

<b>Elfenbein v Freeberg</b>
2011 NY Slip Op 32262(U)
August 2, 2011
Sup Ct, Nassau County
Docket Number: 13582-09
Judge: Steven M. Jaeger
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,  
Acting Supreme Court Justice

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JUDIT ELFENBEIN and DIANA V.  
ELFENBEIN, as Executrices of the Estate of  
ALEXANDER ELFENBEIN,

Plaintiff,

-against-

GARY W. FREEBERG, M.D., ROBERT T.  
SCHREIBER, M.D., JONATHAN M.  
WAXNER, M.D., MICHAEL COMO, M.D.,  
JEFFREY M. WOLF, M.D., NASSAU CHEST  
PHYSICIANS, P.C., ALAN BULBIN, M.D.,  
DAVA KLIRSFELD, M.D., FARAH SHAMS,  
M.D., VITALY KROL, M.D., NORTH SHORE  
INFECTIOUS DISEASE CONSULTANTS,  
P.C. and ST. FRANCIS HOSPITAL,

Defendants.  
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TRIAL/IAS, PART 43  
NASSAU COUNTY  
INDEX NO.: 13582-09

MOTION SUBMISSION  
DATE: 5-31-11

MOTION SEQUENCE  
NOS. 6, 7, and 8

The following papers read on this motion:

- Notice of Motion, Affirmation, and Exhibits X
- Notice of Motion, Affirmation, and Exhibits X
- Notice of Cross-Motion, Affirmation, and Exhibits X
- Affirmation in Opposition X

These motions by the defendants Alan Bulbin, M.D., Dava Klirsfeld, M.D., Farah Shams, M.D., Vitaly Krol, M.D., North Shore Infectious Disease Consultants, P.C. (sequence no. 6) and Gary Freeberg, M.D.; Robert T. Schreiber, M.D., Jonathan M. Waxner, M.D., Michael Como, M.D., Jeffrey M. Wolf, M.D. and Nassau Chest Physicians, P.C. (sequence no. 7); and, cross-motion by the defendant St. Francis

Hospital (sequence no. 8), for an order pursuant to CPLR 3042(a) compelling plaintiffs to provide a more responsive Bill of Particulars and to remove objectionable language is granted as provided herein.

The plaintiffs in this action seek to recover damages for, inter alia, malpractice.

In their Demand for a Verified Bill of Particulars, the defendants Drs. Bulbin, Klirnsfeld, Shams, Krol and North Shore Infectious Disease Consultants, P.C., demanded that the plaintiffs:

“(a) Set forth a statement of the acts or omissions on the part of [them] constituting the malpractice or negligence claimed.

(b) State the accepted medical practices, customs or standards which it is claimed were violated by the defendant with respect to the acts and/or omissions referred to above.

(c) Set forth the date(s), approximate time of the day and the location where each alleged act of malpractice or negligence took place.”

Similarly, in their Demand for a Verified Bill of Particulars, the defendants Drs. Freeberg, Schreiber, Waxner, Como, Wolf and Nassau Chest Physicians, P.C., demanded that the plaintiff set forth the specific acts of negligence alleged against them.

Finally, in its Demand for a Verified Bill of Particulars, St. Francis Hospital demanded that the plaintiff set forth:

1. The dates and times of the day of the alleged negligent acts and/or omissions which will be alleged against [them].
2. The location of the alleged negligent acts and/or omissions charged against [them].

3. A statement of each and every act of negligence, commission or omission which plaintiff(s) will claim as the basis of their alleged malpractice . . . .
4. [T]he names of each and every person who performed such acts or failed to act; if the names are not known, describe the physical appearance with sufficient clarity for ready identification and state the occupation of each such person.
5. State whether or not any claim is made as to improper or defective equipment and, if so, identify the equipment and state the defective conditions.
6. Give a statement of the accepted medical practices, customs and medical standards which it is claimed were violated/departed from by [them].
7. If the plaintiff complains that the defendant(s) ignored signs, symptoms, made an erroneous diagnosis, afforded improper treatment, administered improper and/or contraindicated drugs in an incorrect dosage, failed to take or administer tests or improperly took and administered tests, state:
  - a) the complaints, signs, symptoms that the defendant(s) ignored;
  - b) in what respect the diagnosis was erroneous and incorrect , what the claimed correct diagnosis is, the point in time that the plaintiff claims the defendant(s) should have made the correct diagnosis;
  - c) the improper treatment that was afforded and in what manner the said treatment was improperly performed;
  - d) the name of each and every contraindicated drug;
  - e) the name of each proper drug allegedly administered incorrectly;
  - f) the name of each and every test the defendant(s) failed to take or administer; and,
  - g) the name of each and every test the defendant(s) improperly took or administered and the manner in which each said test was improperly taken or administered.

[\* 4]

8. If plaintiff claims that defendant(s) improperly performed a physical examination or performed a contraindicated procedure and/or unnecessary procedure, state:

- a) in what manner the physical examination was improperly performed;
- b) the name of the surgical procedure and the date performed; and,
- c) in what manner the surgical procedures were improperly performed.

While objecting to the Demands as calling for evidentiary material or information in the form of or to be gleaned from expert testimony and as overly broad, improper and beyond the scope of a Bill of Particulars, the plaintiff served an identical Verified Bill of Particulars on all of the defendants, totaling nine doctors and three entities all of whom played different roles in the care of the plaintiff's decedent. To wit, the plaintiff responded that the defendants

"were negligent in that they failed to diagnose that plaintiff was suffering from lung cancer; and failed to treat plaintiff's lung cancer; and failed to take appropriate and timely measures given plaintiff's symptomology; and the defendants were otherwise negligent."

"The purpose of a bill of particulars is to amplify pleadings, limit proof, and prevent surprise at trial, not to provide evidentiary material." Toth v Bloshinsky, 39 AD3d 848, 849 (2<sup>nd</sup> Dept. 2007), citing Moran v Hurst, 32 AD3d 909 (2<sup>nd</sup> Dept. 2006); Grcic v Peninsula Hosp. Ctr., 110 AD2d 625 (2<sup>nd</sup> Dept. 1985); Cirelli v Victory Mem. Hospital, 45 AD2d 856 (2<sup>nd</sup> Dept. 1974). "It must provide a general statement of the acts or omissions constituting the alleged negligence." Toth v Bloshinsky, *supra*, at p. 849, citing Kaplan v Rosiello, 16 AD3d 626 (2<sup>nd</sup> Dept. 2005). "Notably, in a medical malpractice action, as in any action for personal injuries, the bill of particulars 'requires

[\* 5]

only a “[g]eneral statement of the acts or omissions constituting the negligence claimed.” ’ ’ ’ Felock ex rel. Felock v Albany Medical Center Hosp., 258 AD2d 772 (3<sup>rd</sup> Dept. 1999), quoting Rockefeller v Hwang, 106 AD2d 817, 818 (3<sup>rd</sup> Dept. 1984); quoting CPLR 3043(a)(3); citing Coughlin v Festin, 53 AD2d 800 (3<sup>rd</sup> Dept. 1976). Statements of the accepted medical practices, customs and standards the medical defendants allegedly violated and the specific ways they did so call for evidentiary material in the form of or gleaned from expert testimony are beyond the scope of a bill of particulars. Heyward v Ellenville Community Hosp., 215 AD2d 967 (3<sup>rd</sup> Dept. 1995), citing CPLR 3043(a)(3); State v General Elec. Co., 173 AD2d 939 (3<sup>rd</sup> Dept. 1991); McKenzie v St. Elizabeth Hosp., 81 AD2d 1003, 1004 (4<sup>th</sup> Dept. 1981); Williams v Shapiro, 67 AD2d 706, 707 (2<sup>nd</sup> Dept. 1979); see also Toth v Bloshinsky, supra. “There 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, supra, at p. 849, citing Dellaglio v Paul, 250 AD2d 806 (2<sup>nd</sup> Dept. 2005). Nevertheless, “responses to a demand for a bill must clearly detail the specific acts of negligence attributable to each defendant.” Miccarelli v Fleiss, 219 AD2d 469, 470 (1<sup>st</sup> Dept. 1995), citing Batson v LaGuardia, Hosp., 194 AD2d 705, (2<sup>nd</sup> Dept. 1993); Lamb v Rochester General Hosp., 130 AD2d 963 (4<sup>th</sup> Dept. 1987); Brynes v New York Hosp., 91 AD2d 907 (1<sup>st</sup> Dept. 1983); see also, Toth v Bloshinsky, supra; Felock ex rel. Felock v Albany Medical Center Hospital, supra, at p. 773. And, “otherwise negligent” is not an acceptable response to a bill of particulars as it “ ‘destroys its most essential function, to wit: to limit proof and to prevent surprise to an

adverse party.' " Hayes v Kearney, 237 AD2d 769, 770 (3<sup>rd</sup> Dept. 1997), quoting Schlenker v School Dist. No. 15 of Cementon, Town of Catskill, Greene County, 198 Misc. 775, 775-556 (Supreme Court Albany County 1950). Nevertheless, defendants are entitled to a bill of particulars that narrows the issues sufficiently to permit a reasonable defense when a demand for a description of the negligence allegedly attributable to each defendant is made. Heyward v Ellenville Community Hosp., supra, at p. 968, citing Cheridan v Lemery & Reid, 211 AD2d 894 (3<sup>rd</sup> Dept. 1995); Batson v LaGuardia, Hosp., supra, at p. 705; Morris v Fein, 177 AD2d 915, 916 (3<sup>rd</sup> Dept. 1991); Bellen v Baghei-Rad, 148 AD2d 827 (3<sup>rd</sup> Dept. 1989).

The plaintiffs have failed to distinguish between the defendants' alleged acts and omissions. The plaintiffs are directed to serve Verified Bills of Particulars distinguishing between each defendant's alleged act(s) and/or omission(s).

The phrase "otherwise negligent" is an impermissible response and the plaintiffs are ordered to delete it. While the plaintiffs are not required to state what accepted medical practices were violated, all of the other demands are appropriate. The plaintiffs are directed to reply to each of them to the best of their ability within forty-five (45) days of the date of this Order.

This constitutes the Decision and Order of the Court.

Dated: August 2, 2011

  
STEVEN M. JAEGER, A.J.S.C.

**ENTERED**  
AUG 05 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE