Carroll v New York City Health and Hosps. Corp.
2019 NY Slip Op 30730(U)
March 19, 2019
Supreme Court, New York County
Docket Number: 805016/2014
Judge: George J. Silver
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Index №. 805016/2014
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 10
--X
LINDA CARROLL, as Administrator of the Estate of EDMUND CAROLL, deceased, and LINDA CARROLL, Individually

Plaintiffs

Index №. 805016/2014

Motion Seq. (006)

-against-

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, et al.

Defendant
--X
ALAN R. LAMPERT, M.D., NORTHPORT FAMILY MEDICINE, P.C.,

Third-Party Plaintiffs

-against-

ARETHA PERSAUD-MANCUSI, M.D., and ALL THE ANSWERS, INC.

Third-Party Defendants
--X

The following papers numbered 1 to 3 were read on this motion for (Seq. No. **006**) for **SUMMARY JUDGMENT** (*see* CPLR § 2219 [a]):

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s). 1
Answering Affidavit and Exhibits	No(s). 2
Replying Affidavit and Exhibits	No(s). 3

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision and order of the court.

Dated: March 19, 2019

Hon. George J. Silver
GEORGE J. SILVER J.S.C.

GEORGE J. SILVER

1. CHECK ONE............... ☐ CASE DISPOSED IN ITS ENTIRETY ☑ CASE STILL ACTIVE
2. MOTION IS.................... ☐ GRANTED ☑ DENIED ☐ GRANTED IN PART ☐ OTHER

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HON. GEORGE J. SILVER:

In this medical malpractice action, defendant STEPHEN A. MEZZAFONTE, M.D. ("defendant") moves, pursuant to CPLR §3212, for summary judgment and an order dismissing the complaint of plaintiff LINDA CARROLL ("plaintiff"), as administrator of the estate of EDMUND CARROLL ("decedent"), as against him. If dismissal is granted, defendant also seeks dismissal of all cross-claims against him. Separately, defendant seeks an order striking purportedly improper language from plaintiff's complaint because of plaintiff's failure to provide defendant with details with respect to plaintiff's claims in this lawsuit. Plaintiff opposes defendant's applications.

BACKGROUND

This is a medical malpractice lawsuit involving the death of decedent and pecuniary losses sustained by his estate and widow, plaintiff, because of defendant's alleged failure to timely and accurately interpret echocardiograms. To be sure, plaintiff contends that defendant failed to properly act upon the findings of two echocardiograms, including an echocardiogram accompanied by signs and symptoms of aortic dissection. Due to defendant's alleged malpractice, plaintiff states that decedent was unable to obtain treatment for an alleged aortic dissection, which resulted in his untimely death at the age of fifty (50).

On August 8, 2011, decedent presented to defendant ALAN LAMPERT, M.D. ("Dr. Lampert") for a routine annual physical examination. Diane Stapleton, a sonographer, performed an echocardiogram, which was subsequently interpreted by defendant. The echocardiogram showed mild valve regurgitation, enlarged coronary sinus, and the aortic root was mildly dilated at 4.5 cm. Following the echocardiogram, defendant did not recommend or order any follow-up. On October 12, 2011, decedent presented to Dr. Lampert with complaints of a sore throat. Dr. Lampert's plan was a complete blood count.

On December 26, 2012, decedent presented to Dr. Lampert complaining of intermittent epigastric pain. Decedent also complained of excessive belching. His blood pressure was 120/72. Dr. Lampert referred decedent to a gastroenterologist. On December 27, 2012, decedent presented to the gastroenterologist. On examination, decedent's blood pressure was 126/76. The plan was to perform an endoscopy and a colonoscopy.

On December 29, 2012, decedent underwent an abdominal sonogram. The abdominal sonogram showed a focal aneurysm dilation of the mid to distal abdominal aorta. On January 10, 2013, the gastroenterologist noted that he spoke to decedent regarding his abdominal sonogram and advised him of the small aneurysm in decedent's aorta.

On January 15, 2013, decedent presented to defendant Bellevue Hospital complaining of chest pain that he described as a tightness, midsternal, radiating to jaw, with shortness of breath. The pain lasted 20 minutes. Decedent reported that an imaging study the prior month revealed an enlarged artery. A chest x-ray showed an uncoiled aorta. Cardiac enzymes were negative. No diagnosis was made. Decedent was discharged with the understanding that he would undergo a stress test the following day.

On January 16, 2013, decedent presented to Dr. Lampert. Dr. Lampert noted that decedent had no cardiac symptoms and had a normal cardiac examination. His blood pressure was 128/70. Thereafter, technician Diane Stapleton performed a second echocardiogram, which was once again interpreted by defendant. Plaintiff alleges that defendant misinterpreted the images generated from that echocardiogram by failing to appreciate the presence of an intimal flap (a tear) of the aorta- a sign of an active aortic dissection, as well as other findings indicative of aortic dissection.

From January 16 through January 21, 2013, plaintiff contends that defendant failed to inform decedent or decedent's other physicians that decedent's echocardiogram and complaints of chest pain demonstrated the presence of an active aortic dissection, and failed to take any action to obtain care and treatment for decedent's active aortic dissection.

Decedent was found in cardiac arrest in his car on the morning of January 21, 2013. An autopsy determined that he died from an alleged aortic dissection.

ARGUMENTS

In support of the instant motion, defendant argues that he has put forth a prima facie showing of an entitlement to summary judgment as a matter of law through the detailed and factually supported expert affirmation of Eitan M. Klein, M.D. ("Dr. Klein"), and the pertinent medical records and deposition

transcripts annexed to defendant's moving papers. Dr. Klein is a physician duly licensed to practice medicine in New York, and is board certified in internal medicine and cardiovascular disease. Dr. Klein opines, within a reasonable degree of medical certainty, that defendant did not depart from good and accepted medical practice and that no negligent acts or omissions by defendant caused any injury to plaintiff.

Specifically, Dr. Klein opines that defendant's role as cardiologist was limited to reviewing echocardiograms for Dr. Lampart or other physicians. To that end, Dr. Klein highlights that defendant did not undertake any further duty to decedent. Indeed, As an echo reader, Dr. Klein submits that defendant was under no duty to order testing. Rather, his only duty was to report the findings of the echocardiogram to the ordering clinician, which he did.

Dr. Klein further opines that the standard of care did not require that defendant review the study within 24-hours. To be sure, Dr. Klein submits that the echocardiogram was not presented to defendant as a stat or urgent study. Dr. Klein also opines that the indication for the study, chest pain, did not require immediate review. Dr. Klein opines that chest pain is a non-specific indication. Indeed, the indication of chest pain is a very frequent reason for many echocardiograms, and does not carry with it any increased urgency. As such, Dr. Klein opines that it was proper for defendant to review decedent's results within 48 hours.

Additionally, it is Dr. Klein's opinion that defendant, as the echographer, would not be in the position to order tests directly. In fact, Dr. Klein states that defendant would only be able to recommend testing, and it would be up to the clinician to carry out said orders. Based on Dr. Klein's review of the echocardiogram, he opines that it was proper for defendant to recommend a CT scan. Dr. Klein opines that a CT scan is the gold standard for visualizing an aorta accurately. Dr. Klein further opines that even when present, dissections are frequency not visualized on an echocardiogram. It is Dr. Klein's opinion that the January 16, 2013 echocardiogram did not demonstrate an active aortic dissection. Accordingly, an emergent surgical work-up was unwarranted.

Dr. Klein further opines that even if defendant had recommended surgical intervention, such intervention would not have occurred immediately. Dr. Klein opines that Dr. Lampert would have had to refer decedent to a cardiothoracic surgeon, and that the surgeon would have had to subsequently evaluate, consider, recommend, and obtain approval for the operation. Dr. Klein opines that this would have taken time, and would not have resulted in immediate surgical intervention. Dr. Klein further opines that this time delay would not have changed decedent's outcome, as decedent passed away mere days after his second echocardiogram.

As such, it is Dr. Klein's opinion that any act and/or omission by defendant did not proximately cause injury to decedent. As such, defendant submits that summary judgment in its favor is warranted. Assuming that this action is dismissed as against defendant, defendant separately argues that dismissal of the third-party action as against it is also warranted since the third-party action is derivative of the main action. Finally, defendant argues that dismissal of plaintiff's complaint as against him is warranted on account of the vague allegations set forth in plaintiff's bill of particulars.

In opposition, plaintiff argues that ample issues of fact exist that require resolution at trial before a jury. Indeed, in contrast to defendant's expert affirmation that sets forth that defendant was "only a consultant," plaintiff's annex the affirmations of experts who dispute Dr. Klein's opinions, and further opine that defendant deviated from the standard of care in ways not addressed by Dr. Klein. To be sure, plaintiff's experts opine that defendant departed from accepted standards of care by failing to properly act upon the imaging study of August 8, 2011, including failing to order or recommend a CT or MR for the aortic root dilation of 4.5 cm. Plaintiff's experts further opine that defendant failed to timely review the January 16, 2013 echocardiogram despite the documented indication of chest pain and failed to properly interpret and act upon the imaging study of January 16, 2013, including failing to appreciate the presence of an intimal flap in the aorta and signs of an aortic dissection, and failing to make a proper diagnosis and recommendations prior to decedent's death on January 21, 2013.

Notably, plaintiff argues that even if defendant was "only a consultant," his alleged negligence extends to his failure to properly interpret the January 16, 2013 echocardiogram and recognize the presence of an intimal flap of the aorta, as well as other findings revealing an active aortic dissection. Consequently, plaintiff argues that even if defendant was a "consultant," he still retained a duty to accurately interpret the echocardiogram images and act upon the correct findings.

Plaintiff also disputes defendant's assertion that he was "only a consultant" by highlighting defendant's own testimony, wherein he states that he understood his role as a treating physician to include doing "an evaluation, see if anything further needed to be done, whether that be medication change, further testing, things like that" where, for example, the patient would "come with some sort of complaint that may or may not be cardiac in nature or they had some sort of cardiac problem."

Finally, plaintiff argues that defendant had a doctor-patient relationship with plaintiff from January 16, 2013 until decedent's death, as evidenced by defendant scheduling plaintiff for an appointment on January 23, 2013 at 1:00 PM. As a result of the foregoing, plaintiff argues that judgment in defendant's favor is unwarranted.

Moreover, plaintiff contends that there is no basis to strike any language from plaintiff's bill of particulars, as plaintiff submits that plaintiff's allegations against defendant are sufficiently detailed to inform defendant of the basis of the malpractice allegations asserted against him.

In reply, defendant challenges plaintiff's experts' affirmations and the conclusions drawn therefrom. Defendant further reiterates the arguments made in his moving papers, and renews his argument that he is entitled to judgment in his favor.

DISCUSSION

In an action premised upon medical malpractice, a defendant doctor or hospital establishes prima facie entitlement to summary judgment when he or she establishes that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged (*Roques v. Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Thurston v Interfaith Med. Ctr.*, 66 AD3d 999, 1001 [2d Dept 2009]; *Myers v Ferrara*, 56 AD3d 78, 83 [2d Dept 2008]; *Germaine v Yu*, 49

AD3d 685 [2d Dept 2008]; *Rebozo v Wilen*, 41 AD3d 457, 458 [2d Dept 2007]; *Williams v Sahay*, 12 AD3d 366, 368 [2d Dept 2004]). In claiming that treatment did not depart from accepted standards, the movant must provide an expert opinion that is detailed, specific and factual in nature (*see e.g., Joyner-Pack v. Sykes*, 54 AD3d 727, 729 [2d Dept2008]). The opinion must be based on facts within the record or personally known to the expert (*Roques*, 73 AD3d at 207, *supra*). Indeed, it is well settled that expert testimony must be based on facts in the record or personally known to the witness, and that an expert cannot reach a conclusion by assuming material facts not supported by record evidence (*Cassano v Hagstrom*, 5 NY2d 643, 646 [1959]; *Gomez v New York City Hous. Auth.*, 217 AD2d 110, 117 [1st Dept 1995]; *Matter of Aetna Cas. & Sur. Co. v Barile*, 86 AD2d 362, 364-365 [1st Dept 1982]). Thus, a defendant in a medical malpractice action who, in support of a motion for summary judgment, submits conclusory medical affidavits or affirmations, fails to establish prima facie entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Cregan v Sachs*, 65 AD3d 101, 108 [1st Dept 2009]; *Wasserman v Carella*, 307 AD2d 225, 226 [1st Dept 2003]). Further, medical expert affidavits or affirmations, submitted by a defendant, which fail to address the essential factual allegations in the plaintiff's complaint or bill of particulars do not establish prima facie entitlement to summary judgment as a matter of law (*Cregan*, 65 AD3d at 108, *supra*; *Wasserman*, 307 AD2d at 226, *supra*). To be sure, the defense expert's opinion should state "in what way" a patient's treatment was proper and explain the standard of care (*Ocasio-Gary v. Lawrence Hosp.*, 69 AD3d 403, 404 [1st Dept 2010]). Further, it must "explain 'what defendant did and why'" (*id. quoting Wasserman v. Carella*, 307 AD2d 225, 226 [1st Dept 2003]).

Once the defendant meets its burden of establishing prima facie entitlement to summary judgment, it is incumbent on the plaintiff, if summary judgment is to be averted, to rebut the defendant's prima facie showing (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The plaintiff must rebut defendant's prima facie showing without "[g]eneral allegations of medical malpractice, merely conclusory and unsupported by competent evidence" (*id.* at 325). Specifically, to avert summary judgment, the plaintiff must demonstrate that the defendant did in fact commit malpractice and that the malpractice was the proximate cause of the plaintiff's injuries (*Coronel v New York City Health and Hosp. Corp.*, 47 AD3d 456 [1st Dept 2008]; *Koeppel v Park*, 228 AD2d 288, 289 [1st Dept 1996]). To meet the required burden, the plaintiff must submit an affidavit from a medical doctor attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged (*Thurston*, 66 AD3d at 1001, *supra*; *Myers*, 56 AD3d at 84, *supra*; *Rebozo*, 41 AD3d at 458, *supra*). Where it is argued that a defendant's conduct was a substantial factor in proximately causing injury to a plaintiff, to defeat summary judgment a plaintiff's expert need not precisely say how exactly a defendant caused a plaintiff's injury so long as the plaintiff's expert can show that a defendant's act or omission decreased the plaintiff's chance of a better outcome or increased the injury (*see King v. St. Barnabas*, 87 AD3d 238, 245 [1st Dept 2011]; *Stewart v. New York City Health and Hosp. Corp.*, 207 AD2d 703, 704 [1st Dept 1994]

Here, defendant's submission of deposition transcripts, medical records and an expert affirmation based upon the same established a prima facie defense entitling them the summary judgment (*Balzola v Giese*, 107 AD3d 587 [1st Dept 2013]). To be sure, Dr. Klein specifically provides that defendant's role in plaintiff's care was confined to reviewing and interpreting plaintiff's echocardiogram, and that such a limited

role did not impose upon him a duty to order further testing or review plaintiff's results with any degree of urgency beyond that which he exhibited. Dr. Klein states, for instance, that within the confines of the applicable standard of care, defendant was only able to recommend further testing of decedent, which he did, and was in no way compelled to act in any manner beyond that. Moreover, Dr. Klein argues that even if defendant had a duty to recommend surgical intervention, the same would not have occurred prior to decedent's death a few days after his second echocardiogram. Additionally, Dr. Klein states that his own review and interpretation of decedent's second echocardiogram did not demonstrate an active aortic dissection, as plaintiff argues. To be sure, Dr. Klein opines that at most the increase in the size of decedent's aortic root from 4.5 to 4.8 cm in a year and a half could be indicative of a suspicion of an aortic dissection, but that such suspicion would be an irregular reading of the results. As such, an emergent surgical work-up was not indicated. Considering the foregoing, Dr. Klein opines, within his capacity as a physician board certified in internal medicine and cardiovascular disease, that defendant's care was appropriate and did not proximately cause injury to decedent. As this finding is predicated upon ample evidence within the record, the court finds that it supports a prima facie showing in defendant's favor.

In opposition to defendant's prima facie showing, plaintiff raises triable issues of fact to preclude summary judgment. Indeed, plaintiff's cardiology experts opine that defendant departed from accepted standards of care in several material ways. To be sure, plaintiff's experts opine that defendant's actions ran athwart of standards of care insofar as: 1.) defendant failed to properly act upon the imaging study of August 8, 2011, including failing to order or recommend CT or MR for the aortic root dilation of 4.5 cm; 2.) defendant failed to timely review the January 16, 2013 echocardiogram despite the documented indication of chest pain; 3.) defendant failed to properly interpret and act upon the imaging study of January 16, 2013, including failing to appreciate the presence of an intimal flap in the aorta and signs of an aortic dissection, as well as aortic regurgitation, tricuspid regurgitation, mitral regurgitation, pulmonic regurgitation; 4.) defendant failed to heed and act upon the 4.8 cm dilated aortic root on January 16, 2013, which was dilated than the prior study on August 8, 2011; 5.) defendant failed to properly examine, assess, and take a proper history of defendant; 6.) defendant negligently recommended "CT angiogram of the aorta versus MRA" on a non-urgent basis, rather than immediately admitting decedent to the hospital on January 16, 2013: 7.) defendant failed to immediately notify Dr. Lampert or decedent of the findings of the echocardiogram of January 16, 2013; 8.) defendants failed to make the proper diagnosis and recommendations prior to decedent's death on January 21, 2013.

Regarding the January 16, 2013 echocardiogram, plaintiff's experts disagree with Dr. Klein and submit that defendant should have further explored plaintiff's complaint of chest pain, especially considering the images produced from the echocardiogram. To be sure, one of plaintiff's experts independently reviewed the January 16, 2013 echocardiogram imaging from defendant and concluded that the imaging, when accurately reviewed, reveals that an intimal flap just above the mitral valve in the ascending aorta. Such an intimal flap (or tear) of the intima (the innermost layer of the aorta), in the expert's view, indicates the presence of an aortic dissection (a separation of the inner and medial layers of the aorta), which the expert characterizes as a life-threatening emergency. As such, in contrast to Dr. Klein's opinion, plaintiff's experts state that decedent had an active aortic dissection that defendant negligently missed. That miss, in plaintiff's

experts' estimation, was deviation from the standard of care, and proximately caused injury to decedent by reducing the possibility of a better outcome for him.

In conflict with Dr. Klein's assessment, plaintiff's experts' opinions, also predicated on plaintiff's experts' review of the relevant medical records and testimony, is that defendant failed to appreciate, act upon, or document the presence of an intimal flap just above the mitral valve in the ascending aorta on the January 16, 2013 echocardiogram. To be sure, plaintiff's experts disagree with Dr. Klein's assessment that the 4.8 cm aortic root was insignificant. Indeed, plaintiff's experts opine that the growth from 4.5 cm to 4.8 cm, especially in the presence of decedent's symptoms of chest pain, warranted further appreciation and intervention from defendant.

Plaintiff's experts also disagree with Dr. Klein's opinions regarding the necessary work up for decedent's dilated aortic root. In plaintiff's view, Dr. Klein fails to address: (1) the presence of an intimal flap, indicating an active aortic dissection, on the echocardiogram; and (2) the absolute size and increase in size of the aortic root in the presence of symptoms of chest pain.

Plaintiff's experts further opine that decedent's repeated complaints of chest pain or tightness classified him as "symptomatic," requiring immediate imaging, hospitalization, and cardiothoracic surgical consult. Plaintiff's experts further opine that the standard of care for a cardiologist-consultant or otherwise require the accurate and correct interpretation of echocardiogram imaging. Defendant's failure to accurately interpret the echocardiogram and failure to appreciate the signs and symptoms of an aortic dissection, including the presence of an intimal flap, was, in plaintiff's experts' estimation, a deviation from the standard of care.

Plaintiffs' experts further opine that the presence of an intimal flap on the January 16, 2013 echocardiogram was an emergency that required immediate action, including notifying Dr. Lampert, notifying decedent, and sending decedent to the hospital for additional imaging and surgical evaluation and treatment, as soon as possible. At a minimum, plaintiff argues that defendant should have notified decedent immediately after signing off on the echocardiogram report on the morning of January 18, 2013.

This, and more observations, are sufficient to raise issues of fact and, thus, preclude the granting of summary judgment in defendant's favor. Specifically, plaintiff's experts' opinions raise, among other issues, questions as to whether the delay in diagnosis of decedent's active aortic dissection caused his death when the aortic dissection ruptured prior to decedent having an opportunity to obtain surgical treatment.

Plaintiff's experts opine, contrary to the opinions of Dr. Klein, that there was sufficient time during the five days from January 16 to January 21, 2013 or the three days from January 18 to January 21, 2013 for decedent to be hospitalized, obtain additional imaging, and schedule surgery (including insurance approval for these necessary measures). Further, plaintiff's experts opine that the time period to act would be extended further by decedent's physicians starting him immediately on medication therapy to prevent the extension of the aortic dissection. This would include medications to control his heart rate and blood pressure to decrease the stress placed on the aorta and reduce the risk of further dissection at the site of the tear. Notably, Dr. Klein's affirmation is silent on this point. Even if, as defendant contends, he was "only a consultant,"

defendant still arguably had an opportunity to immediately inform Dr. Lampert of the findings of the echocardiogram, at which time Dr. Lampert would have immediately instructed decedent to go to the hospital.

Dr. Klein's assertion that decedent would have disregarded advice to go to the hospital is irreconcilable as matter of law with plaintiff's contention that decedent would have heeded the advice of his doctors and gone to the hospital immediately. Moreover, plaintiff's contention that decedent would have gone to the hospital cannot be discounted as speculative based on the record before the court. To be sure, the evidence in this case includes testimony that decedent waited for Dr. Lampert to return his call. Additionally, decedent's medical records reveal his history of being a diligent patient who followed the instructions of his physicians.

Collectively, plaintiffs' experts have furnished opinions sufficient to defeat summary judgment. To be sure, issues of fact remain as to whether defendant's alleged departures from the standard of care substantially reduced decedent's chances of a better outcome and ultimately caused his death.

Having established that defendant is not entitled to judgment in his favor as a matter of law, the court need not delve into the viability of the cross-claims asserted against defendant in the third-party action, as defendant's sole contention is that those claims be dismissed as derivative to the claims in the main action based on the assumption that the main action is dismissed (*see Interstate Adjusters, Inc. v. First Fid. Bank, N.A.*, 251 AD2d 232, 234 [1st Dept 1998]). As the court finds that the main action is not dismissed as against defendant, the cross-claims asserted against defendant cannot be dismissed at this time.

Finally, the court finds the allegations in plaintiff's bill of particulars are legally sufficient, and adequately inform defendant of his alleged malpractice. By reference to the arguments proffered by defendant in support of his application for summery judgment, it is evident that defendant is aware of the nature of the allegations against him, which involve two echocardiograms and care related thereto. With respect to the relevant period of malpractice, it is apparent here that plaintiff is prosecuting this case on account of the dates of decedent's two echocardiograms, August 8, 2011 and January 16, 2013, respectively. Moreover, the allegations of negligence related to the January 16, 2013 echocardiogram span five days until decedent's death on January 21, 2013.

Plaintiff goes on to list the alleged acts of malpractice against defendant. Plaintiff's allegations are detailed, and more than sufficiently inform defendant of the basis of his malpractice. The inclusion of language such as "including but not limited to" does not, in and of itself, make plaintiff's allegations vague. To the contrary, this language is actually the preface to more specific lists of particular offenses charged to defendant. The cases cited by defendant are inapposite, as they relate to situations where the "including but not limited to" language was used in conjunction with allegations that were impermissibly vague at the outset. That deficiency is not applicable on the facts of this case. Even if it were, the law favors a disposition on the merits (*Catarine v. Beth Israel Med. Ctr.*, 290 AD2d 213, 215 [1st Dept 2002]). As such, the sanction of "striking the pleading should be restricted to occasions when the failure to disclose is found to be willful, contumacious or in bad faith" (*Cespedes v. Mike & Jac Trucking Corp.*, 305 A.D. 2d 222, 222 [1st Dept

2003]). Here, the record is devoid of any indication that plaintiff fashioned plaintiff's bill of particulars in a deliberately vague fashion. To the extent that defendant believes plaintiff has done so, the appropriate remedy is not for this court to strike the language of plaintiff's bill of particulars, but rather for defendant to seek amplification of plaintiff's pleadings (*see Irizarry v Ashar Realty Corp.*, 14 AD3d 323 [1st Dept 2005]; *Katz v Dream Trans, Inc.*, 11 AD3d 412 [1st Dept 2004]; *Frye v City of New York*, 228 AD2d 182 [1st Dept 1996]). Defendant's delay in seeking such amplification at an earlier juncture in the litigation should not be charged against plaintiff. Accordingly, there is no basis for striking any language from plaintiff's bill of particulars.

Based on the foregoing, it is hereby

ORDERED that defendant's motion for summary judgment is denied in its entirety; and it is further

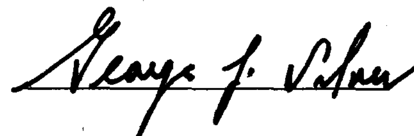
ORDERED that defendant's separate application for dismissal of all cross-claims is denied for the reasons set forth herein; and it is further

ORDERED defendant's application to strike language from plaintiff's bill of particulars is denied; and it further

ORDERED that the parties are directed to appear for a conference before the court on April 30, 2019 at 9:30 AM at the courthouse located at 111 Centre Street, Room 1227 (Part 10).

This constitutes the decision and order of the court.

Dated: March 19, 2019



GEORGE J. SILVER