to the plaintiff and who committed the acts of malpractice. The names of many of these employees are not even

listed in the medical records and were never provided to the plaintiffs.... [I]n a medical malpractice action, the plaintiff need only provide a general statement of the acts or omissions constituting the negligence claimed. The plaintiff need not provide evidentiary material. [citations omitted].... If the Court requires the plaintiff (*sic*) to supplement the Bill of Particulars to set forth the full name of every physician, nurse, aide and technician at the dialysis unit, then the defendant should be required to identify the name and/or identify the signatures of each and every physician nurse, aide and technician who treated the plaintiff in the defendant's rehabilitation center." *See* Plaintiffs' Affirmation in Opposition to Cross-Motion (Seq. No. 04) Exhibits A-C.

Counsel for plaintiffs further asserts that, "[t]he plaintiff (*sic*) also properly alleged statutory violations as set forth in the Bill of Particulars as follows: violating Public Health Law § 2801(d); 10 NYCRR 415; 42 CFR § 483, National Pressure Ulcer Advisory Panel Quality of Care Regulations, F-tags 314, 315, 325 and 327. This is all that is required in a Bill of Particulars. The defendants are on notice of plaintiffs' allegations and are able to read the statute. Moreover, it appears that the defendants' mention of 42 CFR § 683 was a typographical error and should have read 42 CFR § 483 as alleged by the Plaintiffs.... As the Court can see, the plaintiffs' Bill of Particulars is very specific and gives the defendant ample notice of the claims alleged. The fact that many of the allegations may overlap or be the same as those against the co-defendants does not mean that the plaintiff's (*sic*) Bill of Particulars is defective. If two defendants committed the same acts of negligence and/or malpractice, then obviously the allegations against both defendants will be similar if not identical. Defendant is correct that there was ONE sentence in the Plaintiffs' Second Supplemental Bill of Particulars which may be unrelated to the defendant, GLENGARIFF: 'in prematurely and/or improperly discharging the plaintiff from the hospital.' If this one sentence which is not applicable is causing the defendant agita, we will agree to withdraw that sentence from the Bill of Particulars. Other than the one sentence, we believe that the Plaintiffs' Second Supplemental Bill of Particulars is proper in all

respects. [citation omitted]. Lastly, the plaintiffs' Note of Issue should not be vacated since the plaintiff (*sic*) did serve the Bills of Particulars and the defendant signed the Certification Order agreeing that all discovery was complete and the case was ready for trial."

In reply to plaintiffs' opposition, counsel for defendant Glengariff asserts, in pertinent part, that, "plaintiff's supplemental bill of particulars neglected to specify the sections of the federal statute, (42 CFR §483), that he alleges that the defendant violated. As this court is aware, 42 CFR §483 covers a plethora of areas including falls, accidents, mental health care, respiratory care, vision care, hearing care, skin integrity, et. al. This is a pressure ulcer case. As such, the bill of particulars should be specific as to which sections of the federal statute were violated as it refers to this plaintiff. The supplemental Bill of Particulars fails to particularize which section of the statute was violated. The court previously ordered the plaintiff (*sic*) to supplement the 42 CFR §483 claim in the Preliminary Conference Order. Plaintiff (*sic*) failed to do so and offered no justifiable excuse for his failure to comply with this prior court order. The defendant's demand for specifications regarding the allegations of vicarious liability is proper and because plaintiff (*sic*) mischaracterized the roles of the nursing home with regard to the plaintiff's care. During the parties' depositions, it was established that the dialysis center was owned and operated by Winthrop University Hospital and not by Glengariff Healthcare Center.... Notwithstanding plaintiff (*sic*) persisted to allege that Glengariff is vicariously liable for the technicians at the dialysis center. It should be noted that this defendant requested that plaintiff (*sic*) remove or clarify the improper allegations regarding the nursing home. The supplemental bill of particulars is not proper because it alleges that the nursing home is vicariously liable for staff that it does not employ. For instance, defendant nursing home did not employ resident physicians or dialysis technicians. As such, Glengariff cannot be vicariously liable for those individuals. Therefore, the supplemental bill of particulars should be amended for the accuracy of the pleadings, and plaintiff's (*sic*) refusal to supplement the bill of particulars can only be seen as willful and contumacious." See Defendant Glengariff's Reply Affirmation Exhibit A.

CPLR § 3101(1) provides for “full disclosure of all matters material and necessary for the prosecution and defense of an action....” The discovery of any information or material reasonably related to the issues which will assist in preparation for trial by sharpening the issues and reducing delay and prolixity are encouraged. The test is one of usefulness and reason. *See Allen v. Crowell-Collier Pub. Co.*, 21 N.Y.2d 403, 288 N.Y.S.2d 449 (1968).

Indeed, “the scope of permissible discovery is not entirely unlimited and the trial court is invested with broad discretion to supervise discovery and to determine what is ‘material and necessary’ as that phrase is used in CPLR 3101(a).” *Auerbach v. Klein*, 30 A.D.3d 451, 816 N.Y.S.2d 376 (2d Dept. 2006). *See also Stone v. Zinoukhova*, 119 A.D.3d 928, 990 N.Y.S.2d 567 (2d Dept. 2014); *Edwards v. Prescott Cab Corp.*, 110 A.D.3d 671, 972 N.Y.S.2d 629 (2d Dept. 2013); *Ural v. Encompass Ins. Co. of Am.*, 97 A.D.3d 562, 948 N.Y.S.2d 621 (2d Dept. 2012). Ultimately, “[i]t is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims.” *Gomez v. State of New York*, 106 A.D.3d 870, 965 N.Y.S.2d 542 (2d Dept. 2013) *quoting Vyas v. Campbell*, 4 A.D.3d 417, 775 N.Y.S.2d 375 (2d Dept. 2004).

New York has long favored “open and far-reaching pretrial discovery.” *Kavanagh v. Ogden Alliance Maintenance Corp.*, 92 N.Y.2d 952, 683 N.Y.S.2d 156 (1998) *quoting DiMichel v. South Buffalo Ry. Co.*, 80 N.Y.2d 184, 590 N.Y.S.2d 1 (1992) *cert. den. sub. nom. Poole v. Consolidated Rail Corp.*, 510 U.S. 816 (1993). Furthermore, pursuant to CPLR § 3124, disclosure provisions are to be liberally construed.

CPLR § 3126 provides the “[p]enalties for refusal to comply with order or to disclose.” It reads, “[i]f any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party’s control, refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court

may make such orders with regard to the failure or refusal as are just, among them: 1. An order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or 2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or 3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.”

The nature and degree of the sanction to be imposed on a motion pursuant to CPLR § 3126 is a matter reserved to the sound discretion of the trial court. *See Dokaj v. Ruxton Tower Ltd. Partnership*, 91 A.D.3d 812, 938 N.Y.S.2d 101 (2d Dept. 2012). To invoke the drastic remedy of preclusion, the Court must determine that the party’s failure to comply with a disclosure order was the result of willful, deliberate and contumacious conduct or its equivalent. *See Arpino v. F.J.F. & Sons Elec. Co., Inc.*, 102 A.D.3d 201, 959 N.Y.S.2d 74 (2d Dept. 2012); *Zakhidov v. Boulevard Tenants Corp.*, 96 A.D.3d 737, 945 N.Y.S.2d 756 (2d Dept. 2012); *MacKenzie v. City of New York*, 125 A.D.3d 821, 1 N.Y.S.3d 840 (2d Dept. 2015); *6 Harbor Park Drive, LLC v. Town of North Hempstead*, 127 A.D.3d 1065, 5 N.Y.S.3d 887 (2d Dept. 2015); *Crystal Clear Development, LLC v. Devon Architects of New York, P.C.*, 127 A.D.3d 911, 7 N.Y.S.3d 361 (2d Dept. 2015); *De Leo v. State-Whitehall Co.*, 126 A.D.3d 750, 5 N.Y.S.3d 227 (2d Dept. 2015); *Pirro Group, LLC v. One Point St., Inc.*, 71 A.D.3d 654, 896 N.Y.S.2d 152 (2d Dept. 2010); *Assael v. Metropolitan Tr. Auth.*, 4 A.D.3d 443, 772 N.Y.S.2d 364 (2d Dept. 2004). Willful and contumacious conduct can be inferred from repeated non-compliance with court orders, *inter alia*, directing depositions, coupled with either no excuses, or inadequate excuses; or a failure to comply with court ordered discovery over an extended period of time. *See Prappas v. Papadatos*, 38 A.D.3d 871, 833 N.Y.S.2d 156 (2d Dept. 2007).

As previously stated, it is well settled that trial courts have broad discretion in supervising disclosure. *See Alberto v. Jackson*, 118 A.D.3d 733, 987 N.Y.S.2d 218 (2d Dept. 2014); *Caro v. Marsh USA, Inc.*, 101 A.D.3d 1068, 956 N.Y.S.2d 575 (2d Dept. 2012). The determination whether to strike a pleading or to preclude evidence for failure to comply with court-ordered disclosure lies within the sound discretion of the court. *See Palmieri v. Piano Exch., Inc.*, 124 A.D.3d 611, 1 N.Y.S.3d 315 (2d Dept. 2015); *6 Harbor Park Drive, LLC v. Town of North Hempstead, supra*; *Crystal Clear Development, LLC v. Devon Architects of New York, P.C., supra*.

Although the Court has broad discretion in determining the appropriate sanction pursuant to CPLR § 3126, the “general rule is that a court should only impose a sanction commensurate with the particular disobedience it is designed to punish and go no further.” *See Rossal-Daub v. Walter*, 58 A.D.3d 992, 871 N.Y.S.2d 751 (3d Dept. 2009) *citing Landrigen v. Landrigen*, 173 A.D.2d 1011, 569 N.Y.S.2d 843 (3d Dept. 1991).

Furthermore, pursuant to CPLR § 3124, disclosure provisions are to be liberally construed. Ultimately, a trial court is afforded broad discretion in managing disclosure. *See* CPLR §§ 3124, 3101(a); *Kavanagh v. Ogden Allied Maintenance Corp.*, 92 N.Y.2d 952, 683 N.Y.S.2d 156 (1998).

Here, the record does not clearly establish a pattern of wilfulness or contumacious conduct necessary to justify dismissal of plaintiffs’ Verified Complaint or preclusion of plaintiffs from introducing any testimony and/or evidence in support of their claims at the time of trial. *See Warner v. Orange County Regional Medical Center*, 126 A.D.3d 887, 6 N.Y.S.3d 83 (2d Dept. 2015); *De Leo v. State-Whitehall Co., supra* at 752; *Chong v. Chaparro*, 94 A.D.3d 800, 941 N.Y.S.2d 709 (2d Dept. 2012); *Hillside Equities, LLC v. UFH Apartments, Inc.*, 297 A.D.2d 704, 747 N.Y.S.2d 541 (2d Dept. 2002).

However, the Court finds that defendants are indeed entitled to the outstanding discovery that they have outlined in their instant motion papers. In the Preliminary Conference Order,

counsel for plaintiffs agreed that, “ π to supp bill of particulars as to Δ Winthrop & Glengariff to identify individuals from Winthrop University Hospital π will allege committed malpractice & will allege Winthrop is responsible for prior to filing the Note of Issue.” *See* Defendant Winthrop’s Affirmation in Support Exhibit B. Counsel for plaintiffs further agreed that, “ π to supplement 42 CFR 483 which were allegedly violated prior to filing of Note of Issue.” *See id.* Plaintiffs have failed to provide said specific information in their subsequent Bills of Particulars.

A Note of Issue may be vacated pursuant to New York Court Rules § 202.21(e) if the following circumstances are present:

Within 20 days after service of a note of issue and certificate of readiness, any party to the action or special proceeding may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in any material respect....After such period,...no such motion shall be allowed except for good cause shown. At any time, the court on its own motion may vacate a note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect.

That is, a timely motion to vacate the Note of Issue pursuant to 22 NYCRR § 202.21(e) need only demonstrate in what respects the case is not ready for trial. *See Mosley v. Flavius*, 13 A.D.3d 346, 785 N.Y.S.2d 742 (2d Dept. 2004); *Audiovox Corp. v. Benyamini*, 265 A.D.2d 135, 707 N.Y.S.2d 137 (2d Dept. 2000).

In the instant matter, defendants’ motions (Seq. Nos. 03 and 04) to vacate the Note of Issue were made within twenty (20) days after service of the Note of Issue and Certificate of Readiness and demonstrate in what respects the case is not ready for trial. Based upon the evidence and arguments presented in the papers before it, the Court finds that the discovery items as detailed above have not been adequately provided to defendants, and are necessary to their defense in this matter.

Accordingly, the branch of defendant Winthrop's motion (Seq. No. 03), pursuant to CPLR § 3126, for an order dismissing plaintiffs' Verified Complaint for failure to comply with court ordered discovery and other demand, is hereby **DENIED**.

However, the branch of defendant Winthrop's motion (Seq. No. 03), pursuant to CPLR § 3124, for an order compelling plaintiffs to comply with court ordered discovery and other demands, is hereby **GRANTED**. And it is further

ORDERED that plaintiffs supply defendants with an Amended Supplemental Bill of Particulars that identifies those individuals for whom plaintiffs would allege that defendant Winthrop is vicariously liable. Said Amended Supplemental Bill of Particulars must be served within thirty (30) days of this Decision and Order.

The branch of defendant Glengariff's cross-motion (Seq. No. 04), pursuant to CPLR § 3126, for an order dismissing plaintiffs' Verified Complaint and/or precluding plaintiffs from offering any evidence or testimony at the time of trial upon the grounds that plaintiffs have failed to comply with the Preliminary Conference Order, dated May 13, 2015, and with defendant Glengariff's discovery demands, is hereby **DENIED**.

However, the branch of defendant Glengariff's cross-motion (Seq. No. 04), pursuant to CPLR § 3124, for an order compelling plaintiffs to comply with the discovery demands, including a responsive Supplemental Verified Bill of Particulars, is hereby **GRANTED**. And it is further

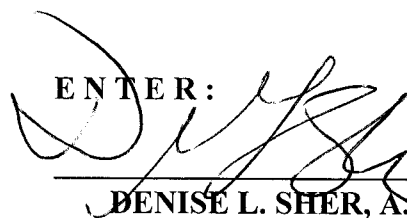
ORDERED that plaintiffs supply defendants with an Amended Supplemental Bill of Particulars that identifies the specific section(s) of 42 CFR § 483 that plaintiffs allege were violated by defendant Glengariff. Said Amended Supplemental Bill of Particulars must be served within thirty (30) days of this Decision and Order.

The branch of defendant Winthrop's motion (Seq. No. 03), pursuant to 22 NYCRR 202.21(e), for an order vacating plaintiffs' Note of Issue and striking this action from the trial calendar, and the branch of defendant Glengariff's cross-motion (Seq. No. 04), pursuant to 22

NYCRR 202.21(e), for an order vacating plaintiffs' Note of Issue and Certificate of Readiness as this matter is not ready for trial, are hereby **GRANTED**. And it is further

ORDERED that plaintiffs shall file a Note of Issue in the instant matter by **July 30, 2018**. A Copy of this Order must accompany the Note of Issue.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
May 29, 2018

ENTERED

JUN 05 2018

NASSAU COUNTY
COUNTY CLERK'S OFFICE