

Johnson v Goertz

2024 NY Slip Op 30698(U)

March 5, 2024

Supreme Court, New York County

Docket Number: Index No. 805175/2020

Judge: John J. Kelley

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

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GLORIA JOHNSON, as administrator of the estate of
KAREEM JOHNSON, deceased,

Plaintiff,

INDEX NO. 805175/2020

MOTION DATE 12/15/2023

MOTION SEQ. NO. 004

- v -

JACOB GOERTZ, M.D., KELLI OUTLAW, M.D., JANICE
SHIN, M.D., ALFRED P. BURGER, M.D., SVETLANA
CHERNYAVSKY, D.O., JENNIFER KAR YEE HUI, M.D.,
ANJALI ASHOK NIGALAYE, ROBERT J. ZIETS, M.D., JANI
LEE, M.D., YULIA ZAK, M.D., RAJESH I. PATEL, JOHN
DOE, M.D., and MOUNT SINAI BETH ISRAEL,

Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 234, 235, 236, 237

were read on this motion to/for DISCOVERY-CPLR 3124 AND 3126.

In this action to recover damages for medical malpractice and wrongful death, the defendants Jacob Goertz, M.D., Kelli Outlaw, M.D., Janice Shin, M.D., Alfred P. Burger, M.D., Svetlana Chernyavsky, D.O., Robert J. Ziets, M.D., Jani Lee, M.D., Rajesh I. Patel, M.D., and Mount Sinai Beth Israel (collectively the Beth Israel defendants) move pursuant to CPLR 3214 and 3042(c) to compel the plaintiff to respond to outstanding discovery demands and demands for particulars or, in the alternative, pursuant to CPLR 3126 and 3042(c) for the imposition of sanctions, including the dismissal of the complaint insofar as asserted against them, for the plaintiff's failure to produce the items of discovery and particulars that they had demanded. During the pendency of the motion, the plaintiff served supplemental bills of particulars as to each of the Beth Israel defendants, referable to the recently added wrongful death cause of action, and she thereupon opposed the motion as academic. The motion is granted to the extent that, on or before April 21, 2024, the plaintiff shall further supplement those bills of

particulars as set forth herein, and shall provide all the authorizations demanded by the Beth Israel defendants, as well as provide them with a response to their combined demands. The motion is otherwise denied. If the plaintiff fails to provide the additional particulars and discovery items by that date, she may be subject to preclusion or dismissal of the complaint upon further motion by the Beth Israel defendants.

In the first instance, the court denies those branches of the Beth Israel defendants' motion seeking to compel the plaintiff to remove, from her bills of particulars, the allegations of negligent hiring and vicarious liability that she had asserted against the individual defendant physicians, the allegations of careless, grossly negligent, and reckless conduct, and references to the doctrine of *res ipsa loquitur*. The relief sought by the Beth Israel defendants in this regard is not the proper subject of a motion to compel further particulars or for the imposition of sanctions. Rather, at this juncture, it is the proper subject only of a motion to strike material from a bill of particulars (*see generally LaVista v Huntington Hosp.* 250 AD2d 649 [2d Dept 1998]) or for summary judgment. Inasmuch as the Beth Israel defendants effectively seek the summary dismissal of substantive claims, their requests for relief in this regard must be supported by evidentiary facts, rather than solely by an attorney's affirmation asserting that the claims are inapposite to this case. In any event, although allegations of reckless conduct are encompassed within the tort of intentional infliction of emotional distress, and thus subject to the one-year limitations period of CPLR 215 (*see James v Flynn*, 132 AD3d 1214, 1216 [3d Dept 2015]), contrary to the Beth Israel defendants' contention, the limitations period applicable to a claim of gross negligence is three years, not one (*see Moffatt v JP Morgan Chase Bank*, 2012 NY Slip Op 33274[U], *13, 2012 NY Misc LEXIS 6240, *14 [Sup Ct, N.Y. County, Jan. 9, 2012]; *Holtkamp v Parklex Assoc.*, 30 Misc 3d 1226[A], 2011 NY Slip Op 50208[U], *14, 2011 NY Misc LEXIS 444, *44 [Sup Ct, Kings County, Feb. 22, 2011]).

To the extent that the Beth Israel defendants request the plaintiff to "[s]pecify and particularize the allegations against each individual doctor and the hospital," there is no need for

the plaintiff to set forth the manner in which any physician or the hospital failed to act in accordance with good and accepted medical practice, since a physician is chargeable with knowing those medically accepted standards applicable to the proper care and treatment of the plaintiff (see *Patterson v Jewish Hosp. & Med. Ctr.*, 94 Misc 2d 680, 683-684 [Sup Ct, Kings County 1978], *affd* 65 AD2d 553 [2d Dept 1978]; see also *Mahr v Perry*, 74 AD3d 1030, 1031 [2d Dept 2010]; *Toth v Bloschinsky*, 39 AD3d 848, 849 [2d Dept 2007]; *Dellaglio v Paul*, 250 AD2d 806, 806 [2d Dept 1998]). Thus, unless there is a differentiation that can be made amongst the various physicians, and between the physicians and the hospital, the Beth Israel defendants' demands for specificity as to departures from good and accepted care "are beyond the scope of a bill of particulars," as they improperly seek evidentiary information that is within the realm of an expert opinion (*Heyward v Elienville Community Hosp.*, 215 AD2d 967, 968 [3d Dept 1995]; see *Sonnenberg Gardens v Eldredge, Fox & Porretti, LLP*, 52 AD3d 1211, 1212 [4th Dept 2008] [a demand is beyond the scope of a bill of particulars where a plaintiff would have to provide evidentiary material in the form of, or gleaned from, expert testimony]; *Khoury v Chouchani*, 27 AD3d 1071, 1073 [4th Dept 2006]; *Goudine v Central Park Rehab. Ctr. at Archcare at Terence Cardinal Cooke Health Care Ctr.*, 2021 NY Misc LEXIS 48824, *4-5 [Sup Ct., N.Y. County, Aug. 3, 2021] [Kelley, J.]; *Letizia v Wong*, 2009 NY Slip Op 30879[U], *3, 2009 NY Misc LEXIS 4810, *6 [Sup Ct, N.Y. County, Apr. 20, 2009] [a bill of particulars need not provide evidentiary material or information gleaned from expert testimony, such as the exact departures of a defendant in a medical malpractice action]; *Patterson v Jewish Hosp. & Med. Ctr.*, 94 Misc 2d at 683 [such specific statements cannot be determined by the plaintiff until after extensive examination before trial, and are thus beyond the scope of the bill of particulars]).

Nonetheless, the plaintiff is obligated to specify the dates that her decedent was confined to bed, hospital, and home, and to specify the claims for special damages, providing adequate itemization and documentation underpinning those claims. The plaintiff shall provide those further particulars on or before April 21, 2024. In addition, by that date, the plaintiff must

provide the Beth Israel defendants with *Arons* authorizations (*Arons v Jutkowitz*, 9 NY3d 393 [2007]), as set forth in a letter demand dated March 24, 2023, and their formal demands dated June 14, 2023 and September 8, 2023, along with the authorizations identified in the Beth Israel defendants' demands dated June 21, 2023, August 22, 2023, and September 8, 2023, as well as a revised authorization permitting them to obtain the records of Dr. Wengerter. Furthermore, the plaintiff must formally respond to the Beth Israel defendants' combined demands dated April 4, 2023, which requested the identification of witnesses, the production of party statements, and the identification of collateral sources.

In light of the fact that the plaintiff responded to the Beth Israel defendants' demands for supplemental bills of particulars during the pendency of the motion, they have not established that the plaintiff's delay in providing those particulars was willful and contumacious and, consequently, the court denies that branch of the motion seeking the imposition of sanctions (see *Butler v Knights Collision Experts, Inc.*, 165 AD3d 406, 407 [1st Dept 2018]; *Tanriverdi v United Skates of Am., Inc.*, 164 AD3d 858, 860 [2d Dept 2018]; *Walter B. Melvin, Architects, LLC v 24 Aqueduct Lane Condominium*, 51 AD3d 784, 785 [2d Dept 2008]; *Chamberlain, D'Amanda, Oppenheimer & Greenfield v Beauchamp*, 247 AD2d 858, 859 [4th Dept 1998]).

In light of the foregoing, it is,

ORDERED that motion is granted only to the extent that, on or before April 21, 2024, the plaintiff shall (a) serve further particulars as to the dates that her decedent was confined to bed, hospital, and home, and as to her claims for special damages, providing adequate itemization and documentation underpinning the claims for special damages; (b) provide the movants with *Arons* authorizations, as set forth in their letter demand dated March 24, 2023, and formal demands dated June 14, 2023 and September 8, 2023; (c) provide the movants with authorizations identified their demands dated June 21, 2023, August 22, 2023, and September 8, 2023; (d) provide the movants with a revised authorization permitting them to obtain the

records of Dr. Wengerter; and (e) formally respond to the movants' combined demands dated April 4, 2023; and the motion is otherwise denied; and it is further,

ORDERED that, should the plaintiff fail to comply with the directives set forth in this decision and order, she may be subject, upon further motion by the movants, to the sanctions either of preclusion or dismissal.

This constitutes the Decision and Order of the court.

JOHN J. KELLEY, J.S.C.

3/5/2024
DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE