Bolorin v Aijaz
2019 NY Slip Op 34085(U)
February 4, 2019
Supreme Court, Westchester County
Docket Number: 65918/2016
Judge: Joan B. Lefkowitz
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER : COMPLIANCE PART

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LETICIA BOLORIN and ANTHONY BOLORIN,

Plaintiffs,

-against-

ANDREW ASHIKARI, ASIM AIJAZ, MADDALENA DUARTE, ASHIKARI & KELEMEN, M.D., P.C. *d/b/a* THE ASHIKARI BREAST CENTER, HUDSON VALLEY HEMATOLOGY AND ONCOLOGY, PLLC , also known as NEW YORK-PRESBYTERIAN/HUDSON VALLEY HOSPITAL,

Defendants.

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DECISION AND ORDER

Index No. 65918/2016
Motion Date: Feb. 4, 2019
Motion Seq. No.: 3

LEFKOWITZ, J.

The following papers were read on this application by defendants Andrew Ashikari, Ashikari & Kelemen, M.D., P.C. *d/b/a* the Ashikari Breast Center (the "moving defendants"):
"A. Pursuant to CPLR § 3126 and 3121, and 22 NYCRR §202.17, precluding plaintiffs' untimely and un-noticed 9/25/18 Neuropsychological Examination report of Barbara Baer, Ph.D. not received by defendants until 12/10/18 and precluding plaintiffs from introducing at trial any testimony or other evidence arising from or relating to same on the basis that the report is an untimely, unnoticed, and prejudicial IME report;
B. Pursuant to CPLR § 3126 and 3101, precluding plaintiffs' untimely and un-noticed 9/25/18 Neuropsychological Examination report of Barbara Baer, Ph.D. not received by defendants until 12/10/18 and precluding plaintiffs from introducing at trial any testimony or other evidence arising from or relating to same on the basis that the report was untimely disclosed on the eve of a 12/14/18 conference at which the case was intended to be certified and it was untimely disclosed in contravention of this court orders and causes prejudice to defendants;
C. Pursuant to CPLR § 3042(c), 3042(d), 3126(2), and 3126(3), striking plaintiffs' 12/5/18 supplemental bill of particulars as to Dr. Ashikari and Ashikari & Kelemen, MD, PC, concerning all claims arising from or relating to the Neuropsychological Examination report of Barbara Baer, Ph.D. and precluding plaintiffs' from introducing at trial any evidence or

testimony arising from or relating to those stricken claims on the basis that the Neuropsychological Examination report is precluded per section (A) and/or section (B) above and on the resultant prejudicial effect of same; and

D. Pursuant to CPLR § 3042(c), 3042(d), 3126(2), and 3126(3), striking plaintiffs' 12/5/18 supplemental bill of particulars as to Dr. Ashikari and Ashikari & Kelemen, MD, PC, concerning all claims arising from or relating to lost wages claims and precluding plaintiffs' from introducing at trial any evidence or testimony arising from or relating to those stricken claims on the basis that the that the lost wage claims contradict prior bills of particulars and are untimely and prejudicial; Or, in the alternative;

E. Compelling plaintiff Leticia Bolorin to submit to an IME by a physician selected by Dr. Ashikari and Ashikari & Kelemen, MD, PC, within 20 days of the date of this court's issuing order and extending the NOI deadline; and

F. Pursuant to CPLR § 3042(c), 3042(d), 3126(2), and 3126(3), striking plaintiffs' 12/5/18 supplemental bill of particulars as to Dr. Ashikari and Ashikari & Kelemen, MD, PC, concerning all claims arising from or relating to lost wages claims and precluding plaintiffs' from introducing at trial any evidence or testimony arising from or relating to those stricken claims on the basis that the that the lost wage claims contradict prior bills of particulars and are untimely and prejudicial;

G. For such other and further relief as this Court deems just and proper."

Order to Show Cause, Affirmation in Support, Exhibits A-I, J1-J5, K;
Affirmation in Opposition; Exhibits 1-11
NYSCEF file.

Upon the foregoing papers and the proceedings held on February 4, 2019, this motion is determined as follows:

This medical malpractice action was commenced by plaintiff, Leticia Bolorin and her spouse, Anthony Bolorin, by the filing of a summons and complaint on September 20, 2016. Plaintiff Leticia Bolorin was diagnosed with Invasive Ductal Carcinoma of her left breast, and consequently, underwent a bilateral nipple sparing mastectomy on September 8, 2014. She alleges that the mastectomy was performed by defendant Andrew Ashikari at defendant hospital, HVHC. Following the mastectomy, plaintiff Leticia Bolorin claims that defendants Andrew Ashikari and Asim Aijaz advised her that she need not undergo a course of radiation or chemotherapy, but rather, a course of hormone therapy. Thereafter, in January of 2016, plaintiff Leticia Bolorin was diagnosed with recurrent carcinoma of her left breast. On February 23, 2016, she underwent a further mastectomy by Dr. Port at the Dubin Breast Center. Plaintiffs allege that defendants were negligent in the performance of the bilateral nipple sparing mastectomy on September 8, 2014, in that defendants left behind too much breast tissue. Plaintiffs assert that defendants' failure to remove such breast tissue resulted in the recurrence of the Invasive Ductal Carcinoma in the left breast of plaintiff Leticia Bolorin.

Since the preliminary conference stipulation for medical, dental and podiatric malpractice actions was so-ordered by this Court on October 19, 2017, there have been numerous conferences

and a previous discovery motion has been made in this action. Moving defendants now complain that on the eve of the certification conference, on December 12, 2018, defendants received from plaintiffs' counsel a "Neuropsychological Examination" report (the "Report") by a physician, Dr. Baer, "whom plaintiffs' counsel admitted is a known IME physician and whose identity and records were never previously disclosed." Moving defendants contend that plaintiffs' counsel never reserved a right to perform an independent medical examination or gave notice of same. Further, they assert that based upon the Report and in violation of court orders and demands, plaintiffs' supplemental bill of particulars, dated December 5, 2018, asserts new damages claims based upon the Report and asserts new lost earnings claims in contradiction to plaintiffs' counsel's prior representations and in violation of court orders. Moving defendants aver that the court should preclude the Report and strike the untimely and improper new damages and lost earnings claims, or alternatively, compel plaintiff to submit to an examination by a physician designated by moving defendants.

In response, plaintiffs assert that Dr. Baer was a treating physician and was not retained to perform an expert examination at plaintiffs' counsel's request. Plaintiffs state that they have a continuing obligation to exchange treatment records as they become available, and upon learning that plaintiff, Leticia Bolarin came under the care of Dr. Baer, a copy of Dr. Baer's records and a HIPPA compliant authorization was also provided to defense counsel. Plaintiffs' point out that the first sentence of Dr. Baer's record, dated September 25, 2018, indicates that plaintiff, Leticia Bolorin was seen at the request and referral of her treating neurologist. With respect to the bills of particulars, plaintiffs counter that they have the right to supplement sequella of the injuries alleged as well as lost earnings. Plaintiffs refer to the transcript from the deposition of plaintiff, Leticia Bolorin, to support their position that plaintiff had testified to psychological issues and lost earnings. Plaintiffs further provide documentation that defendants were provided mental health authorizations in September 2018. Last, plaintiffs posit that assuming Dr. Baer performed an independent medical examination, there is no authority to support the position that a plaintiff must reserve the right to conduct an independent medical examination or face preclusion from having their own client examined or that a plaintiff must perform an examination before the case is certified.

Analysis:

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." The phrase "material and necessary" is "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). Although the discovery provisions of the CPLR are to be liberally construed, "a party does not have the right to uncontrolled and unfettered disclosure" (*Foster*, 74 AD3d at 1140; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]). The party seeking disclosure has the burden to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims (*Foster*, 74 AD3d at 1140).

The court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Mironer v City of New York*, 79 AD3d 1106, 1108 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]), as well as impose penalties upon a party which "refuses to obey an order for disclosure" or "wilfully fails to disclose information which the court finds ought to have been disclosed" (CPLR 3126). The penalties, although not exhaustive, include deciding the disputed issue in favor of the prejudiced party, precluding the disobedient party from producing evidence at trial on the disputed issue, striking the pleadings of the disobedient party, or rendering a default judgment against the disobedient party (*DiDomenico v C & S Aeromatik Supplies*, 252 AD2d 41, 48-49 [2d Dept 1998]). The penalties are designed "to prevent a party who has refused to disclose evidence from affirmatively exploiting or benefitting from the unavailability of the proof during the pending civil action" (*Sands v News Am. Publ.*, 161 AD2d 30, 37 [1st Dept 1990]; *see Matusewicz v Jo Jo's Auto Parts*, 18 AD3d 828 [2d Dept 2005]; *DiDomenico*, 252 AD2d at 49). "The nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter generally left to the discretion of the Supreme Court" (*Carbajal v Bobo Robo*, 38 AD3d 820 [2d Dept 2007]). To invoke the drastic remedy of striking a pleading a court must determine that the party's failure to disclose is willful and contumacious (*Greene v Mullen*, 70 AD3d 996 [2d Dept 2010]; *Maiorino v City of New York*, 39 AD3d 601 [2d Dept 2007]). "Willful and contumacious conduct can be inferred from repeated noncompliance with court orders ... coupled with no excuses or inadequate excuses" (*Russo v Tolchin*, 35 AD3d 431, 434 [2d Dept 2006]; *see also Prappas v Papadatos*, 38 AD3d 871, 872 [2d Dept 2007]).

Here, there is no dispute that the defendants were entitled to obtain an independent physical examination of plaintiff Leticia Bolorin pursuant to CPLR 3121. Plaintiff Leticia Bolorin placed her physical condition in controversy when the lawsuit was commenced *(see Koump v Smith*, 25 NY2d 285 [1969]). However, contrary to the moving defendants' assertions, they were aware of plaintiff's claims of depression and memory loss and related treatment since her deposition. Therefore, although plaintiff Leticia Bolorin consulted with Dr. Baer regarding these issues in September 2018, since the record demonstrates that moving defendants were aware of the injuries claimed, they should not now be permitted to pursue an examination on the eve of trial (*see Silverberg v Guzman*, 61 AD3d 955 [2d Dept 2009].)

Moreover, the moving defendants had ample opportunity to conduct an examination. The NYSCEF record indicates that there have been at least eleven discovery conferences held in this 2016 action and one discovery motion previously made since the preliminary conference was held in October 2017. Although several of the compliance conference orders issued after conferences cautioned the parties that any disclosure demands not raised would be deemed waived, the moving defendants did not seek an examination of the plaintiff. Indeed, in light of the testimony and extensive discovery exchanged and the procedural history, it appears that the moving defendants determined that the evidence proffered did not warrant a physical examination and waived their right to demand one. The argument raised in their motion papers that had they known about Dr. Baer's report, they would have conducted an examination is disingenuous at best and their insistence that this Court should somehow relieve them of their waiver is not compelling. To permit the moving

defendants to engage in discovery at this juncture and delay this action further cannot be countenanced. As noted by the Court of Appeals in *Kihl v Pfeffer* (94 NY2d 118 [1999]) "if the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity" (*Id.* at 123).

To the extent that the moving defendants' claim that an order should issue striking plaintiffs' disclosure relating to Dr. Baer's examination, plaintiffs correctly note that a plaintiff's treating physician is not an expert retained for litigation purposes as contemplated by the statute (*see Gonzalez v 80 West Realty LLC*, 2018 NY Slip Op 33414(U), Nov. 28, 2018). Moreover, 22 NYCRR 202.17(c) provides in pertinent part that copies of the records of the medical providers making examinations pursuant to this section, shall be served on all other parties within 45 days after completion of the examination. Moving defendants provide no authority in their papers that the minimal delay in doing so should result in a preclusion. Indeed, 22 NYCRR 202.17(h) specifically permits the court to dispense with the requirement of the rule "in the interests of justice and upon a showing of good cause." It has been explained that the "interest of justice and good cause" requirement is "concerned less with the excuse offered for the failure timely to serve the report than it is with a party's need for the medical proof, the availability of alternate sources and the adverse party's preparedness to cross-examine with respect to the evidence based on the newly furnished report" (*McDougald v Garber*, 135 AD2d 80, 94 [1st Dept 1988]). Here, since the report is consistent with all previous exchanged medical records and testimony, there can be no genuine claim of surprise to warrant preclusion (*see Hughes v Webb*, 40 AD 3d 1035 [2d Dept 2007]).

As to moving defendants' complaints regarding the supplemental bill of particulars, the long recognized purpose of a bill of particulars is to amplify the pleadings, limit proof and prevent surprise at trial (*see Suits v Wyckoff Hgts. Med. Ctr.*, 84 AD3d 487 [1st Dept 2011]; *Harris v Ariel Transp. Corp.*, 37 AD3d 308 [1st Dept 2007]; *Moran v Hurst*, 32 AD3d 909 [2d Dept 2006]; *Castellano v Norwegian Christian Home & Health Ctr., Inc.*, 24 AD3d 490 [2d Dept 2005]). It is well settled that a supplemental bill of particulars may be used for purposes of updating claims of continuing special damages and disabilities, but may not be used for adding new damages (*see Mayer v Hoang*, 83 AD3d 1516 [4th Dept 2011]; *Schreiber v University of Rochester Med. Ctr.*, 74 AD3d 1812 [4th Dept 2010]; *Kraycar v Monahan*, 49 AD3d 507 [2d Dept 2008]; *Dalrymple v Koka*, 295 AD2d 469 [2d Dept 2002]; *Martinovics v N.Y. City Health & Hosps. Corp.*, 285 AD2d 532 [2d Dept 2001]; *Pearce v Booth Memorial Hospital*, 152 AD2d 553 [2d Dept 1989]). CPLR 3043(b) provides in relevant part that "...a party may serve a supplemental bill of particulars with respect to claims of continuing special damages and disabilities without leave of court at any time, but not less than thirty days prior to trial." Here, plaintiffs have updated their claims of special damages and disabilities and have not added any new claims (*cf., Dahlin v Paladino*, 14 AD3d 647 [2d Dept 2005]; *see also Fuentes v City of New York*, 3 AD3d 549 [2d Dept 2004]).

Accordingly, the moving defendants' application must be denied. All other arguments raised and evidence submitted by the parties have been considered by this Court notwithstanding the specific absence of reference thereto.

In view of the foregoing, it is

ORDERED that the moving defendants' motion is denied in all respects; and it is further

ORDERED that, any applications not addressed in the foregoing are denied; and it is further

ORDERED that counsel for the parties are directed to appear for a conference in the Compliance Part of this Court, Courtroom 800, on February 11, 2019, at 9:30 a.m., and this matter shall be certified ready for trial, and a trial readiness order shall issue; and it is further

ORDERED that, plaintiffs shall serve a copy of this order with notice of entry upon defendants within seven (7) days of entry.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
February 4, 2019

HON. JOAN B. LEFKOWITZ, J.S.C.

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