

Fina v Caremount Med., P.C.
2024 NY Slip Op 35289(U)
April 23, 2024
Supreme Court, Ulster County
Docket Number: Index No. EF2021-2893
Judge: Julian D. Schreibman
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STATE OF NEW YORK

SUPREME COURT

ULSTER COUNTY

CHARLES FINA AND CHRISTINA FINA,

Plaintiffs,

Decision & Order

-against-

Index No.: EF2021-2893CAREMOUNT MEDICAL, P.C. AND MARK
MONTERA, M.D.,

Defendants.

Supreme Court, Ulster County

Motion Return Date: March 22, 2024

Present: Julian D. Schreibman, JSC

Appearances:

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By: Clifford A. Platt, Esq.**Schreibman, J.:**

This is a medical malpractice action commenced in October 2021, by plaintiffs Charles Fina ("Fina") and Christina Fina, who sues derivatively. Plaintiffs allege that defendants failed to diagnose and treat Fina's bladder cancer. Plaintiffs filed note of issue on or about February 7, 2023, and trial is scheduled to commence on June 10, 2024. Now before the Court is plaintiffs' motion seeking an order permitting plaintiffs to amend their verified bill of particulars, dated April 22, 2022 ("BOP"), and permitting them to disclose a radiology expert.

Procedural Background

This Court issued a Trial Order on March 20, 2023, scheduling the matter for trial on January 29, 2024, and setting dates for the parties' expert disclosure in March 2023, and May 2023, respectively. Plaintiffs served their expert disclosure in May 2023 ("initial expert disclosure"), in which they disclosed medical experts in primary care and oncology. Defendants served their expert disclosure in September 2023, in which they disclosed medical experts in primary care and urology. Following defendants' expert disclosure, plaintiffs' counsel consulted with an expert urologist, and served a supplemental expert disclosure on January 9, 2024 ("first supplemental expert disclosure").

By Order to Show Cause issued January 10, 2024 ("January OSC"), plaintiffs sought an order permitting their first supplemental expert disclosure as to their urology expert, and a treating primary care provider, and directing defendants' counsel to accept said supplemental expert disclosure. Defendants opposed the motion, citing, *inter alia*, proximity to the then-current trial date, and prejudice.

While the January OSC was pending and following conference with the parties, by Amended Trial Order dated January 16, 2024, the Court granted plaintiffs' request to adjourn the trial due to significant, unrelated, family medical issues. The trial was rescheduled to May 20, 2024. On January 19, 2024, defendants requested a short adjournment of the rescheduled trial date due to party and witness scheduling conflicts. Accordingly, by (second) Amended Trial Order, dated January 22, 2024, the trial was rescheduled to the current, impending date of June 10, 2024.

By Decision and Order dated February 21, 2024 ("February Order"), this Court, in the exercise of its discretion, and referencing, *inter alia*, the recently adjourned trial date and lack of any new issues raised in the first supplemental expert disclosure, granted plaintiffs' motion to the

extent detailed therein. Plaintiffs did not submit any supplemental submissions to this Court, or seek any additional relief, while the January OSC was pending.

Thereafter, on February 21, 2024, the same day this Court's February Order was issued, plaintiffs submitted the instant motion, commenced by Order to Show Cause of even date ("February OSC"). Plaintiffs now seek permission to amend their BOP to add an additional claim of negligence with regard to defendants' alleged failure to correctly interpret the July 2, 2020 ultrasound ("July 2020 US") at issue in this case and to serve and have defendants accept a second supplemental expert response ("second supplemental expert disclosure"). The motion is denied as discussed herein.

In support of the instant motion, plaintiffs submit the affirmation of counsel dated February 21, 2024, referencing the original BOP and initial expert response, in which plaintiffs allege the failure of defendants Mark Montera, M.D. ("Montera") and Caremount Medical, P.C. ("CMM"), to, *inter alia*, diagnose bladder cancer, correctly appreciate and convey the results of the July 2020 US, and communicate findings of an enlarged prostate, "distended urinary bladder with significant post void residual," "scattered calcifications on the prostate," and "diffuse wall thickening."

Plaintiffs seek to add a claim of alleged negligence for the acts and/or omissions of the CMM radiologist. Plaintiffs' proposed amended BOP includes allegations that defendants failed to correctly interpret the July 2020 US insofar as it revealed "focal asymmetric bladder wall thickening, not diffuse bladder wall thickening," as originally alleged. As plaintiffs' BOP did not previously disclose the claim that the July 2020 US was not correctly interpreted, they seek leave to do so now. Additionally, plaintiffs submit the expert radiologist, presumably upon whose review the proposed amended BOP is based, should be permitted as no prejudice would result to defendants and plaintiffs have good cause for the late disclosure. Counsel submits, without specifying dates or detail, that in addition to consulting with the expert urologist (whose late

disclosure was subject to the January OSC), he consulted with the proposed radiology expert, and that “[a]fter reviewing the materials and imaging films, the radiology expert rendered the opinion that [the July 2020 US] revealed focal, asymmetric bladder wall thickness, which is highly consistent with bladder cancer, not diffuse bladder wall thickness as indicated on the report.” Further, “[t]he radiology expert emphasized the repeated assertion of [plaintiffs’] urologist that [Fina] should have been referred to a urologist for a cystoscopy.” Counsel avers he prepared the second supplemental expert disclosure after becoming aware of the radiologist’s opinions and disclosed said opinions “[a]s soon as [he] became aware” of them.

Plaintiffs submit amendment of the BOP should be permitted because the negligence claim “arise[s] out of the same transaction or occurrence of claims already asserted” in the original BOP and that defendants would not be prejudiced as defense counsel has “five months to adjust to the new claim” and prepare the defense before trial.¹

In opposition, defendants submit that allowing plaintiffs to amend their BOP, essentially on the eve of trial, and particularly with regard to a new theory of liability not previously alleged, would be prejudicial. Further, defendants submit plaintiffs have not established a reasonable excuse for the delay, nor presented an affidavit establishing the merit of the proposed amendment(s).

In support of their argument, defendants submit that to permit the amendment as to the new theory advanced by plaintiff, essentially that CMM radiologist Dr. Panghaal failed to correctly interpret the July 2020 US, would be inappropriate and unjust in that, *inter alia*, note of issue was filed over a year ago and the trial date is looming, no new or additional records of ultrasounds were

¹ The Court notes that even at the time of submission of the instant Order to Show Cause, trial was approximately three and a half months away, much less the shorter interval available by the return date. Notably, plaintiffs also refer the Court to arguments raised in certain paragraphs in their January OSC supporting papers, which pertained solely to supplemental expert disclosure.

provided after the completion of discovery and therefore plaintiffs are not in possession of newly available evidence, and, of particular relevance to this Court's review, plaintiffs were "aware of the underlying factual circumstances that form the basis for the proposed new theory of liability as they were in possession of the CMM records and the [July 2020 US] and aware that [it] was ordered as part of the evaluation and treatment by defendant Montera and was interpreted by Dr. Panghaal from the questioning of defendant [Montera at his EBT in December 2022] – all before the Note of Issue was filed and plaintiffs certified the case was ready for trial." Additionally, defendants argue that in answer to their demand for a verified BOP seeking "each and every negligent or other tortious act or omission" claimed as the basis for defendants' liability, plaintiffs set forth five theories (a-e) and did not claim that defendants were negligent due to the CMM radiologist's alleged failure to correctly interpret the July 2020 US. Further, in answer to defendants' demands that "if there is any claim of vicarious liability against said defendant[s], state the name of each and every person or entity whose act or omission is charged against defendant[s]," plaintiffs' response was "defendant, Caremount Medical, P.C. was vicariously liable for the acts and omissions of defendant, Mark Montera, M.D." As emphasized by defendants, plaintiffs did not include broad language that CMM was vicariously liable for acts and omissions of agents, employees, or others, but instead limited the allegation of vicarious liability to the "acts and omissions of defendant, Mark M. Montera, M.D."

Leave to Amend

It is well-established that

While leave to amend a bill of particulars is ordinarily to be freely given in the absence of prejudice or surprise, once discovery has been completed and the case has been certified ready for trial, a party will not be permitted to amend the bill of particulars except upon a showing of special and extraordinary circumstances. Where a motion for leave to amend a bill of particulars alleging new theories of liability not raised in the complaint or the original bill is made on the eve of trial,

leave of court is required, and judicial discretion should be exercised sparingly, and should be discreet, circumspect, prudent and cautious.

...Nevertheless, leave to amend a bill of particulars may properly be granted, even after the note of issue has been filed, where the plaintiff makes a showing of merit, and the amendment involves no new factual allegations, raises no new theories of liability, and causes no prejudice to the defendant. Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine.

(*Cioffi v S.M. Foods, Inc.*, 178 AD3d 1015, 1016 [2nd Dept. 2019][internal quotation marks, brackets and citations omitted]).

Upon full review of the parties' submissions, the Court agrees with defendants. "In exercising its discretion, the court should consider how long the party seeking the amendment was aware of the facts upon which the motion was predicated, whether a reasonable excuse for the delay was offered, and whether prejudice resulted therefrom." (*King v Marwest, LLC*, 192 AD3d 874, 876 [2nd Dept. 2021][internal citations and quotation marks omitted]; *see also Yavorski v Dewell*, 288 AD2d 545, 546 [3rd Dept. 2001] [noting that the exercise of judicial discretion to allow amendment on a new theory of liability was not warranted, particularly when a certificate of merit had not been served as required pursuant to CPLR §3012-a]).

Here, while the proposed amendment(s) arise out of the same underlying transaction, the proposed amended BOP raises an entirely new theory of liability, which plaintiffs have alleged long after the completion of discovery and certification of the case for trial and have sought to advance months after defendants made their expert disclosure. Further, plaintiffs have "failed to proffer a reasonable excuse for [their] delay in seeking the amendment and the proposed amendment [is] prejudicial to the defendant[s]". (*Id.*, at 876 [internal brackets, citations and quotation marks omitted]; *see also Ferretti v Village of Scotia*, 200 AD3d 1243, 1247 [3rd Dept. 2021] [finding leave to amend was properly denied as an exercise of the Court's discretion where

the proposed amended was based on “facts of which (plaintiff) was aware...and (plaintiff) proffered no excuse for the delay.”)].

Additionally, the Court agrees with defendants that the facts and/or interpretation by plaintiffs of the case law cited in support of their motion is distinguishable and/or reliance thereon misplaced. For instance, plaintiffs correctly submit that prejudice “is more than the mere exposure of a party to greater liability. Rather, there must be some indication that the party has been hindered in the preparation of its case or has been prevented from taking some measure in support of its position.” (*Tardi v Casler-Bladek*, 216 AD3d 1267, 1270 [3rd Dept. 2023])[internal citations and quotation marks omitted]). However, contrary to plaintiffs’ contention, it is apparent defendants would be hindered in the preparation of the case were the Court to allow the proposed amended BOP. At minimum, Dr. Panghaal has not been deposed, and defendants have not disclosed a radiology expert who could review and address plaintiffs’ amended BOP and proposed expert’s opinions, and contribute to defendants’ trial preparation at this late date.

Simply put, plaintiffs have not presented “special and extraordinary circumstances” that would warrant the exercise of the Court’s discretion in granting the requested relief at this stage, particularly when it appears plaintiffs did not seek radiology review until after urology review, which itself occurred months after defendants’ expert disclosure and in close proximity to the originally-scheduled trial date, and where plaintiffs were aware of and questioned defendant Montera as to the July 2020 US well over a year before seeking to amend their BOP. (*See e.g. McLeod v Duffy*, 53 AD2d 1011, 1012 [4th Dept. 1976]).

Second Supplemental Expert Disclosure

Given the Court’s determination regarding the branch of plaintiffs’ motion seeking leave to amend the BOP, it is unnecessary to address this branch in detail as it is essentially rendered moot, since there is no basis on which to permit the proposed expert radiologist to present opinion

testimony at trial, as such testimony would pertain to a new theory of liability. However, were the Court to reach the merits, it would find that plaintiffs have not sufficiently demonstrated a basis for the Court to exercise its discretion and permit the second supplemental expert disclosure.

CPLR § 3101(d) was intended to provide timely provision of expert witness information between parties so that parties could adequately and thoroughly prepare for trial. (*See Bauernfeind v Albany Med. Ctr. Hosp.*, 195 AD2d 819 [3rd Dept. 1993]). Notwithstanding the lack of a specific time frame in CPLR § 3101(d)(1)(i), the Third Judicial District has promulgated an “Expert Disclosure Rule,” which provides that plaintiffs’ disclosure is required at the time of filing of note of issue, with defendants’ disclosure to be made within 60 days thereafter. Further, “[a]ny amended or supplemental expert disclosure shall be allowed only with the permission of the Court. Unless the Court directs otherwise, a party who fails to comply with this rule is precluded from offering the testimony and opinions of the expert for whom a timely response has not been given.” (Third Jud. Dist. Rules §1, *et seq.*). Further, “the Third Department has made it abundantly clear that a trial court is within its discretion in precluding expert testimony for failure to comply with the provisions of CPLR § 3101(d)(1)(i) where the non-complying party fails to show good cause for its delay and/or that disclosure was not intentionally withheld.” (*Tyre v Merritt Const., Inc.*, 2016 WL 11339551, *2 [Sup. Ct., Greene County 2016] [internal citations, brackets and quotation marks omitted]).

While the instant submissions do not reflect that plaintiffs willfully or intentionally withheld the second supplemental expert disclosure, as set forth above with regard to the proposed amended BOP, given the totality of the circumstances, plaintiffs have failed to show good cause for their delay. Moreover, defendants have demonstrated that plaintiffs have raised new issues and that defendants would be significantly prejudiced in the event the requested relief was granted. (*Cf. McColgan v Brewer*, 84 AD3d 1573 [3rd Dept. 2011]). Accordingly, the Court finds that the

interests of justice would not be served by allowing plaintiffs to proceed with the proposed second supplemental expert disclosure at this late stage. (*Cf. Hytko v Hennessey, MD*, 2002 WL 34703475 [Sup. Ct., Albany County 2002]).

Therefore, based upon review of all of the parties' submissions and applicable legal principles, the Court finds it is provident to deny plaintiffs' motion in its entirety.

The Court has otherwise considered any remaining arguments not specifically addressed herein and finds them either unavailing or rendered academic. Based on the foregoing, it is hereby

ORDERED that the plaintiffs' motion is denied.

This shall constitute the Decision and Order of the Court. The original Decision and Order is being filed with the Ulster County Clerk via NYSCEF. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provisions of that rule regarding notice of entry.

SO ORDERED.

Dated: April 23, 2024
Kingston, New York

ENTER,



JULIAN D. SCHREIBMAN, JSC

Papers considered: Order to Show Cause dated February 22, 2024; Affirmation of John H. Fisher, Esq. dated February 21, 2024, with Exhibits A-G; and Affirmation in Opposition by Clifford A. Platt, Esq. dated March 18, 2024, with Exhibits A-K.