

**Yakkay v Ascher**

2008 NY Slip Op 30670(U)

March 5, 2008

Supreme Court, New York County

Docket Number: 0105463/2005

Judge: Eileen Bransten

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

PRESENT: BRANSTEN  
Justice

PART 6

YAKKAY, ROBERT B.,  
ET AL.  
- v -  
GEORGE ASGHAR,  
ET AL.

INDEX NO. 105463/05  
MOTION DATE 1/22/08  
MOTION SEQ. NO. 03  
MOTION CAL. NO. \_\_\_\_\_

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM**

**FILED**  
MAR 11 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: 3-5-08

Eileen Bransten

HON. EILEEN BRANSTEN 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: PART SIX

-----X

ROBERT B. YAKKAY, as Administrator of the Estate  
of ROBERT E. YAKKAY,

Plaintiff,

Index No.: 105463/05  
Motion Date: 1/22/08  
Motion Sequence No.: 003

*-against-*

GEORGE ASCHER, TILLIE ASCHER, NEW YORK  
PRESBYTERIAN HOSPITAL, LONG BEACH  
MEDICAL CENTER and THE KOMANOFF CENTER  
FOR GERIATRIC AND REHABILITATIVE  
MEDICINE,

Defendants.

-----X

PRESENT: EILEEN BRANSTEN, J:

Plaintiff Robert B. Yakkay (“Plaintiff”), as Administrator of the Estate of Robert E. Yakkay (“Mr. Yakkay”), moves 1) pursuant to CPLR 3025(b) to amend the complaint to add a cause of action under Public Health Law Section 2801(d) against Defendant The Komanoff Center for Geriatric and Rehabilitative Medicine (“Komanoff”); 2) to remove defendants George Ascher and Tillie Ascher from the caption; and 3) for a 90-day extension to file the note of issue. Komanoff only opposes Plaintiff’s portion of the motion permitting the Public Health Law claim. Defendants New York Presbyterian Hospital (“NY Presbyterian”) and Long Beach Medical Center (“Long Beach”) do not oppose the motion.

### BACKGROUND

On December 21, 2002, while lawfully walking on property that George and Tillie Ascher owned, Mr. Yakkay fell to the ground and sustained injuries. *See*, Franco Aff., Ex A., at 3-4, ¶ 12-15. He was admitted to NY Presbyterian on December 27, 2002 where he was treated for the surgical repair of a humeral head fracture and given physical and occupational therapy. *Id.*, at 6, ¶ 19; at 7, ¶ 20. He was discharged on January 24, 2003, and admitted to Komanoff, a nursing-home facility affiliated with Long Beach. *Id.*, at 8, ¶ 25. Mr. Yakkay received physical and occupational therapy there until his death on May 16, 2003. *Id.*

Plaintiff commenced this action in April 2005. In the first cause of action, he alleges that George and Tillie Ascher negligently maintained their property, which contributed to Mr. Yakkay's injuries. In the second, third, and fourth causes of action, Plaintiff alleges that NY Presbyterian, Long Beach, and Komanoff did not provide competent physical and occupational therapy and failed to appropriately clean Mr. Yakkay's bed pans and diapers, which caused him to develop serious and severe bed sores.

The case was initially assigned to Hon. Judith J. Gische. In a memorandum decision dated September 5, 2006, that Court dismissed the tort claims against George and Tillie Ascher for Plaintiff's failure to effectuate service, and entered judgment accordingly. *Id.*, Ex. B. Plaintiff substituted counsel thereafter, who agreed to prosecute the case against the

remaining three defendants. After a conference with Judge Gische in May 2007, this action was transferred to this medical malpractice part Plaintiff filed a Notice of Medical Malpractice on December 5, 2007. *Id.*, Ex. C.

In this motion, Plaintiff moves to remove George and Tillie Ascher from the caption, obtain a 90-day extension to file the note of issue, and add a Public Health law claim against Komanoff pursuant to CPLR 3025(b). NY Presbyterian and Long Beach do not oppose the motion; Komanoff only opposes the addition of a new claim.

#### DISCUSSION

Public Health Law § 2801(d) provides a private right of action to nursing home patients injured while in the facility. In particular, the statute provides that a nursing home may be sued for deprivation of any right effected for the well-being of a patient by the terms of any contract, state or federal statute, code, rule, or regulation. One such right is to receive adequate and appropriate medical care. Public Health Law § 2803-c(3)(e); *Zeides v. Hebrew Home for the Aged at Riverdale, Inc.*, 300 A.D. 2d 178 (1<sup>st</sup> Dept. 2002).

Plaintiff first argues that he actually pled a cause of action pursuant to Public Health Law § 2801(d), despite the fact that he did not identify it as such in the complaint. *See*, *Franco Aff.* at 5. However, the Appellate Division, First Department has stated:

“Article 28 of the Public Health Law contains nothing that would indicate an intent to equate its private right of action with one for either medical malpractice or ordinary negligence. The statutory basis of liability is neither

a deviation from acceptable standards of medical practice nor breach of a duty of care. Rather, it contemplates injury to the plaintiff caused by the deprivation of a right conferred by contract, statute, regulation, code or rule \* \* \*.”

*Zeides*, 300 A.D. 2d 178 (holding that the statute of limitations differed for claims asserted under both Public Health Law 2801(d) and for ordinary negligence despite the fact that they derived from the same facts.)

Plaintiff pled that Komanoff deviated from the ordinary care-standard by allegedly not cleaning Mr. Yakkay and by providing inadequate physical and occupational therapy. He did not plead that Komanoff violated a contract, law or regulation by its purported failure. Therefore, the complaint does not state a Public Health Law claim and must be amended pursuant to CPLR 3025(b) in order to assert one.

It is well-settled that leave to amend a pleading pursuant to CPLR 3025(b) is left to the sound discretion of the trial court. *See, Lebowitz v. Mt. Sinai Hospital*, 296 A.D. 2d 340 (1<sup>st</sup> Dept. 2002). “While leave to amend is freely given, [the First Department] has consistently held that, in order to conserve judicial resources, an examination of the underlying merits of the cause of action is warranted.” *Megaris Furs Inc v. Gimbal Bros. Inc*, 172 A.D. 2d 209 (1<sup>st</sup> Dept. 1991).

Komanoff argues that this “underlying-merits” examination necessitates an affidavit akin to one required in a summary judgment motion. But the Appellate Division, First Department case law that it relies on is inapplicable here. In each of the cited cases, the plaintiff sought to amend the complaint by either adding or changing the facts. Here, Plaintiff does not seek to add or change the underlying facts, but rather simply wants to assert an additional claim premised on the same facts.

The Appellate Division, First Department has held that an examination of the underlying merits requires a court to ensure that the proposed pleading states a cause of action. *See, Megaris Furs Inc.*, 172 A.D. 2d 209 (citing *Thomas Crimmins Contracting Co v City of New York*, 74 N.Y. 2d 166 [1989]). Furthermore, leave to amend should not be denied as long as there is no prejudice to the opposing party. *See, Cherebin v Empress Ambulance Service, Inc.*, 43 A.D. 3d 364 (1<sup>st</sup> Dept. 2007). Prejudice requires “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 [her/his] position” *Id.*

In his proposed amended complaint, Plaintiff once again alleges that Komanoff failed to properly clean Mr. Yakkay’s diapers and bedpan, which resulted in bed sores. *See, Franco Aff., Ex D., Proposed Amended Complaint at 6, ¶ 26.* In addition, he alleges that Public Health Law § 2801(d) was violated because Mr. Yakkay had a statutory right under Public Health Law § 2803c(3)(e) to receive adequate and appropriate medical care, which he

purportedly did not. *Id.*, at 7, ¶ 27-29. Accordingly, Plaintiff properly pleads a Public Health Law claim in the proposed complaint. Furthermore, Plaintiff already testified at his deposition that he made several complaints to Komanoff about Mr. Yakkay's soiled diapers, dirty bed pan, and the ant infestation that occurred in his room as a result of the alleged unsanitary conditions. *See*, Franco Reply Aff., Ex A.

Moreover, the proposed amendment will not prejudice Komanoff's defense. Indeed, while the new claim is premised on a statutory violation, the facts that give rise to it were already pled under the medical malpractice claim. Indeed, Komanoff has been aware since at least April 2005 that it had to defend itself against this allegation.

In addition, the possibility of punitive damages under the Public Health Law will not prejudice Komanoff at this juncture. Discovery is not complete and Komanoff has a full-and-fair opportunity through the remaining process to tune its legal strategy. By permitting Plaintiff to add the claim, this Court is not denying Komanoff the opportunity to file a dispositive motion at a later date.

Accordingly, it is hereby

ORDERED that GEORGE ASCHER and TILLIE ASCHER are to be removed from the caption; and it is further

ORDERED that a copy of this Decision and Order is to be served on the County Clerk and the Trial Support Office (Room 158) who are directed to amend their records accordingly; and it is further

ORDERED that the motion to add a Public Health Law claim is GRANTED; and it is further

ORDERED that the parties are to appear at a compliance conference, which the court will shortly place on the calendar, to schedule firm dates for the completion of all discovery and receive a date to file the note of issue.

This constitutes the Decision and Order of the Court.

Dated: New York, New York

March 5, 2008

**FILED**  
MAR 11 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

ENTER:



Hon. Eileen Bransten

**HON. EILEEN BRANSTEN**