Donnelly-Friedmann v Edwards

2023 NY Slip Op 31081(U)

April 5, 2023

Supreme Court, New York County

Docket Number: Index No. 805047/2020

Judge: Kathy J. King

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. KATHY J. KING** **PART** **06**

Justice

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KATHLEEN DONNELLY-FRIEDMANN, STANLEY FRIEDMANN,

Plaintiff,

- v -

ERIC EDWARDS, MOUNT SINAI HOSPITAL, ICAHN SCHOOL OF MEDICINE AT MOUNT SINAI

Defendant.

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INDEX NO. 805047/2020

MOTION DATE 05/19/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48

were read on this motion to/for AMEND CAPTION/PLEADINGS.

Plaintiffs move by order to show cause for the following relief::

(1) leave to serve an amended Bill of Particulars, pursuant to CPLR 3025(b), to allege that the actions of Dr. Taub triggered Mount Sinai Hospital (MSH)'s vicarious liability;

(2) leave to serve an amended summons and complaint, to add Dr. Taub as a defendant to this action, pursuant to CPLR 3025, and to treat the claims relating to Dr. Taub as having been interposed at the time the original complaint was interposed, pursuant to CPLR 203(6)(f);

(3) an order compelling defendant MSH to produce for the Court's *in camera* inspection records reflecting Dr. Taub's surgical credentials and privileges in effect as of January 2018 and, following such inspection, permitting suitably redacted copies of the records to be produced to plaintiffs;

(4) an order vacating or striking MSH's Response to plaintiffs' Notice to Admit and compelling MSH to respond to the queries in the Notice to Admit; and

(5) an order compelling MSH to respond to plaintiffs' discovery demand for employment contracts.

Defendants oppose plaintiffs' motion and cross-move for a protective order.

Background

Plaintiff Kathleen Donnelly-Friedmann (Kathleen) asserts a cause of action for medical malpractice against defendants Eric Edwards, M.D. (Dr. Edwards), MSH, and Icahn School of Medicine at Mount Sinai (collectively "defendants"). Kathleen's spouse, Stanley Friedmann (Stanley), asserts a cause of action for loss of consortium against defendants, arising from alleged medical malpractice. Plaintiffs' claims are based on injuries and complications that Kathleen allegedly suffered from an undetected, small bowel perforation that was created during the surgery that Dr. Edwards performed on her at MSH on January 29, 2018.[1] However, in discovery, plaintiffs raised questions regarding the role that non-party Peter Taub, M.D. (Dr. Taub), an attending plastic surgeon at MSH called in to perform abdominal wall reconstruction, may have played in Kathleen's bowel surgery. Plaintiffs contend that Kathleen's injuries from the surgery "resulted from the septic shock and infection as resulted from defendants' failure to detect and repair [a 1 centimeter small] bowel perforation at the time of the original surgery on January 29, 2018".

Plaintiffs deposed both Drs. Edwards and Taub in February 2022, at which time the applicable two-and-one-half year statute of limitations had already elapsed with respect to Dr. Taub, as plaintiffs concede. Plaintiffs assert that they had believed that the surgeons had operated independently, with Dr. Edwards working solely on the inspection, resection, and anastomoses of Kathleen's small bowel and then, after completion of the bowel surgery, Dr. Taub worked solely on reconstruction of Kathleen's abdominal wall. At their respective depositions, however, Drs.

[1] Plaintiffs also assert causes of action against MSH and/or the ISM, as Dr. Edwards' employer(s).

Edwards and Taub each testified that they worked together on all aspects of the surgery and that neither of them could say which of them had performed any particular task.

Defendants oppose plaintiffs' motion and cross-move for a protective order, barring the disclosure of documents relating to Dr. Taub's surgical credentials and privileges with MSH, based on privilege under New York Education Law and Public Health Law.

Plaintiffs' Motion to Amend Bill of Particulars

Under CPLR 3042(b), "[i]n any action or proceeding in a court in which a note of issue is required to be filed, the party may amend the bill of particulars once as of right prior to the filing of a note of issue." As the note of issue has not yet been filed in this action, plaintiffs' proposed amendment is allowed as of right and its motion to be granted leave to file such a proposed amendment is denied as moot.

Plaintiffs' Motion to Amend Summons and Complaint

"[L]eave to amend a pleading should be freely granted, so long as there is no surprise or prejudice to the opposing party" (*Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 [1st Dept 2011] citing, *inter alia*, CPLR 3025[b]). "Prejudice requires some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position" (*id.* [internal quotation marks and citations omitted]). Much the same analysis is used to consider the propriety of granting leave to amend a summons (*see* CPLR 305[c] ["[a]t any time, in its discretion and upon such terms as it deems just, the court may allow any summons . . . to be amended, if a substantial right of a party against whom the summons is issued is not prejudiced"]).

Plaintiffs assert that they are entitled to amend the original summons and complaint, to add Dr. Taub as a defendant, under the relation back doctrine, since"there was no good-faith medical

basis [to] assume at the outset of this lawsuit that a plastic surgeon would ever undertake responsibility for performing open bowel surgery, including anastomosis and inspection of the small bowel."

> "As codified in New York's Civil Practice Law and Rules, what is commonly referred to as the relation back doctrine allows a claim asserted against a defendant in an amended filing to relate back to claims previously asserted against a codefendant for Statute of Limitations purposes where the two defendants are 'united in interest'"

(*Buran v Coupal*, 87 NY2d 173, 177 [1995], citing CPLR 203[b]).

Plaintiffs contend that they did not learn that Dr. Taub had also participated in the surgery on Kathleen's small bowel, the situs of her injury, until after the two-and-a-half-year limitations period for malpractice ran on their claim.

Citing *Buran v Coupal*, defendants assert, in opposition, that three conditions must be met for claims against one defendant to relate back to claims against another:

> "(1) both claims arose out of the same conduct, transaction or occurrence, (2) the new party is 'united in interest' with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits and (3) the new party knew or should have known that, but for *an excusable mistake* by plaintiff as to the identity of the proper parties, the action would have been brought against him as well"

(87 NY2d at 178, quoting *Brock v Bua*, 83 AD2d 61, 69 [2d Dept 1981] [emphasis added and citations omitted]).

Defendants argue that plaintiffs cannot satisfy this three-part test because their failure to name Dr. Taub in their initial pleading was either an inexcusable mistake, or an intentional decision not to include Dr. Taub as a named defendant in the initial pleading.

In *Buran*, the Court of Appeals expressly rejected the "excusable mistake" standard in the third prong of the statute, stating that New York law "requires merely mistake – not excusable mistake – on the part of the litigant seeking benefit of the doctrine" (*id.* 87 NY2d at 176); that the

question of whether plaintiffs' failure to name the new defendant "initially was 'excusable' was immaterial" (*id.* at 182); and that inclusion of the word "excusable" in the test undermined "what the United States Supreme Court has called the 'linchpin' of the relation back doctrine – notice to the defendant within the applicable limitations period" (*id.* at 180, quoting *Schiavone v Fortune*, 477 US 21, 31 [1986]).

Here, the Court finds that the first prong is clearly met, as it is admitted that Dr. Taub, an MSH-affiliated plastic surgeon, participated with Dr. Edwards in the surgical operation on which plaintiffs premise their malpractice cause of action. As to the second prong, Dr. Taub may be viewed as being "united in interest" with the original defendants, as an MSH-affiliated surgeon who participated directly in the surgery and "by reason of that relationship can be charged such notice of the initiation of the action that he will not be prejudiced in maintaining his defense on the merits" (*Buran*, 87 NY2d at 178, quoting *Brock*, 83 AD2d at 69. As to the third prong, considering the circumstances, the Court finds that Dr. Taub may be added as a party, relating back to the original filing, because he must have known, or should have known, that plaintiffs mistakenly overlooked naming him as a defendant. Since the Court of Appeals held in *Buran*, that the excusability factor is not determinative, the Court rejects defendant's opposition based on whether plaintiff's mistake was excusable. Furthermore, defendants' assertion that plaintiffs intentionally failed to name Dr. Taub as a defendant is, at best, speculative. Accordingly, plaintiffs have met the three-part test for their claims against Dr. Taub to relate back to the filing of the original summons and complaint, pursuant to CPLR § 203(6)(f). Thus, the Court grants plaintiffs leave to serve and amended summons and complaint.

Plaintiffs' Motion to Compel Discovery

Plaintiffs also move for an order compelling MSH to produce, for the Court's *in camera* inspection, its records reflecting Dr. Taub's surgical credentials and privileges in effect as of January 2018, and to direct that suitably redacted copies of such records be produced to plaintiffs. They also seek to compel production of Dr. Taub's employment contract, in effect as of January 2018.[2]

Defendants, in opposition to the order to show cause and in support of their cross motion, submit attorneys' affirmations, arguing, among other things, that the materials sought by plaintiffs – that is, MSH "documentation containing surgery privileges for Dr. Peter Taub, including applications and listings/designation and description of such surgeries in effect, or pertaining to, January, 2018" (plaintiffs' discovery demand letter, dated February 25, 2022 fall squarely within the broad statutory privilege established under New York's Public Health Law and Education Law. Defendants also argue that it is improper for plaintiffs to seek discovery regarding the credentialing of Dr. Taub, as he is not a party to this action.[3]

"Discovery determinations rest with the sound discretion of the motion court" (*Gumbs v Flushing Town Ctr. III, L.P.*, 114 AD3d 573, 574 [1st Dept 2014] [citation omitted]).

> "Disclosure in civil actions is generally governed by CPLR 3101(a), which directs: there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof. We have emphasized that the words, 'material and necessary', are to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason"

(*Forman v Henkin*, 30 NY3d 656, 661 [2018] [alterations, internal quotation marks and citation omitted]). "A party seeking discovery must satisfy the threshold requirement that

[2] Plaintiffs fail to put forth any evidence or argument in support of their request to compel production of Dr. Taub's employment contract, and so this discovery demand is deemed waived.

[3] This part of defendants' argument has been mooted, as the Court has decided herein to grant plaintiffs' motion to amend the summons and complaint, to add Dr. Taub as a defendant.

the request is reasonably calculated to yield information that is 'material and necessary' – i.e., relevant – regardless of whether discovery is sought from another party or a nonparty" (*id.*, citing CPLR 3101[a][1] and [a][4]).

However, New York State's Education Law "shields from disclosure 'the proceedings [and] the records relating to performance of a medical or a quality assurance review function or participation in a medical and dental malpractice prevention program'" (*Logue v Velez*, 92 NY2d 13, 16-17 [1998], quoting Education Law §6527[3]). "The purpose of the discovery exclusion is to 'enhance the objectivity of the review process' and to assure that medical review committees 'may frankly and objectively analyze the quality of health services rendered' by hospitals" (*id.*, citing Mem. of Assembly Rules Comm., Bill Jacket, L. 1971, ch. 990, at 6).

"Public Health Law § 2805-m also confers complete confidentiality on information gathered by a hospital in accordance with Public Health Law §§ 2805-j and 2805-k, expressly exempting it from disclosure under CPLR article 31" (*id.*, citing Public Health Law 2805-m [2]). "These protections against disclosure were added to the Public Health Law to 'clarify that existing protections against disclosure of materials relating to quality assurance activities apply to hospital malpractice prevention programs and incident reporting'" (*id.*, 92 NY2d at 17-18, citing, *inter alia*, L. 1986, ch. 266, Bill Jacket, Governor Program Bill, at 7). "[I]f the information sought is in fact privileged, it is not subject to disclosure no matter how strong the showing of need or relevancy" (*Hoffman v Ro-San Manor*, 73 AD2d 207, 210 [1st Dept 1980], quoting *Cirale v 80 Pine St. Corp.*, 35 NY2d 113, 117 [1974]).

The party invoking this privilege "bears the burden of demonstrating that the documents sought were prepared in accordance with the relevant statutes" (*Kivlehan v Waltner*, 36 AD3d 597, 598 [2d Dept 2007] [citations omitted]). To do so, defendants are "required, at a minimum to show

that [the hospital] has a review procedure and that the information for which the exemption is claimed was obtained or maintained in accordance with that review procedure" (*Bamberg-Taylor v Strauch*, 181 AD3d 432, 433 [1st Dept 2020], citing *Kivlehan*, *supra*).

In *Bamberg-Taylor*, the First Department found that defendant Montefiore Medical Center had met its burden to show that the statutory privilege applied, noting not only that the doctor's affidavit submitted in opposition established that the information at issue had been obtained or maintained in accordance with the hospital's review procedure, but also that "the motion court's prior order on defendant's motion for a protective order included a finding that the hospital had a review procedure that met the standards of the Public Health Law" (181 AD3d at 433.).

Applying *Bamberg-Taylor* to the case at bar, it cannot be said that defendants have met their burden in showing that the statutory privilege applies to them, as they have failed to submit a doctor's affidavit, showing that MSH has complied with the Education Law and Public Health Law and that the statutory privilege applies to Dr. Taub's records.

Plaintiffs' Motion to Vacate/Strike

Finally, plaintiffs request that the Court vacate or strike those parts of defendants' responses to plaintiffs' notice to admit (exhibits 8 and 7, respectively, to Morrison affirmation [part of NYSCEF Doc No. 29]), in which they purportedly refuse to respond to plaintiffs' queries about whether MHS employs Dr. Edwards and Dr. Taub, even though Dr. Edwards and Dr. Taub each concede in the deposition testimony that they are MSH employees (*see* Morrison affirmation, ¶¶7-8).

Defendants oppose the motion, objecting to the improper use of this discovery vehicle, and clarifying that Dr. Edwards testified that he is an employee of the Mount Sinai Hospital System, and that he treated Kathleen as "his personal patient under the auspices of Mount Sinai Heath

System which includes" MSH (Havia affirmation, ¶¶47-48). At his deposition, Dr. Taub also confirmed that he is employed by "Mount Sinai Medical Center" (Taub deposition transcript [Tr]), at 13:18-21 [ex I to Havia affirmation]).

The plaintiffs' request to vacate or strike parts of the defendant's responses to plaintiffs' notice to admit is tantamount to a "further form of deposition in the nature of written interrogatories [which] would defeat and detract from [the] intended purpose [of a notice to admit]", and should not be allowed (*Berg v Flower Fifth Ave. Hosp*., 102 AD2d 760, 760-761 [1st Dept 1984]). Thus, that prong of plaintiffs' motion is denied.

Accordingly, it is hereby

ORDERED that plaintiffs' motion to amend their bill of particulars is denied as moot; and it is further

ORDERED that plaintiffs' motion to amend the summons and complaint in this action is granted; and it is further

ORDERED that plaintiffs' motion to compel discovery is granted to the extent that if defendants do not produce by e-filing within thirty (30) days of the date of this Order, one or more physician affidavit(s) attesting that defendants MSH and/or ISM have ascertained all potentially responsive documents in their possession, custody or control are protected by the statutory privilege pursuant to New York's Education Law and Public Health Law, defendants shall produce for the Court's *in camera* review all responsive credentialing documents regarding Dr. Peter Taub,; and it is further

ORDERED that plaintiffs' motion to compel defendants to produce employment contracts is denied as waived; and it is further

ORDERED that plaintiffs' motion to vacate or strike defendants' responses to plaintiffs' notice to admit is denied; and it is further

ORDERED that defendants' cross motion for a protective order is denied; and it is further

ORDERED that counsel are directed to appear on May 18, 2023, for an in-person status conference at 10:00am, at Part 6, 60 Centre Street, Room 351.

This constitutes the decision and order of the Court.

4/5/2023	
DATE	KATHY J. KING, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE