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

PRESENT: Honorable Joan B. Carey PART 40 D
Justice

KENNETH LISSAK and MIRIAM LISSAK,

Plaintiffs,

-V-

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

Defendants.

Index No.: 115763/97
MOTION DATE
MOTION SEQ. NO. 7
MOTION CAL. NO.

The following papers, 1-23, were read on this motion by defendant Franco P. Cerabona, M.D., to amend his answer to include the defense of setoff and reduction in damages pursuant to GOL § 15-108

	Papers Numbered
Notice of Motion /Order to Show Cause - Affidavits - Exhibits	1-16
Answering Affidavits - Exhibits	17-21
Replying Affidavits	22-23

Cross-Motion: ☐ Yes ■ No

The plaintiffs commenced the instant action to recover damages for medical malpractice against defendants Franco Cerabona, M.D., Sunil Trasi, M.D., and St. Vincent's Hospital and Medical Center. From the time they appeared in this action in September of 1997 through the middle of February 2004, Dr. Cerabona and the Hospital maintained a joint defense based upon their contention that all of the care provided to the injured plaintiff by the defendants was within accepted standards of medical practice. On February 9, 2004, ten days prior to the trial date assigned to the action, a settlement was reached between the plaintiffs and Dr. Trasi. On February 23, following an adjournment of the trial date, the plaintiffs settled this action with the Hospital.

In the wake of these settlements, Dr. Cerabona served CPLR 3101(d) responses on the plaintiffs that asserted that the Doctor intended to offer the testimony of experts who would assert negligence on the part of Dr. Trasi. These CPLR 3101(d) responses had the effect of injecting a new, previously undisclosed theory of defense- that the injured plaintiff's injuries were caused, in whole or in part, by Dr. Trasi. The plaintiffs objected to these responses.

Following these events, Dr. Cerabona moved to amend his answer to include the defense of setoff and reduction pursuant to GOL § 15-108. The plaintiffs made an application to preclude Dr. Cerabona from presenting the newly noticed expert testimony. The court denied the plaintiffs' application and reserved decision on Dr. Cerabona's motion.

By an order, dated August 19, 2004, the Appellate Division, First Department reversed that portion of the court's order which denied the plaintiffs' application to preclude, granted the application, and precluded Dr. Cerabona from offering as witnesses those witnesses described in CPLR 3101(d) responses dated after January 22, 2004, witnesses which include the experts who would assert negligence on the part of Dr. Trasi.

Dr. Cerabona now seeks to amend his answer to assert the defense of GOL § 15-108 based upon the settlements of Dr. Trasi and the Hospital.

General Obligations Law ("GOL") § 15-108 allows a nonsettling defendant a monetary offset against the amount of a verdict rendered against it. Generally, the statute permits a reduction of the verdict by the greater of (1) the amount stipulated by the settlement between the plaintiff and the settling defendant, (2) the amount of consideration paid for the settlement, and (3) the settling defendant's equitable share of the damages, as apportioned by the trier of fact. As an affirmative defense, GOL § 15-108 must be pled by the nonsettling defendant seeking the benefit offered by the statute (see e.g. Whalen v Kawasaki Motors Corp., 92 NY2d 288 [1998]).

"When an amendment to a pleading [] is sought at or on the eve of trial, judicial discretion in allowing such amendment should be discreet, circumspect, prudent and cautious" (Lissak v Cerabona, 10 AD3d 308, 310 [1st Dept. 2004], citing Kassis v Teachers Ins. & Annuity Assn., 258 AD2d 271, 272 [1st Dept. 1999]). Leave to amend a pleading should be denied where the opposing party would be prejudiced by the proposed amendment (see e.g. Cseh v New York City Trans. Auth., 240 AD2d 270 [1st Dept. 1997]). Prejudice arises when, among other things, a party incurs a change in position or is hindered in the preparation of its case (see Valdes v Marbrose Realty, Inc., 289 AD2d 28 [1st Dept. 2001]; Ward v City of Schenectady, 204 AD2d 779 [3d Dept. 1994]).

In reversing this court's prior order, the Appellate Division determined that Dr. Cerabona could not offer expert witnesses to testify that Dr. Trasi was negligent in the manner in which he cared for the injured plaintiff. To do so, the Court reasoned, would result in a material alteration of the theory of defense that Dr. Cerabona had maintained throughout the course of the litigation, which would prejudice the plaintiffs by interfering with their ability to prepare for trial. If the court were to allow Dr. Cerabona to amend his answer to assert negligence on the part of Dr. Trasi, use witnesses to assert negligence on the part of Dr. Trasi (i.e. Dr. Cerabona, Dr. Trasi), and seek apportionment of fault between Drs. Cerabona and Trasi, then the court would be violating the spirit of the Appellate Division's order. The same prejudice that the Appellate Division found that the plaintiffs would endure if Dr. Cerabona were allowed to offer expert witnesses to assert negligence on the part of Dr. Trasi (i.e. interference with plaintiffs' ability to prepare for trial), would visit the plaintiffs if the court were to permit Dr. Cerabona to assert negligence on the part of Dr. Trasi through fact witnesses (i.e. Drs. Cerabona and Trasi).

While the court will not permit Dr. Cerabona to assert negligence on the part of Dr. Trasi, thereby foreclosing him from a possible reduction of the settling defendants' equitable shares of the damages, Dr. Cerabona is not without recourse. Dr. Cerabona, assuming a verdict is rendered in favor of the plaintiffs, is still entitled to a setoff of the greater of the amount stipulated by the settlements between the plaintiffs and the settling defendants, and the amount of consideration paid for the settlements (see Whalen v Kawasaki Motors Corp., supra).

Based upon the foregoing, it is hereby

ORDERED that the motion is granted to the extent that defendant Franco Cerabona, M.D., is granted leave to amend his answer to include the defense of setoff and reduction in damages pursuant to GOL § 15-108 by the greater of the amount stipulated by the settlements between the plaintiffs and the settling defendants, and the amount of consideration paid for the settlements; and it is further,

ORDERED that counsel for the parties are to appear before the court at 9:30 am on June 13, 2005, at 111 Centre Street, room 572, for jury selection.

Dated: 05/13/2005

J.S.C.

Check one: ☐ FINAL DISPOSITION ■ NON- FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE