Cheeks v City of New York
2015 NY Slip Op 31892(U)
September 10, 2015
Supreme Court, Bronx County
Docket Number: 21962/1999
Judge: Mary Ann Brigantti
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

9/28

SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

PRESENT: Honorable Mary Ann Brigantti

----------X

TATIANA CHEEKS,

Plaintiff,

-against-

DECISION / ORDER

THE CITY OF NEW YORK, Index No. 21962/1999

Defendant

----------X

The following papers numbered 1 to 5 read on the below motion noticed on September 8, 2015, and duly submitted on the Part IA15 Motion calendar of **September 8, 2015**:

Papers Submitted[1]		Numbered
City's Order to Show Cause, Exhibits		1,2
Pls.' Aff. in Opp., Exhibits	DS	3,4
Oral Argument Transcript		5

By way of Order to Show Cause, the defendant City of New York ("Defendant") seeks an order:

(1) quashing the judicial subpoena duces tecum served upon the New York City Department of Correction ("NYCDOC"), the New York City Administration of Children's Services ("NYCACS"), the New York City Department of Human Resources ("NYCDHR"), and the New York City Police Department ("NYPD"), pursuant to CPLR 2304;

(2) precluding Plaintiff from calling Michael M. Baden, M.D., at trial;

(3) precluding Plaintiff from presenting any and all evidence regarding a theory of negligent investigation, including but not limited to the testimony of Edward Mamet, as there is no recognized cause of action for negligent investigation;

(4) precluding Plaintiff from calling Harold S. Raucher, M.D.;

(5) precluding Plaintiff from introducing evidence relating to new damages and liability claims raised in her supplemental bill of particulars served without leave of court, including but

[1]Additional legal arguments contained in correspondence later faxed to the Court's chambers on September 9, 2015, were not considered.

not limited to the testimony of Robert Lloyd Goldstein, M.D; and

(6) pursuant to 22 NYCRR 130-1.1, sanctioning Plaintiff's counsel for her willful and contumacious conduct.

Plaintiff Tatiana Cheeks ("Plaintiff") opposes the motion.

I. Background

This action arises out of an alleged false arrest, and malicious prosecution of the Plaintiff, who was arrested on May 27, 1998, in connection with the death of her then 5 ½ - week-old daughter, Cha-Nell Coppedge. On December 29, 1999, Plaintiff served a verified bill of particulars. In that submission, Plaintiff claimed that this occurrence took place "on or about May 27, 1998, at approximately between 11:00AM through 10:00PM, inside the New York City Police Department of the 78th Precinct." The parties entered into a Preliminary Conference on March 9, 2000, resulting in a Preliminary Conference Order, which directed the Defendant to "provide arrest records for incident herein condition upon receipt of authorization." Prior to the initial trial of this matter, the Defendant moved, in part, to quash subpoenas served on the NYCDOC by the Plaintiff. In a decision dated March 31, 2011, Justice Larry Schachner granted the motion, stating in relevant part that "counsel represented in open court that she is withdrawing any claim that DOC was negligent in failing to put plaintiff in protective custody."

This matter proceeded to trial before Justice John Barone in April of 2011. Prior to the trial, Plaintiff and Defendant entered into a stipulation wherein Plaintiff, *inter alia* discontinued with prejudice all claims and causes of action that were not contained in her Notice of Claim, including allegations that the Defendant was negligent in supervising Plaintiff while she was in the Department of Correction's custody, as well as any 42 U.S.C. §1983 claims. The trial went forward, and resulted in a verdict in favor of the Plaintiff on April 21, 2011. Defendant subsequently moved to dismiss Plaintiff's complaint for failure to establish a prima facie case, or in the alternative, to set the verdict aside and direct a new trial, as the verdict was against the weight fo the credible evidence. Justice Barone denied Defendant's motion in its entirety, and upheld the verdict. Defendant subsequently appealed. By Order entered December 16, 2014, the Appellate Division, First Department, vacated the jury verdict entered in favor of the

Plaintiff, and remanded this matter for a new trial. In a sharply contested decision, a majority of the panel ultimately concluded that (1) a new trial was warranted because the trial court should have admitted into evidence an unredacted copy of the autopsy report that was generated by the New York City Medical Examiner with respect to the baby's death. The unredacted report contained the medical examiner's conclusion that the manner of the infant's death was "homicide (parental neglect);" and (2) there is an issue of fact as to whether Detective Donald Faust of the New York City Police Department had probable cause to arrest Plaintiff (*Cheeks v. City of New York*, 123 A.D.3d 532 [1st Dept. 2014]).

On August 10, 2015, the Defendant moved by Order to Show Cause to quash a subpoena duces tecum served upon the NYDOC, seeking records allegedly identical to the subpoena that was served and quashed prior to the first trial in 2011. The Order to Show Cause also sought to preclude any and all evidence, including but not limited to the testimony of Michael M. Baden, M.D., forensic pathologist, that challenged the acts and/or omissions and/or findings of the Office of the Chief Medical Examiner ("OCME") in connection with the autopsy performed on Plaintiff's infant daughter, Cha-Nell. Plaintiff opposed the motion. After oral argument, Justice Mitchell Danziger granted Defendant's motion in its entirety. In an Order dated August 13, 2015, Justice Danziger held: (1) that Plaintiff's subpoena seeking records from the NYCDOC is quashed pursuant to Justice Schachner's Order, and (2) Plaintiff is precluded from offering or presenting any and all evidence, including but not limited to the testimony of Dr. Baden, that challenges that OCME's (medical examiner's) findings regarding the cause and manner of Cha-Nell's death, and the NYPD's reliance thereon on those conclusions.

After being thereafter served with additional subpoenas, and a "modified" CPLR 3101(d) response with respect to Dr. Baden, Defendant made the instant motion. The proposed Order to Show Cause was presented to the City Part on September 8, 2015, who then referred it to this Court on that same date, when jury selection on the new trial was scheduled to begin. Plaintiff appeared on that date and submitted written opposition to the Order to Show Cause. On the record, both parties presented oral argument. This Court determined, at the outset, that it would decide the motion before jury selection commenced, contrary to Plaintiff counsel's suggestion to address evidentiary issues during the course of the trial.

II. Applicable Law and Analysis

The Subpoenas

At oral argument, specifically with respect to the subpoenas, Plaintiff's counsel indicated that he was only opposing those branches of the motion which sought to quash (1) an August 18, 2015 subpoena served upon NYCDOC, and (2) an August 4, 2015 subpoena served upon the NYCDHR, seeking "the complete Medicaid records" for Plaintiff. Accordingly, those branches of Defendant's Order to Show Cause seeking to quash the subpoenas served on NYCACS, as well as the NYPD, are granted without opposition, and those subpoenas are quashed.

Defendant asserts that at no point during the seventeen years of litigation did Plaintiff ever seek records maintained by, among other entities, the NYCDOC, or the NYCHR. Prior to the initial trial, Defendant moved, in part, to quash subpoenas served upon the NYCDOC by Plaintiff. On May 31, 2011, Defendant's motion was granted. The short-form Order of Justice Schachner stated, in relevant part "[t]he court notes that counsel represented in open court that she is withdrawing any claim that DOC was negligent in failing to put plaintiff in protective custody." Further, before the initial trial commenced, the parties entered into a stipulation where the Plaintiff agreed, among other things, to discontinue with prejudice all claims and causes of action not included in her Notice of Claim, including claims that the Defendant was negligent in supervising Plaintiff while in the NYCDOC custody, and that NYCACS improperly removed Plaintiff's surviving child, Davaughn, from her custody after it was determined that Cha-Nell died from malnutrition.

On June 4, 2015, Plaintiff served a subpoena upon the NYCDOC, seeking records identical to a subpoena that was served and quashed prior to the first trial, in 2011. On August 10, 2015, the Defendant moved to quash that subpoena, and to preclude all evidence, including but not limited to the testimony of Dr. Baden, that challenged the acts and/or omissions and/or findings of the OCME in connection with the autopsy performed on Cha-Nell. On August 13, 2015, Justice Danziger granted Defendant's motion, and among other things, quashed the newly-served subpoena. In response to Justice Danziger's decision, the Plaintiff served another subpoena on the NYCDOC, dated August 18, 2015. That subpoena differs slightly from the June

4, 2015 subpoena, as it seeks "original or certified copy of the records that related to whether inmate Tatiana Cheeks, NYSID 8914401P, was placed in special protective or separate custody while incarcerated after her arrest on or about May 27, 1998, and original or certified copy of the records that related to whether inmate Tatiana Cheeks, NYSID 8914401P, was placed on suicide watch while incarcerated after her arrest on or about May 27, 1998." The now-quashed June 4, 2015 subpoena sought the "full and complete" inmate record of Plaintiff, as well as the "full and complete Department of Corrections Rules and Regulations relative to the Department's Operation Order for High Status Inmates in full force and effect in May 1998."

"[A] subpoena duces tecum may not be used for purposes of discovery or to ascertain the existence of evidence" (*Matter of Terry D.*, 81 N.Y.2d 1042, 1044 [1993]). Although Plaintiff's revised August 18, 2015 subpoena issued to the NYCDOC is more limited and specific when compared to the quashed June 4, 2015 subpoena, it nevertheless improperly seeks production of materials that Plaintiff failed to seek during the discovery process that took place over the course of several years before trial (*Id.*, *see also Mestel & Co. v. Smythe Masterson & Judd, Inc.*, 215 A.D.2d 329 [1st Dept. 1995]). While Plaintiff now argues that the NYCDOC records are only being sought to corroborate her trial testimony, this is unavailing as presumably Plaintiff knew of these facts, as well as her anticipated testimony during the discovery process years ago, and yet she made no attempt to secure such records until three weeks before jury selection is scheduled to begin on her new trial. Under these circumstances, the post note-of-issue subpoenas must be quashed as improper (*Id.*, *see also Bour v. 259 Bleeker LLC*, 104 A.D.3d 454 [1st Dept. 2013]). For similar reasons, the subpoena served on the NYCHR, seeking "the complete Medicaid records" for Plaintiff, must also be quashed. The subpoena, seeking records that will allegedly bolster Plaintiff's damages claim, is plainly being used as a substitute for pretrial discovery (*Id.*, *see also Soho Generations of New York, Inc. v. Tri-City Ins. Brokers, Inc.*, 236 A.D.2d 276 [1st Dept. 1997]).

The Experts

A. Dr. Michael A. Baden, M.D., and Dr. Harold S. Raucher, M.D.

As noted *supra*, the August 13, 2015 Order of Justice Danziger precluded the Plaintiff

from offering any evidence, including that of Dr. Baden, that challenged the OCME's findings regarding the cause and manner of Cha-Nell's death, and the NYPD's reliance on those conclusions in arresting Plaintiff. In response to that Order, Plaintiff served a "modified" CPLR 3101(d) response with respect to Dr. Baden, stating that Dr. Baden will not assert that there were departures from good practice or fault on the part of the OCME with respect to the Autopsy Report. Dr. Baden's testimony is, instead, being submitted based on the foundation, *inter alia*, of anticipated testimony of retired NYPD Captain Edward Mamet, and pediatric expert Dr. Harold Raucher, that "had Detective Faust been a prudent NYPD Detective proceeding prudently in all the circumstances here present he would and should have consulted with available and relevant information from them before proceeding with the arrest of the Plaintiff." Dr. Baden will present expert testimony explaining the relevant medical materials and jargon as to what such consultation and explanation would have elicited and engendered, to aid the jury in determining whether Detective Faust acted prudently.

Defendant argues that this proposed testimony inappropriately seeks to assert an unpleaded "negligent investigation" claim, which is not a recognized cause of action in New York. Second, it is the exclusive purview of the OCME to determine the cause of death. Since the OCME determined that Cha-Nell's death was unnatural and a homicide, it was the obligation of the NYPD to determine who was responsible for that death, and to arrest that person, so long as the low threshold of "probable cause" was satisfied. Third, the "modified" 3101(d) exchange suggests that Dr. Baden, who is a forensic pathologist, is in a position to comment and, in fact conclude, whether or not probable cause existed to arrest the plaintiff. Lastly, the "modified" exchange does not conform to the prior rulings of Justice Schachner or Danziger, or the stipulation of the parties, as it continues to challenge the way in which the autopsy was conducted, its findings, and its conclusions.

In opposition, Plaintiff argues, *inter alia*, that Plaintiff will not ask any questions of Dr. Baden as to any alleged negligence, failure, or departures on the part of the medical examiner. Instead, Dr. Baden will be presented only to, among other things, explain and decipher the contents of the now-unredacted autopsy report.

This Court notes that the"modified" 3101(d) exchange, specifically paragraphs 3-12,

state, *inter alia*, that Dr. Baden will testify as to:

(1) the mechanism of the injury and causation of Cha-Nell's death, upon review of the autopsy report,

(2) the interaction between the NYPD and the OMCE regarding the "investigation of deaths and possible homicides,"

(3) the fact that children "rarely die of malnutrition" and it would be scientifically and medically erroneous to conclude or assert from photographs that Cha-Nell was not fed or was neglected,

(4) will note that the Autopsy revealed the presence of breast milk in the stomach and other findings in the digestive system to suggest that the child ingested food a day or two prior to death, and will challenge the manner in which the Autopsy was performed;

(5) the inclusion of "Homicide (Parental Neglect)" in the final diagnosis was a matter of opinion;

(6) that Detective Faust should have spoken with the OCME before arresting the suspect because the diagnosis from the OCME was "contrary to the statements made at the autopsy at which Detective Faust was present where the same medical examiner stated that there was no malnutrition present;

(7) his opinion that there was insufficient medical evidence to support a diagnosis of homicidal malnutrition and that the cause of death and manner of death remains undetermined;

(8) his opinion that the treating hospital should have made a clinic appointment for Cha-Nell, in light of the circumstances.

This proposed testimony is specifically prohibited by prior orders of the Court, notably the August 13, 2015 Order from Justice Danziger, which expressly forbade Plaintiff from offering "any and all evidence, including but not limited to the testimony from Dr. Baden," that would challenge the OCME's findings regarding the cause and manner of death, or the NYPD's reliance on those findings in later arresting the plaintiff.

Plaintiff claims in opposition that Dr. Baden will only be asked questions relating to, *inter alia*, food and stool in the stomach, intestines, and colon of the baby and what those findings meant, and to explain the now-unredacted "technical jargon within the autopsy report." This

Court fails to see how this proposed testimony would be appropriate in light of Justice Danziger's Order, which precluded any challenge to the autopsy report's findings. The opinions contained in the Appellate Division's decision, moreover, do not require a different result with respect to the proposed witness. As noted by a majority of the panel, the now-unredacted autopsy report is not being offered for its truth, but rather, for the effect it had on the mind of the detective who made the arrest[2]. Accordingly, Dr. Baden's anticipated opinions with the ultimate findings or the methodology of the medical examiner in preparing his autopsy report are irrelevant to the issue of whether it was reasonable for Detective Faust to make the arrest. To the extent that Dr. Baden will opine, based upon the anticipated foundation testimony from Dr. Raucher and retired NYPD Captain Edward Mamet, that Detective Faust did not act prudently under the circumstances of this case, due to his alleged failure to consult with certain additional medical personnel, such anticipated foundation testimony will not be permitted in this action, as will be addressed *infra*.

For similar reasons, this Court will grant that branch of Defendant's Order to Show Cause that seeks to preclude the testimony of Dr. Harold S. Raucher. Dr. Raucher conceded at the first trial that the infant died of malnutrition, and that there was no evidence that this malnutrition was caused by defect in digestion or malassimilation. According to the re-submitted CPLR 3101(d) response, Dr. Raucher intends to testify, *inter alia*, that: death of breast-fed infants by starvation in the U.S. is rare, but is an issue in developing countries and that pediatricians and other health care providers are especially watchful for problems with breast feeling infants and young mothers; that it is possible that the mother of a calorie-deprived infant would be unaware of a breast feeding problem until the infant is weighed at a doctor's office; that the plaintiff testified

---

[2]"As Justice Kapnick correctly observes, the conclusion of the report was being offered, not for its truth, but 'for the effect it had on the mind of the detective who made the arrest.' And, again, it was the reasonableness of the detective's decision to arrest in light of the information in his possession at the time – not the underlying question of whether plaintiff had neglected the infant – that was at issue at the trial of this matter" (123 A.D.3d at 551 [Friedman, J.]).

"To the extent that the trial court sustained the redaction because defendant did not call an expert medical witness to testify as to the manner of death, this too was error since the redacted conclusion was not being offered for its truth, i.e., the infant's manner of death was in fact 'homicide (parental neglect),' but rather, for the effect it had on the mind of the detective who made the arrest (*Rivera v. City of New York*, 200 A.D.2d 379 [1st Dept. 1994])" (123 A.D.3d at 557-558 [Kapnick, J.]).

that she fed her baby regularly and she was unaware of the child's failure to gain weight; that the presence of curdled milk in the baby's stomach and of stool in her colon support the fact that Cha-Nell was indeed receiving feedings; and that although the death was preventable, the Plaintiff acted prudently and reasonably, and there was no neglect on her part. None of this proposed testimony, however, is relevant to the issue at hand: whether Detective Faust had probable cause in making his arrest. The Appellate Division directed, on retrial, that the complete, unredacted Autopsy Report be presented to the jury. Moreover, Justice Danziger issued an Order precluding any challenges to the findings regarding to cause and manner of Cha-Nell's death, or the NYPD's reliance on that Report. Proposed testimony regarding the state of mind of the Plaintiff (based upon her own statements), and any other proffered opinions of Dr. Raucher, are simply irrelevant to the issue of probable cause. Contrary to Plaintiff's contentions, Justice Acosta was writing for the dissent when he concluded that placing the opinion found in the autopsy report as to the cause and manner of death, without accompanying medical examiner testimony, would have caused prejudice to the plaintiff that outweighed any probative value (123 A.D.3d 532, 572-573), and this Court does not agree with Plaintiff's argument that the Appellate Division presented a mandate in this new trial with respect to the expert evidence that should or should not be admitted in this matter.

B. Ret. Captain Edward Mamet

Plaintiff has served a CPLR 3101(d) response, dated August 6, 2015, reserving the right to call Captain (retired) Edward Mamet, C.P.P., C.F.E., an expert in the field of, *inter alia*, police practices and departures, at the time of trial. The notice states that Captain Mamet will testify regarding the police practices and departures involved in the defendant's criminal investigation and arrest of Plaintiff for the murder of her infant child, Cha-Nell. The third branch of Defendant's present motion seeks to preclude Plaintiff from presenting any and all evidence regarding a theory of negligent investigation, including but not limited to the testimony of Captain Mamet, as there is no recognized cause of action for negligent investigation. After reviewing the papers and considering the oral argument presented, this Court will resolve this branch of the motion as follows.

By virtue of Justice Danziger's Order, dated August 13, 2015 – which is binding on this Court– Plaintiff is not only precluded from challenging the ultimate findings on the cause and manner of Cha-Nell's death found in the autopsy report, but is also precluded from challenging the police department's reliance on that report. Based upon the Plaintiff's offer of proof, the proposed testimony of this expert witness will be in defiance of that Order – for example, Plaintiff states that Captain Mamet will testify that it was "highly unusual for a medical examiner to offer his opinion on the perpetrator of the injury..." and that Detective Faust "should have been aware of how unusual it was for [the medical examiner] to do this...," and that the detective should have spoken with additional various medical personnel. This Court finds that such questioning falls within the penumbra of the prior Order, and is precluded based on that Order, and also based on the decision of the Appellate Division[3].

In light of the fact that Plaintiff never produced an expert on police practices or departures during the initial trial, the Court orders Plaintiff to bring in the expert as an offer of proof with regards to the remaining testimony that Plaintiff wishes to elicit. The parties are directed to refrain from identifying this witness or discussing his anticipated testimony during jury selection.

C. Dr. Robert Lloyd Goldstein, M.D., and the Supplemental Bill of Particulars

Plaintiff's verified bill of particulars, dated December 29, 1999, alleged the following injuries sustained as a result of this incident:

(1) headaches

(2) nightmares

(3) insomnia

(4) psychological trauma

(5) humiliation

(6) ridicule

[3]For these additional reasons, Dr. Baden is precluded from testifying as to what information would have been elicited from conversations with various medical personnel.

(7) embarrassment

(8) resultant emotional stress

(9) acute mental anxiety

(10) obloquy

(11) Claustrophobic

(12) Impairment of future earnings potential

(13) loss of normal pursuits of life and pleasures of life

(14) resultant emotional stress, acute mental anxiety and inability to perform everyday functions.

Plaintiff then stated that the above-mentioned injuries and their effects are "permanent, except such minor injuries have subsided." Plaintiff claimed that the above injuries, "resulting in anxiety, mental anguish and shock," "essentially prevented plaintiff" from enjoying a normal life.

The "supplemental bill of particulars," served on August 7, 2015, added four alleged injuries:

(1) continuing post traumatic stress syndrome

(2) future post traumatic stress syndrome

(3) continuing emotional distress

(4) future emotional distress.

It should be noted that the supplemental bill of particulars contains several additional allegations listed in bold print, that were not included in the original 1999 submission. In open court and on the record, however, counsel for the Plaintiff indicated that he was withdrawing "item four... going into 15, 16" of the supplemental bill of particulars.

First, the supplemental bill of particulars was served, without leave of court, several years after this action was commenced, several years after the note of issue was filed, over eight months after the Appellate Division vacated the jury verdict that was rendered in 2011, and approximately three weeks before the new trial was scheduled to commence.

It is true that where a plaintiff seeks to allege "continuing consequences" of injuries suffered and described in a previous bill of particulars, rather than new or unrelated injuries, the

bill is supplemental and does not require prior leave of court (*see Anderson v. Ariel Services, Inc.*, 93 A.D.3d 525 [1st Dept. 2012]; CPLR 3043 [b]). In other words, supplementation without leave of court is only appropriate where the alleged continuing special damages or disabilities are an anticipated sequelae of the injuries described in the original bill of particulars (*see Tate v. Colabello*, 58 N.Y.2d 84, 86-87 [1983]).

In this matter, Plaintiff's originally-served bill of particulars made general allegations of "resultant emotional stress" and "mental anxiety" and "psychological trauma" sustained as a result of this incident. Under some circumstances, allegations of post-traumatic stress disorder do not allege a "new injury" but rather, merely supply a diagnostic label to injuries previously alleged (*see Allen v. Braxton*, 21 A.D.3d 1272 [4th Dept. 2005]). From the commencement of this action, however, to the current date, spanning a course of some sixteen (16) years, Plaintiff provided no medical records detailing her treatment or any injuries sustained that were causally related to this incident. Defendant's counsel asserted at oral argument, without rebuttal by Plaintiff, that the only records that had been received during the first trial regarding such treatment were certain therapy records concerning ACS proceedings with respect to Plaintiff's elder son. Further, Defendant's counsel set forth on the record that at the time of this incident, a number of other traumatic events occurred in Plaintiff's life that could have amounted additional stress that was unrelated to Cha-Nell's passing. This is, accordingly, not a situation where the "supplemental" bill of particulars only amplified the general, previously-alleged injuries, or only set forth "anticipated sequelae," of those injuries. Moreover, this is not a situation where it can be stated that the defendant had sustained no appreciable prejudice as a result of the proposed "supplemental" allegations (*see generally Spiegel v. Gingrich*, 74 A.D.3d 425 [1st Dept. 2010]; CPRL 3043[c]). The 2015 bill of particulars is most fairly viewed as an "amended" bill of particulars. Amended bills of particulars improperly served after the filing of the Note of Issue, and without leave of court, are ordinarily deemed a nullity (*see Kassis v. Teacher's Ins. and Annuity Ass'n*, 258 A.D.2d 271 [1st Dept. 1999]). It is nevertheless true that leave to amend pleadings is generally freely given (*Id*). When such leave is sought at or on the eve of trial, however, judicial discretion in allowing such an amendment should be "discreet, circumspect, prudent, and cautious" (*Perricone v. City of New York*, 96 A.D.2d 531 [2nd Dept. 1983], *aff'd*, 62

N.Y.2d 661 [1994], *quoting Symphonic Electronic Corp. v. Audio Devices*, 24 A.D.2d 746 [1st Dept. 1965]). Moreover, where, as here, there has been an extended delay in moving to amend, the proponent of the amendment must provide an affidavit of reasonable excuse for the delay as well as an affidavit of merit (*Kassis v. Teacher's Ins. and Annuity Ass'n*, 258 A.D. at 272 [internal citations omitted]). In this case, Plaintiff has proffered no sufficient reasonable excuse for its delay in serving its amended bill of particulars, some eight years after filing the Note of Issue. The fact that her present counsel was recently retained does not excuse her failure to seek leave to amend, despite presumably having personal knowledge of injuries sustained as a result of this incident. Further, Plaintiff has not demonstrated that the proposed amendment has merit. Annexed to her 3101(d) response, Plaintiff submits an unsworn report from Dr. Goldstein that is based on a single examination of the Plaintiff, that took place on August 11, 2015, some seventeen (17) years after this incident occurred. That report now alleges, for the first time, that as a result of this incident, Plaintiff suffers from posttraumatic stress disorder and major depressive disorder, and that she requires long-term psychiatric treatment for an indefinite period of time. Consideration of these alleged injuries, submitted on the eve of trial, without reasonable excuse and without a sufficient showing of merit, would be overly prejudicial to the Defendant. Accordingly, Defendant's Order to Show Cause will be granted to the extent that Plaintiff is precluded from offering any evidence of new injuries pled in her supplemental bill of particulars dated August 7, 2015, and Plaintiff and her expert are precluded from offering testimony at trial regarding any injury or damages not previously pled, including, but not limited to, post-traumatic stress disorder, major depressive disorder, suicidal ideations, and future long-term psychiatric treatment.

Defendant also notes that Dr. Goldstein reports that Plaintiff sought additional medical treatment at Montefiore Hospital, Bellevue Psychiatric Hospital, and "inpatient and outpatient psychiatric treatment in Massachusetts." Further, the Plaintiff has recently provided courtesy copies of subpoenas for records from Bellevue Hospital, Montefiore Medical Center, and New York Methodist Hospital. To date, no records from any of those institutions have been provided to the Defendant. Defendant, therefore, argues that Plaintiff should be prohibited from introducing or relying upon any evidence related to anything covered by those subpoenas to the

providers. Plaintiff has not addressed this branch of Defendant's Order to Show Cause in its opposition papers. In any event, for the same reasons as outlined above, Plaintiff may not now, on the eve of trial, endeavor to submit treatment records not previously disclosed that are purportedly related to these newly-pled injuries.

Sanctions

Under the circumstances of this case, the Defendant has not demonstrated sufficient willful or contumacious conduct so as to warrant entitlement to the striking of the complaint, pursuant to 22 NYCRR 130-1.1.

Conclusion

Accordingly, it is hereby

ORDERED, that Defendant's motion for an Order, pursuant to CPLR 2304, quashing the judicial subpoena duces tecum served upon the NYCDOC, NYCACS, NYCDHR, and the NYPD, is granted, and those subpoenas are quashed, and it is further,

ORDERED, that the branch of Defendant's motion are granted to the extent that Plaintiff is precluded from calling Michael M. Baden, M.D., and Harold S. Raucher, M.D., at the time of trial, and it is further,

ORDERED, that Defendant's motion to preclude the testimony of Captain Edward Mamet is granted in part, insofar as the expert is precluded from testifying as to the detective's alleged improper reliance on the autopsy report, that the detective should have spoken with the medical examiner, or should have spoken with other medical personnel, and the expert is precluded from offering any other testimony challenging the findings of the autopsy report, and it is further,

ORDERED that the Court reserves decision on that branch of Defendant's motion seeking preclusion of evidence regarding a theory of negligent investigation, including but not limited to the remaining anticipated testimony of Captain Mamet, pending an offer of proof/ voir dire of the expert witness, and it is further,

ORDERED, that Plaintiff is precluded from offering testimony at trial, including but not limited to the proposed testimony of Dr. Robert Lloyd Goldstein, M.D., regarding any injury or damages not previously pled, including, but not limited to, post-traumatic stress disorder, major depressive disorder, suicidal ideations, and future long-term psychiatric treatment, and it is

further,

ORDERED, that the branch of Defendant's motion seeking preclusion of the Plaintiff from introducing or relying upon evidence related to recently-served subpoenas for records from Bellevue Hospital, Montefiore Medical Center, and New York Methodist Hospital, is granted, unopposed, and it is further,

ORDERED, that Defendant's request for sanctions, pursuant to 22 NYCRR 130-1.1, is denied.

This constitutes the Decision and Order of this Court.

Dated: Sept 10, 2015

Hon. Mary Ann Brigantti, J.S.C.