Lettieri v New York-Presbyt. Hosp.

2007 NY Slip Op 34043(U)

December 6, 2007

Supreme Court, New York County

Docket Number: 0105699/2005

Judge: Sheila Abdus-Salaam

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SCANNED ON 12/14/2007

[* 1]

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

PRESENT: HON. SHEILA ABDUS-SALAAM PART 13
Justice

Robert Lettieri

INDEX NO. 105699/05

MOTION DATE 12/6/07

- v -

MOTION SEQ. NO. 001

New York-Presbyterian Hospital, Answorth Allen, M.D., and Tony Wanich, M.D.

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	

FILED
DEC 14 2007
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion by defendants Allen and Wanich for an order pursuant to CPLR 3025 (b) permitting them to amend their answers to assert the affirmative defense of the statute of limitations, and upon amendment, for an order pursuant to CPLR 3211 (a)(5) dismissing the complaint, is granted.

The complaint sets forth three causes of action. None of them are labeled. The first cause of action contains allegations of negligence and also alleges that the defendants performed a surgical procedure that was "unconsented to by the plaintiff."(¶ 17.) The second cause of action alleges, among other things, that defendants "did not inform the plaintiff that any of the injuries which the plaintiff suffered were or could be an unavoidable result of the care and treatment rendered by the defendants"(¶ 26) and that the care and treatment was rendered without the plaintiff's informed

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

consent. The third cause of action alleges the doctrine of res ipsa loquitor.

This action was scheduled for jury selection on October 25, 2007. Both counsel submitted pre-trial information sheets which included the contentions of the parties, the requests to charge, and the number of witnesses that were to be called. Plaintiff's pre-trial sheet indicated that plaintiff would not call any expert witnesses and listed as a lay witness Dr. Young Kwon, plaintiff's treating physician. Plaintiff also stated that he was contending that defendants performed a tenotomy procedure without obtaining his consent and that this procedure was never discussed by defendants with plaintiff.

Defendants then submitted a memorandum of law arguing that the complaint must be dismissed on the ground that it was apparent from plaintiff's pre-trial information submission that plaintiff was claiming a battery as opposed to a lack of informed consent, and that such a claim is barred by the statute of limitations. Defendant also argued that if plaintiff is in fact claiming a lack of informed consent his complaint must be dismissed because plaintiff had stated that he was not going to call any expert witnesses.

It was not clear to this court from the pleadings, the bills of particulars, or plaintiff's pre-trial information sheet whether plaintiff was claiming a battery in addition to or in lieu of a lack of informed consent and whether plaintiff was also claiming negligence. Plaintiff's complaint, as noted, alleges a lack of consent, a lack of informed consent and negligence, in addition to res ipsa loquitor, which is not a cause of action but merely a legal doctrine. The bills of particulars allege that the tenotomy was performed without obtaining plaintiff's informed consent, and also allege that consent was not obtained. The pre-trial submission states that the procedure was performed without obtaining plaintiff's consent or explaining the possible complications or alternatives to said procedure. The issue of law is framed by plaintiff as follows: "Should the defendants be liable to the

plaintiff for performing an un-consented to medical/surgical procedure upon the plaintiff without obtaining his informed consent."(Pre-trial Information sheet, ¶ 5). Plaintiff also states that he underwent an unnecessary medical/surgical procedure, which sounds like a negligence cause of action.

When the parties appeared before me I asked plaintiff's counsel for clarification as to what causes of action they were pursuing. They informed me that the only claim plaintiff is asserting is a battery claim. Defendants' counsel then indicated that they intended to move for leave to amend their answers to assert the affirmative defense of statute of limitations, and this motion was filed.

Under the circumstances here, defendants are granted leave to amend their answers on the eve of trial to assert the affirmative defense of statute of limitations. "In the absence of prejudice or unfair surprise, requests for leave to amend should be granted freely."(Masterwear Corporation v. Bernard, 3 AD3d 305 [2004].) Lateness is not a barrier to the amendment unless the lateness is coupled with significant prejudice. (id.) The court has discretion to grant such a motion even after a jury has been selected where plaintiff has not established prejudice as a result of defendant's failure to timely assert the defense (see Caceras v. Zorbas, 74 NY2d 884 [1989]). Plaintiff's citation to Cameron v. 1199 Housing Corporation (208 AD2d 454 [1994]) is unpersuasive. Initially, in light of the imprecise drafting of the complaint and the bills of particulars in this case, it was not clear that plaintiff was claiming a battery and thus defendants cannot be said to have waived the statute of limitations defense for the battery claim. And even if this court were to assume that plaintiff had relied on defendants' waiver of the statute of limitations defense and accordingly suffered prejudice by

engaging in disclosure and preparing for trial[1], defendants here, unlike the defendants in Cameron, have offered an excuse for the delay in moving to amend their answers. It was not clear to defendants, or to this court, until October 25, 2007, that plaintiff was not pursuing a negligence claim and that his sole cause of action was for battery (compare Cseh v. New York City Transit Authority, 240 AD2d 270 [1997] where the First Department held that the trial court had improvidently exercised its discretion to allow an amendment after a 10 year delay when no excuse for the delay was given).

Accordingly, the motion is granted and the complaint is dismissed pursuant to CPLR 3211 (a) (5).

ORDERED that the Clerk enter judgment dismissing the complaint.

FILED
DEC 14 2007
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/6/07 SA-S

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[1]This type of effort and expense put forth by plaintiff is no greater than that expended by the plaintiff in Caceras where the Court of Appeals held that a court has discretion to allow defendant to amend his answer after a jury has been selected and that plaintiff had not demonstrated prejudice as a consequence of defendant's failure to timely assert the affirmative defense of workers' compensation law.