

Corbett v Campbell Hall Rehabilitation Ctr., Inc.

2020 NY Slip Op 34953(U)

August 10, 2020

Supreme Court, Orange County

Docket Number: Index No. EF009454-2018

Judge: Sandra B. Sciortino

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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THOMAS J. CORBETT a/k/a THOMAS CORBETT, Deceased, by and through LINDA CARTER, as Administratrix of the Estate of THOMAS J. CORBETT a/k/a THOMAS CORBETT,

Plaintiff,

DECISION AND ORDER
INDEX NO.: EF009454-2018
Motion Date: 7/21/2020

Sequence No. 2

-against-

CAMPBELL HALL REHABILITATION CENTER, INC., d/b/a CAMPBELL HALL REHABILITATION CENTER,
Defendants.

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SCIORTINO, J.

The following papers numbered 1 to 13 were read on defendant's motion to dismiss the action, to preclude plaintiff from introducing evidence, or to strike allegations and compel plaintiff to provide a Supplemental Bill of Particulars:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Affirmation of Good Faith (Singer)/ Affirmation in Support (Singer)/Exhibits A-D	1 - 7
Affirmation in Opposition (Johnson)/Exhibits A-D	8 - 12
Reply Affirmation (Singer)	13

Background and Procedural History

This action, based on allegations of nursing home neglect, sounds in wrongful death; negligence; gross negligence and violations of Public Health Law sections 2801-d and 2803-c. Plaintiff commenced the action by electronic filing of a summons and verified complaint on September 12, 2018. In the complaint, it is alleged that the decedent, Corbett, developed pressure ulcers; sepsis; weight loss; pneumonia and dehydration while a resident of defendant Campbell Hall.

Corbett died September 23, 2017 at age 79. In the first cause of action, plaintiff asserts violations of Public Health Law sections 2801-d and 2803-c and claims entitlement to punitive damages pursuant to the statutes. The second cause of action sounds in negligence and gross negligence. (Exhibit A to moving papers)

The Summons and Complaint were served on defendant on September 14, 2018. However, upon plaintiff's determination that defendant might not have been properly served, plaintiff moved by *ex parte* application for an order extending time for service by 120 days. That application was granted on May 6, 2019. Defendant was served through the Secretary of State pursuant to Business Corporation Law section 306 on May 13, 2019. An Answer with Affirmative Defenses, together with various discovery demands, was electronically filed on July 11, 2019.

On August 13, 2019, defendant moved to dismiss the allegations of gross negligence and the claim for punitive damages arguing that the Complaint failed to allege conduct to support such claims. By Decision and Order dated September 30, 2019 (Exhibit D to opposing papers), the motion was denied. Plaintiff's Bill of Particulars (Exhibit C to moving papers) was served on or about November 6, 2019. On January 21, 2020, defendant provided a good faith letter (Exhibit D to moving papers) objecting to various responses in the Bill of Particulars. At a conference on March 4, 2020, just prior to the COVID-19 interruption, the Court directed plaintiff to provide a Supplemental Bill of Particulars complying with defendant's demand. The plaintiff has failed to do so.

The Instant Motion

By Notice of Motion electronically filed May 14, 2020, defendant seeks an order: (a) dismissing the action for plaintiff's willful and contumacious failure to provide an adequate Bill of Particulars; (b) alternatively, precluding plaintiff from introducing evidence of his claims at trial; or c) ,alternatively, striking certain allegations of the Bill of Particulars and compelling defendant to

provide a Supplemental Bill of Particulars with specific dates of negligence.

Defendant asserts that plaintiff's original Bill of Particulars was inadequate as it failed to provide specific dates of negligence or to particularize the alleged claims. The dates provided are vague and overbroad and include "multiple periods of negligence, one of which documents a period of over one year." Moreover, the response to paragraph 3, seeking a general statement of the acts or omissions constituting the negligence, are vague, conclusory and "boilerplate" and should be stricken. Nor has plaintiff, at the time of the filing of the motion, complied with the Court's directive to provide more responsive answers.

Defendant asks the Court to exercise its discretion in fashioning a sanction for what it deems plaintiff's willful and contumacious conduct in failing to supply a Supplemental Bill. The Court can dismiss the action; preclude the claims; or compel production of further responses, or face additional sanctions.

Opposition

On May 21, 2020, plaintiff served an Amended Bill of Particulars. (Exhibit A to opposing papers) Plaintiff asserts that the service of the Amended Bill renders moot the objections of defendant. By letter dated June 9, 2020 (Exhibit B to opposing papers), defendant continues to object that the responses were insufficient as "vague, open-ended, conclusory, overbroad", etc. However, by letter dated July 8, 2020 (Exhibit C), plaintiff advised defendant that he disagreed with that position. Plaintiff argues that the Bill of Particulars is sufficiently specific to permit the defendant to conduct discovery and prepare its defense. Plaintiff has met his obligation to present a general statement of the acts or omissions constituting negligence. More information must await discovery. Further, plaintiff's primary claim is under Public Health Law §2801-d, predicated on a deprivation of rights and benefits pursuant to statute and regulation as opposed to a claim based on the reasonableness of defendant's conduct and its departures from the standard of care.

Having alleged in the Bill of Particulars and the Amended Bill of Particulars that Corbett suffered bilateral heel pressure ulcers, weight loss, dehydration, urinary tract infection and sepsis, which caused his death, plaintiff has met its burden. Moreover, plaintiff did specifically allege that defendant allowed the pressure ulcers to worsen (with date); failed to provide offloading pressure devices prior to the development of the pressure ulcers (with date); and failed to apply a barrier cream when skin impairment was first observed (with date). Plaintiff also alleged specific statutory violations, and has stated that, except for those periods of time in which Corbett was hospitalized, the conditions continued throughout his residency at defendant's facility.

Finally, defendant's complaint regarding the response to the demand for particulars regarding punitive damages should also be denied as premature, until discovery has taken place.

Reply

Defendant asserts that the Amended Bill does not provide responses which are adequately tailored to its demands. Specifically, the Amended Bill still has no dates of claimed treatment, and the allegations of negligence remain open-ended, overbroad and without limitations. To merely recite that injuries occurred over an extended period of time neither particularizes nor amplifies the pleadings. Plaintiff's implied argument that, because the action is not for medical malpractice, that level of particularity is not required is not supported by any precedent. Moreover, statements such as "failed to meet defendant's needs," "failed to provide wound care," and "failed to provide prompt intervention" are insufficiently specific and permit plaintiff's counsel to allege "every possible negligent act." Finally, the response that "defendant's reckless disregard for patient's rights and gross negligence ... permits the imposition of punitive damages" is inadequate and lacks merit in that there are no facts alleged demonstrating a basis for such a claim.

The Court has fully considered the submissions of the parties.

Discussion

For the reasons which follow, defendant's motion is granted in part and denied in part.

"It is well-settled that the object of a bill of particulars is to amplify the pleadings, limit the proof, and prevent surprise at trial." (*Bergman v. Gen. Motors Corp.*, 74 AD2d 886 [2d Dept 1980]; *Stoddard v. New York Oncology Hematology, P.C.*, 172 AD3d 1504 [3d Dept 2019]) The bill of particulars must clearly detail the specific acts of negligence, and which narrow the issues sufficiently to permit a reasonable defense. (*Stoddard*, 172 AD3d at 1506) Trial courts have broad discretion to determine whether a party has complied with discovery demands or provided sufficient information in a bill of particulars. (*id.*, citing *Graves v. County of Albany*, 278 AD2d 578 [3d Dept 2000])

Defendant's objections to the Bills of Particulars at bar focus on three areas. First, defendant asserts it is entitled to dates more specific than Corbett's period of residence at the facility. Especially in a wrongful death case, plaintiff is obligated to be as responsive as possible in responding to a demand for dates of alleged negligence, including dates on which the patient suffered pain and suffering. "[I]f dates more specific than merely reciting the entire...course of treatment were unavailable, [plaintiff must] state the unavailability of that information." (*Berger v. Feinerman*, 203 AD2d 407, 407-408 [2d Dept 1994]; *see also, Hanlon v. Rosenthal*, 7 AD3d 758, 759 [2d Dept 2004])

To the extent plaintiff is able to do so, within thirty days from the date of this Decision and Order, plaintiff shall provide an Supplemental Amended Bill of Particulars which includes specific dates of alleged negligence, or stating that such information is, as yet, unavailable.

A party is entitled to particulars of specific acts where such acts are claimed to be negligent. Conclusory or general statements do not satisfy the purpose of a bill of particulars. (*Bergman*, 74 AD2d at 886) A bill of particulars which fails to provide any particulars with respect to the nature

of the plaintiff's claim for damages is inadequate. (*Callaghan v. Curtis*, 48 AD3d 501 [2d Dept 2008])

Item 3 of defendant's Demand for a Bill of Particulars (Exhibit B to moving papers) sought a "general statement of the acts or omissions constituting the negligence, gross negligence, and/or malpractice and/or violations of resident's rights under Public Health Law §2801-d." Plaintiff's original response (Exhibit C to moving papers) consisted of 34 separate allegations of negligence and 71 alleged statutory or regulatory violations. The Amended Bill (Exhibit A to opposing papers) consisted of 59 separate allegations of negligence and essentially the same statutory and regulatory violations. Defendant asserts that the responses are vague and overbroad, and fail to either particularize or amplify the pleadings, and will not prevent surprise at trial. (*See, e.g., Gannotta v. Long Island College Hosp.*, 92 AD2d 930 [2d Dept 1983])

Plaintiff asserts that the primary thrust of the action is the statutory and regulatory violations under the Public Health Law implying that the distinction somehow relieves him of the obligation to supply a more informative bill of particulars. However, allegations such as a failure to enact and follow an appropriate care plan, failure to change/adjust the decedent's care plan, failure to provide adequate staffing and failure to provide adequate services to maintain decedent's physical well-being sound in medical malpractice because "they challenge the [nursing home's] assessment of [decedent's] need for supervision." (*Carthon v. Buffalo Gen. Hosp. @ Deaconess Skilled Nursing Facility Div.*, 83 AD3d 1404 [4th Dept 2011]) Moreover, the second, third and fourth causes of action in the Complaint allege negligence, gross negligence, conscious pain and suffering and wrongful death. To the extent that plaintiff argues that he need not provide a fully-informative Bill of Particulars, that argument is rejected.

The Court has reviewed the Bill of Particulars and the Amended Bill of Particulars and does not agree that every response cited by defendant is vague, overbroad or otherwise insufficient. A bill

of particulars is a pleading and is not a discovery device. Demands which may be perfectly proper for discovery may be improper for a bill of particulars (*Bouton v. Suffolk Co.*, 125 AD2d 620 [2d Dept 1986]). Some of defendant's complaints seek information better suited to discovery.

However, the Court directs that the following responses to the Amended Bill of Particulars are stricken: h, k, l, r, s, w, z, aa, cc, dd, gg, hh, ll, eee. Plaintiff's Supplemental Amended Bill of Particulars shall include particularization of the claims alleged in those items.

The deficiencies addressed above have been ongoing and addressed by correspondence between the parties and by the direction of the Court last March. Plaintiff's only response to defendant was not served until after service of the instant motion. Such recalcitrance will not be further tolerated.

In the event plaintiff fails to provide a sufficiently particularized response as outlined herein, plaintiff shall be precluded from introducing evidence with respect to all items for which particulars have been inadequately or defectively furnished. (*Callaghan*, 48 AD3d at 502). Further such conduct may well be deemed willful and contumacious, warranting dismissal of all or part of the complaint.

On the basis of the foregoing, it is:

ORDERED that to the extent plaintiff is able to do so, within thirty days from the date of this Decision and Order, plaintiff shall provide an Supplemental Amended Bill of Particulars, including specific dates of alleged negligence, or stating that such information is (as yet) unavailable; and it is further

ORDERED that the following responses to the Supplemental Amended Bill of Particulars are stricken: h, k, l, r, s, w, z, aa, cc, dd, gg, hh, ll, eee. Plaintiff's Supplemental Amended Bill of Particulars shall include particularization of the claims alleged in those items; and it is further

ORDERED that if plaintiff fails to provide a sufficiently particularized response as outlined herein, plaintiff shall be precluded from introducing evidence with respect to all items for which

particulars have been inadequately or defectively furnished. Further such conduct may well be deemed willful and contumacious, warranting dismissal of all or part of the complaint; and it is further

ORDERED that a virtual status conference shall be held on October 1, 2020 at 9:30 a.m. A link to the conference will be provided in advance of the conference date.

All relief not specifically addressed herein is denied.

This decision shall constitute the order of this Court.

Dated: August 10, 2020
Goshen, New York

ENTER:



HON. SANDRA B. SCIORTINO, J.S.C.

TO: *Counsel of Record via NYSCEF*