

Glasgow v Chou

2005 NY Slip Op 30284(U)

March 3, 2005

Supreme Court, Kings County

Docket Number:

Judge: Laura Lee Jacobson

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At an IAS Term, Part 21, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 3rd day of March, 2005

P R E S E N T:

HON. LAURA L. JACOBSON,

Justice.

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VALERIE GLASGOW,

Index No. 14849/01

Plaintiff,

- against -

MIKE CHOU, M.D., et al.,

Defendants.

----- X

The following papers numbered 1 to 2 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	1_____
Opposing Affidavits (Affirmations)_____	2_____
Reply Affidavits (Affirmations)_____	_____
Affidavit (Affirmation)_____	_____
Other Papers_____	_____

Upon the foregoing papers, plaintiff Valerie Glasgow's cross motion, heretofore held in abeyance, for an order, pursuant to CPLR 3025, granting plaintiff leave to further amend her complaint to assert a claim for medical malpractice against defendants Mike Chou, M.D. (Dr. Chou) and Long Island College Hospital (LICH or the Hospital), is hereby denied.

The facts of this matter are thoroughly detailed in the court's prior, August 20, 2004, decision and order, and the parties are referred thereto for a full and complete recitation thereof.

Said prior order determined, *inter alia*, that the allegations supporting plaintiff's claims against LICH and Dr. Chou clearly derived from the physician-patient relationship, were substantially related to and an integral part of the medical treatment being rendered to plaintiff and involved issues of medical malpractice which could not be established absent expert medical testimony.

On those and other grounds, the court dismissed the ordinary negligence, together with each and every other, cause of action set forth in plaintiff's second amended complaint. The court did not, however, dismiss the action in full as against LICH and Dr. Chou and, instead, held plaintiff's cross motion to amend in abeyance so as to give plaintiff an opportunity to submit, at the very minimum, a physician's affidavit of merit and a supplemental affirmation containing an excuse for plaintiff's lengthy delay in seeking the requested relief.

Plaintiff has now submitted additional papers in support of her cross motion to further amend the complaint, and the court has carefully considered same, along with LICH and Dr. Chou's opposition thereto.

While leave should be freely given, "[a] motion for leave to amend a pleading is committed to the broad discretion of the trial court, and the resulting determination will not be lightly set aside" (*Leibowitz v Plaza 400 Owners' Corp.*, 226 AD2d 681, 682 [1996]; *see*

also *Paolano v Southside Hospital*, 3 AD3d 524 [2004]; *Hassan v Schweizer*, 277 AD2d 797, 799 [2000]; *Capstone Enterprises of Port Chester, Inc. v County of Westchester*, 272 AD2d 427, 428 [2000]; *Sidor v Zuhoski*, 257 AD2d 564 [1999]; *EDP Medical Computer Systems, Inc. v Sears, Roebuck and Co.*, 255 AD2d 481, 482 [1998]; *Constantini v Benedetto*, 190 AD2d 888, 889 [1993]; *Pitcher v Quinn*, 144 AD2d 115, 116 [1988]).

Here, plaintiff, despite the court having granted her ample opportunity to do so, fails to present an adequate affidavit of merit or any other evidentiary support for her cross motion seeking leave to further amend her complaint to assert a cause of action for medical malpractice (see *Joyce v McKenna Assocs.*, 2 AD3d 592, 594 [2003]; *Bhattacharyya v Quincy Mutual Fire Insurance Co.*, 5 Misc 3d 1029[A], **3 [2004] [“leave to amend should not be granted ‘upon mere request of a party without a proper basis’ Rather, it is incumbent upon the movant to make ‘some evidentiary showing that the claim can be supported’”], quoting *Morgan v Prospect Park Assocs. Holdings, L.P.*, 251 AD2d 306 [1998]; see also *Sober v Kalina*, 208 AD2d 1140 [1994]), and fails to show any reasonable excuse for her extensive delay in seeking such leave (see generally *Alexander v Seligman*, 131 AD2d 528 [1987]; *Schroeder v Brooklyn Hospital*, 119 AD2d 564, 564-565 [1986]), thus requiring the cross motion’s denial.

First, although the necessity of the proffer of such document on a motion for leave to amend a complaint is clearly self-evident, and need not have been specifically directed by the court, plaintiff fails to provide a copy of the proposed third amended complaint for the court’s examination thereof. A motion to amend a pleading should be denied when the

amender fails to submit a copy of the proposed pleading with the motion for the court's review (*Haller v Lopane*, 305 AD2d 370 [2003], citing *Branch v Abraham & Strauss Dept. Store*, 220 AD2d 474, 475 [1995]; see also *Anderson Properties, Inc. v Sawhill Tubular Division, Cyclops Corp.*, 149 AD2d 950 [1989]; *Bridges v 725 Riverside Drive, Inc.*, 119 AD2d 789, 790 [1986]; *Commissioners of the State Insurance Fund v Liverpool Central School District No. 1*, 180 Misc 2d 501, 504 [1999]; *Katzeff v Cohn*, 139 Misc 2d 1076, 1078 [1988], citing *Goldner Trucking Corp. v Stoll Packing Corp.*, 12 AD2d 639 [1960]).

Second, plaintiff fails to present a reasonable excuse for the delay. In fact, plaintiff, in her current submission, seems to insist even more strongly that there was no inadvertence, misperception or other error on her part, and no excuse for her delay in pleading or seeking to plead this claim, other than plaintiff or her counsel did not believe, and still does not believe, that her claims against LICH and Dr. Chou properly and legally sound in medical malpractice rather than in ordinary negligence. Indeed, plaintiff's moving papers express a clear and certain reluctance to even assert a cause of action for medical malpractice and that leave to amend is sought only as a means of avoiding the court's dismissal of the complaint in its entirety.

Where, as here, a party fails to recognize the potential applicability of certain legal theories, or the inapplicability of others, to the facts of the case, such failure does not excuse a lengthy delay in pleading a cause of action or defense (see *Leibowitz*, 226 AD2d at 682, citing *Napoli v Canada Dry Bottling Company of New York, Inc.*, 166 AD2d 696, 697 [1990]).

Here, plaintiff delayed three or more years prior to moving to amend her complaint to assert a cause of action for medical malpractice and did so, by her own argument, only because she did not, and still does not, recognize the applicability of such claim. During the period of the delay, plaintiff twice amended her original complaint, but failed to assert the claim - - acts that were arguably prejudicial to defendants and by which plaintiff might be said to be guilty of laches.

Since plaintiff presents no reasonable excuse for her extended delay in moving to amend, the cross motion must be denied (*see Alexander*, 131 AD2d at 528; *Santorelli v New York City Transit Authority*, 121 AD2d 527 [1986]; *Schroeder*, 119 AD2d at 564-565; *Bertran v Richmond Memorial Hospital and Health Center*, 106 AD2d 362, 363-364 [1984]; *see also Auwarter v Malverne Union Free School District*, 274 AD2d 528, 529 [2000]; *Wagner v Variano*, 253 AD2d 427, 428 [1998]; *Salovaara v Eckert*, 6 Misc 3d 1005 [A], *15 [2005]; *Bhattacharyya*, 5 Misc 3d at 1029, **3).

Third, plaintiff fails to provide in connection with the proposed amendment, and as specifically requested by the court, a physician's affidavit of merit or any other adequate affidavit of merit from a medical expert.

Where a party is guilty of an extended delay in moving to amend, the court should ensure that the amendment procedure is not abused by requiring from the proponent an affidavit or showing of merit and, in the case of a medical malpractice action, a physician's affidavit of merit (*Bertran*, 106 AD2d at 364; *see also Neveloff v Faxton Children's Hospital and Rehabilitation Center*, 227 AD2d 457 [1996] ["In a medical malpractice action, expert

medical opinion evidence is generally required to demonstrate merit”]; *Evans v Kringstein*, 191 AD2d 714, 715 [1993]).

Here, plaintiff again presents only a registered nurse’s affidavit, wherein it is asserted that, (1) “[t]here was a deviation in accepted nursing practice in maintaining the surgical field and/or in the care, custody and control of the sterile allograft after its sealed sterile container was opened and while it was being dumped into the sterile field,” and (2) “there was a deviation of accepted nursing practices either on the part of the circulating nurse ... in contacting the allograft or in a breach of the procedure to maintain sterility of the basin into which the allograft was dumped within the sterile field.” Said document contains the same deficiencies previously noted by the court in its prior decision.

The nurse’s affidavit is ineffective as against Dr. Chou, since it fails to assert (and, under the circumstances presented herein, a nurse is, in any event, not qualified to assert) that, in treating plaintiff, Dr. Chou departed from accepted medical practice and that such departure was a proximate cause of plaintiff’s alleged injuries. Plaintiff’s counsel’s affirmation, alleging Dr. Chou’s negligence in failing to properly supervise the operating room nurses, is made without personal knowledge and constitutes insufficient support for a cause of action alleging Dr. Chou’s medical malpractice (*see Lucido v Vitolo*, 251 AD2d 383 [1998]).

Nor, assuming that a nurse’s affidavit would be sufficient to support a cause of action against LICH for medical malpractice, is the court satisfied that plaintiff’s cross motion to amend is supported by an affidavit of merit from a qualified medical expert. The

resume/curriculum vitae annexed to plaintiff's nurse's affidavit states that she is, among several other things, an "O.R. Nurse," while failing to state, generally or in particular, her qualifications and experience in the sterile handling of allograft or other transplant materials during surgical procedures. Her listed experience in "surgical cardio thoracic" and "post anesthesia" care, as a "patient advocate," in preparing patients for the operating room and assisting the surgical team with scrubbing and by obtaining supplies and equipment, is insufficient to demonstrate that her assertions of departures from accepted nursing practices in the handling of the allograft material are made by a medical expert qualified to make such determinations (*cf. Smith v Tyras*, 265 AD2d 217 [1999]).

Even accepting that plaintiff's proffered expert is sufficiently qualified to make the necessary medical assessments required herein, the court again notes, as it did in its prior decision and order, that "[a]n expert cannot reach a conclusion by reliance on a 'contingent, speculative, or merely possible' foundation of material facts" (*Kirker v Nicolla*, 256 AD2d 865, 867 [1998]). Here, plaintiff's nursing expert reaches her conclusion that the operating room nurses deviated from accepted nursing standards by assuming, and then relying upon such assumption, that either the allograft material was contaminated through contact with unsterile operating room personnel or through contact with unsterile instruments, which instruments became unsterile as a result of deviations occurring within the operating room's sterile field.

What plaintiff's expert does not appear to consider, and among the reasons her affidavit is unacceptable, is what the record discloses to be the equal possibilities that (1) the

instruments may have been unsterile, not because of any deviation from accepted medical standards, but due to a malfunction of the autoclave sterilization machine, or (2) the allograft material arrived at the hospital and, thus, into the operating room, in an already contaminated state.

Finally, it is incumbent upon one seeking leave to amend a pleading to make some evidentiary showing that the claim sought to be added can be supported (see *NAB Construction Corp. v Metropolitan Transportation Authority*, 167 AD2d 301 [1990] [court must examine the underlying merit of the causes of action asserted in a proposed amended complaint, since, to do otherwise, would be wasteful of judicial resources]; see also *Joyce*, 2 AD3d at 594; *Hynes v Start Elevator, Inc.*, 2 AD3d 178 [2003]; *Sidor*, 257 AD2d at 565; *Farrell v K.J.D.E. Corp.*, 244 AD2d 905 [1997]; *Walter & Rosen, Inc. v Pollack*, 101 AD2d 734 [1984]).

As to the instant matter, plaintiff, in addition to failing to present a competent affidavit of merit from a medical expert qualified to make the required assessment that there was a medical departure that proximately caused plaintiff's alleged injury, fails to present any other competent proof of a causal connection between the alleged medical malpractice and claimed injury.

On this record, the court finds that there has been no clear showing among the several possible sources (those being the hospital, its personnel or equipment; the non-party entity that harvested the allograft material from the cadaver; and the human cadaver itself) as to the actual source of the contamination, or that, all discovery having been completed, plaintiff is

now, or will ever be, in a position to prove the true source by a legal preponderance of the evidence. Even assuming that the contamination occurred, or more likely occurred, within the hospital, rather than prior to the material's arrival thereat, the record suggests equal likelihoods that the source of the contamination was the sterilization machine, rather than operating room personnel. There is, however, no allegation or evidence proffered by plaintiff with respect to the accepted standards of care in relation to the autoclave sterilization machine; no proof that any such accepted standards of care were deviated from or not met; or proof even that the actions of plaintiff's medical care givers amounted to simple negligence (*see Hattendorf v State*, 4 Misc 3d 1008[A], **6 [2004]).

Based upon all of the foregoing, plaintiff's cross motion for leave to further amend her complaint to state a medical malpractice cause of action against LICH and Dr. Chou is denied, and the second amended complaint hereby dismissed in its entirety.

The foregoing constitutes the decision, order and judgment of this court.

ENTER,

J. S. C.

HON. LAURA JACOBSON