

Spencer v Northern Westchester Hosp.

2013 NY Slip Op 32751(U)

February 25, 2013

Sup Ct, Westchester County

Docket Number: 56717/11

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

-----X

HAZEL SPENCER,

Plaintiff,

DECISION & ORDER

-against-

Index No. 56717/11
Motion Date: Feb. 25, 2013

NORTHERN WESTCHESTER HOSPITAL, MOUNT
KISCO MEDICAL GROUP, P.C., EUGENE TOLUNSKY
and EUGENE SPAGNUOLO,

Seq. no. 1

Defendants.

-----X

LEFKOWITZ, J.

The following papers were read on this motion by defendants Mount Kisco Medical Group ("MKMG") and Eugene Tolunsky, M.D. (hereinafter "moving defendants"), for an order compelling plaintiff to provide a more particularized bill of particulars in accordance with CPLR 3041, 3042 (c) and 3043 (a)(3).

Order to Show Cause - Affirmation in Support - Exhibits A-G
Affirmation in Opposition - Exhibits 1-3

Upon the foregoing papers and the proceedings held on February 25, 2013, the motion is decided as follows:

Factual and Procedural Background

In the present medical malpractice action, plaintiff generally alleged in her verified complaint that the negligence and malpractice of defendants included, inter alia, the following: failed and neglected to properly treat her; failed to treat her in accordance with the standards of care and treatment accepted in the community; deviated and departed from the customary standards of care; failed to promptly recognize and detect symptoms; failed to properly diagnosis and treat her; allowed and permitted plaintiff to remain without proper care; and violated applicable laws, statutes regulations and/or rules. Moving defendants served an answer and demands for a bill of particulars. Plaintiff served essentially identical verified bills of particulars as to each moving defendant in response to the demands. Thereafter, plaintiff, inter alia, demanded the deposition of Dr. Deborah Benzil on behalf of defendant MKMG.

In the verified bills of particulars, plaintiff responded that the acts of negligence and/or

malpractice occurred from February 23, 2010 to March 25, 2010. As to the demands for “each and every alleged act of malpractice on part of the answering defendant, which it will be claimed constitutes malpractice as alleged in the complaint ...,” plaintiff, however, objected to the demands as “improper” and cited multiple cases. Notwithstanding the objections, plaintiff also responded to the demands by essentially setting forth the general allegations of negligence and malpractice set forth in the verified complaint, including the allegations that defendants failed to properly treat and care for plaintiff, failed to properly treat plaintiff in accordance with the standards of care in the community, deviated from accepted standards of care, failed to provide plaintiff with treatment, failed to diagnose plaintiff, failed to undertake proper corrective treatment, exposed plaintiff to harm and danger, and violated applicable laws, statutes, regulations and/or rules. With respect to the demands seeking “[a] statement of the standards of medical practice from which it is claimed that the answering defendant deviated,” plaintiff objected to the demands as “improper,” cited numerous cases, and referred to its answer to the demand regarding the acts of negligence and/or malpractice.

Moving Defendants’ Contentions

Moving defendants now seek an order compelling plaintiff to provide a more particularized bill of particulars. Moving defendants contend that the boilerplate allegations in plaintiff’s bills of particular fail to indicate which of defendants’ numerous interactions with plaintiff constituted the alleged malpractice. Moving defendants note that during the period of alleged negligence and malpractice, plaintiff was evaluated by three different physicians at defendant MKMG on three different dates, underwent two radiology examinations, communicated with two additional employees of MKMG, and plaintiff’s treating physician at Northern Westchester Hospital spoke with defendant Tolunsky and another MKMG physician. Moving defendants contend that the purpose of the bill of particulars is to amplify the pleadings, limit the proof, and prevent surprise at trial. Accordingly, moving defendants contend that they are entitled to a supplemental bill of particular setting forth allegations specific to this case. Moving defendants rely upon, inter alia, *Heyward v Ellenville Community Hospital* (215 AD2d 967 [3d Dept 1995]), wherein the Court held that where plaintiff’s bill of particulars contained extremely broad statements encompassing any type of malpractice, plaintiff was required to provide more specific answers indicating with reasonable particularity the actions or omissions of each defendant.

Moving defendants also contend that the failure of plaintiff to provide a specifically particularized bill of particulars will prejudice defendants’ ability to move for summary judgment since it is impossible to retain an expert since there is no way to know what alleged departures of defendants from the accepted standard of care are alleged by plaintiff. Moving defendants further assert that, at this time, plaintiff cannot claim a lack of knowledge of the elements of the alleged malpractice since substantial discovery has been completed, including the exchange of voluminous medical records and the deposition of plaintiff. Moving defendants note that the depositions of defendants Dr. Spagnuolo and Dr. Tolunsky are to be completed prior to the return date of the present motion.

Finally, moving defendants contend that they are entitled to a supplemental bill of particulars setting forth the allegations of malpractice with specific particularization prior to the deposition of Dr. Deborah Benzil on behalf of defendant Mount Kisco Medical Group. Moving defendants assert that since plaintiff has failed to amplify the pleadings and defendant MKMG is unaware of what acts are claimed to be negligent, defendant MKMG is unable to ascertain whether Dr. Benzil is an appropriate witness to produce and Dr. Benzil is unable to properly prepare for the deposition.

Plaintiff's Contentions

Plaintiff opposes the motion on multiple grounds. Initially, plaintiff notes that moving defendants failed to object to the bills of particulars when they were served over a year ago, and have acknowledged that plaintiff may not have enough information to be more specific in a bill of particulars until discovery is done. Plaintiff also contends that it is defendants' depositions that will provide them with the information necessary to be more specific regarding the alleged malpractice. Plaintiff further notes that CPLR 3043 (a) only requires a "general statement of the acts or omissions constituting the negligence claimed." Plaintiff further relies upon *Mahr v Perry* (74 AD3d 1030 [2d Dept 2010]), wherein the Court held that plaintiff properly object to demands for a bill of particulars on the ground that they improperly sought evidentiary material and that a doctor is chargeable with knowing how he/she failed to act in accordance with good and accepted medical practice. Accordingly, plaintiff contends that moving defendants' contention that plaintiff needs to be more specific about defendants' departures from accepted medical standards so defendant will be able to move for summary judgment is without merit. Plaintiff also contends that defendant should obtain the facts needed to move for summary judgment from discovery, including depositions of the doctors. With respect to moving defendants' contention that defendant MKMG is unable to ascertain if Dr. Benzil is the appropriate witness for a deposition on behalf of MKMG, plaintiff asserts that she has already informed them in writing that she seeks to depose Dr. Benzil, and annexes Dr. Benzil's report of her treatment of plaintiff. Insofar as Dr. Benzil treated plaintiff and detailed her evaluation in a report, plaintiff contends that Dr. Benzil cannot be surprised by a deposition regarding that treatment.

Analysis

CPLR 3043 (a)(3) provides that in an action to recover for personal injuries, including a medical malpractice action, the bill of particulars must provide "[a] general statement of the acts or omissions constituting the negligence claimed." The purpose of a bill of particulars is to amplify pleadings, limit the proof and prevent surprise at trial, not provide evidentiary material (*Jurado v Kalache*, 93 AD2d 759 [2d Dept 2012]; *Toth v Bloshinsky*, 39 AD3d 848, 849 [2d Dept 2007]).

As a whole, plaintiff's bills of particulars sufficiently set forth a general statement as to the acts and omissions which constituted defendants' alleged medical malpractice. Plaintiff's allegations that defendants failed to properly treat and diagnose her and deviated from the accepted standards of medical care, when read in conjunction with her allegations in the bills of particulars that she sustained specified personal injuries, including a ruptured choroidal artery aneurysm, left

facial droop, and difficulty ambulating, satisfied the purpose of the bill of particulars (*see Stidham v Clerk*, 57 AD3d 1369 [4th Dept 2008]). Contrary to moving defendants' contention, it is not the purpose of the bill of particulars to provide facts upon which defendants can retain an expert for the purposes of summary judgment. Rather, as correctly asserted by plaintiff, defendants will have the opportunity to retain an expert and move for summary judgment based upon the facts gathered during discovery. Additionally, the court agrees with plaintiff that under the circumstances of this action and prior to the completion of discovery, plaintiff is unable to provide more particularized allegations regarding the acts and omissions of the defendants which constitute the alleged malpractice. In medical malpractice actions, insofar as defendants, not plaintiff, are in the possession of the information necessary to specifically particularize the acts or omissions which constitute the malpractice, plaintiff may not be able to further particularize the alleged acts of malpractice until after the completion of discovery (*see Coleman v Richards*, 138 AD2d 556 [2d Dept 1988]).

Moreover, it has been held that "[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 at 849; *see Mahr v Perry*, 74 AD3d 1030, 1031 [2d Dept 2010]; *Khoury v Chouchani*, 27 AD23d 1071 [4th Dept 2006]). Accordingly, plaintiff properly objected to the demand that she set forth "the standards of medical practice from which it is claimed that the answering defendant deviated."

With respect to the pending deposition of Dr. Benzil on behalf of defendant MKMG, it cannot be said that Dr. Benzil will be unable to prepare for the deposition or will be surprised at the deposition due to the lack of a more particularized bill of particulars. Notably, Dr. Benzil is one of plaintiff's treating physicians and plaintiff has provided Dr. Benzil's report regarding her examination and treatment of plaintiff.

In view of the foregoing, it is

ORDERED that the motion is denied with leave to renew upon the completion of discovery; and it is further

ORDERED that counsel are directed to appear for a conference in the Compliance Part, Courtroom 800, on March 12, 2013 at 9:30 A.M.

The foregoing constitutes the decision and order of this court.

Dated: White Plains, New York
February 25, 2013


HON. JOAN B. LEFKOWITZ, J.S.C.

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