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| Ciceron v Gulmatico |
| 2022 NY Slip Op 31266(U) |
| April 13, 2022 |
| Supreme Court, Kings County |
| Docket Number: Index No. 2635/2013 |
| Judge: Genine D. Edwards |
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At Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Brooklyn, New York, on the 13th day of April 2022.

PRESENT:

Hon. Genine D. Edwards
Justice, Supreme Court

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BRUNON CICERON and MARIE CICERON,

Plaintiffs,

Index No. 2635/2013

-against-

AMENDED
DECISION/ORDER

CONSTANTINO V. GULMATICO, M.D.,
SAMANTHI RAJU, M.D., BETH ISRAEL
MEDICAL CENTER, and THE BROOKLYN
HOSPITAL CENTER,

Defendants.

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

| <u>Papers</u> | <u>Numbered</u> |
|--|-----------------|
| Notice of Motions and Affirmations in Support..... | 1 - 3 |
| Memorandum of Law in Support..... | 4 - 6 |
| Notice of Cross-Motions and Affirmations in Support..... | 7 - 8 |
| Affirmations in Opposition..... | 9 - 11 |
| Affirmations in Reply..... | 12 - 14 |

In this medical malpractice action, plaintiffs Brunon Ciceron and Marie Ciceron seek relief in motion sequences twenty-six through twenty-eight. In motion sequence twenty-six, plaintiffs seek an order: (1) declaring plaintiffs' supplemental bills of particulars (supplemental bill of particulars as to defendant, Constantino Gulmatico, M.D., supplemental bill of particulars as to defendant, Samantha Raju, M.D., supplemental bill of particulars as to defendant, Beth Israel Medical Center, and supplemental bill of particulars as to damages and liver cancer) as supplemental and not requiring an amendment, and being legally adequate and properly served;

or alternatively (2) declaring plaintiffs' supplemental bills of particular as amended bills of particulars, and allowing their prior service on defendants as amended bills of particulars, *nunc pro tunc*.

In motion sequence twenty-seven plaintiffs seek an order: (1) precluding defendant, Beth Israel Medical Center, from entering, raising, or asserting any defense to plaintiffs' claims, for any and all purposes, including but not limited to motions and trial; (2) holding that the issues to which the information is relevant (liability of defendant, Beth Israel, for failure to diagnose cancer and liability of defendant, Gulmatico for departure from operating room standards of care, both of which caused damage to plaintiffs) shall be deemed resolved for purposes of the action in accordance with the claims of plaintiffs; (3) prohibiting the disobedient party, Beth Israel Medical Center, from opposing plaintiffs' medical malpractice claims, and from producing in evidence all exhibits, testimony or other proof, whether lay or expert, as to liability or damages; and (4) awarding plaintiffs' attorneys fees in the amount of \$10,000.00¹

In motion sequence twenty-eight plaintiffs seek an order granting plaintiffs preference on the trial calendar because plaintiff, Brunon Ciceron, is over 70 years of age and this action seeks damages from medical malpractice.

In motion sequence twenty-nine defendant Constantino Gulmatico, M.D., seeks an order: (1) consolidating plaintiffs' motion for a preference and his cross-motion with plaintiffs' motion seeking declaratory relief (motion no. 26, also returnable on August 5, 2021) and his cross-motion seeking to strike their supplemental bill of particulars²; (2) denying plaintiffs' motion seeking a preference; and (3) striking the action from the calendar.³

¹ Beth Israel Medical Center was dismissed prior to this decision.

² The motions were administratively consolidated by the Part Clerk prior to this decision.

³ The Note of Issue was vacated prior to this decision.

In motion sequence thirty defendant Constantino Gulmatico, M.D., seeks an order: (1) consolidating plaintiffs' motion for "declaratory relief" and his cross-motion with plaintiffs' motion seeking a trial preference (motion no. 26 also returnable on August 5, 2021) and his cross-motion seeking to strike the case from the trial calendar; (2) denying plaintiffs' motion seeking "declaratory relief" and/or for "leave" to have their supplemental bills of particulars deemed to be amended bills of particulars; and (3) striking plaintiffs' supplemental bill of particulars, dated March 3, 2019 [sic] and June 22, 2021.

In motion sequence thirty-one defendant Samathi Raju, M.D., seeks an order: (1) consolidating plaintiffs' motion for "declaratory relief" and her cross-motion with the motion seeking a trial preference; and (2) striking the action from the trial calendar.

Leave to amend a bill of particulars is freely given in the absence of prejudice or surprise. *See Moore v. Franklin Hosp. Medical Center-North Shore-Long Island Jewish Health System*, 155 A.D.3d 945, 63 N.Y.S.3d 884 (2d Dept. 2017). A supplemental bill of particulars may be used for purposes of updating claims of continuing special damages and liabilities but may not be used to add new injuries or damages. *See Kraycar v. Monahan*, 49 A.D.3d 507, 856 N.Y.S.2d 123 (2d Dept. 2008).

Plaintiffs served "supplemental" bills of particulars as to Dr. Gulmatico and Dr. Raju and another as to damages for liver cancer⁴. The "supplement" as to Dr. Gulmatico is permissible absent prejudice. *See Moore*, 155 A.D.3d 945; *See also Aiello v. Long Island College Hosp.*, 300 A.D.2d 607, 751 N.Y.S.2d 426 (2d Dept. 2002). The "supplement" as to Dr. Raju is stricken as to all claims for medical malpractice, pursuant to this Court's Decision and Order dated January 4, 2021.

⁴ Plaintiffs withdrew the portion of their motion seeking leave to amend the bill of particulars which identifies damages for liver cancer. NYSCEF Doc. No. 213.

Pursuant to CPLR 3403(a)(5), an action to recover damages for medical malpractice is entitled to a trial preference as is a party of seventy years of age or older. *See* CPLR 3403. A party is not, however, entitled to “stacking” multiple trial preferences. *See Green v. Vogel*, 144 A.D.2d 66, 537 N.Y.S.2d 180 (2d Dept. 1989).

Accordingly, it is

ORDERED that plaintiffs’ supplemental Bill of Particulars as to Dr. Gulmatico is deemed proper; and it is further

ORDERED that plaintiffs are granted leave to serve an amended Bill of Particulars as to Dr. Raju, with the exception of any medical malpractice claims; and it is further

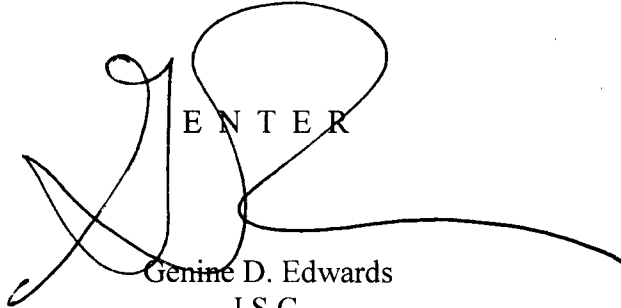
ORDERED that plaintiffs’ motion for a trial preference is granted; and it is further

ORDERED that plaintiffs’ motion as to Beth Israel Medical Center is moot; and it is further

ORDERED that Dr. Gulmatico’s cross-motions are denied; and it is further

ORDERED that Dr. Raju’s cross-motion is moot.

This constitutes the Decision and Order of this Court.


ENTER
Genine D. Edwards
J.S.C.