

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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_____AD3d_____

Argued - September 14, 2010

REINALDO E. RIVERA, J.P.
THOMAS A. DICKERSON
RANDALL T. ENG
LEONARD B. AUSTIN, JJ.

2010-00550

DECISION & ORDER

Suzan Botros, etc., et al., respondents, v Eugene
Flamm, etc., et al., appellants.

(Index No. 10700/06)

Aaronson, Rappaport, Feinstein & Deutsch, LLP, New York, N.Y. (Steven C. Mandell of counsel), for appellants.

Coville & Genovese, P.C., Merrick, N.Y. (John D. Coville and Mitchell Dranow of counsel), for respondents.

In an action, inter alia, to recover damages for medical malpractice, the defendants appeal from an order of the Supreme Court, Suffolk County (Molia, J.), dated October 21, 2009, which granted the plaintiffs' motion for leave to amend the complaint to add a cause of action to recover damages for wrongful death and to amend the caption, and denied, as premature, with leave to renew upon the completion of disclosure, the defendants' cross motion for summary judgment dismissing the complaint.

ORDERED that the order is affirmed, with costs.

The Supreme Court did not improvidently exercise its discretion in granting that branch of the plaintiffs' motion which was pursuant to CPLR 3025(b) for leave to amend the complaint to add a cause of action to recover damages for wrongful death, as the proposed amendment would not cause prejudice or surprise and was neither palpably insufficient nor patently devoid of merit (*see* CPLR 3025[b]; *Lucido v Mancuso*, 49 AD3d 220, 229; *Hines v City of New York*, 43 AD3d 869, 871). As a result, that branch of the plaintiffs' motion which was for leave to

October 5, 2010

BOTROS v FLAMM

Page 1.

amend the caption also was properly granted. The defendants' remaining contention regarding the amendment of the complaint is not properly before this Court.

CPLR 3212(f) permits a party opposing a motion for summary judgment to obtain further discovery when it appears that facts supporting the position of the opposing party exist but cannot be stated (*see Family-Friendly Media, Inc. v Recorder Tel. Network*, 74 AD3d 738; *Aurora Loan Servs., LLC v LaMattina & Assoc., Inc.*, 59 AD3d 578; *Juseinoski v New York Hosp. Med. Ctr. of Queens*, 29 AD3d 636, 637). Under the circumstances, the Supreme Court properly denied, as premature, with leave to renew upon the completion of disclosure, the defendants' cross motion for summary judgment dismissing the complaint.

RIVERA, J.P., DICKERSON, ENG and AUSTIN, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "Matthew G. Kiernan". The signature is written in a cursive, slightly slanted style.

Matthew G. Kiernan
Clerk of the Court