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SCANNED ON 12/12/2007

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

PRESENT: ALICE SCHLESINGER PART 16

Justice

Jean Mamalos

-v-

NY Presbyterian Hospital

INDEX NO. 101568/03

MOTION DATE

MOTION SEQ. NO. 004

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | |
| Answering Affidavits — Exhibits | |
| Replying Affidavits | |

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED
DEC 12 2007
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: DEC 07 2007

ALICE SCHLESINGER J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 16

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JEAN MAMAKOS

Plaintiff,

-against -

NEW YORK PRESBYTERIAN HOSPITAL WEILL CORNELL MEDICAL CENTER, ELIZABETH AUCHINCLOSS, M.D., OSMAN ALI, M.D., HERBERT PARDES, M.D., and JOHN DOES 1-25,

Defendants.

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Index No. 101568/03

Motion Seq. No. 004



**SCHLESINGER, J:**

Plaintiff Jean Mamakos has moved by Order to Show Cause to amend the *ad damnum* clause in her complaint to include a demand for punitive damages. Defendants vigorously oppose the motion, claiming that it is untimely and prejudicial and that the motion papers suffer from procedural defects. For the reasons stated below, this Court finds that defendants' objections, when viewed in the context of these proceedings, do not bar the requested relief.

Background Facts

On March 24, 2002, at approximately 8:00 p.m., Jean Mamakos arrived at New York Presbyterian Hospital (the Hospital)[1]. Ms. Mamakos asserts that, as she entered the building, unidentified security guards employed by the Hospital "attacked and assaulted [her], knocking her to the pavement, handcuffed her, dragged her into the street where [she] was hoisted in the air by approximately six (6) unidentified security guard(s), placed on a stretcher, with one wrist handcuffed to the stretcher, leaving [her] other arm and legs

[1]The Hospital is named in this action as New York Presbyterian Hospital Weill Cornell Medical Center. Ms. Mamakos had previously been employed by an affiliate.

being painfully restrained by multiple unidentified security guard(s). Thereafter an EMT van pulled up next to where [Ms. Mamakos] was lying on the stretcher and plaintiff was put into the van without her permission and consent. While [Ms. Mamakos was] restrained, an unidentified security guard placed a black bag over [her] head creating apprehension in [her] of immediate harm and fear." (Complaint, §§10-11). Ms. Mamakos further alleges that she later found herself "on a stretcher in the emergency room in a psychiatric unit at defendant Hospital in isolation with a four point restraint holding her arms and legs ... disrobed and wearing a hospital gown." (Complaint §16). After Ms. Mamakos had allegedly been held in that condition "under a four point restraint for approximately four (4) hours, defendant Dr. Osman Ali appeared with a hypodermic needle filled with an unknown fluid [and] proceeded to inject [Ms. Mamakos over her objection]." (Complaint §18).

In January 2003, Ms. Mamakos commenced this action against the Hospital and various employees asserting three causes of action: assault, false arrest and false imprisonment, and violation of constitutional rights and intentional infliction of emotional distress. In her *ad damnum* clause, she seeks damages in the sum of five million dollars on the first cause of action, ten million dollars on the second, and ten million dollars on the third. The phrase "punitive damages" does not appear in the *ad damnum* clause or elsewhere in the complaint.

After extensive discovery and motion practice which led to the dismissal of the complaint against defendant Dr. Herbert Pardes, a trial date of October 22, 2007 was set. At a conference on October 17, plaintiff's counsel indicated, and then confirmed in writing, that he would be demanding punitive damages. When defense counsel objected and claimed surprise, the Court in a written decision dated October 22, 2007 stayed the trial and directed plaintiff to make this motion to amend the *ad damnum* clause.

Amendment of the *Ad Damnum* Clause is Generally Allowed

The law is well settled that "in the absence of prejudice to the defendant, a motion to amend the *ad damnum* clause, whether made before or after the trial, should generally be granted." *Loomis v Civetta Corinno Construction Corp., et al.*, 54 NY2d 18, 23 (1981). In confirming that principle, the Court of Appeals in *Loomis* emphasized that "[o]ne of the obvious goals of the CPLR was to liberalize the practice relating to pleadings." *Id.* at 23. Thus, CPLR 3017, subd. (a) empowers the court to "grant any type of relief within its jurisdiction appropriate to the proof, whether or not demanded, imposing such terms as may be just." Similarly, CPLR 3025 gives the court broad discretion to allow the amendment of pleadings, indicating in subdivision (b) that leave "shall be freely given" and and confirming in subdivision (c) that the amendment can be authorized "before or after judgment" to conform the pleadings to the proof. The *Loomis* court therefore concluded that a trial court presented with a motion to amend an *ad damnum* clause should weigh the same considerations as applied when considering a motion to amend a complaint and allow the amendment at any stage of the proceedings if no prejudice to the defendant has been shown. 54 NY2d at 23.

Here, the proposed amendment is limited in scope; plaintiff seeks only to amend the *ad damnum* clause to include an express demand for punitive damages.[2] Since a claim for punitive damages is not a separate cause of action, nothing more than the express demand is required in this case. *Rocanova v Equitable Life Assur. Soc. Of U.S.*, 83 NY2d 603 (1994).

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[2]Defendant (at p. 8 of its Memo) challenges plaintiff's assertion that it "is not necessary to specifically claim punitive damages in a complaint." *Sanders v Rolnick*, 188 Misc 627, 631 (App. Term, 1st Dep't 1947), *aff'd* 272 AD 803 (1st Dep't 1947), citing *Korber v Dime Savings Bank*, 134 App. Div. 149 (2nd Dep't 1909). However, the point is moot, as this Court has already directed plaintiff to move to amend the complaint by order dated October 22, 2007.

Punitive damages are typically supported by evidence of wrongdoing that is "intentional and deliberate, and has the character of outrage frequently associated with crime." *Freeman v The Port Authority of New York and New Jersey*, 243 AD2d 409, 410 (1st Dep't 1997), quoting *Liberman v Riverside Mem. Chapel,* 225 AD2d 283, 291, quoting *Preozeralik v Capitol Cities Communications*, 82 NY2d 466, 479, quoting Prosser and Keeton, Torts §2 at 9 (5th ed. 1984). The Verified Complaint in this case contains numerous allegations along those lines. First, the causes of action themselves (assault, false arrest and false imprisonment, and violation of constitutional rights and intentional infliction of emotional distress) are all intentional torts or involve deliberate acts which are routinely associated with punitive damages. *See Freeman, supra*. Moreover, the Complaint quoted above describes defendants' conduct in great detail and then characterizes it as "malicious assault" (¶13), "willful and wanton misconduct" (¶ 27), and conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, regarded as atrocious and was intolerable in a civilized community" (¶ 32). Similarly, in ¶19 of the Verified Bill of Particulars, plaintiff describes defendants's conduct as "extreme and outrageous" and as having caused her to reach a level which "no reasonable person could be expected to endure." Plaintiff's statements throughout the litigation to date have at all times been consistent with these allegations, and defendants do not, and cannot, claim otherwise. Therefore, this Court finds that the requested amendment is limited in scope and amply supported by the allegations in the Verified Complaint and Bill of Particulars to allow the requested amendment pursuant to *Loomis*, absent prejudice to the defendants.

Defendants's Claim of Prejudice is Unavailing

Defendants urge this Court to deny the motion because plaintiff has moved on the eve of trial and has failed to offer a reasonable excuse for the delay. The claim is

unavailing. Plaintiff delayed because, in counsel's opinion, the specific allegations in the Complaint and the demand for $25 million in damages obviated the need to expressly demand punitive damages. Plaintiff's position in not unreasonable as a matter of law, even though this Court concluded in its October 22 decision that the better practice was to seek leave to include an express demand for punitive damages.

More significantly, though, a motion to amend may be made and granted at any stage of the proceeding, "absent prejudice or surprise resulting directly from the delay." *McCaskey, Davies and Associates, Inc. v New York City Health & Hospitals Corp.*, 59 NY2d 755, 757 (1983). While defendants claim both surprise and prejudice, few of the claims relate directly to delay, and none of them has merit. The claim of surprise is particularly hollow. As demonstrated above in detail and as this Court stated in its prior decision, the specific allegations in the Complaint as to defendants' conduct, the characterization of that conduct, and the significant demand for damages were sufficient to put the defendants on notice of a potential punitive damages claim.

Nor is there any basis for a finding of prejudice. As the Court of Appeals explained in *Loomis*, 54 NY2d at 23:

> Prejudice, of course, is not found in the mere exposure of the defendant to greater liability. Instead, there must be some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position.

Defendants's claims do not satisfy this test. While they claim they would have conducted discovery on the punitive damages claim, they have failed to specify a single additional question they would have asked the plaintiff or a single additional discovery demand they would have made. In fact, defendants thoroughly explored all the claims

in the Complaint cited above which are the foundation for the punitive damages demand, and plaintiff at no time indicated a desire to withdraw any of those claims. Quite the contrary, plaintiff has vigorously pursued this case at every stage and has opposed all efforts by the defense to have the case dismissed or discontinued against individual defendants. Under these circumstances, defendants cannot fairly presume that this Court would have granted a motion to dismiss a punitive damages claim as a matter of law.

This case is readily distinguishable from *Heller v Provenzano, Inc.*, 303 AD2d 20 (1st Dep't 2003) relied upon by defendants. *Heller* involved a claim of personal injury against a building owner by a plaintiff who had tripped and fallen as he exited a freight elevator in the parking garage. On appeal of the jury verdict in favor of the plaintiff, the Appellate Division ordered a new trial due to misconduct by both counsel. Plaintiff then sought to amend to include a claim of punitive damages based on violations of the Building Code and safety regulations which had not originally been alleged. In denying the motion to amend, the court cited a need for discovery about defendants's practices related to the newly alleged violations and accident statistics as only two of the issues raised by the proposed amended complaint. The *Heller* case cannot reasonably be compared to this case.

Similarly unpersuasive is defendants's claim that they are prejudiced because they have not had a "full and air opportunity to consult the personal counsel required because their insurance will not cover such damages." (Memo of Law at p. 6). To avoid any such prejudice, this Court stayed the trial of this action on October 22 to give defendants ample opportunity to consult private counsel. Presumably, that consultation

has taken place by now so that the matter can proceed to trial next year with the full protection of defendants's rights.

Conclusion

This Court finds that the Verified Complaint and the Verified Bill of Particulars lay a sufficient foundation for the proposed demand for punitive damages, and that the amendment of the *ad damnum* clause to expressly state the demand will not prejudice the defendants. Plaintiff's failure to attach a proposed Amended Complaint to the moving papers is not fatal, considering the *de minimus* amendment proposed.

Accordingly, it is hereby

ORDERED that plaintiff's motion is granted and plaintiff is directed to serve an Amended Complaint by January 4, 2008 by personal delivery to the offices of defense counsel; and it is further

ORDERED that defendants shall similarly serve an Answer to the Amended Complaint by January 24, 2008; and it is further

ORDERED that counsel shall appear before this Court to select a trial date on December 14, 2007 at 9:30 a.m. as previously scheduled.

This constitutes the decision and order of this Court.

Dated: December 7, 2007

DEC 07 2007

J.S.C.

ALICE SCHLESINGER