

Matter of Reilly v Fishman

2019 NY Slip Op 30198(U)

January 8, 2019

Supreme Court, Westchester County

Docket Number: 60297/2015

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER-COMPLIANCE PART

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MAURA REILLY, as Administratrix of the Estate of KEVIN REILLY, Deceased, and MAURA REILLY, Individually, and CONSTANCE REILLY,

Plaintiffs,

-against-

DECISION & ORDER
Index No. 60297/2015
Motion Date: Jan. 8, 2018
Seq. Nos. 2, 3

ERIC FISHMAN, LOUIS VIZIOLI, LISA YOUKELES, LOREDANA MILITARU, KANWALWIR SANGHERA, ERIC SHULMAN, VICTORIA CHERNYAK, ELLIOT RHEE, LISA MILLMAN, ANTHONY LIN, WESTMED MEDICAL GROUP, P.C., MAPLE MEDICAL, LLP, WHITE PLAINS HOSPITAL CENTER and MONTEFIORE MEDICAL CENTER,

Defendants.

-----X
LEFKOWITZ, J.

The following papers were read on motion sequence 2 by defendants Eric Shulman (“Dr. Shulman”), Victoria Chernyak (“Dr. Chernyak”), Elliot Rhee (“Dr. Rhee”), Lisa Millman (“Dr. Millman”), Anthony Lin (“Dr. Lin”) and Montefiore Medical Center (“Montefiore”) (collectively the “Montefiore defendants”) for an order pursuant to CPLR 3024 and 3126 striking plaintiffs’ verified bills of particulars, verified supplemental bills of particulars and fourth supplemental bills of particulars, awarding motion costs and granting such other and further relief as to this court may seem just and proper, and on motion sequence 3 by defendants Louis Vizioli (“Dr. Vizioli”), Loredana Militaru (“Dr. Militaru”), Kanwalwir Sanghera (“Dr. Sanghera”), Maple Medical, LLP (“Maple Medical”) and White Plains Hospital Center (“WPHC”) (collectively the “White Plains defendants”) for an order striking plaintiffs’ verified bills of particulars, and supplemental verified bills of particulars as to these defendants, or in the alternative, striking portions of said pleadings and compelling further particularization and specification, and for such other and further relief as this court deems just and proper.

Motion Sequence 2:

Order to Show Cause; Affirmation in Support by Esther S. Widowski, Esq.

with Exhibits A-H
Affirmation in Opposition with Exhibits A- J

Motion Sequence 3:

Order to Show Cause, Affirmation in Support by Audrey A. Lark, Esq. with Exhibits A-H
Affirmation in Opposition with Exhibits 1-2

Upon the foregoing papers, and the proceedings held on January 8, 2018 these motions are determined as follows:

Factual and Procedural Background:

This wrongful death action arises from allegations that the White Plains defendants failed to timely diagnose and treat intraoperative complications from an angiographic procedure performed on the decedent, Kevin Reilly, by co-defendant Eric Fishman, M.D. at WPHC on December 13, 2012, and the subsequent failure of the Montefiore defendants to properly and timely prevent, diagnose and treat the decedent's sacral ulcer. Dr. Fishman referred the decedent to the emergency room at WPHC for admission. The decedent was subsequently transferred to Montefiore for further evaluation and treatment where he died on July 11, 2013.

The action was commenced by the filing of a summons and verified complaint on June 12, 2015. Issue was joined by the Montefiore defendants on October 28, 2015. With their answers the Montefiore defendants each served a demand for a bill of particulars. The White Plains defendants served their answers with demands for a bill of particulars on October 29, 2015. On or about June 7, 2016, plaintiffs served verified bills of particulars as to the Montefiore and White Plains defendants.

By Preliminary Conference Stipulation and Order (Lefkowitz, J.) entered June 30, 2016 defendants were directed to serve any objections to the bills of particulars by July 15, 2016 and plaintiffs were directed to respond to any objections by August 5, 2016. By letters dated July 14, 2016 and July 29, 2016, the Montefiore and White Plains defendants, respectively, objected to plaintiffs' bills of particulars, on the grounds that the bills of particulars were not particularized, were identical as to each defendant, and were overbroad and vague.

On August 14, 2017, after the completion of all party depositions, plaintiffs served verified supplemental bills of particulars on the Montefiore and White Plains defendants. By letter dated September 18, 2017 the Montefiore defendants objected to the supplemental bills of particulars, alleging that the supplemental bills failed to address any of the previously identified deficiencies of the initial bills.

The Compliance Conference Referee Report & Order entered on September 21, 2017 directed plaintiffs to respond to the September 18, 2017 letter regarding the supplemental bills of particulars within two weeks, together with responses to the August 1, 2017 demand by the

White Plains defendants. By letter dated October 4, 2017 the White Plains defendants reiterated that the deficiencies they objected to in the initial bills remained in the supplemental bills. On October 16, 2017, having not received any further response from plaintiffs, the Montefiore defendants sent another good faith letter. On October 30, 2017 plaintiffs served a fourth verified bill of particulars on all of the Montefiore defendants except for Drs. Chernyak and Shulman.¹ The Montefiore defendants contend that the fourth verified supplemental bills of particulars also failed to address the deficiencies of the prior bills of particulars. The Montefiore and White Plains defendants contend that despite the fact that discovery has been completed, plaintiffs have failed to address their objections to the prior bills of particulars, including the failure to particularize the allegations of negligence as against each of the defendants.

The Parties' Contentions:

Motion Sequence Number 2:

The Montefiore defendants assert that all of plaintiffs' bills of particulars fail to describe the acts or omissions which constituted the alleged negligence of each of the defendants. The Montefiore defendants assert that each of the bills of particulars contains a virtually verbatim description of the alleged negligent acts of the defendants. The Montefiore defendants state that plaintiffs improperly used the identical language in the bills of particulars with respect to the five individual defendants and the defendant hospital. The Montefiore defendants assert that plaintiffs also improperly claim that the decedent was negligently discharged "with inappropriate medical equipment" although he died at Montefiore Hospital. The Montefiore defendants also assert that the plaintiffs have used vague, overbroad and boilerplate language including allegations of "negligence, carelessness, abandonment and other departures from accepted and proper medical, nursing, and other good practices on the part of the defendant." The Montefiore defendants argue that plaintiffs' bills of particulars are voluminous, redundant, vague and overbroad and are intended to annoy, harass and improperly impede their ability to defend the case and prepare for trial. The Montefiore defendants further state that although all depositions of the five individual defendants have been completed plaintiffs continue to allege that the dates of negligent treatment occurred "at various times during December of 2012 through and including July of 2013."

Defendants specifically refer to Dr. Shulman's deposition testimony which states in part that he graduated from medical school in 2013 and started his employment at Montefiore on July 1, 2013 (Exhibit N, pp 18-19) and that his duties with respect to the decedent were limited to placing orders in the chart for blood cultures and medications on July 10, 2013 and filling out paperwork at the time of decedent's death, including the discharge summary (Exhibit N, pp. 29-31). Defendants assert that despite having completed Dr. Shulman's deposition on May 15, 2017, plaintiffs' supplemental bill of particulars served on August 14, 2017 continued to assert

¹ In total, plaintiffs served initial bills of particulars and supplemental bills of particulars as to all of the Montefiore and White Plains defendants and fourth supplemental verified bills of particulars as to all of the Montefiore defendants, except for Drs. Chernyak and Shulman.

seven pages of allegations of negligence as against Dr. Shulman, including his failure to properly manage a neurological event on June 6, and 7, 2013, which occurred prior to when he started working at Montefiore.

In opposition plaintiffs state the bills of particulars contain the necessary and requisite information and that plaintiffs should not be precluded from offering evidence nor should plaintiffs be required to amplify the bills of particulars. Plaintiffs argue they are only required to provide a general statement of the acts or omissions constituting the negligence claimed and they are not required to provide evidentiary material. Plaintiffs argue that the allegations are sufficiently particularized as to each defendant and more than adequate to apprise defendants of the general areas of malpractice upon which plaintiffs will rely. Additionally plaintiffs assert that there are overlapping allegations as to the Montefiore defendants which relate to their failure to properly prevent and treat pressure ulcers that resulted in further complications to the decedent such as osteomyelitis and sepsis. Plaintiffs argue that the allegations against the Montefiore defendants have been significantly narrowed since the inception of the case. Plaintiffs contend that the prevention of pressure ulcers and wound care are collaborative in nature which makes it impossible to delineate allegations as they relate to individual physicians. Plaintiffs further contend that the allegations concerning the pressure ulcer injuries occurred throughout the decedent's admission at Montefiore. It is plaintiffs' contention that each physician who treated the decedent owes a duty to provide care as it relates to pressure ulcer prevention and treatment.

Motion Sequence Number 3:

The White Plains defendants argue that the language in the initial bills of particulars and the supplemental bills of particulars pertaining to the allegations of negligence are vague and fail to properly particularize claims of negligence as against each defendant. The White Plains defendants state that the plaintiffs have served bills of particulars with negligence claims that are substantially identical to all of the White Plains defendants as well as to that of each co-defendants' bills of particulars. The White Plains defendants assert that plaintiffs' claims of negligence are the same with respect to each of the White Plains defendants, individuals and institutional defendants alike. The White Plains defendants state that the allegations are the same as against all of them even though the involvement of Dr. Militaru, an emergency room attending physician at WPHC, was limited to evaluating and admitting the decedent on December 8, 2012. Dr. Sanghera's only involvement was the interpretation of EKG studies on December 8, 2012 and on December 13, 2012. Dr. Vizioli's involvement consisted of a preoperative consultation on December 9, 2012 and consultations on December 13, and 14, 2012 during the decedent's admission to WPHC. The White Plains defendants contend that now that all depositions have been completed it is improper for the allegations as to each of these defendants to remain identical. The White Plains defendants contend that the supplemental bills of particulars continue to contain allegations that are vague and identical as to each defendant, including the institutional defendants. The White Plains defendants assert that plaintiffs have also failed to indicate the specific time period during which the alleged negligence is claimed to have occurred as to each

of the moving defendants

In opposition plaintiffs contend that they have alleged with sufficient particularization the negligence attributed to each of the White Plains defendants. Plaintiffs contend that the allegations as to the White Plains defendants are limited only to the preoperative and postoperative care provided to the decedent during the December 13, 2012 angiographic procedure performed by Dr. Fishman. Plaintiffs assert that the claims as against each of the White Plains defendants cannot be further particularized as they were all involved in the case and treatment of the defendant at WPHC throughout the preoperative and postoperative time periods. Plaintiffs also contend that during her deposition Dr. Militaru acknowledged that her signature appears on orders dated December 13, 2012 and while she testified that she did not order those treatments, since her signature appears on those orders, there exists an issue of fact as to whether her involvement with the decedent's case is limited only to December 8, 2012. Plaintiffs contend that Drs. Vizioli and Sanghera were involved in the decedent's care and treatment before and after the December 13, 2012 surgery. Additionally plaintiffs state that in the bills of particulars and supplements thereto they have alleged that the dates of treatment are for December 2012, which plaintiffs assert relates to the decedent's admission to WPHC from December 8, 2012-December 22, 2012.

Analysis:

The purpose of a bill of particulars is to amplify the pleadings, limit the proof, and prevent surprise at trial. A bill of particulars in a medical malpractice action must provide a general statement of the acts or omissions constituting the alleged negligence (*Shanoff v Goylan*, 139 AD3d 932 [2d Dept 2016]; *Contreras v Adeyemi*, 102 AD3d 720 [2d Dept 2013]). Responses to a demand for a bill must clearly detail the specific acts of negligence attributed to each defendant (*Hayes v Kearney*, 237 AD2d 769 [3rd Dept 1997]; *Miccarelli v Fleiss*, 219 AD2d 469 [1st Dept 1995]; *Berger v Feinerman*, 203 AD2d 407 [2d Dept 1994]; *Batson v LaGuardia Hosp.*, 194 AD2d 705 [2d Dept 1993]).

Motion Seq. 2- The Montefiore defendants

A review and comparison of the original bills of particulars, the supplemental bills of particulars, and with respect to Drs. Rhee, Millman and Lin, the fourth supplemental bills of particulars shows that plaintiffs have failed to allege with particularity as against each of the Montefiore defendants the acts of negligence alleged to have been committed by them. Paragraph 1 of their demands request that plaintiffs set forth the manner in which the defendants were negligent, careless and unskillful. Plaintiffs' six-page response to that demand in the initial bills of particulars is almost identical for each of the defendants, including the institutional defendant Montefiore, even though it is clear the roles of the individual defendants are different than Montefiore's (see *Sealy v Uy*, 132 AD3d 839, 840 [2d Dept 2015]). Similarly, the supplemental bills of particulars contain almost identical responses for each of the defendants, including allegations against Dr. Shulman for dates and events which occurred prior to the time

he was employed by Montefiore.² The fourth supplemental bills of particulars for Drs. Rhee, Lin and Millman are also identical in their responses to this demand.

Paragraph 12 of the Montefiore demands requested that plaintiffs provide the reason the decedent presented to each of the defendants. Plaintiffs' response to that demand for each of the defendants was: "[t]hese defendants undertook to treat the plaintiff's (sic) Decedent for a symptomatic presentation." Paragraph 13 requested that plaintiffs provide, inter alia, the date of each treatment provided by the defendants, the date and time of each alleged act of negligence and the name of each individual claimed to have acted negligently. Plaintiffs' responses, identical for all the Montefiore defendants, state, in relevant part "the negligent acts...which are alleged...occurred at various times during December of 2012 through and including July of 2013."

The responses to the Montefiore defendants' demands fail to particularize the acts of negligence alleged as against each of the defendants, allege identical or virtually identical claims of negligence as against each of these defendants, including the institutional defendant Montefiore, and without distinction as to each of the individual defendant physician's roles or their medical specialties. Paragraph 1 of each of plaintiffs' bills of particulars, supplemental bills of particulars and fourth supplemental bills of particulars are stricken and plaintiffs are directed to provide responses specific and particularized with respect to the allegations as against each of the defendants. Paragraph 12 of plaintiffs' bills of particulars is also stricken and plaintiffs are directed to provide a more specific response to that demand. The court additionally finds that plaintiffs' responses to paragraphs 7,10, 11, and 23 are vague, overbroad, nonspecific or otherwise insufficiently informative so as to amplify the pleadings and limit the proof (see *Hayes v Kearney*, 237 AD2d 769, 770 [3d Dept 1997]). Accordingly those responses are appropriately stricken and plaintiffs are directed to provide supplemental responses to those demands.

Motion Seq. 3 - The White Plains defendants

At the outset it is noted that plaintiffs' affirmation in opposition to motion sequence 2 is almost identical to plaintiffs' affirmation in opposition to motion sequence 3. Plaintiffs' affirmation in opposition to the White Plains defendants' motion inexplicably includes the following, which also appears in plaintiffs' opposition to the Montefiore Defendants' motion: "Contrary to Defendants' position, the allegations as against the Montefiore Defendants have been narrowed significantly since the inception of this case. Counsel has failed to acknowledge that Plaintiffs further supplemented their Bills of Particulars as against each of the Montefiore Defendants...." While this paragraph is appropriate in opposition to the Montefiore defendants' motion, it appears to have been included in error in opposition to the White Plains defendants' motion. Moreover, although plaintiffs state in both sets of opposition papers that the allegations against the White Plains defendants are limited to preoperative and postoperative treatment at

² Although plaintiffs concede that certain of the allegations asserted against Dr. Shulman in the bills of particulars were in error, plaintiffs have failed to provide supplemental bills of particulars which correct these errors.

WPHC, and the allegations against the Montefiore defendants are limited to the issues of pressure ulcer prevention and treatment and negligent long term care, plaintiffs inexplicably allege against White Plains defendants Drs. Vizioli and Militaru the failure to institute pressure ulcer protocols and failure to timely turn and position the decedent.

With respect to plaintiffs' bills of particulars, paragraph 2 of the White Plains defendants' demands request plaintiffs to set forth the condition or conditions which is claimed the answering defendant undertook to treat. In response, plaintiffs' verified bills of particulars provide the same response for each of the White Plains defendants: "[t]hese Defendants undertook to treat the Plaintiff's (sic) Decedent for a symptomatic presentation."

Paragraph 3 of the individual White Plains defendants' demands request that plaintiffs "set forth each and every act of malpractice on the part of the answering defendant which it will be claimed constitutes negligence as alleged in the complaint, including date, time and place such acts are alleged to have been committed."³ In response, plaintiffs provide almost verbatim the identical response for each of the defendants which consists of almost three pages of allegations, including failure to determine the existence of hemorrhagic complications of angiographic procedures for treatment of atherosclerotic peripheral vascular disease, failure to utilize diagnostic tests, misreading and misinterpreting tests, failure to prescribe proper medication, failure to take adequate medical history as well as vague and generalized allegations of negligence, carelessness, abandonment failure to treat the decedent in accordance with accepted standards of medical care, failure to monitor screen and diagnose the decedent to determine the existence of an emergency medical condition, failure to treat the decedent in accordance with standards of care and treatment generally accepted in the community, negligently and carelessly failing to use reasonable care and skill in treatment of the decedent, failing to heed the decedent's symptoms and complaints, failing to use best judgment in care and treatment of decedent. Plaintiffs' responses do not include the date, time or place of each act nor do they identify the particular defendant to which each act of negligence is attributed.

The responses to this demand in the supplemental verified bills of particulars for the individual White Plains defendants, which are six pages in length, again consist of almost identical allegations against the individual defendants. Although there is some variation in the responses among the individual defendants in the supplemental bills of particulars, the responses are still strikingly similar. Although there appears to be greater specificity with respect to allegations as to the individual defendants the bulk of the response remains identical as to each of the individual defendants. Here, too the responses contain a litany of specific allegations as well as vague and general allegations such as the failure to treat the decedent in accordance with accepted standards of medical care.

³ Paragraph 3 for the institutional White Plains defendants requests plaintiffs to set forth the condition or conditions which it is claimed the answering defendant undertook to treat, together with the name of whoever it is claimed acted on behalf of the answering defendant

Similarly, with respect to the institutional defendants Maple Medical and WPHC, demand number 3 asked plaintiffs to set forth each and every act of malpractice on the part of the answering defendant which it will be claimed constitutes negligence as alleged in the complaint, including date, time and place such acts are alleged to have been committed and who acted on behalf of the answering defendant. In response plaintiffs provided the identical response to both WPHC and Maple Medical. While the supplemental responses are more tailored to the individual institutional defendants, the responses to demand number 3, which is 5 pages in length, is still almost identical for both WPHC and Maple Medical. Furthermore, neither the original bills of particulars nor the supplemental bills of particulars provide the dates of the alleged acts of malpractice or the names of those who acted on behalf of the institutional defendants.

The court finds it proper to strike paragraphs 2 and 3 of the initial bills of particulars, and paragraph 3 of the supplemental bills of particulars for all of the White Plains defendants. Plaintiffs shall provide a further response to demand number 2 which shall respond to that demand with specificity. With respect to paragraph 3 plaintiffs shall further particularize those responses as to each of the White Plains defendants while striking any language that is vague or does not apply to that particular defendant. Plaintiffs shall also specify the dates of each alleged act of negligence.

Additionally, movants are entitled to an award of \$100.00 each for costs associated with making this motion.

Accordingly it is:

ORDERED that the motion by the Montefiore defendants is granted to the extent that: paragraph 1 of each of plaintiffs' verified bills of particulars, supplemental verified bills of particulars and fourth verified supplemental bills of particulars are stricken and plaintiffs are directed to provide supplemental responses specific and particularized with respect to the allegations as against each of the defendants; paragraph 12 of plaintiffs' verified bills of particulars is stricken and plaintiffs are directed to provide a more specific response to that demand; and paragraphs 7, 10, 11, and 23 of plaintiffs' verified bills of particulars are stricken and plaintiffs are directed to provide supplemental responses to those demands striking language that is vague, overbroad, nonspecific or otherwise insufficiently informative; and it is further

ORDERED that the motion by the White Plains defendants is granted to the extent that: paragraphs 2 and 3 of the initial verified bills of particulars, and paragraph 3 of the supplemental verified bills of particulars for all of the White Plains defendants are stricken and plaintiffs are directed to provide a supplemental response to demand number 2 which shall respond to that demand with specificity and with respect to paragraph 3 plaintiffs shall provide a supplemental response particularized as to each of the White Plains defendants, including the dates of each alleged act of negligence, while striking any language that is vague or does not apply to that particular defendant; and it is further

ORDERED that all further supplementation, as directed above, shall be served by plaintiffs so as to be received in hand by defendants within 10 days of entry of this decision and order; and it is further

ORDERED that within 10 days of entry of this decision and order plaintiffs shall make a monetary payment of \$100.00 to counsel for each of the moving defendants for costs associated with bringing this motion, and file proof of payment on NYSCEF on or before that date; and it is further

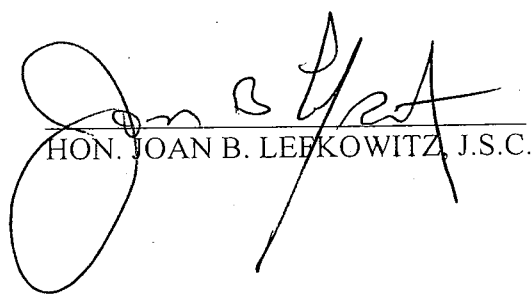
ORDERED that all other branches of motion sequence 2 and motion sequence 3 are otherwise denied; and it is further

ORDERED that the Montefiore defendants shall serve a copy of this decision and order, with notice of entry, upon all parties, within 5 days of entry; and it is further

ORDERED that all parties shall appear for a conference in the Compliance Part, Room 800 on January 29, 2018 at 9:30 A.M.

The foregoing constitutes the decision and order of this court.

Dated: White Plains, New York
January 8, 2018


HON. JOAN B. LEFKOWITZ, J.S.C.

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