Stephens v Mama
2024 NY Slip Op 35240(U)
April 8, 2024
Supreme Court, Westchester County
Docket Number: Index No. 61551/2021
Judge: Lewis J. Lubell
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - MDPM PART

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

PRESENT:
HON. LEWIS J. LUBELL
JUSTICE OF THE SUPREME COURT

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MINERVA STEPHENS, as Administrator of the Estate of DAVID STEPHENS, deceased, and MINERVA STEPHENS, Individually,

Plaintiffs,

-against-

KATAYUN MAMA, M.D. and MONTEFIORE NEW ROCHELLE HOSPITAL,

Defendants.

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DECISION & ORDER

Index No. 61551/2021
Seq. No. 2

LUBELL, J.

The following papers were considered on this motion brought by defendant Montefiore New Rochelle Hospital ("movant" or "Montefiore") for an order, inter alia, (1) pursuant to 22 NYCRR 202.21(e), striking the note of issue; (2) pursuant to CPLR 3124, compelling plaintiffs to provide the discovery demanded, or in the alternative, pursuant to CPLR 3126 precluding the plaintiffs upon the trial of this action from introducing any testimony or adducing any evidence of plaintiffs' lost earnings based upon plaintiffs' failure to comply with defendant's demand; (3) pursuant to CPLR 3212(a), extending the time to move for summary judgment; and (4) for such other and further relief as this Court deems just and proper.

Notice of Motion
Affirmation of Good Faith of Angela M. Ribaudo, Esq.
Exhibits A and B[1]
Affirmation in Support of Angela M. Ribaudo, Esq.
Exhibits C through M[2]
Affirmation in Opposition of James S. Paglinawan, Esq.
Exhibits A through B

1 Exhibits A and B are not separately attached to the moving papers but refer back to the NYSCEF Doc. Nos. as found in the NYSCEF file (Doc. Nos. 71, 72).
2 Exhibits C, F through M are not separately attached to the moving papers but refer back to the NYSCEF Doc. Nos. as found in the NYSCEF file (Doc. Nos. 1–3, 8, 17, 21, 42, 71-74).

Reply Affirmation of Edward R. Nicholson, Esq.
Exhibits N though P
NYSCEF File

Upon the foregoing papers and all the proceedings held herein, this motion is determined as follows:

Factual & Procedural Background

This action was commenced on or about August 23, 2021, when the plaintiffs filed a summons and complaint seeking to recover damages against the defendants. The complaint alleges that the defendants departed from good and accepted medical practice in treating the decedent in the Emergency Department at Montefiore on August 25, 2019. Issue was joined on or about September 8, 2021, when Montefiore served and filed its answer.

As is relevant to the instant motion, on or about April 19, 2022, the plaintiffs served a verified bill of particulars for Montefiore. In response to Montefiore's demand for "Loss of earnings (giving names and addresses of employers). State the manner in which plaintiff's claim for loss of earnings was calculated", the plaintiffs responded, "Approximately $5,000,000" (NYSCEF Doc. No. 17, at ¶14[e]). In response to demands seeking to identify decedents occupation and employer, the plaintiffs responded, "Plaintiff-Decedent was retired at the time of his death" (NYSCEF Doc. No. 17, at ¶16[a], [b]). In response to the demand for plaintiffs' average weekly earnings, plaintiffs again responded, "Plaintiff-Decedent was retired at the time of his death" (NYSCEF Doc. No. 17, at ¶16[e]). In response to the demand for the "amount of money plaintiff was alleged to have earned during each of the five (5 years prior to the occurrence)", plaintiffs again responded, "Plaintiff-Decedent was retired at the time of his death" (NYSCEF Doc. No. 17, at ¶16[f]). In response to the demand seeking to identify "other income the plaintiff was receiving and the sources thereof", the plaintiffs objected (NYSCEF Doc. No. 17, at ¶16[g]). In response to a demand for the "amount earnings the plaintiff was alleged to have lost as a result of the occurrence" the plaintiffs responded, "Plaintiff-Decedent was retired at the time of his death" (NYSCEF Doc. No. 17, at ¶16[h]). In response to the demand for plaintiffs to identify the name of any business if it will be claimed that plaintiff lost profits from business as a result of the defendant's negligence", the plaintiffs responded, "Plaintiffs are not making a claim for lost profits from a business" (NYSCEF Doc. No. 17, at ¶17[a]). In response to the demand for plaintiffs to state the amount of profits and/or revenues plaintiffs claim were lost as a result of the defendant's negligence, plaintiffs again responded that "Plaintiffs are not making a claim for lost profits from a business" (NYSCEF Doc. No. 17, at ¶17[c]). Thereafter, on or about July 25, 2022, Montefiore served a demand for authorizations, seeking fully executed authorizations for 13 specific medical providers INYSCEF Doc. No.40).

On or about July 29, 2022, plaintiffs served a verified supplemental bill of particulars on Montefiore. Again, in response to Montefiore's demand for "Loss of earnings (giving names and addresses of employers). State the manner in which plaintiff's claim for loss of earnings was calculated", the plaintiffs responded, "Approximately $5,000,000" (NYSCEF Doc. No. 42, at ¶14[e]). In response to demands seeking to identify decedents' occupation and employer, the plaintiffs again responded, "Plaintiff-Decedent was retired at the time of his death" (NYSCEF Doc. No. 42, at ¶16[a], [b]). In response to the demand for plaintiffs' average weekly earnings, plaintiffs again responded, "Plaintiff-Decedent was retired at the time of his death" (NYSCEF Doc. No. 42, at ¶16[e]). In response to the demand for the "amount of money plaintiff was alleged to have earned during each of the five (5 years prior to the occurrence)", plaintiffs again responded, "Plaintiff-Decedent was retired at the time of his death" (NYSCEF Doc. No. 42, at ¶16[f]). In response to the demand seeking to identify "other income the plaintiff was receiving and the sources thereof", the plaintiffs objected (NYSCEF Doc. No. 42, at ¶16[g]). In response to a demand for the "amount earnings the plaintiff was alleged to have lost as a result of the occurrence" the plaintiffs responded, "Plaintiff-Decedent was retired at the time of his death" (NYSCEF Doc. No. 42, at ¶16[h]). In response to the demands for plaintiffs to identify the name of any business if it will be claimed that plaintiff lost profits from business as a result of the defendant's negligence", the plaintiffs responded, "Plaintiffs are not making a claim for lost profits from a business" (NYSCEF Doc. No. 42, at ¶17[a]). In response to the demand for plaintiffs to state the amount of profits and/or revenues plaintiffs claim were lost as a result of the defendant's negligence, plaintiffs again responded that "Plaintiffs are not making a claim for lost profits from a business" (NYSCEF Doc. No. 42, at ¶17[c]).

Notably, plaintiffs' bill of particulars for co-defendant Katayun Mama, M.D., was similar. In response to the demand for the amount of money decedent was alleged to have earned during the one year period prior to the occurrence, plaintiffs responded "Plaintiffs are not making a claim for lost wages" (NYSCEF Doc. No. 21, at ¶16[d]). In response to the demand for the "amount of earnings the Plaintiff, David Stephens, is alleged to have lost as a result of the defendant's negligence," plaintiffs again responded, "Plaintiffs are not making a claim for lost wages" (NYSCEF Doc. No. 21, at ¶16[e]).

A so-ordered Preliminary Conference Stipulation was executed by all counsel and entered on September 7, 2022 (Patel, AJSC). The order provided that on or before September 30, 2022, plaintiffs would respond to movant's demand for authorizations dated August 31, 2022 (NYSCEF Doc. No. 51, at ¶ 3[b]). The August 31, 2022 demand sought authorizations for five specific medical providers and facilities (NYSCEF Doc. No. 50). The Preliminary Conference Order also provided that the plaintiffs' bill of particulars had been previously provided (NYSCEF Doc. No. 51, at ¶ 4). Thereafter, twelve separate compliance conferences were held resulting in the entry of eight separate orders addressing outstanding discovery issues. Notably, the compliance conference order indicated that the plaintiffs' depositions were completed. None of the orders indicated that the plaintiffs owed any outstanding authorizations. Further, each compliance conference order provided "any disclosure demands not raised at the Compliance Conference are deemed waived" (NYSCEF Doc. Nos. 55, 57, 61, 63, 65, 68). On or about September 22, 2023, movant served a demand for authorizations on plaintiffs. This demand sought fully executed authorizations for 30 specific medical providers only (NYSCEF Doc. No. 67). On or about November 14, 2023, this Court held the final compliance conference to certify the matter as trial ready. It was at this time that movant's counsel raised for the first time the issue that of plaintiffs' IRS records and tax returns being outstanding in light of the $5,000,000 loss of earnings claim set forth in the plaintiffs' bill and supplemental bills of particulars. On or about November 15, 2023, the Court entered a Trial Readiness Order (NYSCEF Doc. No.

70). The following day, on November 15, 2023, movant served a demand for IRS authorizations for the period of 2016 through 2019 as well as a notice for discovery and inspection seeking plaintiff's tax returns, W-2s for the same period and copies of any survivor benefits received by the plaintiff Minerva Stephens following the decedent's death" (NYSCEF Doc. Nos. 71, 72). Plaintiffs responded to the demand on or about December 1, 2023. In their response to the demand for tax returns and W-2s, the plaintiffs again stated that "Plaintiffs are not seeking lost wages" (NYSCEF Doc. No. 79). In response to the demand for records regarding survivor benefits, plaintiffs stated that the demand was "vague and ambiguous and seeking irrelevant and prejudicial information" (NYSCEF Doc. No. 79). Plaintiffs filed their note of issue on or about December 4, 2023 (NYSCEF Doc. No. 73).

Parties' Contentions

Montefiore now moves, inter alia, to have the note of issue vacated, claiming that material pretrial discovery remains outstanding that is necessary for the defense of this action. Montefiore argues that contrary to the plaintiff's assertion, plaintiff's bill of particulars asserts claims for lost earnings. As such, defendants are entitled to the decedent's tax returns and W-2s. Movant further argues that it is well-settled that in any medical malpractice action in which a claim for wrongful death is asserted, pursuant to EPTL 5-4.3 evidence shall be admissible to establish the federal, state and local personal income taxes which the decedent would have been obligated by law to pay in determining the sum that would otherwise be available for the support of persons for whom the action is brought. Further, the movant argues that it is entitled to survivor disability benefits as these benefits offset any claim for lost earnings. Movant contends that an award for wrongful death may consider evidence of the reasonable expectancy of financial support, gifts, and inheritance that would have inured to those whose behalf a claim is filed had the decedent lived, including other factors such as age, health and life expectancy, future earning capacity and career potential. Alternatively, movant argues that plaintiffs should be precluded from offering any testimony or adducing any evidence of plaintiff's lost earnings at the time of trial.

In opposition, the plaintiffs argue that the defendants had ample time to complete the discovery and provide no acceptable excuse for their inability to do so. Plaintiffs argue that the defendants had the opportunity to address any deficiencies at each of the court conferences and failed to do so. Plaintiffs point out that it was not until after the certification conference on November 14, 2023 that Montefiore first served its demand for the subject tax returns and authorizations. Plaintiffs also argue that the within motion was made without making a good faith effort to resolve the issue ahead of time. Plaintiffs argue that the discovery requests here are contrived and only intended to further delay the trial of this matter.

In reply, Montefiore again argued that the basis for the discovery sought is that the plaintiffs' bill and supplemental bill of particulars both assert a claim for lost earnings in the amount of $5 million dollars. In addition, the plaintiff-administratrix testified that the decedent was employed as a field engineer prior to his death but was unsure of his income (NYSCEF Doc. No. 87, at 52). In reply, movant attaches a copy of a notice for discovery and inspection dated September 23, 2021, where it demanded copies of income tax returns for three years prior and an employment authorization (Reply Affirmation of Edward R. Nicholson, Esq., Exhibit O [NYSCEF Doc. No. 88). Further, movant again asserts that EPTL 5-4.3 permits this discovery since the amount of taxes that a decedent would have been required to pay offsets the sum that would be available for the support of the distributes. Movant contends that to not allow it to obtain this discovery would be extremely prejudicial.

Analysis

AThe purpose of a note of issue and certificate of readiness is to assure that cases which appear on the court's trial calendar are, in fact, ready for trial" (*Tirado v Miller*, 75 AD3d 153, 156 [2d Dept 2010]). AA certificate of readiness certifies that all discovery is completed, waived, or not required that the action is ready for trial@ (*Tirado v Miller*, 75 AD3d at 156, *citing* 22 NYCRR 202.21[b]). AThe effect of a statement of readiness is to ordinarily foreclose further discovery" (*Tirado*, 75 AD3d at 156). The Court of Appeals has held that Athe filing of a note of issue denotes the completion of discovery, not the occasion to launch another phase of it@ (*Arons v Jutkowitz*, 9 NY3d 393 [2007]).

Once the note of issue has been filed and discovery presumably completed, the applicable standard for allowing additional discovery is governed by 22 NYCRR 202.21(d)(e). If a party seeks to vacate the note of issue within twenty days of its service, that party need show only that a material fact in the certificate of readiness is incorrect or that it fails to comply with the requirements of that section in a material respect.

Here, the Trial Readiness Order noted that all discovery had been completed or waived and the matter was ready for trial. Plaintiffs were directed to serve and file a note of issue and certificate of readiness within twenty (20) days (NYSCEF Doc. No. 70). CPLR 2004 permits the court, in the exercise of its discretion, to grant an extension of time fixed by statute, rule or court order, upon a showing of good cause. The plaintiffs filed their note of issue on or about December 4, 2023 (NYSCEF Doc. No. 73). Montefiore's motion to vacate the note of issue was filed within twenty (20) days of issuance of the note of issue. Accordingly, in order to succeed on its motion to vacate the note, movant was required to show only that a material fact on the certificate of readiness was incorrect.

Courts have broad discretion in the supervision of discovery and may exercise their discretion in denying an application to vacate a note of issue based upon their determination that, pursuant to numerous compliance conferences and defendants= failure to avail themselves of numerous opportunities to seek this discovery, the additional discovery sought by the defendants is deemed waived (*Accent Collections, Inc. v Cappelli Enterprises*, 94 AD3d 1027 [2d Dept 2012]). It is incumbent on all parties to diligently pursue discovery and to comply with court orders and deadlines directing that discovery be completed. Here, twelve separate conferences were held, and eight orders were entered addressing discovery. At no point prior to the final certification conference did Montefiore raise the issue of any outstanding demands and more particularly outstanding authorizations for tax returns or otherwise. Nor was any issue raised regarding the plaintiff's bill of particulars or supplemental bill of particulars. Further, while movant attached as an exhibit to its motion a

September 23, 2021, demand that sought copies of tax returns and an authorization for employment records, Montefiore's subsequently served demands for authorizations dated and filed to the NYSCEF file on July 25 and August 31, 2022, and September 22, 2023, only sought authorizations for medical providers and did not seek authorizations for income tax returns or employment records and failed to indicate that this earlier demand had not been complied with (NYSCEF Doc. Nos. 40, 50, 67). Further, the Preliminary Conference Order entered September 7, 2022 also failed to indicate that the September 23, 2021 demand for tax returns and employment authorizations was still outstanding. In fact, the Preliminary Conference Order specifically provided that only Montefiore's August 31, 2022, demand for authorizations was outstanding and was to be responded to on or before September 30, 2022 (NYSCEF Doc. No. 52).

However, this Court cannot ignore the inconsistencies found in the plaintiffs' bills of particulars and supplemental bill of particulars. Both in the plaintiffs' verified bill of particulars for Montefiore served on April 19, 2022, and supplemental bill of particulars served on July 29, 2022, in response to Montefiore's demand for loss of earnings, the plaintiffs summarily responded, "Approximately $5,000,000." However, in response to demands seeking to identify decedent's occupation and employer and provide average weekly earnings, earnings for five years prior, lost income or earnings, the plaintiffs repeatedly responded "Plaintiff-Decedent was retired at the time of his death." Further, in response to the demands for plaintiffs to identify any lost profits and revenue from business as a result of the defendant's negligence", the plaintiffs responded, "Plaintiffs are not making a claim for lost profits from a business." In addition, in response to Montefiore's demands served on November 15, 2023, for IRS authorizations and tax returns, W-2s and copies of any survivor benefits, the plaintiffs again stated that they were "not seeking lost wages." Moreover, in plaintiffs' bill of particulars for co-defendant Katayun Mama, M.D., the plaintiffs responded that they were "not making a claim for lost wages" to the demand for the amount of money decedent was alleged to have earned during the one year period prior and alleged to have lost as a result. In addition, plaintiffs' opposition papers fail to shed any light as to this inconsistency.

As is well-settled the "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 AD3d 824, 825 [2d Dept 2009]; *see Jurado v Kalache*, 93 AD3d 759, 760 [2d Dept 2012]). In a wrongful death action, an award of damages is limited to the "fair and just compensation for the pecuniary injuries resulting from the decedent's death to the persons for whose benefit the action is brought" (EPTL 5-4.3[a]; *see Klos v New York City. Transit Auth.*, 240 AD2d 635 [2d Dept 1997]; *Plotkin v New York City Health & Hosps. Corp.*, 221 AD2d 425, 426 [2d Dept 1995]). The damages for pecuniary loss a plaintiff in a wrongful death action is entitled to recover include decedent's loss of earnings, loss of services each survivor may have received from the decedent, loss of parental guidance from decedent, the possibility of inheritance from decedent, as well as, funeral expenses and medical expenses incidental to death (*see Gonzalez v New York City Hous. Auth.*, 77 NY2d 663, 667-669 [1991]; *DeLong v County of Erie,* 60 NY2d 296, 306–308 [1983]; *see also* EPTL 5-4.3[a]). It is well-settled that a plaintiff has the burden of establishing damages for past and future lost earnings with reasonable certainty (*see Ferrigno v County of Suffolk*, 60 AD3d 726, 728 [2d Dept 2009]; *Karwacki v Astoria Medical Aneshtesia Assocs., P.C.,* 23 AD3d 438, 439 [2d Dept 2005]; *Morgan v Rosselli*, 23 AD3d 356, 357 [2d Dept 2005]).

Here, it remains unclear whether or not the plaintiffs are seeking to recover "approximately $5,000,000" for lost earnings in light of plaintiffs' repeated denial that they are making a claim for lost wages and repeated contention that the decedent was retired. Further, plaintiffs' opposition to the within motion wholly fails to address whether or not they are seeking to recover for lost earnings. It is well-settled that a claim for lost earnings must be predicated on documentary evidence to substantiate the claim, such as tax returns or other relevant documentation (*see Deans v Jamaica Hosp. Medical Center*, 64 AD3d 742, 744 [2d Dept 2009]; *Ferrigno v County of Suffolk*, 60 AD3d at 728; *Lodato v Greyhawk North America, LLC*, 39 AD3d 494, 496 [2d Dept 2007]; *Karwacki v Astoria Medical Anesthesia Assocs., P.C.*, 23 AD3d at 439; *Morgan v Rosselli*, 23 AD3d at 357; *Gomez v City of New York*, 260 AD2d 598, 599 [2d Dept 1999]; *Poturniak v Pupcic*, 232 AD2d 541, 542 [2d Dept 1996]). Unsubstantiated testimony, without documentation, is insufficient to establish a claim for lost earnings (*see Lodato v Greyhawk North America, LLC*, 39 AD3d at 496; *Gomez v City of New York*, 260 AD2d at 599; *see also Schleger v Jurcsak*, 186 AD3d 771, 774 [2d Dept 2020]; *Tarpley v New York City Tr. Auth*, 177 AD3d 929, 932 [2d Dept 2019]). Further, damages for wrongful death are not recoverable when they are based on contingencies that are "uncertain, dependent on future changeable events and, thus, inherently speculative" (*Farrar v Brooklyn Union Gas Co.*, 73 NY2d 802, 804 [1988]). In light of the inconsistencies between the bills of particulars, supplemental bill of particulars and recently served response wherein plaintiffs state that they are not seeking damages for lost wages, and having not provided any relevant documentation to substantiate a claim for lost earnings, it would be highly prejudicial to defendants if plaintiffs were permitted at trial to introduce any evidence demonstrative of lost earnings. Accordingly, plaintiffs are precluded from introducing any evidence, including but not limited to tax returns or W-2s, or adducing any testimony regarding lost earnings in support of its claim seeking damages for wrongful death.

Lastly, insofar as this Court has already denied Montefiore's application for an extension of its time to file a motion for summary judgment (NYSCEF Doc. No. 82) and the movant has now filed its motion for an order pursuant to CPLR 3212, that branch of this motion seeking an extension of time to file its dispositive motion is moot.

All other arguments raised on this motion and evidence submitted by the parties in connection therewith have been considered by this Court, notwithstanding the specific absence of reference thereto.

Accordingly, it is hereby

ORDERED that the defendant Montefiore New Rochelle Hospital's motion is granted, only insofar as, plaintiffs are precluded from introducing any evidence, including but not limited to tax returns or W-2s, or adducing any testimony regarding lost earnings in support of its claim seeking damages for wrongful death, in all other respects the motion is denied; and it is further

ORDERED that defendant Montefiore New Rochelle Hospital shall serve a copy of this order with notice of entry upon all parties within five (5) days of entry.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
April 8 , 2024

HON. LEWIS J. LUBELL
JUSTICE OF THE SUPREME COURT