

Tabertus v Bushwick Ctr. for Rehabilitation & Healthcare

2024 NY Slip Op 33135(U)

September 4, 2024

Supreme Court, Kings County

Docket Number: Index No. 510440/2018

Judge: Consuelo Mallafre Melendez

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 7 of the Supreme Court of the State of NY, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 4th day of September 2024.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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ANNILANT TABERTUS, SIMONE TABERTUS, Individually
and as Administrators of the Estate of EDDY TABERTUS,

Plaintiffs,

DECISION & ORDER

Index No. 510440/2018
Mo. Seq.: 8 & 9

-against-

BUSHWICK CENTER FOR REHABILITATION AND
HEALTHCARE, SHARA N. KHAN, PA, MOHAMMED
RAHMAN, MD, NYC HEALTH & HOSPITALS,

Defendants.

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HON. CONSUELO MALLAFRE MELENDEZ, J.S.C.

Recitation, as required by CPLR §2219 [a], of the papers considered in the review:

NYSCEF #s: Seq. 8: 95 – 96, 97 – 98, 106
Seq. 9: 99 – 100, 101 – 103, 104, 105

Defendant, BUSHWICK CENTER FOR REHABILITATION AND HEALTHCARE (“Bushwick”), moves this Court for an order pursuant to CPLR § 3043 and CPLR § 3211 (Sequence 8) dismissing the claims set forth in the Plaintiffs’ supplemental bill of particulars dated June 25, 2024 on the grounds that the additional dates of treatment and claims amount to an additional cause of action, are improper and barred by the statute of limitations. Plaintiff submitted opposition.

Plaintiffs, ANNILANT TABERTUS and SIMONE TABERTUS, cross-move this Court for an order pursuant to CPLR § 3043(c) (Sequence 9) granting leave to Plaintiffs to serve a Supplemental Bill of Particulars upon Defendant, BUSHWICK, and directing BUSHWICK to accept the verified Supplemental Bill of Particulars served on June 25, 2024 and to compel discovery of the deposition transcript of Plaintiff, SIMONE TABERTUS. Defendant submitted opposition.

Of note, the deposition transcript of Plaintiff, SIMONE TABERTUS, has been produced and that portion of the motion is now moot. At the time the motion was heard, the time of completion of discovery issues had not expired. Therefore, the Court is not ruling on that portion of the motion.

This action was commenced on May 18, 2018, by the filing of a Summons and Verified Complaint alleging medical malpractice and wrongful death for treatment rendered at Bushwick Center for Rehabilitation and Healthcare. Plaintiff served their Bill of Particulars for BUSHWICK on May 8, 2019. Plaintiff served a Supplemental Bill of Particulars for BUSHWICK on June 25, 2024. The original Bill of Particulars for BUSHWICK alleges the claims took place “(b)etween July 27, 2017 and September 10, 2017” and that Defendant improperly “discontinued the administration of Heparin on or about September 6, 2017” days before decedent’s death. The Supplemental Bill of Particulars for BUSHWICK alleges “Bushwick improperly discontinued the administration of Heparin to the decedent, as a prophylaxis for DVT, from about September 6, 2017 until decedent’s death on September 10, 2017.” Further, Plaintiffs allege decedent’s rights under New York Public Health Law § 2801-d and § 2803-c(3)(e) were violated by Bushwick commencing on August 11, 2017.

Defendant moves to dismiss the claims and purported additional cause of action set forth in the supplemental bill of particulars on the grounds they are improper. It is well established in the Second Department that:

“[t]he purpose of a bill of particulars is to amplify the pleadings, limit the proof, and prevent surprise at trial” (*Jones v. LeFrance Leasing Ltd. Partnership*, 61 A.D.3d 824, 825 [2d Dept. 2009]). Pursuant to CPLR 3043(b), “[a] party may serve a supplemental bill of particulars with respect to claims of continuing special damages and disabilities ... [p]rovided however that no new cause of action may be alleged or new injury claimed.” By asserting, in the “second supplemental bill of particulars,” various statutory violations allegedly committed... the plaintiff was not simply amplifying her prior response... Instead, she was adding new allegations, which had not been asserted in the complaint.” *Jurado v. Kalache*, 93 A.D.3d 759, 760 - 761 [2d Dept. 2012].

With regards to the Public Health claims, the Court finds the statutory violation under New York Public Health Law § 2801-d and § 2803-c(3)(e) newly claimed in the supplemental bill of particulars constitute new causes of action and new allegations. This does not conform with the purpose of a supplemental bill of particulars which is to amplify the pleadings. Furthermore, claims pursuant to New York Public Health Law § 2801-d and § 2803-c(3)(e) are now time barred. Therefore, these claims in the supplemental bill of particulars are stricken.

Defendant alleges Plaintiff has added additional dates of treatment in the supplemental bill of particulars. As noted above, Plaintiff claimed in their original bill of particulars that the malpractice took place “(b)etween July 27, 2017 and September 10, 2017, and claimed that defendant discontinued Heparin “on or about September 6, 2017.” The Supplemental bill of particulars claims that Heparin was discontinued “from about September 6, 2017 until decedent’s death on September 10, 2017.”

The Court finds that the dates in the original bill of particulars gave notice that the malpractice continued through to include September 10, 2017. The original bill of particulars states that Plaintiff claimed that the malpractice took place from July 27, 2017 until the time of death (September 10, 2017) during which the Heparin was discontinued on or about September 6th. Similarly, the supplemental bill of particulars indicates that the alleged malpractice continued to the date of the patients’ death which was on September 10th. The claims in both are the same—the discontinuance of Heparin. The Court finds no inconsistency. Additionally, no claims in the supplemental bill of particulars are outside the time period initially stated in the original bill of particulars. Further, Defendant’s argument that these malpractice claims asserted in the Supplemental bill of particulars are time barred is also rejected. Therefore, this portion of Defendant’s motion to strike is denied.

Plaintiffs’ cross-motion for leave to serve a Supplemental Bill of Particulars upon Defendant, BUSHWICK, and directing them to accept the verified Supplemental Bill of Particulars served on June 25, 2024 is GRANTED IN PART as follows: The portion of Paragraph #3 in the supplemental bill of particulars which states “Bushwick improperly discontinued the administration of Heparin to the decedent, as a prophylaxis for DVT, from about September 6, 2017 until decedent’s death on September 10, 2017” and “The foregoing actions by Bushwick proximately caused the decedent to sustain bilateral, occlusive pulmonary emboli resulting in his

death” shall remain a claim in the supplemental bill of particulars. The remainder is stricken in accordance with the above.

Accordingly, it is hereby:

ORDERED that Bushwick’s motion (Sequence 8) for an Order pursuant to CPLR § 3043 and CPLR § 3211 (Sequence 8) dismissing the claims, is **GRANTED TO THE EXTENT** of dismissing Plaintiff’s claims of New York Public Health Law § 2801-d and § 2803-c(3)(e), and the motion is otherwise **DENIED**; and it is further

ORDERED that Plaintiffs’ motion (Sequence 9) for an Order pursuant to CPLR § 3043(c) is **GRANTED TO THE EXTENT** that the Supplemental Bill of Particulars dated June 25, 2024 is deemed served with the deletion of the sentence claiming violations of Public Health Law § 2801-d and § 2803-c(3)(e) as noted above, and the motion is otherwise **DENIED**.

This constitutes the decision and order of the Court.

ENTER.



Hon. Consuelo Mallafre Melendez

J.S.C.