

**Lissak v Cerabona**

2002 NY Slip Op 30028(U)

December 10, 2002

Supreme Court, New York County

Docket Number: 0115763/5763

Judge: Stanley L. Sklar

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Stanley S. Sica  
Justice

PART 29

Frank V. JM

INDEX NO. 115763-9

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 04

MOTION CAL. NO. \_\_\_\_\_

Caroline F.P.M.D.  
Att

The following papers, numbered 1 to 9 were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/Order to Show Cause + Affidavits - Ex <sup>m</sup> bits <u>5</u>	<u>1-7</u>
Answering Affidavits + Ex <sup>m</sup> bits _____	<u>8</u>
Replying Affidavits <u>1</u>	<u>9</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

SCANNED  
DEC 19 2002

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE \_\_\_\_\_

Dated: 12/16/02 \_\_\_\_\_

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 29

..... X

KENNETH LISSAK and MIRIAM LISSAK,

Plaintiffs,

Index No. 115763/97

-against-

FRANCO P. CERABONA, M.D., SUNIL S.  
TRASI, M.D., and ST. VINCENT'S HOSPITAL  
AND MEDICAL CENTER,

Defendants.

-----X

**Stanley Sklar, J.:**

In this action alleging medical malpractice, plaintiffs move, pursuant to CPLR 3025 (b), to amend their complaint to plead further allegations to support an alleged "exemption/exception" to defendants' Article 16 affirmative defenses.

Plaintiff Kenneth Lissak claims that he sustained serious physical injuries as a result of the negligence of defendant Sunil S. Trasi, M.D., in performing a discogram, and the further negligence of defendants Franco P. Cerabona M.D., and St. Vincent's Hospital, in the follow-up care Lissak received after he developed a spinal infection. Plaintiff Miriam Lissak seeks damages for loss of consortium.

The present action was commenced in August 1997. Answers were served in September 1997. The plaintiffs have been directed to file their Note of Issue by September 30, 2002.

All three answers contain, as an affirmative defense, the

following statement: "[w]hatever non-economic injuries plaintiff may have sustained as a result of the wrongdoing alleged in the Complaint will be limited as to the answering defendant by Article 16 of the New York State Civil Practice law and Rules." See, e.g., Answer of Cerabona, at 3.

Article 16 of the CPLR, in abrogation of the common law, "limits a joint tortfeasor's liability for non-economic losses to its proportionate share, provided that it is 50% or less at fault (CPLR 1601[1])." *Rangolan v County of Nassau*, 96 NY2d 42, 46 (2001). However, "[w]hile article 16 was intended to remedy the inequities created by joint and several liability on low-fault, 'deep pocket' defendants, it is nonetheless subject to various exceptions that preserve the common-law rule." *Id.* These exceptions are contained in CPLR 1602.

Plaintiffs, recognizing that they bear the burden of alleging and proving, by a preponderance of the evidence, that one or more of the exceptions set forth in CPLR 1602 applies (see, CPLR 1603), now move to amend their complaint to include allegations which they claim support one or more exceptions allegedly contained in CPLR 1602(2)(iv).

CPLR 1602, as applicable, reads as follows:

The limitations set forth in this article shall:

(2) not be construed to impair, alter, limit, modify, enlarge, abrogate or restrict ... (iv) any liability arising by reason of a non-delegable duty or by reason of the doctrine of respondeat superior.

Leave to amend a pleading is to be freely given in the absence of surprise or prejudice to the opposing side as a result of the delay. CPLR 3025(b); **Pasalic v O'Sullivan**, 294 AD2d 102 (1<sup>st</sup> Dept 2002). However, leave should be denied if the proposed amendment is patently without merit. **Whitney-Carrington v New York Methodist Hospital**, 289 AD2d 326 (2d Dept 2001).

Although plaintiffs have established that the amendment would neither surprise nor prejudice defendants, the motion is denied. CPLR 1602(2)(iv) "is not an exception to apportionment under CPLR article 16, but a savings provision that preserves the principles of vicarious liability., , **Rangolan v County of Nassau, supra**, 96 NY2d at 45; *see also*, **Faragiano v Town of Concord**, 96 NY2d 776 (2001). As such, it does not need to be pleaded nor proven under CPLR 1603, and a proposed amendment to a complaint seeking to add allegations concerning CPLR 1602(2)(iv) is patently without merit. **Denio v State of New York**, 283 AD2d 937 (4<sup>th</sup> Dept 2001); **Rucker v Allis**, 288 AD2d 822 (4<sup>th</sup> Dept 2001).

The case of **Cole v Mandell Food Stores, Inc.** (93 NY2d 34 [1999]) is not to the contrary. **Cole** merely reiterates the rule that an exception to CPLR 1601(1) has to be pleaded and proven under CPLR 1603, so as to apprise the defendant of the plaintiff's claim. As a result, a plaintiff is precluded from bringing up CPLR 1602(2) for the first time on appeal, after trial. *Id.*; *See also*, **Morales v County of Nassau**, 94 NY2d 218

(1999). Neither *Cole* nor *Morales* addressed whether CPLR 1602(2)(iv) was an exception or exemption to the rule of apportionment, the issue addressed directly a few years later in *Rangolan*, *supra*. None of the other cases cited by plaintiff suffice as a basis for requiring plaintiffs to make the proposed amendment.

To the extent, if any, that plaintiffs merely wish to apprise St. Vincent's of their claim that St. Vincent's is vicariously liable for the alleged malpractice of the codefendants because of a claim that the codefendants were St. Vincent's employees or actual or apparent agents plaintiffs have already done so. See: Bill of Particulars as to St. Vincent's, item 7. Any request by plaintiffs to simply amend their pleadings to assert that St. Vincent's had a non-delegable duty is denied since no legal or factual basis has been set forth for such amendment.

Accordingly, the motion is denied.

The foregoing constitutes the order and decision of the court.

Dated: 12/10/02

J.S.C.