

**Siegel v Engel Burman Senior Hous. at E. Meadow,  
LLC**

2010 NY Slip Op 33833(U)

October 21, 2010

Sup Ct, Nassau County

Docket Number: 6709/09

Judge: Antonio I. Brandveen

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This opinion is uncorrected and not selected for official publication.

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

Present: ANTONIO I. BRANDVEEN

J. S. C.

ANDREW SIEGEL, as Executor Under Will of  
CAROL E. SIEGEL, Deceased,

TRIAL / IAS PART 29  
NASSAU COUNTY

Plaintiff,

Index No. 6709/09

- against -

Motion Sequence No.  
001,002,003

ENGEL BURMAN SENIOR HOUSING AT  
EAST MEADOW, LLC d/b/a THE BRISTAL AT  
EAST MEADOW, ULTIMATE CARE NEW  
YORK, LLC, XYZ CORP., ESTHER  
GIOBADDIA, ERIC SCHOENFELD, MD,  
MARTIN E. KESSLER, MD, THE PLASTIC  
SURGERY GROUP, PC and SOUTH NASSAU  
COMMUNITIES HOSPITAL HOME CARE  
SERVICES,

Defendant.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits .....	<u>1,2,3</u>
Answering Affidavits .....	<u>4</u>
Replying Affidavits .....	<u>5,6</u>
Briefs: Plaintiff's / Petitioner's .....	_____
Defendant's / Respondent's .....	_____

The defendants Engel Burman Senior Housing at East Meadow, LLC d/b/a The Bristol at East Meadow, Ultimate Care New York, LLC and Esther Goubadia s/h/a Esther Giobaddia move, under Motion Sequence number one, pursuant to CPLR 3042 and 3043 to strike the plaintiff's April 28, 2010 purported supplemental bill of particulars because it alleges medical malpractice and negligence against the defendants for acts not previously alleged in the April 8, 2009 complaint, or the April 8, 2009 bill of particulars. The defendants Engel Burman Senior Housing at East Meadow, LLC d/b/a The Bristol at East Meadow, Ultimate Care New York, LLC and Esther Goubadia s/h/a Esther Giobaddia also move pursuant to CPLR 3101, 3126, and 3042 to strike the plaintiff's allegations in the bill of particulars regarding negligent hiring and training as there is no cause of action in the complaint for negligent hiring and training. The attorney for Engel Burman Senior Housing at East Meadow, LLC d/b/a The Bristol at East Meadow, Ultimate Care New York, LLC and Esther Goubadia s/h/a Esther Giobaddia states, in a June 24, 2010 affirmation with other supporting papers, the affirmant sent a good faith letter to the plaintiff's counsel on May 14, 2010 which rejected the supplemental bill of particulars because it raised new theories of liability outside the scope of the complaint and the prior bill of particulars. The attorney for Engel Burman Senior Housing at East Meadow, LLC d/b/a The Bristol at East Meadow, Ultimate Care New York, LLC and Esther Goubadia s/h/a Esther Giobaddia notes the defense counsel was unaware of the additional allegations, deposed the plaintiff without this knowledge, and produced the defendants for their depositions without knowing the full allegations claimed by the plaintiff. The attorney for Engel Burman Senior Housing at East Meadow, LLC d/b/a The Bristol at East Meadow, Ultimate Care New York, LLC and Esther Goubadia s/h/a Esther Giobaddia asserts the plaintiff's attorney has refused to withdraw the supplemental bill of particulars which would highly prejudice the defense. The attorney for Engel Burman Senior Housing at East Meadow, LLC d/b/a The Bristol at East Meadow, Ultimate Care New York, LLC and Esther Goubadia s/h/a Esther Giobaddia avers there is no cause of action for negligent hiring nor training in this complaint, so any allegations in the bill of particulars for such a claim must be stricken. The attorney for Engel Burman Senior Housing at East Meadow, LLC d/b/a The Bristol at East Meadow, Ultimate Care New York, LLC and Esther Goubadia s/h/a Esther Giobaddia adds, even if the plaintiff were to seek to amend the complaint to assert a cause of action for negligent hiring, there

is no viable claim here because the plaintiff asserts the decedent was injured by Esther Goubadia s/h/a Esther Giobaddia during the scope of her employment with the defendant facility, so under a theory of *respondeat superior* there is no claim.

The defendant Eric Schoenfeld, MD cross moves, under Motion Sequence number two, pursuant to CPLR 3042 and 3043 to strike the plaintiff's June 17, 2010 purported supplemental bill of particulars because it alleges medical malpractice and negligence against Dr. Schoenfeld for acts not previously alleged in the April 8, 2009 complaint, or the April 8, 2009 bill of particulars. Dr. Schoenfeld also cross moves pursuant to CPLR 3020 (d) (3) because the plaintiff himself should verify his pleadings. The attorney for Dr. Schoenfeld states, in a June 28, 2010 affirmation with other supporting papers, the plaintiff asserts for the first time in the supplemental bill of particulars, among other allegations the decedent had no pulses in her feet; the defendants ignored this fact; the defendants failed to appreciate and act upon the wound was extremely serious for a patient who was so vascularly compromised; and the defendants failed to properly and timely give orders to the South Nassau Home Care nurses. The attorney for Dr. Schoenfeld adopts the arguments of counsel for the co-defendants, to wit the plaintiff should not be permitted to assert additional allegations of negligence in a supplemental bill of particulars in a medical malpractice case, as the supplemental bill of particulars is limited to claims of continuing special damages and disabilities. The attorney for Dr. Schoenfeld argues this supplemental bill of particulars is really an amended bill of particulars, and Courts hold where a plaintiff alleges new theories of medical malpractice or negligence in an amended bill of particulars that were not originally asserted the amended bill of particulars should be stricken. The attorney for Dr. Schoenfeld avers the plaintiff executor must verify this purported supplemental bill of particulars rather than the plaintiff's attorney, who share their law office spaces at in the same suite at a New York County address because the plaintiff is employed and works there.

The plaintiff cross moves, under Motion Sequence number three, to direct all of the defendants to accept the supplemental (amended) bills of particulars. The plaintiff also cross moves to preclude the defendants Engel Burman Senior Housing at East Meadow, LLC d/b/a The Bristol at East Meadow and Dr. Schoenfeld from offering any evidence at trial of compliance with statutory sections set forth in the supplemental bill of

particulars, and seeks costs and sanctions against the defendants Engel Burman Senior Housing at East Meadow, LLC d/b/a The Bristol at East Meadow and Dr. Schoenfeld for respectively bringing on a frivolous motion and cross motion. The plaintiff's attorney states, in a July 8, 2010 affirmation with other supporting papers, this affirmation is support of the plaintiff's cross motion, and in opposition to both defense motions. The plaintiff's attorney points out all counsels to the parties attended an August 5, 2009 preliminary conference with the Court, and consented to the resulting preliminary conference order with a direction to the plaintiff to serve a supplemental bill of particulars no later than 30 days prior to the filing of a note of issue, and the plaintiff to advise about allegations of violations of statutes, rules or regulations. The plaintiff's attorney claims bills of particulars were furnished to all of the defendants prior to the August 5, 2009 preliminary conference, except for the need, long since met to furnish a separate bill of particulars to Esther Goubadia s/h/a Esther Giobaddia. The plaintiff's attorney notes the demand for a bill of particulars from Engel Burman Senior Housing at East Meadow, LLC d/b/a The Bristol at East Meadow, Ultimate Care New York, LLC and Esther Goubadia s/h/a Esther Giobaddia does not seek any information about statutory violations. The plaintiff's attorney reports, although all of the parties completed their examinations before trial, discovery is continuing, and no note of issue has been filed, however this affirmant states, following the depositions of Engel Burman Senior Housing at East Meadow, LLC d/b/a The Bristol at East Meadow, Ultimate Care New York, LLC and Esther Goubadia s/h/a Esther Giobaddia, it was learned a number of statutorily required documents had not been produced after the decedent's records were purportedly furnished to plaintiff's counsel. The plaintiff's attorney claims other violations of those regulations were either uncovered during the depositions, and additional ones seemed to have also been committed, but responses from Engel Burman Senior Housing at East Meadow, LLC d/b/a The Bristol at East Meadow, Ultimate Care New York, LLC and Esther Goubadia s/h/a Esther Giobaddia confirmed all of the violations now set forth in the disputed yet requisite supplemental bill of particulars. The plaintiff's attorney distinguishes the legal citations of the defense as inapplicable even in the absence of the August 5, 2009 preliminary conference order. The plaintiff's attorney takes issue with the defense assertions of prejudice. The plaintiff's attorney concedes the supplemental bill of particulars to Dr. Schoenfeld was mislabeled, but it is an amended bill of particulars. The

plaintiff's attorney contends CPLR 3043 and 3042 are different, and plaintiff may amend the bill of particulars once for any reason, including adding new theories of liability. The plaintiff's attorney postulates the contents of the supplemental bill of particulars do not represent a new theory, rather the language merely constitutes further examples of negligence by the defendants based upon discovery results, and adds Dr. Schoenfeld had orders to the nurses of South Nassau Communities Hospital Home Care Services. The plaintiff's attorney imparts that among the discovery supporting these amendments are a December 26, 2007 letter by Jay A. Kerner, D.P.M., a foot specialist, who examined the decedent's feet, to Dr. Schoenfeld, and the deposition of Barbara Weiss, a nurse with South Nassau Communities Hospital Home Care Services which show the attorney for Dr. Schoenfeld was aware of Dr. Schoenfeld's acts and omissions at the time of the doctor's deposition. The plaintiff's attorney states the statutory violations asserted against Engel Burman Senior Housing at East Meadow, LLC d/b/a The Bristol at East Meadow, Ultimate Care New York, LLC and Esther Goubadia s/h/a Esther Giobaddia require those defendants to prepare certain records, and maintain those records fro three years after the death of a resident. The plaintiff's attorney points out the decedent passed away two years ago, and the acknowledged failure regarding the records represents a clear statutory violation. The plaintiff's attorney submits the appropriate remedy is preclusion of evidence at trial by Engel Burman Senior Housing at East Meadow, LLC d/b/a The Bristol at East Meadow, Ultimate Care New York, LLC and Esther Goubadia s/h/a Esther Giobaddia showing compliance with any of the provisions set forth in the supplemental bill of particulars, and severe sanctions for the frivolous defense motions.

The attorney for Dr. Schoenfeld states, in a July 22, 2010 affirmation in reply to the plaintiff's opposition to Dr. Schoenfeld's cross motion, and in opposition to the plaintiff's cross motion, the plaintiff's attorney had not objected to that branch of Dr. Schoenfeld's motion requesting the plaintiff verify the bill of particulars. The attorney for Dr. Schoenfeld reiterates the assertions in the June 28, 2010 affirmation, and requests the Court direct the plaintiff to verify the bill of particulars. The attorney for Dr. Schoenfeld argues the doctor's motion is not frivolous, and requests the Court deny costs or sanctions to the plaintiff. The attorney for Dr. Schoenfeld reprises the purported supplemental bill of particulars is really an amended bill of particulars, and should be

appropriately characterized by the plaintiff. The attorney for Dr. Schoenfeld asserts the doctor was unaware of this area of inquiry because it was outside of the scope of the pleadings, and the doctor was an undisclosed theory of negligence when the doctor preparing fo the examination before trial.

The attorney for the defendants Engel Burman Senior Housing at East Meadow, LLC d/b/a The Bristol at East Meadow, Ultimate Care New York, LLC and Esther Goubadia s/h/a Esther Giobaddia points, in a July 27, 2010 affirmation in further support of the motion of these defendants, and in opposition to the plaintiff's cross motion, to the preliminary conference order which indicated the plaintiff was to advise of the allegations of violations of statutes, rules and regulations no later than 30 days prior to the filing of the note of issue. The attorney for the defendants Engel Burman Senior Housing at East Meadow, LLC d/b/a The Bristol at East Meadow, Ultimate Care New York, LLC and Esther Goubadia s/h/a Esther Giobaddia asserts the preliminary conference order does not mean the plaintiff can cite allegations of statutes and violations outside the scope of the complaint, or in an effort to establish a statutory cause of action which none existed. The attorney for the defendants Engel Burman Senior Housing at East Meadow, LLC d/b/a The Bristol at East Meadow, Ultimate Care New York, LLC and Esther Goubadia s/h/a Esther Giobaddia reiterates new theories of medical malpractice or negligence in a supplemental or amended bill of particulars should be struck as a matter of law. The attorney for the defendants Engel Burman Senior Housing at East Meadow, LLC d/b/a The Bristol at East Meadow, Ultimate Care New York, LLC and Esther Goubadia s/h/a Esther Giobaddia notes all of the plaintiff's original allegations, to wit the verified complaint and verified bill of particulars are related to one specific accident, and the plaintiff makes no allegations about other treatment dates nor lack of documentation. The attorney for the defendants Engel Burman Senior Housing at East Meadow, LLC d/b/a The Bristol at East Meadow, Ultimate Care New York, LLC and Esther Goubadia s/h/a Esther Giobaddia argues there was no notice of the additional allegations concerning statutory violations which had nothing to do with the treatment rendered to the decedent on the day of the accident. The attorney for the defendants Engel Burman Senior Housing at East Meadow, LLC d/b/a The Bristol at East Meadow, Ultimate Care New York, LLC and Esther Goubadia s/h/a Esther Giobaddia states the plaintiff was advised a search was unsuccessful for certain records, such as evaluations and service plans

maintained by these defendants. The attorney for the defendants Engel Burman Senior Housing at East Meadow, LLC d/b/a The Bristol at East Meadow, Ultimate Care New York, LLC and Esther Goubadia s/h/a Esther Giobaddia contends the plaintiff's preclusion request is misplaced, and adds the regulations pertaining to such records do not state an appropriate sanction for the failure to maintain the records. Moreover, the attorney for the defendants Engel Burman Senior Housing at East Meadow, LLC d/b/a The Bristol at East Meadow, Ultimate Care New York, LLC and Esther Goubadia s/h/a Esther Giobaddia states the plaintiff fails to cite any law to establish preclusion under the circumstances asserted by the plaintiff, and adds the Department of Health regulations only require documents be available for the government agency to review. The attorney for the defendants Engel Burman Senior Housing at East Meadow, LLC d/b/a The Bristol at East Meadow, Ultimate Care New York, LLC and Esther Goubadia s/h/a Esther Giobaddia indicates these defendants provided the plaintiff with several records which comprise a complete response to the plaintiff's demands, and notes the plaintiff fails to establish a right to seek recourse for unavailability of such records to the plaintiff. The attorney for the defendants Engel Burman Senior Housing at East Meadow, LLC d/b/a The Bristol at East Meadow, Ultimate Care New York, LLC and Esther Goubadia s/h/a Esther Giobaddia further states the plaintiff fails to submit any evidence the alleged failure to produce the requested records was willful, contumacious, or an act of bad faith, or show the defendants gain an unfair advantage from the alleged loss of the decedent's records. The attorney for the defendants Engel Burman Senior Housing at East Meadow, LLC d/b/a The Bristol at East Meadow, Ultimate Care New York, LLC and Esther Goubadia s/h/a Esther Giobaddia argues the fails to establish a purported statutory violations provides for a cause of action. The attorney for the defendants Engel Burman Senior Housing at East Meadow, LLC d/b/a The Bristol at East Meadow, Ultimate Care New York, LLC and Esther Goubadia s/h/a Esther Giobaddia avers the plaintiff's preclusion request aimed at Esther Goubadia s/h/a Esther Giobaddia should be denied because the plaintiff offers no evidence the regulations apply to aides at Engel Burman Senior Housing at East Meadow, LLC d/b/a The Bristol at East Meadow, or Esther Goubadia s/h/a Esther Giobaddia had any obligation to maintain the alleged records as shown in the deposition testimony of Esther Goubadia s/h/a Esther Giobaddia. The attorney for the defendants Engel Burman Senior Housing at East Meadow, LLC d/b/a



The Bristol at East Meadow, Ultimate Care New York, LLC and Esther Goubadia s/h/a Esther Giobaddia asserts the motion by Engel Burman Senior Housing at East Meadow, LLC d/b/a The Bristol at East Meadow, Ultimate Care New York, LLC and Esther Goubadia s/h/a Esther Giobaddia is not frivolous, but based on the good faith belief the plaintiff's supplemental bill of particulars impermissibly allege new theories of liability, and expands the scope of the verified complaint and verified bill of particulars. The attorney for the defendants Engel Burman Senior Housing at East Meadow, LLC d/b/a The Bristol at East Meadow, Ultimate Care New York, LLC and Esther Goubadia s/h/a Esther Giobaddia points out the plaintiff fails to address the defense assertion the allegations regarding negligent training should be dismissed from the bill of particulars because there is no cause of action for negligent training or supervision in the verified complaint.

The plaintiff's attorney states, in a July 30, 2010 reply affirmation in further support of the plaintiff's cross motion, and in opposition to the defense motions, Engel Burman Senior Housing at East Meadow, LLC d/b/a The Bristol at East Meadow never requested such information in discovery demands, and Engel Burman Senior Housing at East Meadow, LLC d/b/a The Bristol at East Meadow is silent about the failure to request statutory violations in the original demand for a bill of particulars. The plaintiff's attorney also states Engel Burman Senior Housing at East Meadow, LLC d/b/a The Bristol at East Meadow, Ultimate Care New York, LLC and Esther Goubadia s/h/a Esther Giobaddia fail to provide the Court with a sworn statement from a person with personal knowledge of record keeping procedures. The plaintiff's attorney contends the affirmation by counsel for Engel Burman Senior Housing at East Meadow, LLC d/b/a The Bristol at East Meadow, Ultimate Care New York, LLC and Esther Goubadia s/h/a Esther Giobaddia has no probative value, and cannot serve to refute the claim by the plaintiff that the documents sought have been willfully discarded to avoid disclosure. The plaintiff's attorney asserts preclusion is warranted for this failure, even in the absence of any bad faith conduct, but the appropriate sanction is wholly within the Court's discretion. The plaintiff's attorney avers the defense has no standing to complain about the plaintiff's current request because the defense failed to demand a list of the violated statutes. The plaintiff's attorney contends the amendment of the bill of particulars is further evidence of the negligent conduct previously pled, and any violation of a State

statute would be evidence of negligence. The plaintiff's attorney takes issue with the legal citations by counsel for Engel Burman Senior Housing at East Meadow, LLC d/b/a The Bristol at East Meadow, Ultimate Care New York, LLC and Esther Goubadia s/h/a Esther Giobaddia on the issue of new theories of negligence. The plaintiff's attorney states counsel for Dr. Schoenfeld reliance on certain legal citation is misplaced, and there are only conclusory allegations of prejudice, but no affidavit from Dr. Schoenfeld. The plaintiff's attorney adds neither Engel Burman Senior Housing at East Meadow, LLC d/b/a The Bristol at East Meadow, Ultimate Care New York, LLC and Esther Goubadia s/h/a Esther Giobaddia nor Dr. Schoenfeld show they could not prepare for the depositions with respect to the allegations of statutory violations. The plaintiff's attorney argues the defense arguments regarding spoliation and intentional withholding of documents and records are without merit, and preclusion is the appropriate remedy.

This Court carefully reviewed and considered all of the papers submitted by the parties with respect to this motion and two cross motions with respect to the underlying medical malpractice, negligence and wrongful death action arising from the allegation that an oxygen tank fell on the decedent. The defense motion by Engel Burman Senior Housing at East Meadow, LLC d/b/a The Bristol at East Meadow, Ultimate Care New York, LLC and Esther Goubadia s/h/a Esther Giobaddia pursuant to CPLR 3042 and 3043 seeking to strike the plaintiff's April 28, 2010 purported supplemental bill of particulars because it alleges medical malpractice and negligence against the defendants for acts not previously alleged in the April 8, 2009 complaint, or the April 8, 2009 bill of particulars is denied because the defense has not met its burden with respect to CPLR 3042 and 3043. The defense cross motion by Dr. Schoenfeld pursuant to CPLR 3042 and 3043 to strike the plaintiff's June 17, 2010 purported supplemental bill of particulars because it alleges medical malpractice and negligence against Dr. Schoenfeld for acts not previously alleged in the April 8, 2009 complaint, or the April 8, 2009 bill of particulars is denied because the defense has not met its burden with respect to CPLR 3042 and 3043. That branch of the plaintiff's cross motion is granted seeking to direct all of the defendants to accept the supplemental (amended) bills of particulars by the plaintiff. That branch of the plaintiff's cross motion is denied seeking to preclude the defendants Engel Burman Senior Housing at East Meadow, LLC d/b/a The Bristol at East Meadow and Dr. Schoenfeld from offering any evidence at trial of compliance with statutory sections

set forth in the supplemental bill of particulars. And, the issue of a possible jury instruction for the plaintiff's allegation of missing evidence is respectfully referred to the trial Court. That branch of the plaintiff's cross motion is denied seeking costs and sanctions against the defendants Engel Burman Senior Housing at East Meadow, LLC d/b/a The Bristol at East Meadow and Dr. Schoenfeld for respectively bringing on a frivolous motion and cross motion. "To avoid sanctions, at the least, the conduct must have a good faith basis [citations omitted]" (*Dank v. Sears Holding Management Corp.*, 69 A.D.3d 557, 558, 892 N.Y.S.2d 510 [2<sup>nd</sup> Dept 2010]). This Court has considered all of the criteria set forth in 22 NYCRR § 130-1.1 (c) with respect to an award of costs and sanctions. The Court determines the plaintiff has not met the burden with respect to this provision for noncompliance sanctions, and the defendants appear to have a good faith basis for their motions.

Accordingly, Motion Sequence number one is denied; Motion Sequence number two is denied; Motion Sequence number three is granted in part and denied in part in accord with this decision. This decision constitutes the order of this Court.

So ordered.

Dated: **October 21, 2010**

ENTER:



J. S. C.

NOT FINAL DISPOSITION

**ENTERED**

**OCT 29 2010**

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**