

**Checo v Gonzales**

2012 NY Slip Op 30733(U)

March 22, 2012

Supreme Court, New York County

Docket Number: 105571/09

Judge: Joan B. Lobis

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

PRESENT: Joan B. Lobis  
*Justice*

PART 6

Vladimir Bonilla Checo,  
Et Al.

INDEX NO.

105571/09

MOTION DATE

1/27/12

MOTION SEQ. NO.

2

MOTION CAL. NO.

\_\_\_\_\_

*- v -*  
Marguerita Gonzalez,  
M.A.D. Et Al.

The following papers, numbered 1 to 22 were read on this motion to for vacate note of issue.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1-14

Answering Affidavits — Exhibits \_\_\_\_\_

15-20

Replying Affidavits \_\_\_\_\_

21-22

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE  
WITH THE ACCOMPANYING MEMORANDUM DECISION

**FILED**

MAR 26 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 3/22/12

*JBL*  
JOAN B. LOBIS *J.S.C.*

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 6**

-----X  
VLADIMIR BONILLA CHECO, An Infant, By His  
Parent and Natural Guardian, MARICRUZ CHECO,  
and MARICRUZ CIIECO, Individually,

Plaintiffs,

Index No. 105571/09

-against-

**Decision and Order**

MAGUERITA GONZALES, M.D., TIMOTHY J.  
RAFAEL, M.D., BETH ISRAEL MEDICAL CENTER,  
LARISA VOROBYEVA, M.D., XIMENA  
MATAMALA, M.D., HARLEM HEALTH CENTER and  
THE NEW YORK HOSPITAL TRADES COUNCIL  
AND HOTEL ASSOCIATION OF NEW YORK CITY  
HEALTH CENTER, INC.,

Defendants.

-----X  
JOAN B. LOBIS, J.S.C.:

**FILED**  
**MAR 26 2012**  
NEW YORK  
COUNTY CLERK'S OFFICE

Motion Sequence Numbers 002 and 003 are hereby consolidated for disposition. In Motion Sequence Number 002, defendants Marguerita Gonzales, M.D. s/h/a Maguerita Gonzales, M.D., Timothy J. Rafael, M.D., Beth Israel Medical Center (“BIMC”), Larisa Vorobyeva, M.D., and Ximena Matamala, M.D. (collectively the “MS-2 Defendants”) move, by order to show cause, for an order vacating the note of issue pursuant to 22 N.Y.C.R.R. § 202.21(c), and compelling plaintiffs to provide discovery. In Motion Sequence Number 003, defendant New York Hotel Trades Council & Hotel Association of New York City, Inc., Health Center Inc., s/h/a Harlem Health Center and The New York Hotel Trades Council and Hotel Association of New York City Health Center, Inc. (“NYHTC”) also moves, by order to show cause, for an order vacating the note of issue and compelling plaintiffs to provide outstanding and/or additional discovery, including separate bills of

particulars as to each defendant and particularized claims of vicarious liability. NYHTC also seeks an order vacating all or certain portions of plaintiffs' third set of supplemental bills of particulars.<sup>1</sup>

In this case sounding in medical malpractice, plaintiffs allege that infant-plaintiff Vladimir Bonilla Checo suffered injuries, including shoulder dystocia and Erb's Palsy, as a result of mismanagement of his mother Maricruz Checo's prenatal care by Dr. Matamala, and his labor and delivery, on February 4, 2007, by Drs. Gonzales, Vorobyeva, and Rafael. Ms. Checo also claims injuries, including fecal incontinence, rectal and anal damage, and vaginal tears, as a result of similarly alleged negligence.

Plaintiffs filed a summons and verified complaint on or about April 21, 2009. The verified complaint contains eight (8) causes of action, including medical malpractice on behalf of infant-plaintiff and Ms. Checo; loss of services of the infant-plaintiff on behalf of Ms. Checo; lack of informed consent on behalf of infant-plaintiff and Ms. Checo; and negligent hiring, retention, and supervision against NYHTC and BIMC. On or about September 1, 2009, in response to defendants' demands, plaintiffs served verified bills of particulars. The allegations contained in the verified bills of particulars more or less amplified the injuries alleged in the verified complaint. The injuries alleged as to infant-plaintiff included respiratory trauma, asphyxiation, hypothermia, shoulder dystocia, fractured humerus, temporary paralysis, Erb's Palsy, confinement to hospital and home, emotional distress, mental anguish, inability to perform regular daily activities, and loss of

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<sup>1</sup> NYHTC inadvertently refers to plaintiffs' amended verified bills of particulars dated December 23, 2011 as their "third set of supplemental bills of particulars."

enjoyment of life. The injuries alleged as to Ms. Chcco included vaginal and perineal tears, anorexia, anemia, fecal incontinence, rectal and anal damage, infection, mental and physical suffering, loss of enjoyment of life, depression, and anxiety.

On November 10, 2009, the parties appeared for a preliminary conference, which resulted in an order directing, inter alia, plaintiffs to provide separate bills of particulars for each named defendant, specifying the specific acts of negligence against each defendant; to advise defendants whether infant-plaintiff's father would be produced for deposition voluntarily or to provide his last known address; and to provide supplemental bills of particulars as to special damages. Additionally, plaintiffs stated that they did not allege surgical negligence against NYHTC.

On or about December 1, 2009, plaintiffs served supplemental verified bills of particulars with respect to special damages and confinement to home and bed.<sup>2</sup> On March 2, 2010, the parties appeared for a compliance conference, and between April 6, 2010 and January 24, 2012, they appeared for nine (9) status conferences. Between June 17, 2010 and October 24, 2011, the parties conducted the depositions of Ms. Chcco, Dr. Gonzales, Dr. Vorobyeva, Dr. Matamala, and Dr. Rafacl. In the status conference order dated November 1, 2011, plaintiffs reserved the right to depose NYHTC before the filing of the note of issue. However, plaintiffs failed to do so.

On or about December 23, 2011, plaintiffs served amended verified bills of particulars ("Amended BPs"). The Amended BPs differ from the original bills of particulars in

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<sup>2</sup> Plaintiffs served amended supplemental verified bills of particulars upon NYHTC on or about March 8, 2010.

various respects, including alleging surgical negligence against NYHTC and improper delivery against Dr. Matamala; expanding the dates of negligence as to NYHTC and Dr. Matamala;<sup>3</sup> and adding injuries of developmental and speech delays on behalf of infant-plaintiff and injuries of inability to perform daily activities and care for family members on behalf of Ms. Checo. On December 28, 2011, plaintiffs filed the note of issue and certificate of readiness, certifying that all discovery known to be necessary was complete and that there were no outstanding requests for discovery, except for additional testing scheduled for Ms. Checo and the exchange of written reports thereof.

Both the MS-2 Defendants and NYHTC seek to vacate the note of issue on various grounds. First, NYHTC argues that discovery remains outstanding. NYHTC states that plaintiffs failed to respond to its November 15, 2010 demand seeking photographs and other discovery to which Ms. Checo testified; failed to state whether they will produce infant-plaintiff's father for a non-party deposition or provide his last known address; failed to respond to NYHTC's demand for relevant documents from social media sites; and failed to comply with court orders dated November 1, 2011 and April 4, 2011, directing plaintiffs to respond to NYHTC's November 15, 2010 demand and notice to produce.

In opposition, plaintiffs argue that discovery was complete at the time they filed the note of issue, and that they responded to NYHTC's November 15, 2010 demand on September 15,

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<sup>3</sup> In the original bills of particulars, the dates of alleged negligence ranged from June 22, 2006 to February 4, 2007 as against NYHTC, and from June 22, 2006 to February 12, 2007 as against Dr. Matamala. In the Amended BPs, the dates for both Dr. Matamala and NYHTC range from December 14, 2006 to August 3, 2007.

2011; provided authorizations for fifteen (15) medical providers; advised that Ms. Chcco is in search of the photographs requested; stated that infant-plaintiff's father's last known address is the same as infant's; and attached Medicaid insurance authorizations. In reply, NYHTC states that plaintiffs' September 15, 2011 letter does not fully respond to its November 15th demand, because (i) plaintiffs did not produce the photographs testified to by plaintiff-mother, because the letter merely stated that she was searching for them, and (ii) plaintiffs have still not advised whether they will produce infant-plaintiff's father for a non-party deposition.

Second, the MS-2 Defendants and NYHTC argue that the Amended BPs are defective. NYHTC argues that the court should vacate the Amended BPs on the grounds that they were served without leave of court. Moreover, both the MS-2 Defendants and NYHTC argue that the Amended BPs improperly allege new injuries. Specifically, the MS-2 Defendants argue that the new injuries of developmental and speech delays alleged in the Amended BPs contradict Ms. Chcco's testimony that infant-plaintiff did not have speech delays. They state that these injuries come as a surprise, because they were not mentioned in the verified bills of particulars dated August 4, 2009, do not exist in infant-plaintiff's medical records, and did not exist during an examination of infant-plaintiff by Dr. Regina De Carlo, a neurologist. NYHTC states that it is also surprised by plaintiffs' allegation of surgical negligence, because it contradicts the preliminary conference order, in which plaintiffs stated that they would not allege this claim against NYHTC. In light of the Amended BPs, both the MS-2 Defendants and NYHTC seek further discovery, including an examination of infant-plaintiff and a deposition of Ms. Chcco.

In opposition, plaintiffs argue that the Amended BPs were proper and served prior to the filing of the note of issue, as a matter of right. Plaintiffs state that the new injuries and claims come from the depositions, and that there are no surprises or prejudice to defendants. Specifically, they assert that the extension of dates of negligence results from Ms. Checo's deposition testimony that she continued to treat with Dr. Matamala through August 3, 2007, during which she experienced continuing injuries related to fecal incontinence. Plaintiffs contend that Ms. Checo's inability to provide and care for her son was a continuing and foreseeable injury. Additionally, plaintiffs argue that the MS-2 Defendants' claim that there is no evidence of developmental and speech delays is without merit, because Ms. Checo testified that infant-plaintiff had speech problems and was unable to crawl because of his inability to use his weak, left arm. Plaintiffs maintain that Ms. Checo's testimony that infant-plaintiff had no medically-related speech problems is not conclusive, as this issue will be ultimately decided by the jury. Plaintiffs also state that defendants are already in possession of the discovery they seek, that defendants were on notice of these claims and injuries far in advance of the service of the Amended BPs, and that their failure to request discovery prior to the filing of the note of issue results in a waiver of that discovery.

In reply, defendants assert that they did not pursue discovery with these new injuries and claims in mind, and that they could not conduct further discovery because they received the Amended BPs after the note of issue was filed.

As to NYHTC's argument that plaintiffs' Amended BPs should be vacated due to their failure to obtain leave of court, under C.P.L.R. Rule 3042(b), "a party may amend the bill of particulars once as of course prior to the filing of the note of issue." Plaintiffs served upon all



defendants verified bills of particulars on or about August 14, 2009; supplemental verified bills of particulars as to special damages and disabilities on or about December 1, 2009; and the Amended BPs on or about December 23, 2011. As such, plaintiffs properly amended their bills of particulars for the first time prior to the filing of the note of issue. C.P.L.R. Rule 3042(b). In addition, plaintiffs were entitled to assert new injuries and claims in the Amended BPs. Martinovics v. N.Y. City Health & Hosps. Corp., 285 A.D.2d 532, 535 (2d Dep't 2001). Accordingly, that branch of NYHHC's motion seeking to vacate the Amended BPs, in whole or in part, is denied.

As to the vacatur of the note of issue, the Uniform Rules for Trial Courts state, in pertinent part, that a party "may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect[.]" 22 N.Y.C.R.R. § 202.21(c). A statement in the certificate of readiness that erroneously asserts that discovery known to be necessary has been completed is a basis for vacating the note of issue. Savino v. Lewittes, 160 A.D.2d 176, 177 (1st Dep't 1990). The moving party need only demonstrate that the case is not ready for trial. Audiovox Corp. v. Benyamini, 265 A.D.2d 135, 139 (2d Dep't 2000).

Here, plaintiffs misstated in their note of issue that all discovery known to be necessary was complete. Plaintiffs have yet to comply in full with discovery demands set forth in the court orders dated January 11, 2011 and April 5, 2011. Although plaintiffs provided infant-plaintiff's father's last known address, they have yet to produce the photographs to which Ms. Checo testified. Furthermore, because the Amended BPs were served nearly concurrently with the note of issue, defendants did not have adequate time to seek discovery related to the new claims and injuries

in the Amended BPs. The MS-2 Defendants relied on Ms. Checo's representation that infant-plaintiff did not have speech problems, and as such, conducted their discovery with this understanding. Thus, their surprise to new claims alleging developmental and speech delays is reasonable. Likewise, NYHTC conducted its discovery based on plaintiffs' representation that surgical negligence would not be alleged against it, and its surprise as to this new claim is also reasonable. Moreover, the case to which plaintiffs cite, Schroeder v. IESINY Corp., 24 A.D.3d 180 (1st Dep't 2005), is distinguishable from the case at bar. Here, plaintiffs did not disclose the new injuries and allegations until the time of their filing of the note of issue, and defendants did not have ample time to request additional discovery. Defendants have demonstrated the manner in which this case is not ready for trial, and accordingly, their request for an order vacating the note of issue is granted.

As to defendants' request for further discovery, C.P.L.R. § 3101(a) requires the full disclosure of all matters "material and necessary" in the prosecution of an action. "After commencement of an action in which the mental or physical condition . . . of a party . . . is in controversy, any party may serve notice on another party to submit to a physical, mental or blood examination[.]" C.P.L.R. § 3121(a). See Koump v. Smith, 25 N.Y.2d 287 (1969). Here, plaintiff-infant underwent a neurological evaluation on February 4, 2011 with Dr. DeCarlo, whose report stated briefly that the child was "well-developed," and that he was able to complete full sentences. However, the portion of the report regarding his "speech" and "development," which plaintiffs contend is sufficient, is not nearly as robust as the portion of the report regarding his ability to use his left arm, which was the primary alleged injury at that time. Because plaintiffs now put into issue infant-plaintiff's developmental and speech abilities, defendants are entitled to a further examination

of him. Additionally, Ms. Checo asserts new injuries and allegations not previously pled, which were not fully explored at her deposition. Defendants have demonstrated that such additional discovery is necessary. Accordingly, defendants are entitled to a further medical examination of infant-plaintiff and a further deposition of Ms. Checo, limited to the new injuries and theories of liability alleged in the Amended BPs.

Both the MS-2 Defendants and NYHTC seek an order compelling plaintiffs to serve further bills of particulars specific as to each defendant. Specifically, the MS-2 Defendants argue that alleging negligent delivery and labor against Dr. Matamala is improper, because Dr. Matamala was not present at the labor and delivery on February 4, 2007. NYHTC argues that plaintiffs' claim that NYHTC's "agents, servants, and/or employees committed acts of negligence" is a boilerplate response that does nothing to limit surprise or amplify plaintiffs' claims, and is impermissively vague. In opposition, plaintiffs state that Dr. Matamala's prenatal care of Ms. Checo was so poor that Dr. Matamala should be held liable for the alleged negligence that occurred during the delivery, even though she was not present for the delivery. As to NYHTC's argument that the Amended BP fails to identify for whom NYHTC is vicariously liable, plaintiffs state that NYHTC is vicariously liable for Dr. Matamala. In reply, the MS-2 Defendants argue that plaintiffs can only claim negligence as to the acts performed by Dr. Matamala, and that Dr. Matamala is entitled to a bill of particulars that specifies the acts or omissions attributable to her. They argue that plaintiffs acknowledge that Dr. Matamala was not present for the delivery; therefore, such claims alleging negligence of infant-plaintiff's delivery are not specific as against her. NYHTC states that no surgeries are performed at its facilities, and that plaintiffs cannot allege surgical negligence against it.

“The purpose of the bill of particulars is to amplify the pleadings, limit the proof and prevent surprise at trial.” Twiddy v. Standard Mar. Transp. Servs., 162 A.D.2d 264, 265 (1st Dep’t 1990). A response to a demand for a bill must clearly detail the specific acts of negligence attributable to each defendant. Batson v. La Guardia Hosp., 194 A.D.2d 705, 706 (2d Dep’t 1993). The “trial court has broad discretion to determine compliance with discovery demands.” Graves v. County of Albany, 278 A.D.2d 578 (3d Dep’t 2000).

Here, plaintiffs were directed in the preliminary conference order to produce bills of particulars specific to each defendant. The court agrees with defendants that they may be held liable only for the acts attributable to each defendant. Therefore, plaintiffs’ allegations that Dr. Matamala is responsible for the alleged negligent act of other physicians is improper. Similarly, the courts have found that the language “agents, servants, and/or employees” is improper, as it is vague and overbroad, and does not apprise the defendant specifically for whom it is allegedly vicariously liable. Gannotta v. Long Island College Hosp., 92 A.D.2d 930 (2d Dep’t 1983); Batson v. La Guardia Hosp., 194 A.D.2d 705, 706 (2d Dep’t 1993). Therefore, plaintiffs’ failure to state for whom specifically NYHTC is vicariously liable renders their bills of particulars inadequate as to NYHTC. Accordingly, plaintiffs are directed to serve further bills of particulars, specifying for whom NYHTC is vicariously liable and setting forth allegations specific to each defendant.

NYHTC also seeks an order compelling plaintiffs to particularize its special damages claims, as was directed in the preliminary conference order. C.P.L.R. Rule 3043(a)(9) requires special damages to be particularized. Plaintiff bears the burden of calculating special damages claimed by them. Bass v. Kansas, 198 A.D.2d 693, 694 (3d Dep’t 1993). Ordinarily, a plaintiff

“may serve a supplemental bill of particulars with respect to claims of continuing special damages and disabilities without leave of court at any time, but not less than thirty days prior to trial.” C.P.L.R. Rule 3043(b). Here, plaintiffs served supplemental bills of particulars on or about March 8, 2010. However, plaintiffs’ response stating that “special damages are not being claimed until the date of trial, except [that] plaintiffs will claim past damages to the full extent of any amounts claimed by lien holders to be due and owing and/or to the full extent of any amounts attached by lien holders claimed to [be] due and owing” does not satisfy the requirements of Rule 3043. Plaintiffs must, at the very least, itemize and calculate the amount of special damages they claim up until now. Plaintiffs may further supplement their bills of particulars with respect to special damages up until thirty (30) days prior to the date of trial. Accordingly, plaintiffs are directed to serve further supplemental bills of particulars in compliance with the C.P.L.R.

Accordingly, it is hereby

ORDERED that the portion of defendants’ motions seeking to strike the note of issue is granted and the note of issue is hereby vacated and the case is stricken from the trial calendar; and it is further

ORDERED that the portion of defendants’ motion seeking additional discovery is granted and, subject to the limitations contained herein, all further discovery in this matter shall be completed within sixty (60) days from the date of service of a copy of this order with notice of entry; and it is further

ORDERED that, within fifteen (15) days from the entry of this order, movants shall serve a copy of this order with notice of entry on all parties and upon the Clerk of the Trial Support Office (Room 315), who is hereby directed to strike the case from the trial calendar and make all required notations thereof in the records of the courts; and it is further

ORDERED that, within fifteen (15) days from completion of discovery as hereinabove directed, plaintiffs shall cause the action to be placed upon the trial calendar by the filing of a new note of issue and statement of readiness and payment of the fee therefor; and it is further


ORDERED that plaintiffs shall serve further bills of particulars upon defendants, specifying the alleged acts or omissions attributable to each defendant, for whom each institutional defendant is vicariously liable, and special damages claim, within fifteen days (15) of the date of this order; and it is further

ORDERED that all other relief requested is denied; and it is further

ORDERED that the parties shall appear for a status conference on April 24, 2012, in Room 345, Part 6, at 9:30 a.m.

Dated: March 22, 2012

ENTER:

  
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JOAN B. LOBIS, J.S.C.

**FILED**  
MAR 26 2012  
NEW YORK  
COUNTY CLERK'S OFFICE