

Smith v Northern Manhattan Nursing Home. Inc.
2019 NY Slip Op 33179(U)
October 23, 2019
Supreme Court, New York County
Docket Number: 805104/14
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. JOAN A. MADDEN PART 11
Justice

**FREDRICK SMITH, deceased, by and through
CAROLYN LUNDY-SMITH, as Administratrix
of the Estate of FREDRICK SMITH**

INDEX NO. 805104/14
MOTION SEQ NO. 005

Plaintiff,

- v -

NORTHERN MANHATTAN NURSING HOME. INC.,

Defendant .

The following papers, numbered 1 to _____ were read on this motion to serve supplemental bill of particulars.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: [] Yes [x] No

Plaintiff moves, by order to show cause, pursuant to CPLR 3025(b) for an order granting her leave to serve a Third Further Supplemental Bill of Particulars. Defendant opposes the motion, which is granted.¹

This is an action for wrongful death arising out of the care and treatment of plaintiff's decedent at the defendant nursing home. Specifically, it is alleged that plaintiff's decedent died on April 15, 2012, as the result of serious medical conditions that were not properly diagnosed, managed or treated by the nursing home staff, including diabetes, which led to anoxic brain injury, and the development of pressure sores and sepsis during his stay at the nursing home.

¹After this order to show cause was issued, by decision and order dated September 27, 2019, the court granted plaintiff's application to sever the third party action, which was commenced on August 1, 2019, or approximately eight months after the note of issue was filed on November 29, 2018, and approximately four and a half years after the commencement of the main action.

This action was commenced on March 24, 2014, by filing a Verified Complaint which asserts six counts based on allegations that defendant, which is subject to the regulatory provisions set forth in 10 NYCRR § 415, et seq. and 42 CFR § 483, et seq., violated Public Health Law §§ 2801-d and 2803-c; was negligent in that it breached its duty to exercise the degree of care and skill exercised by nursing homes in the community; was grossly negligent; and committed medical and nursing malpractice.

On July 1, 2014, in response defendant's demand for a bill of particulars, plaintiff served a Verified Bill of Particulars which alleged, *inter alia*, that the defendant violated Public Health Law §§ 2801-d and 2803-c, along with 42 CFR § 483.10 (residents' rights), 42 CFR § 483.15 (quality of life), 42 CFR § 483.20 (resident assessment), 42 CFR § 483.25 (quality of care), 42 CFR § 483.25(c) (pressure sores), 42 CFR § 483.30 (nursing services), 42 CFR § 483.40 (physician services), 42 CFR § 483.70 (physical environment), and 42 CFR § 483.75 (quality assurance and performance improvement). Plaintiff supplemented the Bill of Particulars on February 19, 2015 to clarify that she was not making claims for either lost wages or lack of informed consent.

On April 28, 2016, the plaintiff served a Further Supplemental Bill of Particulars to correct Paragraph 5 (specifying the acts/omissions constituting negligence), Paragraph 30 (regarding allegations that the defendant ignored signs/symptoms, made an erroneous diagnosis, afforded improper treatment, and/or administered drugs improperly), and Paragraph 32 (regarding the acts/omissions constituting malpractice). Plaintiff served a Second Further Supplemental Bill of Particulars on May 31, 2016, to add allegations to Paragraphs 5, 30 and 32 regarding the defendant's failure to properly diagnose and treat plaintiff's decedent's hypoglycemia and his decreasing FBS (fasting blood sugar).

The Note of issue was filed on November 29, 2018, and a trial date is scheduled for October 28, 2019. On July 15, 2019, the plaintiff served a Third Further Supplemental Bill of Particulars to elaborate on the responses to Items 6(a) and 6(b), demanding that plaintiff state the laws, rules, and regulations claimed to be violated in the action. The Third Further Supplemental Bill of Particulars alleged that the defendant deprived plaintiff's decedent of his rights and benefits, and acted with reckless disregard of his rights and benefits, by violating Public Health Law §§ 2801-d and 2803-c, based on the violation of various New York State and Federal regulations including 10 NYCRR §§ 415.1(a)-(b), 415.3, 415.3(a), 415.3(a)(1), 415.3(c), 415.3(e)(1)(I), 415.3(e)(2), 415.5, 415.5(a)-(f), 415.11, 415.11(a)-(c), 415.12, 415.12(a), 415.12(c), 415.12(e)-(g), 415.12(i)-(m), 415.13, 415.13(a)(1), 415.14, 415.15, 415.26, and 415.26(c); and by violating 42 CFR §§ 483.10, 483.15, 483.20, 483.20(a)-(e), 483.20(g)-(i), 483.20(k), 483.25, 483.25(a), 483.25(c)-(g), 483.25(i)-(m), 483.30, 483.40, 483.70, and 483.75.²

By letter dated August 1, 2019, defense counsel rejected the Third Further Supplemental Bill of Particulars on the ground that it "includes additional statutes and allegations not included in any of the prior pleadings, and was filed post-Note of Issue."

Thereafter, plaintiff moved, by order to show cause, for an order granting plaintiff leave to serve a Third Further Supplemental Bill of Particulars. In support of her motion, plaintiff argues that none of the allegations in the Third Further Supplemental Bill of Particulars are "new" claims that have never been stated and, in particular, that the Verified Complaint alleged

²Plaintiff also incorporated the failures set forth in response to Items 5, 30, and 32 of the Bill of Particulars, the Further Supplemental Bill of Particulars, and the Second Further Supplemental Bill of Particulars, and stated that the defendant willfully or recklessly deprived plaintiff's decedent of his rights as a nursing home resident, including the right to adequate and proper medical care.

violations of the Public Health Law and referred to state regulatory provisions set forth in 10 NYCRR § 415 et seq., as well as federal regulatory provisions set forth in 42 CFR § 483 et seq., which federal provisions were particularized in the previous bills of particulars.

Defendant opposes the motion, arguing that since the Note of Issue has already been filed it will be prejudiced as the Third Further Supplemental Bill of Particulars “includes numerous statutes not previously alleged that are unrelated to the statutes and regulations alleged [in the original] Verified Bill of Particulars [and] [s]pecifically, [that] Plaintiff now alleges violations of 10 NYCRR §§ 415.14 (Dietary); 415.26 (organization and administration); 42 CFR §§ 483.15 (Admission, Transfer, and discharge rights); 483.40 (Behavioral health services); and 483.70 (Administration).”

In reply, plaintiff points out that asserted federal regulatory provisions specifically objected to by defendant were set forth in a prior bills of particulars and as for 10 NYCRR § 415.26 (relating to Administration), which was not included, defendant cannot be prejudiced by its inclusion since the corresponding federal regulation, that is 42 CFR § 483.70, was set forth in the original bill of particulars. Moreover, plaintiff notes that its original bill of particulars included allegations that decedent suffered severe weight loss, malnutrition and dehydration and therefore the request to add a violation of 10 NYCRR § 415.14 (dietary) is proper.

“Generally, in the absence of prejudice or surprise to the opposing party, leave to amend a bill of particulars should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit.” Dimoulas v. Roca, 120 AD3d 1293, 1296 (2d Dept 2014)(internal citations and quotations omitted). Moreover, although plaintiff is moving to supplement her bill of particulars on the eve of trial, plaintiff is correct that she is not seeking to add new theories of liability but only to amplify previously alleged theories. In particular, the

New York State regulation, 10 NYCRR § 415 was included in the Verified Complaint, and the specific state regulations either mirror the federal regulations alleged in earlier bill of particulars, or provide a regulatory basis for theories of liability included in earlier bills of particulars.

Accordingly, defendants cannot show prejudice or surprise and leave to supplement the bill of particulars is properly granted. See Sagarese v. City of New York, 173 AD3d 435, 436 (1st Dept 2019)(reversing trial court determination treating plaintiff’s supplemental bill of particulars as a nullity “with respect to defendant’s alleged violations of statutes, ordinances, rules, and/or regulations which amplify and elaborate upon facts and theories already set forth in the original bill of particulars and raise no new theory of liability”); Spiegel v. Gingrich, 74 AD3d 425 (1st Dept 2010)(holding that it was improper for court to strike plaintiff’s amended bill of particulars solely because it was served 12 days before trial where defendant had “no legitimate claim of prejudice or surprise”); Orros v. Yick Ming Yip Realty, Inc., 258 AD2d 387, 388 (1st Dept 1999)(trial court erred in denying plaintiff’s motion made nearly a year after note of issue was filed “to file a supplemental bill of particulars with respect to defendants’ alleged violations of statutes, ordinances, rules, and/or regulations, since these amendments, which merely amplify and elaborate upon facts and theories already set forth in the original bill of particulars, raise no new theory of liability”).

In view of the above, it is

ORDERED that plaintiff’s motion for leave to serve a Third Further Supplemental Bill of Particulars is granted, and the Third Further Supplemental Bill of Particulars is deemed served.

DATED: October 23 2019

HON. J. J. MADDEN
J.S.C.

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION