

**Ballentine v Montefiore Med. Ctr.**

2020 NY Slip Op 34416(U)

December 7, 2020

Supreme Court, Bronx County

Docket Number: 302184/2010

Judge: John R. Higgitt

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Court/County: \_\_\_\_\_

Case Title: \_\_\_\_\_

Docket Number: \_\_\_\_\_

Judge: John R. Higgitt

EXPERT(s): \_\_\_\_\_

File date: \_\_\_\_\_ Type: \_\_\_\_\_

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	Trial Motion, Memorandum, and Affidavit	<b>_TM</b>	<b>LBLX</b>
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	Jury Instruction (actual)	<b>_JI</b>	Proposed and submitted jury instructions
	Expert Depositions	<b>_ED</b>	FULL
	Expert Transcripts	<b>_ET</b>	FULL
	Partial Expert Testimony	<b>_EP</b>	Partial Depos or Transcripts
	Expert Report and Affidavit	<b>_ER</b>	Expert Reports Expert Affidavits
	Proposed Order, Agreement, and Settlement	<b>_PR</b>	(ALL are JV ONLY) Proposed trial order Proposed plea agreement Proposed settlement agreement Proposed verdicts Proposed judgments Findings with proposed orders Stipulations with proposed orders Unsigned stipulations; Unsigned findings; Unsigned orders or verdict sheets
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	CV	<b>_CV</b>	Curriculum Vitae

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: I.A.S. PART 34

-----X  
LURLINE BALLENTINE, As Administrator of the Estate  
of GLENFORD ANTHONY BALLENTINE, Deceased,  
And LURLINE BALLENTINE, Individually,

DECISION AND ORDER

Index No. 302184/2010

Plaintiffs,

- against -

MONTEFIORE MEDICAL CENTER, JACK D. WEILER  
HOSPITAL, THE UNIVERSITY HOSPITAL FOR THE  
ALBERT EINSTEIN COLLEGE OF MEDICINE, JOHN  
DOE 1-5, JANE DOE 1-5 (said names being unknown but  
meant to be the physicians, nurses and house staff who  
treated the decedent),

Defendants.

-----X

John R. Higgitt, J.

Defendants' motion, among other things, to preclude plaintiffs from offering certain evidence at trial (motion seq. no. 8) is granted in part.

In July 2010, plaintiffs commenced this action to recover damages stemming from the death of their decedent, Glenford Ballentine, who received medical care and treatment at defendants' facilities in the seven-and-a-half weeks preceding his March 18, 2008 death. In the complaint, plaintiffs pleaded causes of action for medical malpractice and lack of informed consent, and sought to recover damages for decedent's pain and suffering, and the pecuniary losses sustained by decedent's distributees occasioned by his wrongful death. Additionally, decedent's spouse, plaintiff Lurline Ballentine, asserted a derivative claim based on the loss of decedent's companionship and services.

Defendants interposed an answer, and demanded a bill of particulars from plaintiffs. Defendants requested that plaintiffs particularize, among other things,

- the amount claimed by plaintiffs for decedent's lost earnings (defendants' July 29, 2010 demand for bill of particulars at ¶ 9[e]);
- the names, addresses, and ages of decedent's next-of-kin who received financial support from decedent at the time of his death (defendants' July 29, 2010 demand for bill of particulars at ¶ 16);
- the names, addresses, ages, and relationships to decedent of each of decedent's distributees, and the amount of pecuniary loss each distributee claimed to experience as a result of decedent's death and the basis for such loss (defendants' July 29, 2010 demand for bill of particulars at ¶¶ 20-21); and

- the bases for plaintiff Lurline Ballentine's loss-of-companionship and loss-of-services claims, and the amount she sought on such claims (defendants' July 29, 2010 demand for bill of particulars at ¶ 28).

In their November 2010 bill of particulars, which was five pages long, plaintiffs stated that they were not in possession of information relative to decedent's lost earnings, but that such information would be provided (plaintiffs' November 30, 2010 bill of particulars at ¶ 9). Plaintiffs identified plaintiff Lurline Ballentine as the next-of-kin whom decedent financially supported at the time of his death (plaintiffs' November 30, 2010 bill of particulars at ¶ 16). Regarding decedent's distributees, plaintiffs listed plaintiff Lurline Ballentine and decedent's children, Michelle Mack and Richard and Michael Ballentine (plaintiffs' November 30, 2010 bill of particulars at ¶ 20). Plaintiffs did not set forth the amounts of pecuniary loss allegedly sustained by each of the distributees; rather, plaintiffs indicated that they would provide that information at a later time (plaintiffs' November 30, 2010 bill of particulars at ¶ 21). As to plaintiff Lurline Ballentine's derivative claims, plaintiffs stated that Mrs. Ballentine "was deprived of the loss of services of her husband" (plaintiffs' November 30, 2010 bill of particulars at ¶ 28).

Discovery and motion practice ensued between November 2010 and October 5, 2018, when plaintiffs filed their note of issue and certificate of readiness. The certificate of readiness contained representations by plaintiffs that discovery was complete, that "there ha[d] been a reasonable opportunity to complete [discovery] proceedings," and that the case was ready for trial.

However, two days before they filed the note of issue and certificate of readiness, plaintiffs had prepared a 35-page amended bill of particulars. Notably, plaintiffs amended their responses to the demands for the particulars listed above. With regard to the amount of decedent's lost earnings, plaintiffs, who identified no particular sum in their initial bill of particulars, claimed that those losses totaled \$10,000 (Plaintiffs' October 2, 2018 amended bill of particulars at ¶ 9). Concerning the identity of decedent's next-of-kin who received financial support from decedent at the time of his death, plaintiffs listed only plaintiff Lurline Ballentine as such a recipient in their initial bill of particulars. Yet that list expanded significantly in the amended bill of particulars to include decedent's children (Michelle Mack and Richard and Michael Ballentine), and one of decedent's grandchildren, Romell Ballentine (Plaintiffs' October 2, 2018 amended bill of particulars at ¶ 16). Similarly, the list of decedent's distributees grew significantly from the initial bill of particulars to the amended bill of particulars. In the initial bill of particulars, plaintiffs listed decedent's wife (Lurline) and his children as his distributees; in the amended bill of particulars, plaintiffs included decedent's grandchildren Romell and Nicholas Ballentine and Rachel and Gabriella Mack as distributees (Plaintiffs' October 2, 2018 amended bill of particulars at ¶¶ 9, 20). Although plaintiffs identified no specific sum of money in the initial bill of particulars for the pecuniary losses decedent's distributees allegedly sustained as a result of his wrongful death, plaintiffs asserted in the amended bill of particulars that the distributees sustained pecuniary losses totaling \$10,000,000 (*id.*). In addition to serving a substantially amended bill of particulars, plaintiffs served a supplemental response to defendants'

2010 demand for the names of potential witness, listing for the first time as potential witnesses decedent's children and grandchildren.

By an order to show cause, signed on January 30, 2020, defendants moved to strike the complaint or preclude plaintiffs from offering evidence at trial relevant to damages based on plaintiffs' failure to provide certain material discovery. Alternatively, defendants sought to compel plaintiffs to produce decedent's children and grandchildren for depositions, and to compel plaintiffs to produce documents relevant to their wrongful death claim, including decedent's tax returns, and employment and financial records. (Defendants also sought an adjournment of the trial of this action, which was scheduled to commence on March 4, 2020. The making of this motion was followed in short order by the outbreak of the COVID-19 pandemic, mooting out the request for an adjournment.)

Defendants argue that plaintiffs' amended bill of particulars, served at or around the time plaintiffs filed the note of issue and certificate of readiness, greatly expanded the nature of plaintiffs' cause of action for wrongful death and prejudiced defendants' ability to defend against that cause of action. Defendants also argue that the amended bill of particulars greatly expanded the nature of plaintiff Lurline Ballentine's derivative claims. Regarding the desired documentary discovery, defendants highlighted that plaintiffs had not provided documents and authorizations called for in defendants' September 21, 2018 demand. With respect to their lengthy delay in moving for discovery-related relief, defendants contend that they attempted to secure relevant post-note-of-issue discovery at pretrial conferences, which efforts led to the deposition of Richard Ballentine, but that they were unable to obtain any additional discovery, necessitating this motion. Defendants do not request that the note of issue be vacated; they ask that the case remain on the trial calendar while any court-ordered discovery is conducted (*see* defendants' February 18, 2020 reply at ¶ 12).

Plaintiffs opposed the motion, arguing principally that it is significantly untimely because it was made long after the filing of the note of issue and certificate of readiness, and that defendants made the motion to force an adjournment of the trial of the action. Moreover, plaintiffs contended that defendants' motion represented an impermissible successive summary judgment motion, defendants' prior summary judgment motion having been granted in part and denied in part by Justice Silver in July 2019.

There is no gratifying determination on this motion. On the one hand, defendants waited approximately 15 months after the filing of the note of issue and certificate of readiness before making the present motion and did so on what the parties believed was the eve of trial, and they offer no compelling reason for this significant delay. On the other hand, after 8 years of litigation, plaintiffs served an amended bill of particulars almost concurrently with the filing of the note of issue and certificate of readiness. Although the amended bill of particulars was 7 times longer than the initial bill of particulars, and, among other things, identified distributees who were not previously disclosed and stated (for the first time) a significant sum of pecuniary loss incurred by the distributees, plaintiffs represented in the certificate of readiness that all discovery was complete, that the parties had a reasonable opportunity to conduct discovery proceedings, and that the case was ready for trial.

Ultimately, while defendants should have moved much sooner for the relief they seek on the present motion, the court cannot countenance plaintiffs seeking a significant wrongful death verdict based on the alleged pecuniary loss of several individuals who, for whatever reason, were not identified prior to the filing of the note of issue and certificate of readiness. The picture painted by plaintiffs in their initial bill of particulars, plaintiff Lurline Ballentine's deposition testimony, and plaintiffs' discovery responses was that they were pursuing a modest wrongful death claim; the image of that claim as a result of the amended bill of particulars is much different.

Therefore, the court will permit defendants to conduct remote depositions of decedent's children and grandchildren (except for Richard Ballentine, whose deposition was already taken), such depositions to be limited to the subject of those individuals' alleged pecuniary loss resulting from decedent's death. In light of the age of the case, the length of time the case has already been on the trial calendar, and the increasing number of cases on the trial calendar occasioned by the Covid-19 pandemic, the court declines to vacate the note of issue and certificate of readiness (*see* 22 NYCRR 202.21[e]). Rather, the court, in its discretion (*see Valencia v City of New York*, \_\_\_ AD3d \_\_\_, 2020 NY Slip Op 06732 [1st Dept 2020]; *Lopez v Hicks*, 178 AD3d 620 [1st Dept 2019]; *Cuprill v Citywide Towing and Auto Repair Services*, 149 AD3d 442 [1st Dept 2017]), will permit the discovery to occur while the case is on the trial calendar. Notably, plaintiffs will not be prejudiced by the post-note-of-issue discovery because of the pause on jury trials in Supreme Court, Bronx County. The depositions of Michael Ballentine and Michelle Mack, and Romell and Nicholas Ballentine and Rachel and Gabriella Mack, are to be conducted remotely and are to be limited to five hours each. The parties are to confer and agree on the dates and times of the remote depositions, and the logistics of them (e.g., the remote on-line and mobile platform(s) on which the depositions are to take place) before defendants subpoena the non-party witnesses (*see* CPLR 3106[b], 3107; Uniform Interstate Depositions and Discovery Act).

Additionally, given the manner in which plaintiff Lurline Ballentine's derivative claims expanded from the initial bill of particulars to the amended bill of particulars (*compare* plaintiffs' November 30, 2010 bill of particulars at ¶ 28 with Plaintiffs' October 2, 2018 amended bill of particulars at ¶ 28), defendants may conduct a further deposition of her. That further deposition will be conducted remotely, and limited to the subject of plaintiff Lurline Ballentine's derivative claims and limited to five hours.

These depositions are to be completed within 90 days of the date of service on defendants of a copy of this decision and order with notice of entry thereof.

Regarding defendants' request that plaintiffs produce documents identified in defendants' September 21, 2018 demand, defendants should have pursued that discovery long ago, particularly because defendants had cause to pursue such discovery from the beginning of this action. Whether there was one distributee or eight distributees, defendants could have and should have sought discovery from plaintiffs relevant to decedent's means and support of his distributees. Defendants, however, are free to pursue non-party discovery from decedent's children and grandchildren relevant to their alleged pecuniary loss (*see, e.g.*, CPLR 3120;

Uniform Interstate Depositions and Discovery Act), provided they do so within 90 days of the date of service on them of a copy of this decision and order with notice of entry thereof.

The court notes that defendants are free to seek appropriate relief from the trial judge if plaintiffs attempt to introduce or otherwise rely on documents or information that was not produced during discovery.

Accordingly, it is hereby ORDERED that defendants' motion is granted to the extent set forth above; and it is further

ORDERED that defendants' motion is otherwise denied; and it is further

ORDERED that the parties shall appear for a status conference before the undersigned, via a Microsoft Teams on-line conference, on February 19, 2021 at 10:00 am.

This constitutes the decision and order of the court.

Dated: 12/7/2020

Hon. \_\_\_\_\_

  
JOHN R. HIGGITT, J.S.C.

**Check one:**

- Case Disposed in Entirety  
 Case Still Active

**Motion is:**

- Granted       GIP  
 Denied       Other

**Check if appropriate:**

- Schedule Appearance       Settle Order  
 Fiduciary Appointment       Submit Order  
 Referee Appointment