SHORT FORM ORDER

INDEX No. 04-5895
CAL. No. 07-00156-MM

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 6-14-07
ADJ. DATE 9-11-07
Mot. Seq. # 001 - MD
002 - MG

DENISE H. LENT and PHILIP LENT,

Plaintiffs,

- against -

A.O. FOX MEMORIAL HOSPITAL, CLAIRE A. BEETLESTONE, M.D., JAMES D. McCHESNEY, M.D., FRANCIS NOLAN, M.D. and STUART B. CHERNEY, M.D.,

Defendants.

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Upon the following papers numbered 1 to 24 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15; Notice of Cross Motion and supporting papers 16-22; Answering Affidavits and supporting papers __; Replying Affidavits and supporting papers 23-24; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is

ORDERED that this motion (001) by defendant, James D. McChesney, M.D., pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint, is denied; and it is further

ORDERED that this cross motion (002) by plaintiffs, Denise H. Lent and Philip Lent, pursuant to CPLR 3025(b) to amend the complaint to add additional defendants and to assert a claim against James D. McChesney, M.D., P.C., Stuart B. Cherney, M.D., P.C. and Robin Kammerer, is granted and a supplemental summons and the proposed amended complaint shall be served by plaintiff within forty five days of the date of this order. Defendants are directed to serve their respective answers within thirty days

of the date of this order.

The complaint of this action sets forth causes of action sounding in medical malpractice and lack of informed consent on behalf of plaintiff Denise H. Lent, with a derivative cause of action for loss of services asserted on behalf of Philip Lent. Plaintiff alleges, *inter alia*, defendants failed to timely and properly diagnose a depressed fracture of the lateral tibio-femoral joint space and joint effusion, failed to timely operate to correct the depressed fracture, and failed to inform plaintiff of her condition and lack of treatment, causing plaintiff to lose the opportunity to undergo an acute open reduction with internal fixation thus causing irreparable damage with development of arthritis and need for additional surgery.

Denise Lent had been involved in a roll over automobile accident in Oneonta, New York, on October 13, 2001, and was brought to the emergency department at A.O. Fox Memorial Hospital for care and treatment, which consisted, in part, of various x-rays. She was seen at the emergency department at A. O. Fox Memorial Hospital by physician Frances Nolan, M.D. who ordered various x-rays of both knees, facial bones, and cervical spine and CT scan of her head. Plaintiff was then diagnosed with a non-displaced fracture of the skull, knee pain and multiple scrapes and contusions.

Defendant James McChesney, M.D. seeks summary judgment dismissing the complaint as asserted against him alleging he did not read or interpret the x-ray of plaintiff's knee and did not personally employ Dr. Claire A. Beetlestone, M.D., who did read the x-rays. Dr. McChesney further alleges that Dr. Beetlestone was employed by James McChesney, M.D., P.C., and not by James McChesney, M.D.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.***, 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]).

In support of his motion, Dr. McChesney has submitted, *inter alia*, copies of the pleadings, verified bill of particulars, supplemental bill of particulars, uncertified copy of plaintiff's medical records from A.O. Fox Memorial Hospital, unsigned, unsworn copies of the transcripts of the examinations before

trial of James D. McChesney, M.D. and Claire Beetlestone, M.D., affidavit of James D. McChesney, M.D., and a copy of an employment agreement.

Dr. McChesney sets forth in his supporting affidavit that radiological services were provided to the A.O. Fox Memorial Hospital by the professional corporation of James D. McChesney, M.D., P.C., ofwhich he is the president. He states that since he did not participate in plaintiff's medical care and treatment and did not read or interpret plaintiff's x-rays at the hospital, and is not Dr. Beetlestone's employer, the action against him should be dismissed.

Dr. McChesney states that during his deposition he testified that he paid a salary to Dr. Beetlestone. In actuality, he now states, Dr. Beetlestone is paid by and through a New York professional service corporation entitled "James D. McChesney, M.D., P.C." Dr. McChesney also states that during his deposition he stated he considered himself to be Dr. Bettlestone's employer. He now testifies that Dr. Beetlestone was an employee of a professional service corporation entitled James D. McChesney, M.D., P.C.

In support of this claim that he is a professional corporation, Dr. McChesney has not submitted a copy of any papers demonstrating there was a corporation filed with New York State at the time of the alleged malpractice. Additionally, Dr. McChesney has raised credibility issues by attempting to change his deposition testimony at this late date after a summary judgment motion has been made (*see, **Zamir v Hilton Hotels Corp,*** 304 AD2d 493, 758 NYS2d 645 [1st Dept 2003]; ***Breco Envitl., Inc. v Town of Smithtown,*** 31 AD2d 359, 818 NYS2d 244 [2nd Dept 2006]; ***Surdo v Albany Collision Supply, Inc,*** 8 AD3d 655, 779 NYS2d 544 [2nd Dept 2004]).

CPLR 3116(a) provides "The deposition shall be submitted to the witness for examination and shall be read to or by him or her, and any changes in form or substance which the witness desires to make shall be entered at the end of the deposition with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness before any officer authorized to administer an oath. If the witness fails to sign and return the deposition within sixty days, it may be used as fully as though signed. No changes to the transcript may by made by the witness more than sixty days after submission to the witness for examination.

In the instant action, Dr. McChesney has not produced a signed and sworn copy of the deposition transcript with errata sheets wherein the corrections which he is now asserting were made within sixty days of receipt of the transcript, thus raising credibility issues concerning his current averments. These credibility issues are not to be determined on a motion for summary judgment (CPLR §3212(b), ***S.J. Capelin Associates, Inc. v. Globe Manufacturing Corporation***, 357 N.Y.S.2d 478, 34 N.Y.2d 338 [1st Dept 1974])

Under the doctrine of respondeat superior, a corporation, including a professional corporation, is liable for a tort committed by its employees acting within the scope of their employment ***(Yaniv v Taub,*** 256 AD2d 273, 683 NYS2d 34 [1st Dept], *cf.*, ***Beauchamp v City of New York,*** 3 AD3d 465, 771 NYS2d 129 [2nd Dept 2004]). However, a shareholder, employee, or officer of a professional corporation is liable only for negligent or wrongful acts committed by him or by any person under his direct supervision and control while rendering professional services on behalf of such corporation (***Moller v Talliuaga,*** 255

AD2d 563, 681 NYS2d 90 [2nd Dept 1998]). In that defendant McChesney has not provided this Court with any supporting evidence for this court to determine as a matter of law that Dr. McChesney does not pay or employ Dr. Beetlestone as his employee, Dr. McChesney has not demonstrated entitlement to summary judgment dismissing the complaint.

Accordingly, motion (001) is denied.

Turning to motion (002), plaintiffs seek to amend the caption and the complaint to add James D. McChesney, M.D., P.C., Stuart B. Cherney, M.D., P.C. and Robin Kammerer as defendants and employees of the asserted professional corporations. In support of this application, plaintiffs have submitted, *inter alia*, an uncertified copy of the transcript of the examinations before trial of Stuart Cherney, M.D., uncertified copies of plaintiff's medical records, affidavit and report of plaintiff's expert, and a proposed amended verified complaint. Plaintiffs also refer to exhibits A-L appended to the affirmation of Julio J. Vasquez.

Plaintiffs claim that after the expiration of the relevant statute of limitations and not long before the instant motion practice, plaintiffs were, for the first time, advised of the existence of professional corporations bearing the names of defendant James D. McChesney, M.D., P.C, and Stuart B. Cherney, M.D., P.C.

CPLR 3025(b) provides "a party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances."

While leave to amend pleadings should be freely granted, such a decision lies within the discretion of the trial court and the exercise of that discretion should not be lightly set aside. Lateness in making a motion to amend, coupled with the absence of a satisfactory excuse for the delay and prejudice to the opposing party, justifies denial of such a motion (***Thibeault v Palma,*** 266 AD2d 616, 697 NYS2d 404 [3rd Dept 1999]). Where a note of issue and certificate of readiness has been filed, prejudice is a less significant criterion since the court must also consider how long the amending party was aware of the facts upon which the motion was predicated and whether a reasonable excuse was offered for the delay (***Murray-Gardner Mgt. v Iroquois Gas Transmission Sys.,*** 251 AD2d 954, 674 NYS2d 820 [3rd Dept 1998]). In the instant action, the Note of Issue and Certificate of Readiness were filed January 22, 2007. Dr. McChesneys's examination before trial was conducted August 25, 2006, and he has only come forward now, on a motion for summary judgment, after the expiration of the statute of limitation, asserting that he is not the employer of, and does not pay, Dr. Beetlestone. As such, this is a situation in which defendants' delay in revealing this information causes severe prejudice to plaintiffs in light of the expiration of the statute of limitations. In opposing this motion, defendants have not articulated substantial prejudice or actual prejudice if such amendment is permitted (*see,* ***Wiesel and Rosenweig v Rubinstein a/k/a Kalmen Rubinstein,*** 2006 NY Slip Op 51107U, 12 Misc3d 1168A, 820 NYS2d 847 [Nassau County 2006]). In fact, Dr. Cherney has not opposed this motion.

As set forth above, under the doctrine of respondeat superior, a corporation, including a professional corporation, is liable for a tort committed by its employees acting within the scope of their

employment (***Yaniv v Taub,*** supra), and a shareholder, employee, or officer of a professional corporation is liable only for negligent or wrongful acts committed by him or by any person under his direct supervision and control while rendering professional services on behalf of such corporation (***Moller v Talliuaga,*** supra). Merit has been demonstrated by plaintiffs in support of making such amendment to the summons and complaint in that both Dr. Cherney and Dr. McChesney assert they are professional corporations

Plaintiff's expert opines that the x-rays from A.O. Fox Memorial Hospital on October 13, 2001, and subsequent x-rays read by defendants, reveal a depressed fracture of the lateral tibial plateau with widening of the lateral tibio-femoral joint space with joint effusion, which was not diagnosed by defendants.

Additionally, the report and affidavit of plaintiff's expert sets forth a basis upon which to premise liability in the complaint against the proposed defendants based upon his expert opinion that there was a depressed fracture of the right knee in the x-rays interpreted as negative by defendants.

In that the current defendants, and the proposed defendants, are united in interest (*see,* ***Brock v Bua***, 83 AD2d 61, 443 NYS2d 407 [2nd Dept 1981]; ***Grossman v The New York City Health and Cospitals Corporation et al,*** 178 AD2d 323, 578 NYS2d 135 [1st Dept 1991]) concerns regarding the expiration of the statute of limitations and service upon the proposed defendants are eliminated. Robin Kammerer, a physician's assistant, is alleged to be an employee, agent or servant of Stuart B. Cherney, M.D., P.C., acting under his supervision, and is alleged to have rendered care and treatment to plaintiff on or about October 22, 2001.

Accordingly, plaintiffs' motion (002) to serve the proposed supplemental summons and amended complaint is granted and the same shall be served by plaintiff within forty five days of the date of this order. Defendants are directed to serve their respective answers within thirty days of the date of this order.

Dated: OCT 10 2007

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION