

Butler v Touijer

2025 NY Slip Op 34349(U)

November 13, 2025

Supreme Court, New York County

Docket Number: Index No. 805373/2022

Judge: John J. Kelley

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

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ANDRE BUTLER and YVONNE CATHCART-BUTLER,

Plaintiffs,

- v -

KARIM A. TOUIJER, M.D., MEMORIAL SLOAN
KETTERING SIDNEY KIMMEL CENTER, KELLY
GARRETT, M.D., and NEW YORK PRESBYTERIAN
HOSPITAL,

Defendants.

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INDEX NO. 805373/2022

MOTION DATE 09/17/2025

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81

were read on this motion to/for STRIKE PLEADINGS.

In this action to recover damages for medical malpractice, the defendants Karim A. Touijer, M.D., and Memorial Sloan Kettering Sidney Kimmel Center (the MSKCC defendants) move pursuant to CPLR 3042(c) and (d) to strike Item No. 1 of the plaintiffs' verified bills of particulars addressed to the MSKCC defendants, and to compel the plaintiffs to serve amended bills of particulars as to that item, or otherwise be precluded from adducing evidence at trial in support of their claims. The plaintiffs oppose the motion. The motion is denied.

On June 6, 2025, the plaintiffs filed the note of issue in this action. In a so-ordered stipulation dated August 6, 2025 (Sokoloff, J.), the parties agreed, among other things, that the MSKCC defendants would be permitted to make the instant motion, despite the fact that the action remained on the trial calendar, and that the time within which they could move for summary judgment would be extended until December 18, 2025. On August 14, 2025, the MSKCC defendants made the instant motion. In an order dated September 26, 2025, this court denied the MSKCC defendants' motion to strike the note of issue (MOT SEQ 001).

In their respective demands for bills of particulars, the two MSKCC defendants demanded, in Item No. 1 of each demand, that the plaintiffs “set[] forth in detail . . . “[t]he manner and respect in which it is claimed the [MSKCC defendants] w[ere] negligent, careless and unskillful.” In response to both demands, the plaintiffs asserted the following:

“Defendant[s], individually and through their agents, servants, and/or employees, physicians, nurses, interns, and/or other health care providers were negligent, careless, and/or unskilled in the following manner: in failing to monitor the signs and symptoms during the prostatectomy; in failing to refer plaintiff to a hospital with more specialized care that would have properly performed the prostatectomy; in failing to appreciate plaintiff’s complaints and concerns following his prostatectomy surgery; in failing to timely assess the plaintiff’s post-operative condition; in failing to timely and properly assess plaintiff’s condition during surgery; in negligently administering medical care to the plaintiff; in failing and neglecting to properly evaluate conditions manifested by the plaintiff; in negligently performing plaintiff’s prostatectomy; in causing a perforation in plaintiff’s bladder; in failing to repair plaintiff’s bladder perforation during the procedure; in failing to timely recognize the signs and symptoms of the bladder perforation following the surgery; in failing to advise plaintiff of the risks of the prostatectomy; in failing to take into consideration plaintiff’s pre-existing medical conditions prior to performing the prostatectomy; in failing to advise plaintiff that the prostatectomy will cause an ulcerative colitis exacerbation; in failing to recognize that the prostatectomy will cause and ulcerative colitis exacerbation; in failing to call for a urology consult; in failing to obtain proper informed consent; in negligently managing plaintiff’s post-operative care; in failing to perform proper post-operative assessment and testing; in failing to treat plaintiff for the perforation in his bladder; in failing and neglecting to properly evaluate conditions manifested by the plaintiff; in failing to render immediate and/or urgent medical intervention, diagnosis, care, treatment, services and consultation to plaintiff; in failing to timely, properly, and appropriately perform an evaluation, assessment, diagnosis, care, treatment, services, testing and render medical advice relative to plaintiff’s bladder perforation; in causing a significant replay in the proper diagnosis and treatment of plaintiff’s bladder perforation; in failing to monitor the patient; in failing to perform proper physical examinations; in failing to administer appropriate medications for the treatment of plaintiff’s condition; in failing to take heed of plaintiff’s complaints and physical signs of distress; in failing to use due and reasonable and proper skill in the care and treatment of plaintiff; in failing to properly follow the plaintiff’s medical condition; *in failing to render and provide proper and adequate medical and diagnostic care and treatment in accordance with the standards of accepted medical and diagnostic practices and procedures*; in causing, permitting, and allowing the injuries and conditions alleged herein; in failing to take standard and accepted care and precautions to avoid and prevent the occurrence and conditions complained of herein; in failing to obtain a fully informed consent with respect to the treatment rendered; in failing to consider the risks, hazards and dangers of the treatment rendered; in failing to impart same to plaintiff; in failing to inform the plaintiff as to the true nature of his condition before and after the treatment rendered; in failing to take proper prudent and reasonable steps to prevent injury to plaintiff; in causing injury to the plaintiff; in failing to

aggressively monitor and manage the plaintiff during and subsequent to the treatment rendered herein; in failing and neglecting to take any steps to rectify and/or mitigate the said conditions; in failing to properly and adequately evaluate, diagnose and examine plaintiff and failing to properly follow and observe plaintiff prior and subsequent to the treatment rendered herein; in failing to take heed of, notice, and observe all the heralding signs, symptoms and complaints including but not limited to the conditions alleged herein; in failing to call additional consults; *in failing and neglecting to exercise the degree of care, caution, prudence, skill, ability, professional knowledge, and training generally possessed by physicians, surgeons and hospital.* In addition to the foregoing, plaintiffs shall rely upon the doctrine of *res ipsa loquitur*.”

(emphasis added). The MSKCC defendants now seek to strike the assertions italicized above from the relevant bills of particulars, contending that these allegations are so vague that any presently undisclosed departures from accepted practice could be shoe-horned into those statements, thus depriving them of the opportunity to prepare a defense to the action, and opening the door to surprise allegations that might be made in opposition to their anticipated summary judgment motion.

Initially, the court notes that, in connection with medical malpractice actions,

“[i]t is well settled that items of a demand for a bill of particulars which . . . call for evidentiary material and expert medical opinion testimony are not proper demands (*McKenzie v St. Elizabeth Hosp.*, 81 AD2d 1003). A bill of particulars in a medical malpractice action, as in any action for personal injuries, requires only a ‘[general] statement of the acts or omissions constituting the negligence claimed’ (CPLR 3043, subd [a], par [3]; *Coughlin v Festin*, 53 AD2d 800; *Horowitz v Saydjari*, 49 AD2d 760; *Cirelli v Victory Mem. Hosp.*, 45 AD2d 856; *Palazzo v Abbate*, 45 AD2d 760). . . .As has often been stated, the purpose of a bill of particulars is to amplify the pleadings, limit the proof and prevent surprise at trial, but not to provide evidentiary material” (*Coughlin v Festin*, *supra*, p 801, quoting *Cirelli v Victory Mem. Hosp.*, *supra*, p 857)”

(*Rockefeller v Hwang*, 106 AD2d 817, 818 [3d Dept 1984]). In an initial bill of particulars in a medical malpractice action, “[t]here is no need for a plaintiff to set forth the manner in which the physician 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” (*Toth v Bloshinsky*, 39 AD3d 848, 849 [2d Dept 2007]; *see Dellaglio v Paul*, 250 AD2d 806, 806 [2d Dept 1998] [“request for specific departures in a bill of particulars is evidentiary”]), although where a complaint is so vague that a defendant in a

medical malpractice action is not informed of the basis of the action, a more detailed bill of particulars should be required (*see Nelson v New York Univ. Med. Ctr.*, 51 AD2d 352, 354-355 [1st Dept 1976]). Inasmuch as a plaintiff in a medical malpractice action

“may lack present knowledge of relevant information required by a demand for a bill of particulars prior to the completion of disclosure . . . , [i]n such circumstances, plaintiff should be as responsive as is presently possible. If unable to respond in any particulars, plaintiff should so state and upon acquiring knowledge of such particulars, through discovery, serve a supplemental bill”

(*Lamb v Rochester Gen. Hosp.*, 130 AD2d 963, 964 [4th Dept 1987]). In the instant case, the plaintiffs did not defer the particularization of the MSKCC defendants’ purported departures from good and accepted practice, and instead provided those defendants with a detailed, specific itemization of alleged departures in the initial bills of particulars.

“[I]n a medical malpractice action, a plaintiff’s bill of particulars need only make a ‘reasonable attempt to amplify the pleading, limit the proof and prevent surprise at the trial’” (*Braxton v Erie County Med. Ctr. Corp.*, 208 AD3d 1038, 1041 [4th Dept 2022], quoting *Randall v Pech*, 51 AD2d 864, 865 [4th Dept 1976] [some internal quotation marks omitted]; *see Kristie M. v Mercy Hosp. of Buffalo*, 240 AD3d 1228, 1230 [4th Dept 2025]). The specificity provided by the plaintiffs herein satisfied even the most rigid requirements of particularization (*see Stidham v Clerk*, 57 AD3d 1369, 1369-1370 [4th Dept 2008]).

The plaintiffs’ allegations that the MSKCC defendants failed to render and provide proper and adequate medical and diagnostic care and treatment in accordance with the standards of accepted medical and diagnostic practices and procedures, and that they failed and neglected to exercise the degree of care, caution, prudence, skill, ability, professional knowledge, and training generally possessed by physicians, surgeons, and hospitals, constitute general statements as to how those allegedly were “negligent, careless and unskillful.” These allegations, however, are not so vague as to require striking them from the bills of particulars. Unlike the situation in which a plaintiff improperly employs a vague and overbroad phrase in a bill of particulars, for example, that a defendant was “otherwise” negligent (*see Hayes v*

Kearney, 237 AD2d 769, 770 [3d Dept 1997], citing *Schlenker v School Dist.*, 198 Misc 775, 776 [Sup Ct, Albany County 1950] [rejecting bill of particulars that employed the phrase “among others” and “among other conditions” to refer to departures and injuries]; *Mora v New York City Hous. Auth.*, 2016 NY Slip Op 30981[U], *8, 2016 NY Misc LEXIS 2007, *12 [Sup Ct, N.Y. County, Feb. 9, 2016]; *Elfenbein v Freeberg*, 2011 NY Slip Op 32262[U], *5-6, 2011 NY Misc LEXIS 4106, *7 [Sup Ct, Nassau County, Aug. 2, 2011]; see also *Stoddard v New York Oncology Hematology, P.C.*, 172 AD3d 1504, 1505-1506 [3d Dept 2019] [requiring further particulars to explain the phrase “and the effects thereof” in connection with claimed injuries]; *Myers v Community Gen. Hosp. of Sullivan County*, 51 AD3d 1359, 1360-1361 [3d Dept 2008]), the allegations sought to be stricken here were not vague or overbroad, since they apprised the MSKCC defendants of the “first level” of the basis for the plaintiffs’ claims of malpractice, that is, that those defendants failed to provide proper medical diagnoses, treatment, and care, and departed from applicable standards of care. In fact, the court concludes that these allegations may indeed be necessary because the MSKCC defendants’ demands for bills of particulars did not explicitly request the plaintiffs to articulate in what way those defendants departed from applicable standards of care, but made only the more general request that the plaintiffs describe in what way those defendants were “negligent, careless and unskillful.” A physician or hospital may only be held liable for negligence, in the first instance, when they depart from applicable standards of care (see *Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 24 [1st Dept 2009]).

The court deems the challenged allegations to constitute an appropriate “preamble” to the myriad, more specific “second-level” allegations of why such diagnoses, treatment, and care were improper and constituted negligence, a departure from applicable standards of care, and evinced a lack of skill (see generally *Valenti v Camins*, 95 AD3d 519, 521-522 [1st Dept 2012] [allegation in bill of particulars of “improper placement of orthopedic hardware” was not too vague to have placed defendants on notice that surgeon inserted a screw at the wrong level of plaintiff’s cervical spine]). Contrary to the MSKCC defendants’ contentions, the challenged

responses are not a catch-all category into which the plaintiffs may later attempt to fit more specific claims of departures that have yet to be identified.

All other requests for relief made by the MSKCC defendants are denied.

Accordingly, it is,

ORDERED that the motion is denied; and it is further,

ORDERED that, on the court's own motion, the time within which the defendants Karim A. Touijer, M.D., and Memorial Sloan Kettering Sidney Kimmel Center may move for summary judgment is extended until January 21, 2026.

This constitutes the Decision and Order of the court.

11/13/2025
DATE



JOHN J. KELLEY, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	