

**Rich v Cacatian**

2008 NY Slip Op 31009(U)

February 26, 2008

Supreme Court, Richmond County

Docket Number: 0101437/2005

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND PART DCM 3**

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**Index No.: 101437/05  
Motion No.: 1, 2, 3**

**CHRISTINE RICH, Administratrix of the Estate of JADA  
CHRISTINE SINGLETON, deceased, JOHN SINGLETON,  
an infant by his mother and natural guardian, CHRISTIE  
RICH, and CHRISTIE RICH, Individually,**

*Plaintiff*

*against*

**DECISION & ORDER**

**HON. JOSEPH J. MALTESE**

**JOSE C. CACATIAN, M.D., DAVID M. HERZOG, M.D.,  
SCOTT B. BERMAN, M.D., LEILA A ALMEIDA, M.D.,  
MICHAEL A. SCHIRRIPA, M.D.,  
MICHAEL L. MORETTI, M.D.,  
ST. VINCENT'S CATHOLIC MEDICAL CENTERS OF  
NEW YORK,  
ST. VINCENT'S MEDICAL CENTER-STATEN ISLAND,**

*Defendants.*

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The following items were considered in the review of this motion

<u>Papers</u>	<u>Numbered</u>
Notice of Petition and Affidavits Annexed	1
Notice of Cross Motion and Affidavits Annexed	2, 3
Answering Affidavits	4
Replying Papers	5, 6
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

In this medical malpractice action, defendant, Jose C. Cacatian, M.D. ("Dr. Cacatian"), seeks an order (1) granting leave to amend his verified answer to add the affirmative defense of lack of personal jurisdiction pursuant to CPLR §3025 (2) dismissing the action against him for lack of personal jurisdiction pursuant to CPLR §308 and §3212; and (3) dismissing plaintiffs' fourth and fifth causes of action against all defendants for failure to state a cause of action pursuant to CPLR §3212 and CPLR §3211.

Co-defendants, David M. Herzog, M.D., Scott B. Berman, M.D., and Michael A Schirripa, M.D., cross-move and incorporate the same arguments advanced by Cacatian with respect to dismissing plaintiffs' fourth and fifth causes of action.

Plaintiffs cross-moves for an order pursuant to §306-b granting an extension of time to serve the summons and complaint upon defendant, Cacatian.

This action is a result of allegations that defendants rendered negligent care to the plaintiff mother Christie Rich, which resulted in the c-section delivery of twins, Jada C. Singleton ("Jada") and John Singleton ("John") on May 11, 2003 at Saint Vincent's Catholic Medical Center-Richmond ("St. Vincent's"). Jada died on July 19, 2003 and John was discharged from St. Vincent's on September 29, 2003 and allegedly sustained severe, permanent, emotional, psychological and mental defects.

Plaintiffs filed a summons and complaint in Richmond County on or about May 10, 2005. Plaintiffs served on Dr. Cacatian's wife at their house on May 23, 2005. On July 5, 2005, St. Vincent's filed for bankruptcy. The bankruptcy stay was lifted in this case on November 16, 2006 and parties were notified on November 28, 2006. On July 23, 2007, almost eight months after the bankruptcy stay was lifted, plaintiffs received Dr. Cacatian's answer, which did not assert the affirmative defense of lack of personal jurisdiction. On August 15, 2007, Dr. Cacatian's counsel called plaintiffs' attorney requesting a stipulation so that he may amend Dr. Cacatian's answer to assert the affirmative defense of lack of personal jurisdiction. Plaintiffs refused to stipulate and therefore, defendant Dr. Cacatian brings this motion to amend.

Leave to amend or supplement pleadings should be freely granted unless the amendment sought is palpably improper or insufficient as a matter of law, or unless prejudice and surprise directly result from the delay in seeking the amendment."<sup>1</sup> While a motion seeking leave to amend is generally freely

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<sup>1</sup>*Alatorre v Hee Ju Chun*, 44 AD3d 596 [2d Dept 2007], citing *Crespo v Pucciarelli*, 21 AD3d 1048, CPLR 3025(b), *Jacobsen v Amedio*, 218 AD2d 872.

given, the Court of Appeals of New York has taken exception in the case where a defendant has failed to raise the affirmative defense of lack of personal jurisdiction in its original answer, as in this case.<sup>2</sup> Here defendant seeks to interpose an affirmative defense of lack of service three months after he submitted an answer, which was 8 months late, that is, 8 months after the defendant had notice that the hospital was out of bankruptcy.

Dr. Cacatian is an employee of St. Vincent's. The only reason that the defendant is making this application now rather than earlier is because the statute of limitations had not expired when he first answered, because the bankruptcy stay served to toll all proceedings and arguably freeze the statute of limitations as well. The bankruptcy stay was in effect from July 5, 2005 until November 28, 2006. Had there not been a bankruptcy stay, the statute of limitations would have expired on July 19, 2005 on the wrongful death action and on November 11, 2005 on the medical malpractice cause of action. Under CPLR §312a-(b) the defendant had 30 days which to answer the complaint, which was served on May 23, 2005, that was June 23, 2005, which was 2 weeks before the bankruptcy stay on July 5, 2005. Therefore, the defendant Dr. Cacatian was in default. Absent consent to extend the time to answer from the plaintiff, Dr. Cacatian was required to seek an extension of time to answer, upon good cause shown from the court.<sup>3</sup> Dr. Cacatian did not seek leave of court and consequently none was given. Hence, Dr. Cacatian was in default for failure to timely answer.

On July 23, 2007, the defendant finally answered 25 months after it was due and 8 months after the lifting of the Bankruptcy stay, without any leave of this court to file a late answer nor with consent from the plaintiff. Yet, three months after the defendants finally served his answer he sought to amend his answer to add an affirmative defense of lack of *in personam* jurisdiction based on the service upon his allegedly estranged wife in a home jointly owned by him and his wife. To that request this court says "Denied!" Having reviewed the allegations as to service, this court finds that the process server acted reasonably in serving the wife of the doctor at his last known residence. Indeed, all his wife said was

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<sup>2</sup>*See, Adesso v Shemtob*, 70 NY2d 689 [1987].

<sup>3</sup>CPLR §3012a-(d)

that the process server should “come back when the doctor is here,” which indicated that the doctor did in fact live there. To come into court 2 years and 6 months after that service was made to allege that the doctor and his wife have been living separately for years is inappropriate especially after failing to timely answer while the statute of limitations ticked by, thereby depriving the plaintiff an opportunity to re-serve the doctor. What is even more egregious is the hospital’s refusal to accept service for the doctor, when the doctor was an employee of the hospital at the time of the incident.

For all of the foregoing reasons, the defendant’s motion is denied because the doctor was served properly. His wife was of suitable age and discretion at his last known home address, which was followed up by mail. Therefore, defendant Dr. Cacatian’s motion for summary judgment dismissing the action against him, is denied. The plaintiffs’ cross motion for an extension of time to serve a summons and complaint on Dr. Cacatian, is not considered by this court as it is moot.

As to the defendant Dr. Cacatian’s motion, which is joined by co-defendants, David M. Herzog, M.D., Scott B. Berman, M.D., and Michael A Schirripa, M.D.’s cross-motion to dismiss plaintiff’s fourth and fifth causes of action, those applications are granted as plaintiffs do not oppose that branch of defendants’ motion.

Accordingly, it is hereby:

ORDERED, that defendant Jose C. Cacatian, M.D.’s motion granting leave to amend his verified answer to add the affirmative defense of lack of personal jurisdiction pursuant to CPLR §3025, is denied; and it is further

ORDERED that defendant Jose C. Cacatian’s motion to dismiss the action against defendant for lack of personal jurisdiction pursuant to CPLR §308 and §3212, is denied; and it is further

ORDERED that defendant Jose C Cacatian’s motion and co-defendants David M. Herzog, M.D., Scott B. Berman, M.D., and Michael A Schirripa, M.D.’s cross motion to dismiss plaintiffs’ fourth and

fifth causes of action against all defendants for failure to state a cause of action pursuant to CPLR §3212 and CPLR §3211, is granted; and it is further

ORDERED that plaintiffs' motion granting an extension of time to serve the summons and complaint upon defendant Jose C. Cacatian, M.D. pursuant to CPLR §306-b, is denied as moot; and it is further

ORDERED that all parties appear at DCM Part 3 on Wednesday, March 26, 2008 for a compliance conference.

ENTER,

DATED: February 26, 2008

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Joseph J. Maltese  
Justice of the Supreme Court