

Schwenner v Broumand
2018 NY Slip Op 30102(U)
January 16, 2018
Supreme Court, New York County
Docket Number: 805292/12
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

Index No. 805292/12

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BRIGITTE SCHWENNER,

Plaintiff,

-against-

STAFFORD R. BROUMAND, M.D.,

Defendants.

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JOAN A. MADDEN, J.:

In this medical malpractice action, plaintiff, Brigitte Schwenner (“plaintiff” or “Ms. Schwenner”), appearing *pro se*, moves for an order permitting her to amend her bill of particulars, and related relief. Defendant opposes the motion and cross moves to dismiss it or, alternatively, to preclude plaintiff from offering additional claims for personal injuries/negligence and to direct that plaintiff provide expert witness disclosure pursuant to CPLR 3101(d) by a date certain, or that her claim will be dismissed. Plaintiff opposes the cross motion.

With respect to plaintiff’s motion to amend her Bill of Particulars, post note of issue, the *pro se* plaintiff’s time to file an expert affidavit in support of this motion is extended to May 15, 2018. Plaintiff has submitted a record of an examination of Ms. Schwenner by Dr. Ursula Tanzella, a German physician. Such record is insufficient to satisfy the requirement of New York law that opinion evidence be in the form of an affirmation or affidavit. See Dow v. Lenox Hill Hosp., 39 AD3d 286 (1st Dept 2007) (holding that the court properly refused to consider the unsworn letter from plaintiff’s expert submitted in opposition to summary judgment).

As for defendant’s cross motion to dismiss, the history of this action, as set forth in this

court's decision and order dated August 30, 2017 ("the August 30 decision"), is relevant to the determination of the cross motion and is summarized here. This action was commenced in October 2012, and note of issue was filed on February 5, 2015. Plaintiff was represented in this action by the firm of Herzfeld & Rubin, P.C. Pre-trial conferences were held before Hon. Alice Schlesinger on April 15, 2015, May 6, 2015, and September 15, 2015, and at the last of these conferences, a trial date was set for March 7, 2016. At plaintiff's request, on March 7, 2016, the trial was adjourned.

On May 25, 2016, another pre-trial conference was held and an order issued on that date, which required plaintiff to provide her 3101(d) disclosure by July 12, 2016. A final pre-trial conference was scheduled for September 7, 2016 with jury selection scheduled for September 12, 2016. At plaintiff's request the trial was adjourned until October 3, 2016. On that date, Ms. Schwenner appeared in court and requested to speak to Judge Schlesinger. After speaking to Ms. Schwenner and her lawyer, Judge Schlesinger relieved the firm of Herzfeld and Rubin as counsel finding "irreconcilable difference between them," and adjourned the action to December 7, 2016. On that date, Ms. Schwenner requested additional time to find counsel, and the matter was adjourned to January 27, 2017, on which date Ms. Schwenner informed the court that the law firm of Pulvers, Pulvers Thompson & Freeman was reviewing the case file. The parties were directed to appear on February 23, 2017, by which date this action was transferred from Judge Schlesinger to this court. The February 23, 2017 conference date was adjourned to March 7, 2017, on which date an attorney from Pulvers, Pulvers Thompson & Freeman attended the conference and indicated that the firm was reviewing the file to determine whether to represent Ms. Schwenner. The matter was then adjourned to May 4, 2017, for a decision by Ms.

Schwenner as to whether to proceed *pro se* or by counsel.

On May 4, 2017, Ms. Schwenner appeared *pro se* for the pre-trial conference and requested that the matter be stricken from the trial calendar and that she be permitted to amend her bill of particulars to include additional allegations of negligence and injuries. However, plaintiff failed to specify in her papers the basis for amending her bill of particulars, or delineate the nature of her additional injuries. By order dated May 4, 2017, the court permitted plaintiff to seek to amend the bill of particulars, limited to injuries allegedly caused by Dr. Broumand, and directed that the motion be made by order to show cause on or before June 19, 2017, and that plaintiff must “submit an affidavit by a medical expert as to the merits of the proposed new additional injuries by July 20, 2017 at noon.”

Plaintiff did not submit an order to show cause by June 19, 2017, seeking to amend her bill of particulars. On June 20, 2017, plaintiff filed a motion for the court to appoint an expert to assist her in prosecuting this medical malpractice action. Defendant opposed the motion and cross moved for an order precluding plaintiff from offering additional claims of negligence or injuries and directing plaintiff to provide an expert affidavit, and that in the absence of such affidavit, her claims would be dismissed.

In the August 30 decision, the court denied plaintiff’s motion for the appointment of an expert, and granted defendant’s cross motion to the extent of directing that plaintiff move, by order to show cause, by October 30, 2017, to amend her bill of particulars limited to injuries allegedly caused by defendant, and to provide an expert affidavit supporting such motion. The court ordered that in the absence of such affidavit, plaintiff would be precluded from amending her bill of particulars. The court further ordered that plaintiff serve her 3101(d) expert disclosure

on defendant on or before October 30, 2017, and that the failure to provide such disclosure may result in an order dismissing her complaint. By supplemental order dated August 31, 2017, the court vacated the August 30 decision to the extent it required plaintiff to move by order to show cause, and permitted her to move by notice of motion returnable on or before November 20, 2017, and directed that plaintiff provide defendant with an updated authorization. Plaintiff timely moved to amend, and that motion and defendant's cross motion are now before the court. At oral argument issues were raised with respect to the authorizations, and these issues are resolved below.

Significantly, under New York law, a claim of medical malpractice must be supported by expert medical evidence. See Mosberg v. Elahi, 80 NY2d 941 (1992); Romanoff v. St. Vincent's Medical Center of New York, 97 AD2d 382 (1st Dept 1983). In addition, despite the August 30 decision directing plaintiff to serve expert disclosure pursuant to CPLR 3101(d), plaintiff has not yet provided such disclosure to support her claims or, as indicated above, the proposed amendment to her bill of particulars.

In view of the above, it is

ORDERED that plaintiff's motion to amend is denied without prejudice to renewal upon plaintiff's submission of an expert affidavit supporting the amendment to the bill of particulars on or before May 15, 2018; and it is further

ORDERED that defendant's cross motion is granted to the extent of directing that plaintiff serve her 3101(d) expert disclosure for the existing claims on or before May 15, 2018, and failure to provide such disclosure may result in an order dismissing her complaint; and it is further

ORDERED that within 30 days of the e filing of this order, the *pro se* plaintiff, Brigitte Schwenner is to provide authorizations valid through December 31, 2018 for Mount Sinai Hospital for the period plaintiff alleges treatment at such facility; and it is further

ORDERED that the authorizations need not include authorizations for the release of mental health, alcohol or substance abuse records, or records relating to HIV status; and it is further

ORDERED that a pre-trial conference shall be held on May 24, 2018, at 11:20 am, in Part 11, 60 Centre Street, room 351, New York, NY.

DATED: January 16, 2018



HON. JOAN A. MADDEN
J.S.C.