

Thomas v Stern

2020 NY Slip Op 34307(U)

November 12, 2020

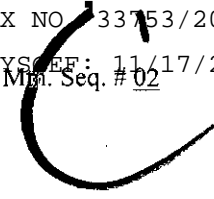
Supreme Court, Bronx County

Docket Number: 33753/2018E

Judge: John R. Higgitt

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 34

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THOMAS, TINA

Index No. 33753/2018E

- against -

Hon. JOHN R. HIGGITT,

STERN, M.D., JOSHUA M., et al.
-----X

J.S.C.

The following papers were read on this motion to COMPEL, noticed on July 7, 2020 and duly submitted on the Motion Calendar of July 7, 2020

	NYSCEF Doc. Nos.
Notice of Motion – Order to Show Cause - Exhibits and Affidavits Annexed	59-66
Notice of Cross-Motion - Order to Show Cause - Exhibits and Affidavits Annexed	67-86
Answering Affidavit and Exhibits	87-89
Replying Affidavit and Exhibits	93-94

Plaintiff’s motion to permit her to be deposed remotely and compel defendants to participate in that deposition is denied, and defendants’ cross motion to preclude plaintiff from offering certain evidence at trial is granted to the extent indicated below.

On December 5, 2018, plaintiff commenced this action to recover damages for personal injuries she allegedly sustained during a January 19, 2018 urological operation. Plaintiff served bills of particulars in May 2019; the bills were identical for each of the separately-named defendants. The bills of particulars stated that plaintiff sustained injuries to her mouth and jaw as a result of the manner in which she was intubated prior to the operation.

In the August 7, 2019 preliminary conference order (Silver, J.), plaintiff was directed, among other things, to serve supplemental bills of particulars addressing certain subjects (i.e., special damages, gross negligence, lack of insurance, res ipsa loquitor), and to serve bills of particulars unique as to each defendant, specifying the particular claims of malpractice and negligence as against each defendant. The preliminary conference order also directed plaintiff to provide defendants with a number of authorizations for records. Plaintiff served supplemental bills of particulars later that month.

By a September 25, 2019 compliance conference order (Silver, J.), plaintiff was direct to further supplement her bills of particulars as to the items in her supplemental bills of particulars. The compliance conference order also directed plaintiff to provide defendants with a number of previously-required authorizations.

Defendants’ February 2020 motion to preclude plaintiff from offering certain evidence at trial based on her failure to comply with the preliminary and compliance conference orders culminated in a February 5, 2020 decision and order of the court (Silver, J.), which provides, in pertinent part, that:

“defendants’ demand seeks, among other things, particularized allegations with respect to [defendants] Dr. Stern and Dr. Moazami. Plaintiff’s general claim that these physicians ‘supervised’ the anesthesiologists who intubated plaintiff is insufficient, particularly since it belies logic that urologists, including a resident urologist, would be tasked with the

responsibility of supervising specialists, namely anesthesiologists, outside their area of expertise. Nevertheless, to the extent that plaintiff wishes to advance such claims, but feels that [she] is at an informational disadvantage given the stage of the proceeding, plaintiff should state as much in a supplemental pleading and should state when [she] intends to provide further supplementation (perhaps following depositions). Indeed, it is inadequate for plaintiff to repeat the exact same responses in respective bills of particulars, especially when the physicians that have been sued practice in different areas and had different roles with respect to plaintiff's care. Accordingly, the branch of defendants' motion seeking to compel plaintiff to supplement her responses to defendants' individual demands for bills of particulars as to Dr. Stern and Dr. Moazami is granted to the extent provided herein."

In response to the court's February 5, 2020 decision and order, plaintiff served the third supplemental bills of particulars. The third supplemental bills of particulars as to defendants Stern and Moazami are essentially the same as the second supplemental bills of particulars served on those defendants; however, in the third supplemental bills of particulars as to those defendants, plaintiff added the following sentence: "Plaintiff respectfully submits that she is at an informational disadvantage given the stage of discovery. Plaintiff therefore intends to supplement her responses herein following the completion of discovery. See *Miccarelli v Fleiss*, 219 AD2d 469, 470 [1st Dept 1995]." Thus, plaintiff employed the approach noted in the February 5, 2020 decision and order.

Now, plaintiff seeks to be deposed remotely and to compel defendants to participate in the remote deposition, arguing that defendants have failed to proceed with her deposition.

In addition to opposing plaintiff's motion for a remote deposition, defendants cross-move to preclude plaintiff from offering certain evidence at trial based on her failure to comply with the court's February 5, 2020 order. Defendants highlight that the third supplemental bills of particulars are identical to the second supplemental bills of particulars except for the reference to *Miccarelli*, and argue that plaintiff does not need the refuge provided by *Miccarelli* because she already has her medical records, which enable her to particularize her claims against defendants Stern and Moazami (or to make an informed decision to discontinue those claims). Defendants also argue that plaintiff must provide a valid authorization (one accompanied by an updated power of attorney) for her records from the New York City Employees Retirement System, and plaintiff must respond to various court orders and notices for discovery and inspection, seeking, among other things, a number of authorizations and certain records.

With respect to plaintiff's third supplemental bills of particulars, in light of the decision and order of February 5, 2020 and the content of the third supplemental bills of particulars, the court cannot say that plaintiff has willfully failed to provide particulars which were required by that decision and order or which otherwise ought to have been provided (*see* CPLR 3042[d]). By virtue of the allegations in the third supplemental bills of particulars and the February 5, 2020 decision and order, defendants are on notice that plaintiff is claiming that defendants Stern and Moazami negligently supervised the anesthesiologists during plaintiff's intubation, and that plaintiff is pursuing a *res ipsa loquitur* theory based on the manner in which she was intubated. Defendants are positioned, therefore, to orient their defense. Notably, the court has no reason to conclude that plaintiff invoked the *Miccarelli* principle in bad faith. Upon the completion of all party depositions, plaintiff is to provide an additional

supplemental bill of particulars as to defendants Stern and Moazami, clearly detailing the specific acts of malpractice or negligence attributed to each of those defendants.

Whether defendants wish to move under CPLR 3211(a)(7) or CPLR 3212 against the claims as they are presently asserted by plaintiff is a matter for defense counsel's judgment. The court notes that defendants maintain that a surgeon (such as defendants Stern and Moazami) has no duty to a patient to supervise an anesthesiologist, and that questions of the existence and scope of a duty of care are typically questions of law for the court that are amenable to resolution on an accelerated-judgment motion.

Regarding defendants' contentions regarding outstanding discovery, after reviewing the various submissions on the motion and cross motion, the court concludes that plaintiff must provide defendants with the following authorizations (in the form required by the respective entity), which were required under prior orders of the court, defendants' notices for discovery, or both:

- Social Security Disability
- Medicaid
- Jacobi Hospital
- New York City Employees Retirement System
- AARP

Additionally, plaintiff must provide copies of dental records in her possession that are potentially relevant to this action, and authorizations for any oral surgeons and TMJ specialists she has treated with since January 19, 2018. (Whether defendants are entitled to additional authorizations for oral surgeons and TMJ specialists plaintiff treated with prior to the surgery giving rise to this action cannot be determined on this motion and cross motion. However, should plaintiff fail to identify and provide authorizations for any such surgeons and specialists prior to her deposition, defendants may be entitled to an additional deposition of plaintiff.) In the event plaintiff does not have any potentially relevant medical records in her possession, she is to provide defendants with an affidavit detailing the efforts she made to locate any such records and aver that she possesses no such records.

In light of the authorizations needed by defendants before they can meaningfully prepare for plaintiff's deposition, the court denies, without prejudice, plaintiff's motion to permit her to be deposed remotely and compel defendants to participate in that deposition. The court notes, however, that remote depositions are being ordered by various New York State courts, including the undersigned (*see e.g. Pena-Oliver v Nunez*, Bronx County index no. 23852/2019E, July 14, 2020; *Vays v Montefiore Medical Center*, Bronx County index no. 36036/2017E, Oct. 13, 2020; *Matthew v DeRose*, Bronx County index no. 31141/2017E, Nov. 6, 2020), and that remote proceedings are strongly recommended and encouraged while the State is dealing with the COVID-19 pandemic (*see* Administrative Order AO/129/20, dated June 22, 2020). Additionally, the court reminds the parties of their obligation to work in good faith to address and resolve discovery-related issues (*see* 22 NYCRR 202.7[a], [c]).

Accordingly, it is hereby ORDERED that plaintiff's motion is denied without prejudice; and it is further

ORDERED that defendants' cross motion is granted to the extent that, within 30 days of service

upon her of a copy of this order with notice of entry thereof, plaintiff is to provide to defendants (1) authorizations for Social Security Disability, Medicaid, Jacobi Hospital, New York City Employees Retirement System, AARP, and for any oral surgeons and TMJ specialists she has treated with since January 19, 2018, in the forms required by those entities; and (2) copies of dental records in her possession that are potentially relevant to this action, unless she has no such medical records in her possession, in which case she is to provide defendants with an affidavit detailing the efforts she made to locate the records and aver that she possesses no such records; and it is further

ORDERED that, within 30 days of the completion of the last party deposition, plaintiff is to provide further supplemental bills of particulars as to defendants Stern and Moazami, clearly detailing the specific acts of malpractice or negligence attributed to each of those defendants; and it is further

ORDERED that the parties shall appear before the undersigned for a discovery status conference via Microsoft Teams at 10:00 am on January 25, 2021; and it is further

ORDERED that defendants' cross motion is otherwise denied.

This constitutes the decision and order of the court.

Dated: 11/12/2020

Hon. 
JOHN R. HIGGITT, J.S.C.

Check one:	Motion is:	Check if appropriate:
<input type="checkbox"/> Case Disposed in Entirety	<input type="checkbox"/> Granted <input type="checkbox"/> GIP	<input type="checkbox"/> Schedule Appearance <input type="checkbox"/> Settle Order
<input checked="" type="checkbox"/> Case Still Active	<input checked="" type="checkbox"/> Denied <input type="checkbox"/> Other	<input type="checkbox"/> Fiduciary Appointment <input type="checkbox"/> Submit Order
		<input type="checkbox"/> Referee Appointment