

Semper v Karamitsos
2020 NY Slip Op 32902(U)
September 1, 2020
Supreme Court, New York County
Docket Number: 805182/2015
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER

PART 6

Justice

TULIP SEMPER AND ERIC HOLLOMAN,

INDEX NO. 805182/2015

Plaintiffs,

MOTION DATE

- against-

MOTION SEQ. NO. 11

MOTION CAL. NO.

HARRY KARAMITSOS, M.D., KAMEELAH PHILLIPS, M.D., SERGUEI V. DOLGOPOLOV, M.D., LENOX HILL HOSPITAL OF THE NORTH SHORE-LONG ISLAND JEWISH HEALTH SYSTEM, INC., RONALD BLATT, M.D., JEFFREY A. MAZLIN, M.D., EAST SIDE GYNECOLOGY SERVICES, P.C. and RONALD BLATT, M.D., P.C.,

Defendants.

The following papers, numbered 1 to _____ were read on this motion for/to

PAPERS

NUMBERED

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

Answer – Affidavits – Exhibits _____

Replying Affidavits

Cross-Motion: Yes X No

Under Motion Sequence 11, Plaintiffs Tulip Semper and Eric Holloman (collectively, “Plaintiffs”) seek leave to amend the Bills of Particulars as to Kameelah Phillips, M.D. (“Dr. Phillips”) “to include additional deviations of standard of care” committed by Dr. Phillips. Dr. Phillips opposes the motion.

Plaintiffs seek to amend the Bill of Particulars “to include additional deviations of standard of care” committed by Dr. Phillips as follows:

in failing to immediately send plaintiff to the hospital on January 3, 2013 after the failed abortion by defendant, Dr. Mazlin; in failing to send plaintiff to the hospital on January 3, 2013 for evaluation and management after the failed abortion; in being aware that Dr. Mazlin was discharging plaintiff to Dr. Phillips’ office in order to perform the termination of pregnancy he was unable to do and yet in doing absolutely nothing to terminate the pregnancy on January 3, 2013; in negligently waiting four (4) days to perform a D & C; in knowing plaintiff had a large fibroid uterus and an open cervix after the failed abortion and yet in failing to send plaintiff to the hospital that same day for evaluation and management; in failing to heed the medical significance of a failed abortion and the possibility and likelihood of a uterine perforation during the cancelled and failed abortion procedure; in failing to discontinue Doxycycline for the plaintiff; in failing to substitute a longer duration, higher dosage

prescription of Vancomycin in place of Doxycycline for the plaintiff; in failing to perform a D & C on January 3, 2013; in failing to ascertain the circumstances under which the attempted abortion was cancelled; in knowing plaintiff was discharged NPO (nothing by mouth) from East Side Gynecology Services, P.C. and therefore capable of having surgery that same day and yet in failing to send plaintiff to the hospital for a termination of pregnancy; in neglecting to undertake an investigation to determine if the circumstances at and immediately after the failed abortion procedure raised the chances and likelihood of a MRSA infection for the plaintiff; and in failing to obtain a copy of the plaintiff's medical records from defendant, East Side Gynecology, P.C.

Plaintiffs contend that "the claims in the proposed Amended Bill of Particulars are covered by the following allegations in plaintiff's original Bill of Particulars dated December 7, 2015 and Supplemental Bill of Particulars dated January 9, 2017" as follows:

a. in failing to timely intervene with medical care and treatment thereby permitting and allowing the injuries and conditions complained of herein to progress and worsen; b. in delaying the performance of the dilation and curettage; c. in performing a dilation and curettage in an untimely manner; d. in failing to administer antibiotics prior to, during, and after the dilation and curettage procedure; e. in failing to properly treat plaintiff's MRSA infection with antibiotics; f. in failing to prescribe appropriate antibiotics; and g. in negligently failing to diagnose a uterine perforation.

Plaintiffs state that they "submitted an Affirmation by an expert wherein he/she asserts that it was a deviation from the standard of medical care and practice in failing to immediately send Ms. Semper to the hospital for evaluation and management including a possible D&C when she presented on January 3, 2013 after the failed abortion and that departure was a proximate cause of and a substantial factor in causing Ms. Semper's pain and suffering and claimed injuries including an infection with MRSA, septic shock, renal failure, DIC, and surgery in the form of an exploratory laparotomy, supracervical abdominal hysterectomy and right salpingo-oophorectomy and a further surgery for abdominal wound closure."

Plaintiffs contend that "[t]he basis for these claims is information only received after taking all depositions and an expert review of all medical records and transcripts in this matter after completion of all depositions." Plaintiffs contend that these additional allegations against Dr. Phillips are the same as Plaintiffs' allegations against Dr. Mazlin as they concern the failure to send Ms. Semper to the hospital immediately after the attempted abortion. Plaintiffs contend, "All the Bills of Particulars as to Dr. Mazlin were also served on defense counsel for Dr. Phillips, therefore there has been ample opportunity for them to review them especially given the fact that both Dr. Phillips and Dr. Mazlin treated the plaintiff on the same day separated by a few hours."

Plaintiffs contend this is not a motion made on the eve of trial without good cause. Rather, Plaintiff notes that the certificate of readiness was filed on October 15, 2019 and there is no trial date set in this matter. Further, Plaintiffs contend that the initial Bill of Particulars and supplemental Bill of Particulars “would arguably encompass the specific allegations set forth above” and “this is just a clarification of the original pleadings.”

Dr. Phillips contends that Plaintiffs are asserting claims against her that were never plead in any of the prior Bills of Particulars. Dr. Phillips contends, “The plaintiffs have now abandoned these allegations and totally changed their theory of the case to be that it was actually Dr. Mazlin who perforated plaintiff’s uterus during the procedure he attempted on plaintiff at East Side Gynecology Services, PC, thereby creating an open pathway for introduction of MRSA into plaintiff’s uterus. The plaintiff now claims that had defendant PHILLIPS sent plaintiff to the hospital on January 3, 2013, that the uterine perforation would have been diagnosed, a blood culture would have been performed which would have revealed a MRSA infection and plaintiff would have been given timely treatment.”

Dr. Phillips contends that Plaintiffs “failed to provide a sufficient reason for the delay in seeking leave and failed to make a showing of merit for the proposed amendments.” Dr. Phillips notes that Plaintiffs are seeking to amend the Bill of Particulars eight months after the Note of Issue was filed and one month after Plaintiffs opposed the summary judgment motion. Dr. Phillips contends that permitting to amend at this juncture and would prejudice the defendants.

Dr. Phillips notes that “the medical affidavit submitted in opposition to defendant Phillips’ summary judgment motion is the same affidavit submitted in support of plaintiffs’ motion to amend the Bill of Particulars as to Dr. Phillips.” Dr. Phillips notes that the expert claims only that Dr. Phillips departed from the standard of care by failing to send Ms. Semper to the hospital on January 3, 2013. Dr. Phillips argues, “None of the other allegations of negligence the plaintiffs’ counsel wishes to raise in their proposed Supplemental Bill of Particulars as to Dr. Phillips, or any of the claims raised in plaintiffs’ counsel’s prior Bills of Particulars as to defendant PHILLIPS, are alleged by plaintiffs’ expert in the Affidavit in support of the motion and thus are abandoned.”

“Leave to amend pleadings, including a bill of particulars, is to be freely given, absent prejudice or surprise.” *Cherebin v. Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365 (1st Dept 2007). Where there is “extended delay in moving to amend, an affidavit of reasonable excuse for the delay in making the motion and an affidavit of merit should be submitted in support of the motion.” *Id.* “In the absence of prejudice, mere delay is insufficient to defeat the amendment.” *Id.* “Prejudice requires ‘some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position.’” *Id.*

“[A] plaintiff cannot defeat a summary judgment motion that made out a prima facie case by merely asserting without more, a new theory of liability for the first time in their opposition papers.” *Biondi v. Behrman*, 149 AD3d 562, 563 (1st Dept 2017). In *Silber v Sullivan Properties, L.P.*, 182 AD3d 512, 513 (1st Dept 2020), the First Department held that “the court did not improvidently exercise its discretion in denying plaintiff’s cross motion filed about two months after plaintiff opposed defendant’s summary judgment motion, to amend the bill of particulars.”

The First Department held, “Plaintiff did not submit an affidavit or any other admissible evidence to show a reasonable excuse in moving to amend the bill of particulars about three months after the note of issue was filed and three years after the action was commenced.” *Silber*, 182 AD3d at 513. The First Department further held that “the plaintiff sought to add to the original bill of particulars [that] constituted untimely substantive additions to the theory of the case, warranting denial of the motion.” *Id.*

The proposed Amended Bill of Particulars does not add a new theory that had not been raised in the initial Bill of Particulars and Supplemental Bill of Particulars or that was not addressed by Plaintiffs’ expert affirmations submitted in opposition to Dr. Phillips’ motion. Those expert affirmations were considered in granting Dr. Phillips’ motion for summary judgment and partially granting Dr. Mazlin’s motion for summary judgment. The proposed amended Bill of Particulars does not add anything which affects the analysis of Dr. Phillips’ motion for summary judgment. (See Motion Sequence 4). The Court, in its decisions in motion sequences 4 and 7 discussed the Expert affirmations submitted there and in support of the amended bill of particulars, and examined their shortcomings and lack of merit.

Wherefore it is hereby

ORDERED that Plaintiffs’ motion (Motion Sequence 11) to amend the Bill of Particulars is denied.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: SEPTEMBER 1, 2020

ENTER: 
_____ J.S.C.

HON. EILEEN A. RAKOWER

Check one: **FINAL DISPOSITION X NON-FINAL DISPOSITION**