McCormack v Winick
2016 NY Slip Op 30190(U)
February 3, 2016
Supreme Court, Suffolk County
Docket Number: 10-31231
Judge: Arthur G. Pitts
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SHORT FORM ORDER

INDEX No. 10-31231
CAL. No. 14-01034MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 8-29-13 (#003)
MOTION DATE 10-23-14 (#004)
ADJ. DATE 1-8-15
Mot. Seq. # 004 - MD
005 - XMD

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WILLIAM MCCORMACK and JAMES BOPP, as Guardians of TIMOTHY MCCORMACK, an Incapacitated Person,

Plaintiffs,

- against -

JONATHAN CHARLES WINICK, M.D., LONG ISLAND NEUROLOGY P.C. and SOUTHSIDE HOSPITAL,

Defendants.

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Upon the following papers numbered 1 to 42 read on this motion for summary judgment and cross motion to amend pleadings; Notice of Motion/ Order to Show Cause and supporting papers 1 - 22; Notice of Cross Motion and supporting papers 23 - 36; Answering Affidavits and supporting papers 37 - 38; Replying Affidavits and supporting papers 39 -42; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Southside Hospital seeking, inter alia, summary judgment dismissing the complaint is denied; and it is further

ORDERED that the cross motion by plaintiffs for leave to amend their bill of particulars is denied, without prejudice to renew, upon proper papers within thirty (30) days of the entry date of this order.

On March 19, 2008, Timothy McCormack presented to the Emergency Department of Southside Hospital with complaints of fever, weakness, falls, generalized malaise and decreased oral intake for three

days, and a diffuse erythematous rash for one day. Due to a history of seizures, he was taking Dilantin and Topamax, and had recently started taking Lamictal. Timothy McCormack's initial vitals included a hypotensive blood pressure, an elevated temperature and an oxygen saturation rate of 94%. Based upon his presentation, Timothy McCormack was placed in respiratory isolation. The laboratory tests of blood samples taken in the Emergency Department revealed that Timothy McCormack's white blood cell count, glucose level, creatinine level, and blood urea nitrogen level were elevated, and that he had a low sodium level of 133. A spinal tap was performed, which revealed clear spinal fluid. In addition, a computerized tomography ("CT") scan demonstrated symmetric frontal lobe gliosis, indicating a remote parenchymal injury and a coincidental arachnoid cyst within the superior portion of the posterior fossa. The CT scan report indicated that there was no acute intracranial hemorrhage mass, mass effect or infraction. After undergoing various consultations, Timothy McCormack was diagnosed with Stevens-Johnson syndrome, secondary to Lamictal, the new seizure medication, as well as questionable sepsis, rhabdomyolysis/renal failure and seizure disorder. Following the diagnosis, he was admitted into the hospital and placed in the Intensive Care Unit, an intravenous ("IV") catheter was inserted to administer fluid and broad-spectrum antibiotics, and he was given deep vein thrombosis prophylaxis.

On March 20, 2008, at approximately 6:00 p.m., Timothy McCormack was discovered out of his bed, on his hands and knees on the floor, in an agitated state with no apparent signs of trauma. As a result of his behavior, restraints were applied and a head CT scan was performed, which did not show any signs of gross interval changes since the CT study performed the previous day. On March 21, 2008, Timothy McCormack was intubated as a result of developing acute hypoxic respiratory failure. He also was in liver, pulmonary and renal failure, and he had disseminated intravascular coagulation ("DIC"). He was given fresh frozen plasma, platelets, and vitamin K to help treat the DIC. During the days after the aforementioned occurrence, Timothy McCormack was extubated and reintubated, and he received numerous blood transfusions due to low hemoglobin; his prothrombin time and partial thromboplastin time remained elevated.

Later that day, Dr. Goyal, a nephrologist, examined Timothy McCormack and issued orders stating that the patient was not to be administered heparin. However, a heparin-based saline solution was used to flush Timothy McCormack's IV lines and permacath catheter every 12 hours. Between March 25 and March 26, 2008, Timothy McCormack was weak and lethargic, but alert, and was extubated and re-intubated due to his low oxygen saturation rate. On March 27, 2008, Timothy McCormack was diagnosed with sepsis, the infecting bacteria was identified as Vancomycin-resistant enterococcus faecium ("VRE"), and he was given Xigris to treat the infection. On March 30, 2008, following an examination by a neurologist, who noted that Timothy McCormack's pupils were dilated, that he was wearing a facemask and that he followed simple instructions, he was once again extubated.

On March 31, an early morning note authored by one of the nurses stated that Timothy McCormack was "quite lethargic and extremities flaccid moves hands only." Later that day, Dr. Michael Sacca, a surgeon, placed a hemodialysis permacath and central line in Timothy McCormack's chest for him to receive dialysis. Dr. Sacca noted in his interoperative report that no complications occurred during the procedure. A note in the hospital chart states that, at approximately 3:20 p.m., Timothy McCormack was awake but lethargic, secondary to the permacath placement surgery. At approximately 4:20 p.m., Timothy McCormack's dialysis treatment began and about an hour into the treatment he became tachycardiac, but

his blood pressure remained stable. At approximately 6:20 p.m., it was noted that his heart rate decreased to the 60s, that he was not responding, that he was "decorticated to noxious stimuli." A CT scan revealed that Timothy McCormack had an acute right subdural hematoma and a smaller left subdural hematoma. The radiologist report also noted a "significant shift of midline structures to the left with effacement of the right lateral ventricle and the third ventricle [and] dilation of the left lateral ventricle, and the fourth ventricle was noted to possibly be slightly smaller than on prior examination." However, no changes to the arachoid cyst previously were observed, and linear lucency was observed in the right occipital bone, which may have been representative of a fracture. After receiving the results of the CT scan, Timothy McCormack was taken to the operating room for an evaluation of the large right subdural hematoma in the frontal and parietal area by Dr. William McCormick.

On April 1, 2008, a repeat CT scan was performed on Timothy McCormack's head, which demonstrated improved overall mass effect from the preoperative study. However, the scan also showed subdural blood/cerebrospinal fluid on the right side of the brain and a continued right to left shift. As a result, a repeat surgical exploration and decompression of the subdural hematoma immediately was performed by Dr. McCormick. On May 8, 2008, Timothy McCormack was transferred to the Traumatic Brain Unit, where he underwent physical occupational and speech therapy. On June 26, 2008, Timothy McCormack was discharged from the Traumatic Brain Unit and transferred to St. Johnland Nursing Home Inc. with limited speech, limited movement in his extremities, the ability to follow simple commands in his left upper extremity, and a rash. Timothy McCormack's final diagnosis at the time of his discharge was "acute renal failure, acute tubular necrosis, rhabdomyolysis, hypersensitive drug reaction/probable Stevens-Johnson syndrome, subdural hematoma, septic shock, hypercoagulopathy, thrombocytopenia, hypopotassemia, seizure disorder and anemia."

On January 29, 2009, William McCormack and James Bopp were appointed guardians of the person and property of Timothy McCormack, an incapacitated individual. Thereafter, plaintiffs William McCormack and James Bopp, as guardians of Timothy McCormack, an incapacitated individual, commenced this action against defendants Jonathan Winick, M.D., Long Island Neurology, P.C., and Southside Hospital, to recover damages for injuries Timothy McCormack allegedly sustained as a result of medical malpractice, and negligent hiring and supervision. The gravamen of the complaint against Southside Hospital alleges that Timothy McCormack was caused to sustain a fracture to his skull, resulting in the development of a subdural hematoma when he fell from his hospital bed, and that the hospital was negligent in failing to take precautions to prevent such an occurrence. Plaintiffs further allege that, in contravention of the order given by Dr. Goyal, heparin was administered to Timothy McCormick during his admission to Southside Hospital in March 2008, and that the hospital failed to properly perform and interpret the radiographic studies taken of Timothy McCormack's brain.

Southside Hospital now moves for summary judgment on the basis that its staff did not deviate from good and acceptable standards of medical care during Timothy McCormack's admission into its facility from March to June 2008. In support of the motion, Southside Hospital submits copies of the pleadings, the affidavit of its expert, Dr. Joseph Jeret, the parties' deposition transcripts, the deposition transcripts of nonparty witnesses Jeannette Blaha, Michelle Peck, Dr. Sevine Kadayifci, and Dr. Michael Sacca, and Timothy McCormick's uncertified medical records.

Plaintiffs oppose the motion on the ground that Southside Hospital failed to meet its prima facie burden that its staff did not deviate from acceptable standards of medical care when it rendered treatment to Timothy McCormack during his admission to its facility. In opposition to the motion, plaintiffs submit copies of the pleadings, the affidavits of Dr. John Robert Kirkwood and Dr. Kenneth Berger, the deposition transcript of William McCormick, and uncertified copies of Timothy McCormack's medical records.

It is fundamental that the primary duty of a hospital's nursing staff is to follow the physician's orders, and that a hospital, generally, will be protected from tort liability if its staff follows the orders" (***Toth v Community Hosp. at Glen Cove***, 22 NY2d 255, 265, 292 NYS2d 440 [1968]; *see* ***Sledziewski v Cioffi***, 137 AD2d 186, 538 NYS2d 913 [3d Dept 1988]). "A hospital may not be held vicariously liable for the malpractice of a private attending physician who is not an employee and may not be held concurrently liable unless its employees committed independent acts of negligence or the attending physician's orders were contraindicated by normal practice such that ordinary prudence required inquiry into the correctness of the same" (***Toth v Bloshinsky***, 39 AD3d 848, 850, 835 NYS2d 301 [2d Dept 2007]; *see* ***Sela v Katz***, 78 AD3d 681, 911 NYS2d 112 [2d Dept 2010]; ***Cerny v Williams***, 32 AD3d 881, 882 NYS2d 548 [2d Dept 2006]). "A hospital may also be held liable on a negligent hiring and/or retention theory to the extent that its employee committed an independent act of negligence outside the scope of employment, where the hospital was aware of, or reasonably should have foreseen, the employee's propensity to commit such an act" (***Doe v Gutherie Clinic, Ltd.***, 22 NY3d 480, 485, 982 NYS2d 431 [2014]; *see* ***Sieden v Sonstein***, 127 AD3d 1158, 7 NYS3d 565 [2d Dept 2015]). However, "an exception to the general rule exists where a patient comes to the emergency room seeking treatment from the hospital and not from a particular physician of the of the patient's choosing" (***Schultz v Shreedhar***, 66 AD3d 666, 666, 886 NYS2d 484 [2d Dept 2009] *quoting* ***Salvatore v Winthrop Univ. Med. Ctr.*** 36 AD3d 887, 888, 829 NYS2d 183 [2d Dept 2007]; *see* ***Sampson v Contillo***, 55 AD3d 588, 865 NYS2d 634 [2d Dept 2008]).

Moreover, "not every negligent act of a nurse [is] considered medical malpractice, but a negligent act or omission by a nurse that constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician constitutes malpractice" (***Bleiler v Bodnar***, 65 NY2d 65, 72, 489 NYS2d 885 [1985]; *see* ***Spiegel v Goldfarb***, 66AD3d 873, 889 NYS2d 45 [2d Dept 2009]). This conclusion is no different with respect to the emergency room nurse, functioning in that role as an integral part of the process of rendering treatment to a patient (***Bleiler v Bodnar***, *supra* at 72, 489 NYS2d 885). On a motion for summary judgment in a medical malpractice action, a medical professional has the initial burden of demonstrating that the medical treatment rendered to a plaintiff was within the acceptable standards of medical care, or that any departure or deviation was not a proximate cause of the alleged injury or damage sustained by the plaintiff (*see* ***Maki v Bassett Healthcare***, 85 AD3d 1366, 924 NYS2d 688 [3d Dept 2011]; ***Suits v Wyckoff Hgts. Med. Ctr.***, 84 AD3d 487, 922 NYS2d 388 [1st Dept 2011]). Where the defendant has met his or her burden, the plaintiff, in opposition, must demonstrate the existence of a triable issue of fact through the submission of evidentiary acts or materials, but only as to the elements on which the defendant met the prima facie burden (*see* ***Schmitt v Medford Ctr.***, 121 AD3d 1088, 996 NYS2d 75 [2d Dept 2014]; ***Gillespie v New York Hosp. Queens***, 96 AD3d 901, 947 NYS2d 148 [2d Dept 2012]; ***Savage v Quinn***, 91 AD3d 748, 937 NYS2d 265 [2d Dept 2012]; ***Stukas v Streiter***, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]). General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to

defeat a medical provider's summary judgment motion (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Garbowski v Hudson Val. Hosp. Ctr.***, 85 AD3d 724, 924 NYS2d [2d Dept 2011]). Further, an expert witness must possess the requisite skill, training, knowledge, or experience to ensure that an opinion rendered is reliable (*see e.g.* ***Brady v Westchester County Healthcare Corp.***, 78 AD3d 1097, 912 NYS2d 104 [2d Dept 2010]; ***Geffner v North Shore Univ. Hosp.***, 57 AD3d 839, 871 NYS2d 617 [2d Dept 2008]; ***Mustello v Berg***, 44 AD3d 1018, 845 NYS2d 86 [2d Dept 2007]).

Upon review of the exhibits and the expert affirmation of Dr. Jeret, the Court finds that Southside Hospital has failed to establish its prima facie entitlement to judgment as matter of law that its staff did not depart from good and accepted standards of medical care in its treatment of Timothy McCormack during his admission to its facility, or that such departure was not a proximate cause of Timothy McCormack's injuries (*see* ***Barle v Bethpage Physical Therapy Assoc.***, 122 AD3d 784, 995 NYS2d 514 [2d Dept 2014]; ***Lormel v Macura***, 113 AD3d 734, 979 NYS2d 345 [2d Dept 2014]; ***Yaegel v Ciuffo***, 95 AD3d 1110, 944 NYS2d 601 [2d Dept 2012]; *cf.* ***Bhim v Dourmashkin***, 123 AD3d 862, 999 NYS2d 471 [2d Dept 2013]). "A hospital is responsible to a patient who sought medical care at the hospital" (***Hill v St. Clare's Hosp.***, 67 NY2d 72, 80-81; 499 NYS2d 904 [1986]), "and must follow accepted and approved standards of practices in the care and treatment of its patients" (***O'Connell v Albany Med. Ctr. Hosp.***, 101 AD2d 637, 638 475 NYS2d 543 [3d Dept 1984]). A defendant moving for summary judgment in an action alleging medical malpractice must specifically address the allegations of medical malpractice contained in the plaintiff's bill of particulars (***Wall v Flushing Hosp. Med. Ctr.***, 78 AD3d 1043, 144-45, 912 NYS2d 77 [2d Dept 2010]; ***Terranova v Finklea***, 45 AD3d 572, 572, 845 NYS2d 389 [2d Dept 2007]). Here, Dr. Jeret's affirmation, as well as the other exhibits submitted in support of the motion, failed to address all of the allegations asserted against Southside Hospital in plaintiffs' bills of particulars, ignored important facts, and was based on certain errors (*see* ***Macias v Ferzli***, 131 AD3d 673, 15 NYS3d 466 [2d Dept 2015]; ***LaVecchia v Bilello***, 76 AD3d 548, 906 NYS2d 326 [2d Dept 2010]; ***Kuri v Bhattacharya***, 44 AD3d 718, 842 NYS2d 734 [2d Dept 2007]; ***Ward v Engel***, 33 AD3d 790, 822 NYS2d 608 [2d Dept 2006]). Plaintiffs' allege, among other things in their bills of particulars, that Southside Hospital was negligent "in their care and treatment of Timothy McCormack; in failing to keep the bed rails up; in failing to pad the bed rails and take other seizure precautions/prophylaxis; in failing to properly work Timothy McCormack up after fall from bed, including but not limited to radiographic studies of the head and other clinical treatments; in failing to properly monitor Timothy McCormack post-extubation to avoid oxygen deprivation, aspiration, disorientation, and thrashing about; and in failing to recognize changes in Timothy McCormack's physical condition prior to and after the placement of the perma cath." However, Southside Hospital's medical expert, Dr. Jeret, only addressed whether Timothy McCormack sustained a subdurmal hematoma during his hospital admission, but not any of the other allegations of negligence against the hospital or any of the other injuries alleged to have been sustained by Timothy McCormack.

Additionally, the opinions expressed by Dr. Jeret in his affirmation are speculative and conclusory regarding the allegations that Southside Hospital departed from acceptable standards of medical care. Conclusory statements of a defendant's expert, such as the defendant physician or staff did not depart from good and accepted practice are insufficient to meet a defendant's prima facie burden (*see* ***Diaz v NY Downtown Hosp.***, 99 NY2d 542, 754 NYS2d 195 [2002]). "Furthermore, bare allegations which do not refute the specific factual allegations of medical malpractice in the bill of particulars are insufficient to establish entitlement to judgment as a matter of law" (***Grant v Hudson Val. Hosp. Ctr.***, 55 AD3d 874, 874,

866 NYS2d 726 [2d Dept 2008]; *see* ***Terranova v Finklea***, 45 AD3d 572, 845 NYS2d 389 [2d Dept 2007]). Dr. Jeret's opinion is premised upon the fact that, since there is no record of Timothy McCormack having suffered any head trauma at Southside Hospital, such did not occur and, therefore, no causal relationship can be established between the resulting injuries that Timothy McCormack sustained and any malpractice by Southside Hospital. However, Dr. Jeret's opinion failed to adequately explain how Timothy McCormack sustained a subdural hematoma while admitted at Southside Hospital. Rather, Dr. Jeret states in his report that the "only reasonable explanation for the subdural hematoma was, because the coagulopathic patient was ripe for a spontaneous bleed." Yet, Dr. Jeret arrives at this conclusion without indicating that he reviewed any of the films of the brain CT scans that Timothy McCormack underwent while he was in Southside Hospital or the location of said subdermal hematoma in relation to a skull fracture that occurred in 1992. "Where an expert's ultimate assertions are speculative or unsupported by any evidentiary foundation, the opinion should be given no probative force and is insufficient to withstand summary judgment" (***Romano v Stanley***, 90 NY2d 444, 451-452, 661 NYS2d 589 [1997]; *see* ***Amatulli v Delhi Constr. Corp.***, 77 NY2d 525, 569 NYS2d 337 [1991]).

Dr. Jeret also states that the order of "no heparin" by the nephrologists treating Timothy McCormack only applied to nephrologists as part of the dialysis order, and that the "trivial diluted amount of heparin" used to flush Timothy McCormack's IV line had no causal relationship with the subdural hematoma suffered by Timothy McCormack. However, Dr. Jeret fails to explain these bare conclusory assertions regarding the use and effect of heparin, even in these "trivial diluted" amounts, in a patient known to be coagulopathic, especially since the orders were written to prevent any direct infusion of heparin into Timothy McCormack. In fact, Dr. Sevine Kadayifci, a hospitalist at Southside Hospital who treated Timothy McCormack, testified at an examination before trial that, since Timothy McCormack had a low platelet count and coagulation abnormalities, the nephrologist wrote orders stating that Timothy McCormack was not to have any heparin to prevent any risk of bleeding occurring. He also testified that he believes it may have been a hemodialysis order, but he is not sure.

Moreover, Dr. Jeret perfunctorily states in his report that there was no treatment for Timothy McCormack's lethargy or flaccid extremities before or after the placement of the permacath, and that there was no causal connection with the alleged injuries he sustained, which is in direct contradiction to the deposition testimony given by Michelle Peck, a registered nurse who cared for Timothy McCormack while he was in the ICU at Southside Hospital. Michelle Peck testified at an examination before trial that when a patient is lethargic and has flaccid extremities there may be a neurological problem or symptom that is occurring. Indeed, Dr. Kadayifci and Dr. Sacca each testified that flaccid extremities and lethargy also can be a change in a patient's clinical condition or finding that may be representative of a neurological compromise, which may require further study based upon the patient. Thus, Dr. Jeret's affirmation failed to eliminate all triable issues of fact as to whether Southside Hospital departed from the acceptable standard of medical care when it treated Timothy McCormack during his admission at its facility, and whether that departure was a proximate cause of Timothy McCormack's injuries (*see* ***Faicco v Golub***, 91 AD3d 817, 938 NYS2d 105 [2d Dept 2012]; ***Callahan v Gueneratne***, 78 AD3d 753, 910 NYS2d 551 [2d Dept 2010]).

In light of this determination, it is unnecessary to review the sufficiency of plaintiffs' opposition papers as they relate to Southside Hospital (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Castro v New York City Health & Hosps. Corp.***, 74 AD3d 1005, 930 NYS2d 152 [2d

Dept 2010]; ***Vincini v Insel***, 1 AD3d 351, 766 NYS2d 569 [2d Dept 2003]). Accordingly, Southside Hospital's motion for summary judgment dismissing the complaint is denied.

Plaintiffs cross-move, pursuant to CPLR 3025, for leave to serve an amended bill of particulars to state the negligent acts occurred from March 19 through 31, 2008, and thereafter, in regards to their allegations against Southside Hospital. In support of the cross motion, plaintiffs submit copies of the pleadings and a copy of the original verified bill of particulars. Southside Hospital opposes the cross motion, alleging that plaintiffs' entire theory of malpractice focused on a purported trauma that occurred during the transport of Timothy McCormack for a permacath placement, and that to allow plaintiffs to amend their bill of particulars to conform to the proof at this late date would be prejudicial to Southside Hospital.

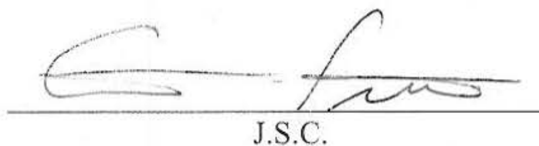
CPLR 3025 (b) states, in pertinent part, that a party may amend his or her pleading at any time by leave of court or by stipulation of all parties, and that leave shall be freely given upon such terms as may be just (*see* ***Edenwald Contr. Co. v City of New York***, 60 NY2d 957, 471 NYS2d 55 [1983]; ***Green v Passenger Bus Corp.***, 61 AD3d 1377; 877 NYS2d 577 [4th Dept 2009]). Moreover, the decision whether to grant leave to amend a pleading is committed solely to the discretion of the court (*see* ***Murray v City of New York***, 43 NY2d 400, 401 NYS2d 773 [1977]; ***Anderson v Nottingham Vil. Homeowner's Assn., Inc.***, 37 AD3d 1195, 830 NYS2d 882 [4th Dept 2007]). Leave to amend a pleading will be granted so long as it does not prejudice the nonmoving party and where the amendment is not patently lacking merit (*see* ***McFarland v Michel***, 2 AD3d 1297, 770 NYS2d 544 [4th Dept 2003]; ***Letterman v Reddington***, 278 AD2d 868, 718 NYS2d 503 [2000]). Also, it is a well-established rule that "the legal sufficiency or merits of a proposed amendment of a pleading will not be examined on the motion to amend unless the insufficiency or lack of merit is clear and free from doubt" (*see* ***Goldstein v Brogan Cadillac Oldsmobile Corp.***, 90 AD2d 512, 455 NYS2d 19 [1982]; ***De Forte v Allstate Ins. Co.***, 66 AD2d 1028, 411 NYS2d 726 [1978]; *see also* Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3205). In addition, a party opposing such an application must establish prejudice by showing that the party "has been hindered in the preparation of [its] case or has been prevented from taking some measure in support of [its] position" (***Loomis v Civetta Corinno Constr. Corp.***, 54 NY2d 18, 23, 444 NYS2d 571 [1981]; *see* ***Whalen v Kawasaki Motors Corp.***, 92 NY2d 288, 680 NYS2d 435 [1998]; ***Valdes v Marbrose Realty***, 289 AD2d 28, 734 NYS2d 24 [1st Dept 2001]). However, the court should consider how long the party seeking the amendment was aware of the facts upon which the motion is predicated, whether a reasonable excuse for the delay was offered, and whether prejudice resulted from such delay (*see* ***Morris v Queens Long Is. Med. Group., P.C.***, *supra*; ***Cohen v Ho***, 38 AD3d 705, 833 NYS2d 542 [2d Dept 2007]; *see also* ***Kyong Hi Wohn v County of Suffolk***, 237 AD2d 412, 654 NYS2d 826 [2d Dept 2003]; ***Volpe v Good Samaritan Hosp.***, 213 AD2d 398, 623 NYS2d 330 [2d Dept 1995]). Likewise, once discovery is complete and the case is certified as ready for trial, a party will not be permitted to amend his or her bill of particulars except upon a showing of "special and extraordinary circumstances" (***Schreiber-Cross v State of New York***, 57 AD3d 881, 884, 870 NYS2d 438 [2d Dept 2008]).

In the instant matter, plaintiffs have failed to include a copy of their proposed amended bill of particulars with their moving papers. Thus, plaintiffs have failed to support their motion with any evidentiary proof or to show that their purposed amendment has merit (*see* ***Kilkenny v Law Off. of Cushner & Garvey, LLP***, 76 AD3d 512, 905 NYS2d 661 [2d Dept 2010]; ***Ferdinand v Crecca & Blair***, 5 AD3d 538,

774 NYS2d 714 [2d Dept 2004], *lv denied* 3 NY3d 609, 786 NYS2d 812 [2004]; ***Farrell v K.J.D.E. Corp.***, 244 AD2d 905, 665 NYS2d 201 [4th Dept 1997]; *cf.* ***Dever v DeVito***, 84 AD3d 1539, 922 NYS2d 646 [3d Dept 2011]; ***Manning v Thorne***, 73 AD3d 1136, 900 NYS2d 900 [2d Dept 2010]; ***Parametric Capital Mgt., LLC. v Lacher***, 33 AD3d, 376, 822 NYS2d 60 [1st Dept 2006]).

Accordingly, plaintiffs' motion for leave to amend their bill of particulars is denied, without prejudice to renew. Plaintiffs may resubmit their cross motion with a copy of the proposed amended bill of particulars attached to the moving papers within 30 days of the entry date of this order. In the alternative, plaintiffs may make an application to the presiding justice for permission to amend the pleadings to conform with the evidence at the time of trial.

Dated: February 3, 2016



J.S.C.

____ FINAL DISPOSITION _X_ NON-FINAL DISPOSITION