

Thomas v Stern
2020 NY Slip Op 35507(U)
February 5, 2020
Supreme Court, Bronx County
Docket Number: Index No. 33753/2018E
Judge: George J. Silver
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Index No. 33753/2018E

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX PART 19A**-----X
TINA THOMAS**Plaintiff****Index No. 33753/2018E****-against-****JOSHUA M. STERN, M.D., SAMAN MOAZAMI,
M.D., ELILARY MONTILLA MEDRANO, M.D.,
NANCY LEE, M.D., and MONTEFIORE MEDICAL
CENTER****Defendants**
-----X**HON. GEORGE J. SILVER:**

In this medical malpractice action, defendants JOSHUA M. STERN, M.D., SAMAN MOAZAMI, M.D. (“Dr. Moazami”), ELILARY MONTILLA MEDRANO, M.D. (“Dr. Medrano”), NANCY LEE, M.D. (“Dr. Lee”), and MONTEFIORE MEDICAL CENTER (“Montefiore”) (collectively “defendants”) move, pursuant to CPLR §§3042, 3124, 3126, for an order precluding plaintiff TINA THOMAS (“plaintiff”) from offering any evidence at the time of trial to support claims for which particulars have been demanded, but have not been served. In the alternative, defendants seek to dismiss plaintiff’s complaint or an order from the court compelling plaintiff to provide bills of particulars with sufficient detail to allow defendants, in particular Dr. Stern and Dr. Moazami, to competently defend themselves at forthcoming depositions.

The complaint in this action broadly alleges medical malpractice related to the administration of anesthesia during an intubation of plaintiff’s mouth prior to surgery. Notably, the injuries alleged in plaintiff’s bills of particulars relate to the “mouth and jaw” following an “intraoral laceration during intubation for surgery.” Notwithstanding these allegations, plaintiff also alleges unspecified malpractice against two defendants, Dr. Stern and Dr. Moazami, who are urologic surgeons. Plaintiff’s allegations against Dr. Stern and Dr. Moazami are being advanced even though neither physician participated in the intubation prior to plaintiff’s surgery. At oral argument, plaintiff’s counsel advanced the argument that Dr. Stern and Dr. Moazami “supervised” the anesthesiologists during plaintiff’s intubation, and therefore were the “masterminds” behind the allegedly botched procedure that resulted in plaintiff’s injuries. Plaintiff’s counsel also argues that this is a *res ipsa loquitur* case, even though the injuries alleged do not correspond to areas where Dr. Stern and Dr. Moazami performed surgery on plaintiff.

CPLR §3042(d) provides “[i]f a party served with a demand for a bill of particulars willfully fails to provide particulars which the court finds ought to have been provided pursuant to

Index №. 33753/2018E

this rule, the court may make such final or conditional order with regard to the failure or refusal as is just, including such relief as is set forth in [CPLR §3126].” However, “[b]efore the sanction of preclusion is granted or a pleading stricken, a showing of ‘willful or contumacious conduct’ is necessary” (*Kovacs v Castle Restoration and Const., Inc.*, 262 AD2d 165, 166 [1st Dept 1999]; *see also Hassan v Manhattan and Bronx Surface Transit Operating Auth.*, 286 AD2d 303, 304 [1st Dept 2001] [striking of plaintiff’s pleadings should be imposed only where “the party seeking disclosure demonstrates conclusively that the failure was willful, contumacious or due to bad faith”]).

Although defendants seek, among other things, to compel “full and proper” responses to their demands for bills of particulars under CPLR §3124, the proper procedure is to move to compel compliance under CPLR §3042(c). The purpose of a bill of particulars is to amplify the pleadings, limit the proof and prevent surprise at trial (*Miccarelli v Fleiss*, 219 AD2d 469, 470 [1st Dept 1995]). Thus, the responses to a demand for a bill must “clearly detail the specific acts of negligence attributed to each defendant” (*id.*). “A response to a demand that is vague, nonspecific and opened-end fails to satisfy the purpose of a bill of particulars” (*Alvarado v New York City Hous. Auth.*, 302 AD2d 264, 265 [1st Dept 2003]). If a plaintiff lacks present knowledge of relevant information requested by the demand, plaintiff “should be a responsive as possible, stating [his or her] inability to respond if such is the case, and upon acquiring the information after disclosure, serving a supplemental bill of particulars” (*Miccarelli*, 219 AD2d at 470, *supra*). However, “[i]t need not set forth a matter that is evidentiary in nature, which is more appropriately obtained through depositions and expert disclosure” (*Harris v Ariel Transportation Corp.*, 37 AD3d 308, 309 [1st Dept 2007]; *but see, Twiddy v Standard Marine Transportation Services, Inc.*, 162 AD2d 264, 265 [1st Dept 1990] [noting, “[w]hile a bill of particulars is not an evidence-producing device, the rule is not an inflexible one”]).

In *Twiddy*, the Appellate Division, First Department, determined that the information sought by a demand for a verified bill of particulars was “indisputably information which normally would be obtainable through discovery ...” as opposed to a bill of particulars (162 AD2d at 265, *supra*). Nonetheless, because there was no showing of prejudice by providing the information requested, and because “rigid adherence to the purpose behind a bill of particulars in [that] case would only result in additional meaningless time-consuming motion practice,” the court declined to vacate the demand in its entirety. In *Miccarelli*, 219 AD2d at 470, the Appellate Division, First Department, held that the IAS court had abused its discretion in striking a demand seeking a statement of “how it will be claimed each of said injuries were caused by the alleged negligence,” finding that the demand did not improperly seek evidentiary information but only a general explanation of causation.

It is well settled that “vague, ambiguous, nonspecific and open-ended assertions contained in [a] plaintiffs’ bill of particulars, qualified by the language ‘including but not limited to,’ fail to satisfy the purpose of a bill of particulars.” (*Alvarado*, 302 AD2d at 265, *supra*; *see also Dejesus v New York City Hous. Auth.*, 46 AD3d 474, 475 [1st Dept 2007] [holding that the lower court

Index No. 33753/2018E

erred in not striking plaintiff's allegation in her bill of particulars that defendant failed "to comport with all applicable statutes of the Multiple Dwelling Law and such other applicable ordinances, codes and statutes" because "this vague and open-ended assertion amplified nothing").

Here, defendants' demand seeks, among other things, particularized allegations with respect to 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 plaintiff is at an informational disadvantage given the stage of the proceeding, plaintiff should state as much in a supplemental pleading and should state when plaintiff intends to provide further supplementation (perhaps following depositions)(*Miccarelli*, 219 AD2d at 470, *supra*). Indeed, it is inadequate for plaintiff to repeat the exact same responses in respective bills of particulars, especially where 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. The motion is otherwise denied.

Finally, the court notes that nothing in this decision and order reaches the merits of plaintiff's underlying claims against defendants. Although in this motion defendants seek, in part, to dismiss plaintiff's complaint, they do so as a penalty for plaintiff's alleged noncompliance with defendants' demand for verified bills of particulars. Defendants have not, however, moved to dismiss for plaintiff's failure to state a claim (CPLR §3211 [a][7]) or moved for summary judgment dismissing plaintiff's complaint as against defendants (CPLR §3212).

Accordingly, it is hereby

ORDERED that defendants' motion is granted solely to the extent that plaintiff must serve supplemental responses to Dr. Stern and Dr. Moazami's individual demands for a bill of particulars, providing a response addressing the court's concerns raised herein, within 30 days of receipt of this decision and order; and it is further

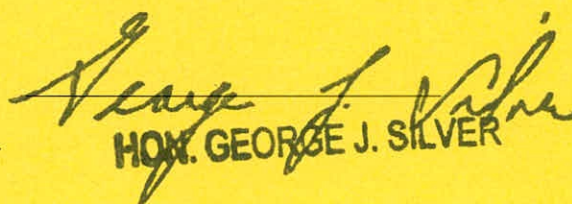
ORDERED that the motion is otherwise denied; and it is further

ORDERED that the parties are directed to appear for a compliance conference on Wednesday March 18, 2020 at 9:30 AM at the courthouse located at 851 Grand Concourse, Room 600 (Part 19A).

This constitutes the decision and order of the court.

Dated: 2-5-2020

- 4 -


HON. GEORGE J. SILVER