

<b>Cohn v New York Univ.</b>
2018 NY Slip Op 30692(U)
April 18, 2018
Supreme Court, New York County
Docket Number: 100159/2016
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 6

-----X  
BARRY H. COHN,

Plaintiff,

Index No.  
100159/2016

**DECISION and  
ORDER**

- against -

Mot. Seq. 002

NEW YORK UNIVERSITY and NYU LANGONE  
MEDICAL CENTER,

Defendants.

-----X  
HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff Barry Cohn (“Cohn”) commenced this medical malpractice action by summons and complaint on February 2, 2016 against Defendants New York University (“NYU”) and NYU Langone Medical Center (“NYU Langone”). Cohn alleges that NYU and NYU Langone departed from accepted standards of medical practice in treating his fractured foot. NYU and NYU Langone interposed their Answers on May 5, 2016 and April 15, 2016 respectively.

Presently before the Court is NYU and NYU Langone’s Order to Show Cause for an order dismissing the Amended Complaint pursuant to CPLR 3025(b), dismissing the complaint with prejudice as to NYU or compelling Cohn to provide separate and distinct Bills of Particulars, and compelling Cohn to provide all outstanding discovery in accordance with prior orders dated January 10, 2018 and February 1, 2018.

NYU and NYU Langone allege that they served Cohn with Demands for Verified Bills of Particulars; Notices to take Deposition upon Oral Examination; Demands for Medicare/Medicaid Lien Information; Demands for Authorizations; Notices of Discovery and Inspection of Statements; Notices of Discovery and

Inspection of Documents; Demands for CPLR 4545 Information; Demands for CPLR 2103 (e) Information; Demands for Discovery of Expert Witness; Demands for Names of Witnesses; and Notices of Discovery and Inspection of Photographic Evidence. (affirmation of Landers at 2) Cohn allegedly served partial responses to some of the requests but allegedly did not respond to the defendants Demand for Verified Bills of Particulars, Demands for Medicaid/Medicare Lien Information and Demand for Authorizations. In addition, the defendants assert that Cohn did not serve proper responses to the Notices of Discovery and Inspection of Documents, Notices of Discovery and Inspection of Statements, Notices of Discovery and Inspection of Photographic Evidence, and Demands for Discovery of Expert Witness. (affirmation of Landers at 2)

On or about May 5, 2016, NYU and NYU Langone served a further Demand for Authorizations, and Notices of Discovery and Inspection, and Combined demands. (affirmation of Landers at 3) Plaintiff allegedly served a single Bill of Particulars as to both defendants and further deficient responses. (affirmation of Landers at 3)

The parties appeared for a preliminary conference on September 27, 2016. Pursuant to the preliminary conference order, the Honorable Joan B. Lobis, J.S.C., directed Cohn to provide all outstanding discovery including: two separate and distinct Bills of Particulars as to each Defendant; Authorizations for any and all orthopedists, orthopedic surgeons, primary care physicians, physical therapists, occupational therapists, nursing care providers, rehabilitation providers, ER visits/hospitalizations, neurologists, cardiologists, radiology facilities, pharmacies, ambulance providers, collateral sources, IRS tax returns, bariatric specialists, vascular specialists, rheumatologists, surgeons, Albany Hospital, Hospital for Joint Diseases, Dr. Victoria Katz, Dr. Tejwani, Riverside Rehab Center, Dr. Retting, Dr. Bearnot, and employment records; Cohn's complete social security number; dates of the photographs previously produced by Cohn; responses to Demand for Medicaid/Medicare Lien Information; Notice of Discovery and Inspection of Documents; Notice of Discovery and Inspection of Statements; Notice of Discovery and Inspection of Photographic Evidence; Notice of Discovery and Inspection of Expert Witnesses.

From December 8, 2016 to January 23, 2017, NYU and NYU Langone served additional discovery demands including a demand for authorizations and *Arons* authorizations. By January 31, 2017, Cohn had allegedly "provided some, but not all, of the discovery responses required by the Preliminary Conference." (affirmation of Landers at 5)

The parties appeared for a Compliance Conference on February 7, 2017. The Honorable Joan B. Lobis, J.S.C., directed Cohn to produce all outstanding discovery pursuant to the Preliminary Conference order. The court also ordered Cohn to respond to Defendants' discovery demands from December 8, 2017 to January 23, 2017. By February 23, 2017, Cohn had allegedly provided some but not all of the discovery responses required. (affirmation of Landers at 5)

On May 4, 2017, the defendants requested copies of all medical records in Cohn's possession and on May 22, 2017, the defendants served additional discovery demands including demands for authorizations.

The parties appeared for a second Compliance Conference on May 23, 2017. The Honorable Joan B. Lobis, J.S.C., directed Cohn to produce all outstanding discovery including "proper separate and distinct" Bills of, authorizations, *Arons* authorizations, documentation of special damages and lost earnings, tax returns and W-2 forms, within 30 days. (affirmation of Landers at 6; *see also* NYU and NYU Langone's exhibit I) The court also noted that no further extensions would be granted without Court approval. (NYU and NYU Langone's exhibit I)

On September 5, 2017, the parties appeared for a third Compliance Conference. This Court directed Cohn to provide all remaining outstanding discovery including proper Supplemental Bills of, authorizations, *Arons* authorizations, documentation of special damages and lost earnings, tax returns and W-2 forms within 15 days. (NYU and NYU Langone's exhibit I) This Court also noted that Cohn's failure to provide the outstanding discovery within 15 days would be deemed willful and contumacious. (NYU and NYU Langone's exhibit I)

Cohn allegedly failed to comply, and the parties appeared for a fourth Compliance Conference on October 10, 2017. This Court directed Cohn to provide all outstanding discovery within 5 days. (NYU and NYU Langone's exhibit I) Again this Court noted that Cohn's failure to comply would be deemed willful and contumacious.

Because Cohn allegedly failed to comply with these discovery demands, NYU and NYU Langone moved by Order to Show Cause for an order dismissing this action pursuant to CPLR 3042 (d) and 3126 (3). Alternatively, the defendants moved for an order precluding Cohn from presenting evidence at trial or striking the complaint unless Cohn provided all outstanding discovery within 10 days. On January 10, 2018, the Court held a conference with respect to the Order to Show

Cause and issued an order. The order directed Cohn to provide “separate and distinct [Bill of Particulars] as to New York University” and a “[Supplemental Bill of Particulars] as to NYU Hospital Center” (NYU and NYU Langone’s exhibit D) The Court directed Cohn *inter alia* to “remove vague, overbroad, and or non-limiting language.” Lastly, the order states, “all of the above to be provided within 10 days or [Cohn] will be precluded from producing evidence on these matters at trial.” (NYU and NYU Langone’s exhibit D)

Seven days later, Cohn filed an Amended Complaint without leave of this Court or a stipulation from NYU and NYU Langone. That day, January 17, 2018, Cohn also served a Bill of Particulars as to NYU. On January 30, 2018, the parties appeared for a compliance conference with the Court. NYU and NYU Langone requested that the Court strike Cohn’s untimely served amended complaint. However, the Court declined to strike the amended complaint until the Defendants moved by Order to Show Cause. Accordingly, on or about March 8, 2018, NYU and NYU Langone brought the instant Order to Show Cause.

NYU alleges that it “includes all of the same allegations of medical malpractice as the Bill of Particulars as to [NYU Langone].” (affirmation of Landers at 3) Neither Bill of Particulars allegedly specifies “the individuals for whom each defendant was sought to be held vicariously liable” nor “which injuries were alleged to have been caused by the alleged malpractice” among other things. (affirmation of Landers at 4) The Defendants assert that other discovery pursuant to the January 10, 2018 order is still outstanding including: a Medicare authorization, evidence regarding special damages, and documentation from plaintiff’s other lawsuits. Indeed, the Defendants argue, “To date, [Cohn] has not supplemented the Bills of Particulars to comply with this Order or provided the other outstanding discovery.” (affirmation of Landers at 4)

Cohn did not timely oppose however this Court granted Cohn an extension to oppose and cross-move. Cohn argues that he has provided two separate and distinct Bills of particulars. However, Cohn notes that he can supplement responses upon concluding depositions. Cohn further argues that to the extent that the Bills of Particulars still contain boilerplate language, the language apprises NYU and NYU Langone of the claims without prejudicing them. Cohn additionally argues that the amended Bills of Particulars delineate a host of injuries including unsteady gait and traumatic ecchymosis of the left ankle. Lastly, Cohn cross-moves to amend the complaint. Cohn argues that the original complaint was drafted when he represented himself *pro se* but now that he has retained Counsel, his Counsel advises to seek punitive damages and out of pocket medical costs among other

things. Cohn asserts that the damages as stated in the complaint are insufficient because they do not account for Cohn's surgeries, rehabilitative services, and consistent medical care.

NYU and NYU Langone oppose and argue that Cohn's cross-motion to amend the complaint should be denied because Plaintiff's cross-motion is not accompanied by the proposed Amended Complaint. Additionally, they assert that the alleged negligence does not rise to the level of egregious misconduct require to sustain a claim for punitive damages.

### Standard

#### *Bills of Particulars*

With respect to Bills of Particulars, "plaintiff's obligation is to be as responsive as the presently available level of information permits and to state directly the absence of information that plaintiff does not have and to provide it upon completion of disclosure." (*Brynes v New York Hosp*, 91 AD2d 907, 907 [1st Dept 1983].) However, it is not "an appropriate response to file bills of particulars that are in all respects identical." (*id.*)

#### *Leave to Amend Standard*

Rule 3025 provides that

"A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplement pleading clearly showing the changes or additions to be made to this pleading."

When interpreting this provision, the First Department has stated, "Motions for leave to amend pleadings should be freely granted, absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit." (*Y.A. v Conair Corp.*, - NYS3d -, 2017 NY Slip Op



07542 [1st Dept 2017].) “On a motion for leave to amend, plaintiff need not establish the merit of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit.” (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010].) However, the plaintiff must “allege facts legally sufficient to support its proposed pleading, and where the facts relied upon are ‘obviously not reliable or are insufficient’, the absence of merit is ‘free from doubt.’” (*Non-Linear Trading Co., Inc. v Braddis Associates, Inc.*, 243 AD2d 107, 117 [1st Dept 1998].)

“The motion must be supported by an affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgment.” (*Nab-Tern Constructors v City of New York (Yankee Stadium)*, 123 AD2d 571, 573 [1st Dept 1986].) “Specious amendments should not be allowed.” (*id.* at 572-573) “[A]n amended pleading, verified by counsel, together with counsel’s opposing affirmation are insufficient.” (*Marinelli v Shifrin*, 260 AD2d 227, 229 [1st Dept 1999].)

### Discussion

In contravention of CPLR 3025, Cohn fails to accompany the cross-motion to amend with the proposed amended pleading clearly showing the changes or additions to be made to this pleading. Additionally, Cohn fails to include an affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgment.” (*Nab-Tern Constructors v City of New York (Yankee Stadium)*, 123 AD2d 571, 573 [1st Dept 1986].) With respect to the Bills of Particulars, Cohn’s obligation is to be as “responsive as the presently available level of information permits and to state directly the absence of information that plaintiff does not have and to provide it upon completion of disclosure.” (*Brynes v New York Hosp*, 91 AD2d 907, 907 [1st Dept 1983].) Accordingly, the parties are to complete depositions by May 8, 2018 and Cohn is to serve notice of depositions by April 19, 2018. Ten days after the completion of the depositions, by May 18, 2018, Cohn shall supplement his Bills of Particulars.

Wherefore, it is hereby

ORDERED that New York University and NYU Langone Medical Center's Order to Show Cause is granted to the extent that Cohn provide all outstanding discovery in accordance with the prior orders; and it is further

ORDERED that Barry Cohn's cross-motion to amend the complaint is denied; and it is further

ORDERED that the parties are to complete depositions by May 8, 2018; and it is further

ORDERED that Barry Cohn is to serve Notice of Depositions by April 19, 2018; and it is further

ORDERED that Barry Cohn supplement his Bills of Particulars ten days after the completion of deposition by May 18, 2018.

ORDERED that this case shall be dismissed unless Barry Cohn complies with the directives herein.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: April 18, 2018



Eileen A. Rakower, J.S.C.