

Brothers-Mohammed v Harrington
2020 NY Slip Op 32961(U)
September 8, 2020
Supreme Court, New York County
Docket Number: 805357/2018
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER
Justice

PART 6

**SERENA BROTHERS-MOHAMMED, as the
Administratrix of the Estate of MARIE
BROTHERS, Deceased,**

Plaintiff,

-against-

**MARTIN E HARRINGTON, M.D.,
ELIZABETH HARRINGTON, M.D.,
ROBERT LOOKSTEIN, M.D., and
MOUNT SINAI HOSPITAL,**

Defendants.

**INDEX NO. 805357/2018
MOTION DATE
MOTION SEQ. NO. 4
MOTION CAL. NO.**

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

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

Answer — Affidavits — Exhibits _____

Replying Affidavits

PAPERS NUMBERED

■
■
■

Cross-Motion: X Yes No

Defendants Martin E. Harrington, M.D., Elizabeth Harrington, M.D., Robert Lookstein, M.D., and the Mount Sinai Hospital s/h/a Mount Hospital (collectively, “Defendants”) move for an Order for dismissal and/or preclusion based on Plaintiff’s failure to provide outstanding discovery. Defendants, in the alternative, seek an Order compelling Plaintiff to provide the outstanding discovery.

Plaintiff cross-moves for an Order striking Defendants’ Answer for failure to proceed with depositions. Plaintiff, in the alternative, seeks an Order of preclusion. Plaintiff also seeks costs and fees incurred with the making of the application. Defendants oppose the cross motion.

Defendants’ Motion

Defendants contend in their moving papers that Plaintiff has failed to produce Supplemental Bills of Particulars in accordance with the July 16, 2019,

and October 22, 2019, December 10, 2019 and December 17, 2019 Court Orders. Defendants state that Plaintiff was directed to supplement the Bills of Particulars in order to particularize various vague allegations, differentiate and distinguish them as to each defendant, and supplement the claims of special damages and vicarious liability.

Plaintiff contends that it has produced all outstanding discovery and dismissal would not be appropriate. Plaintiff states, “Although Plaintiff had previously objected to further supplementing the claims of the defendants - in order to prove to the court that plaintiff is willing to further supplement in order to expedite and move this case along. Attached as Exhibit 3 are further supplemental bills of particulars.”

Defendants acknowledge receipt of Plaintiff’s Supplemental Bills of Particulars dated January 8, 2020, March 17, 2020 and April 13, 2020. Defendants in their reply contend that Plaintiff’s Supplemental Bills of Particulars remain deficient and do not render their motion moot.

Defendants contend that the following issues need to be clarified or supplemented:

- (1) Demand Number 5(c): Plaintiff initially responded to this demand by alleging “that Plaintiff was not provided antibiotics in a proper and timely manner without any specificity as to the nature of the claimed departures.” Plaintiff’s response in its January 8, 2020 Supplemental Bills of Particulars was “N/A.” In an email dated April 6, 2020, Plaintiff’s counsel wrote: “To Demand number 5C– I have withdrawn this claim.... Which is why my response is that it’s not applicable.” Defendants contend, “Nevertheless, in the fourth set of Supplemental Bills of Particulars [dated April 10, 2020], plaintiff did not withdraw the claimed allegations and, once again, alleges in a conclusory fashion that ‘the antibiotics that were given were negligently delayed because of the failure to timely diagnose the ruptured spleen, bowel and pancreas.’” Defendants argue. “Despite changes to the language, plaintiff’s response fails to detail when plaintiff should have been administered antibiotics.”

- (2) Demands Number 5(e) and 5(f): Demand Number 5(e) requires Plaintiff to provide the name and description of each test that Defendants failed to take or administer, and the date of the omission. Demand Number 5(f) requires Plaintiff to provide the name of each test that Defendants improperly took or administered, and the date of the performance. Plaintiff responded to Number 5(e) as follows: “blood test, CT scan, abdominal CT scan, MRI, ultrasound, physical examination after March 21, 2016 surgery, any and all testing to determine if decedent was suffering from an infection.” Defendants state that Plaintiff’s response to Demand Number 5(f) is the same. Defendants argue, “[T]he defendants cannot have both failed to administer a test, and have administered that test improperly. Neither supplemental response includes the date of the administration or omission. These responses require further supplementation.”
- (3) Defendants contend that “Plaintiff has failed to supplement the claims of vicarious liability, or withdraw them.” Defendants state that Plaintiff initially stated that Defendants were “vicariously liable for “Dr. Ravin, Dr. Fremed, and Dr. Beckerman,” and now states that she is unaware of the names of any individuals for whom Defendants are vicariously liable. Defendants request that Plaintiff either withdraw the claims expressly or supplement the response.
- (4) Defendants claim that “Plaintiff has not supplemented claims that the defendants failed to timely refer the decedent to an infectious disease specialist.”
- (5) Defendants contend that Plaintiff “still has not provided the date of birth, social security number and last known address of the decedent’s children.”

At this stage of discovery, Plaintiff has identified issues and supplemented the Bills of Particulars as to the individual Defendants. Further supplementation

may emerge once all depositions are completed. To the extent that future supplemental bills of particulars justify the additional deposition of any party, the court will entertain such an application at the appropriate time.

Depositions in the order of the caption must be noticed within 30 days. The parties shall appear for a compliance conference on October 20, 2020.

Plaintiff's Cross Motion

Plaintiff cross moves to strike Defendants' Answer or for preclusion because of Defendants' delay in appearing for depositions. Defendants oppose the cross motion and point out that Plaintiff has not appeared for a deposition and that the parties agreed to adjourn all depositions until the motions were decided. Plaintiff's cross motion is denied. As indicated above, the parties shall schedule depositions and appear at the compliance conference on October 20, 2020.

Wherefore it is hereby

ORDERED that Defendants' motion is denied; and it is further

ORDERED that Plaintiff's cross motion is denied; and it is further

ORDERED that the parties shall appear for a compliance conference in Part 6 on October 20, 2020 at 11:30 AM.

Dated: September 8, 2020

ENTER: 

J.S.C.
HON. EILEEN A. RAKOWER