

Diorio v Schervier Nursing Care Ctr.
2019 NY Slip Op 32278(U)
July 7, 2019
Supreme Court, Bronx County
Docket Number: 25319/16
Judge: Joseph E. Capella
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NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 23

Case Disposed
Settle Order
Schedule Appearance

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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REGINA DIORIO as Administratrix of the Estate of
ROBERT STANTON, deceased,

Index #: 25319/16
DECISION/ORDER

Plaintiff,

- against -

Present:
Hon. Joseph E. Capella
J.S.C.

SCHERVIER NURSING CARE CENTER, GARY A.
TANNENBAUM, MD, and WESTCHESTER
SURGICAL SPECIALISTS, PLLC,

Defendants.

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The following papers numbered 1 to 3 read on this motion noticed on February 21, 2018, motion and cross-motion noticed on April 30, 2018, and duly submitted June 3, 2019.

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION AND AFFIDAVITS ANNEXED	1
ANSWERING AFFIDAVIT AND EXHIBITS	2
REPLY AFFIDAVIT AND EXHIBITS	3

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER IN THESE MOTION AND CROSS-MOTION IS AS FOLLOWS:

By notice of motion, defendant, Schervier Nursing Care Center (Schervier Nursing Home), seeks dismissal of the complaint, (CPLR 3126), based on plaintiff's alleged failure to provide an adequate bill of particulars (BP). The complaint alleges, in sum and substance, that decedent was a resident of defendant, Schervier Nursing Home, from May 8, 2014, through November 16, 2016. It goes on to allege in very nonspecific language that decedent "sought the professional care of facility for certain complaints, the need for rehabilitation and for nursing home care, including complaints, from which he was suffering, and this defendant nursing home, its agents, servants and employees took on the responsibility of rendering care, diagnosis, treatment and services to him/her." There

is no description of the “certain complaints” that decedent was suffering. The first cause of action for negligence alleges, once again in very broad and general language, that “the above care, diagnosis, treatment and services . . . were rendered carelessly, unskillfully, negligently and in a manner which departed from customary and accepted standards of practice.” The next three causes of action follow the same pattern of vague language, and fail to describe the alleged specific act(s) of negligent conduct that occurred at the Schervier Nursing Home, nor do they specifically describe the alleged injury sustained by decedent. Instead, the complaint appears to include every possible negligent conduct that could occur at a nursing home.

Plaintiff’s bill of particulars (BP) dated November 18, 2016, alleges, *inter alia*, that “defendant(s) . . . were negligent, reckless, without due care and/or caution, violated regulations as set forth herein, and/or failed to properly care for plaintiff/decedent, in among other things, failing to: to have sufficiently qualified staff to meet needs; to properly supervise its staff . . . properly heed the history, complaints, signs, symptoms, and/or conditions . . . provide prompt notification to the family and/or physician(s) of significant changes in health status . . . perform an adequate, competent and/or complete assessment for the risk of pressure ulcers . . . failed to properly assess the risk of malnutrition and/or dehydration . . .” Paragraph nine of the BP alleges a variety of injuries, including amputation above right knee and below left knee, surgery, sepsis and death. The BP continues to ramble on and on with these broad-based allegations without any specificity. A reading of this BP fails to give the reader any idea as to what happened to decedent at the Schervier Nursing Home to warrant the commencement of this action. For example, the alleged pressure ulcer -- how many pressure ulcers, where was the pressure ulcer located on decedent’s body, did decedent arrive at the nursing home with the ulcer, or did the ulcer develop at the nursing home.

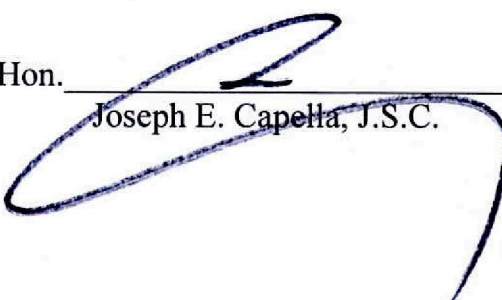
The Amended BP dated November 8, 2017, continues the same pattern of providing very general allegations, except that it added, *inter alia*, the following: “the

medical malpractice and negligent acts and/or omissions of defendant(s) occurred daily and continuously on plaintiff/decedent's admission to defendant(s)' facility, from/about May 8, 2014, through/about November 16, 2014 excluding any admissions to St. John's Riverside Hospital." Plaintiff's most recent BP dated May 17, 2019, still does not provide any factual information as to what happened to decedent at the Schervier Nursing Home to prompt the instant lawsuit. For example, we still have no idea as to when the alleged amputation above the right knee and below left knee, surgery, and sepsis occurred. The purpose of a BP is to amplify the pleadings, limit proof and prevent surprise at trial. (*Toth v Bloschinsky*, 39 AD3d 848 [2nd Dept 2007].) It must provide a general statement of the acts or omissions constituting the alleged negligence. (*Coughlin v Festin*, 53 AD2d 800 [3rd Dept 1976].) The Court assumes that plaintiff's counsel had sufficient information to believe that the instant action was not frivolous, and commenced this action accordingly. (22 NYCRR § 130-1.1(c)(3).) In technical cases such as the instant one, to the extent that plaintiff honestly does not have the information sought in a BP Demand, then plaintiff may provide a statement accordingly with the understanding that said information will be provided in a future Supplemental BP after EBT(s) take place and/or a review of various records. (*Nelson v NYU Medical*, 51 AD2d 352 [1st Dept 1976]; *Coughlin*, 53 AD2d 800.) But this does not obviate the obligation of plaintiff's counsel to have enough information before commencement of the action in order to state a cause of action. In sum, all of the aforementioned BPs fail to provide a cohesive set of facts to constitute negligence.

Based on the aforementioned, the Court shall provide plaintiff with another opportunity to provide defendant, Schervier Nursing Home, with an adequate BP, and the failure to do so shall result in a dismissal of this action. The plaintiff has 30 days from receipt of a copy of this decision/order to provide same, and the motion by defendant, Schervier Nursing Home, is granted accordingly. Defendant, Schervier Nursing Home, is directed to serve a copy of this decision/order with notice of entry by first class mail upon

all sides within 30 days of receipt of copy of same. This constitutes the decision and order of this court.

7/7/19
Dated

Hon. 
Joseph E. Capella, J.S.C.