

<b>Vojtisek v New York Eye &amp; Ear Infirmary</b>
2008 NY Slip Op 32134(U)
July 11, 2008
Supreme Court, Kings County
Docket Number: 0019972/2005
Judge: Gerard H. Rosenberg
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At an IAS Term, Part MMTRP of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 11th day of July, 2008.

P R E S E N T:

HON. GERARD H. ROSENBERG,  
Justice.

-----X  
EDWIN VOJTISEK,

Plaintiff,

- against -

Index No. 19972/05

THE NEW YORK EYE AND EAR INFIRMARY ET AL.,

Motion Seq. No. 002

Defendants.

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The following papers numbered 1 to 6 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1-2
Opposing Affidavits (Affirmations) _____	3-5
Reply Affidavits (Affirmations) _____	6
_____ Affidavit (Affirmation) _____	_____
Other Papers: _____	_____

Upon the foregoing papers, defendant New York Eye & Ear Infirmary ("NYEEI") moves, by order to show cause, for an order (1) pursuant to CPLR 3101(d), precluding plaintiff from presenting expert testimony at trial; (2) pursuant to CPLR 3101(d) dismissing plaintiff's complaint with prejudice; (3) pursuant to CPLR 3025(b), granting leave to amend

NYEEI's answer to include cross-claims against co-defendants; and (4) pursuant to CPLR 3212, granting contribution and indemnification.<sup>1</sup>

Plaintiff commenced this medical malpractice action against defendants NYEEI, ophthalmologist Kenneth Cohen, MD ("Dr. Cohen"), Dr. Remy Moonthungal, MD ("Dr. Moonthungal") and Danielly Muchiutti, CNRA ("Muchiutti") as a result of ambulatory cataract surgery that took place on April 10, 2003.<sup>2</sup> The procedure was performed at NYEEI by Dr. Cohen, anesthesiology services were provided by co-defendants Dr. Moonthungal, and Muchiutti, a nurse. Dr. Cohen is a private attending physician affiliated with, *inter alia*, NYEEI, and is a senior attending surgeon at NYEEI.<sup>3</sup> Moonthungal is an anesthesiologist who practiced at NYEEI from 1983 until 2003 and thereafter practiced "office-based anesthesia" in various doctor's offices and ambulatory centers as an independent contractor. Lastly, Muchiutti, a Certified Registered Nurse Anesthetist, is an employee of an entity at NYEEI called New York Eye & Ear Anesthesia Associates.

In addition to allegations made as against the co-defendants, plaintiff alleges that NYEEI (1) was negligent in entrusting the care, administration of anesthesia, sedation and management of the plaintiff to incompetent, unskilled, untrained personnel; (2) failed to

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<sup>1</sup>NYEEI has subsequently withdrawn the application for leave of court to assert cross-claims for indemnification and contribution as against Dr. Cohen.

<sup>2</sup>Plaintiff underwent left eye phacoemulsification with intraocular lens insertion on April 10, 2003.

<sup>3</sup>The Court reiterates the following facts determined in its Decision and Order dated November 9, 2007, which denied NYEEI's motion for summary judgment.

properly anesthetize and sedate him prior to initiating and during the performance of an ambulatory cataract surgery on April 10, 2003, causing him to suffer a hemorrhage with resulting rupture of the anterior capsule in the eye; and (3) failed to obtain an appropriate informed consent.

NYEEI argues that plaintiff should be precluded from offering expert witness testimony because his expert disclosures fail to make any claims as to NYEEI's alleged negligence in the ownership, operation, management, maintenance and control of the hospital. According to NYEEI, the Ophthalmology expert response merely repeats the relevant portion from the Bill of Particulars (failing to call in and provide a competent physician, surgeon, anesthesiologist, certified registered nurse anesthesiologist and/or specialist to properly and adequately examine, test, treat and perform cataract surgery upon plaintiff), which does not pertain to it. Specifically, it argues that Dr. Cohen, plaintiff's treating ophthalmologist, is responsible for ordering and performing the surgery, and that the expert disclosure contains no allegations that the anesthesiologist and/or nurse anesthetist were not competent and/or that NYEEI was aware of such incompetence. NYEEI also asserts that the Anesthesiologist expert response makes no allegations that pertain to the Hospital. Accordingly, it argues that plaintiff must be precluded from offering expert witness testimony. As plaintiff should be precluded from offering expert witness testimony, NYEEI also contends that plaintiff's complaint must be dismissed with prejudice because expert medical opinion is a required element of a *prima facie* case of medical malpractice.

In opposition, plaintiff contends that NYEEI is attempting to re-litigate it's previously unsuccessful motion for summary judgment on vicarious liability grounds.<sup>4</sup> Plaintiff also notes that, along with co-defendants, NYEEI previously objected to plaintiff's 3101(d) notice solely on the basis of sufficiency of information regarding the experts qualifications, and accordingly, plaintiff responded with a supplemental 3101(d) notice dated January 31, 2007. Further, he argues that NYEEI fails to allege or establish either prejudice or surprise due to the claimed deficiencies in plaintiff's expert disclosure notice, or make a showing of good cause for the delay in filing the motion. According to plaintiff, at no time during the intervening fifteen months did NYEEI (or co-defendants) ever voice any objection with regard to the substance of the facts and opinions upon which plaintiff's experts are expected to testify.

The Court denies that aspect of NYEEI's motion precluding plaintiff from proffering expert testimony at trial and dismissing plaintiff's complaint. Trial courts have broad discretion administering pre-trial disclosure, including whether to allow a witness to testify as an expert (CPLR 3101[d]; *De Long v County of Erie*, 60 NY2d 296 [1983]). Here, the Court finds that plaintiff has disclosed, in reasonable detail, the subject matter in which each expert is expected to testify, the qualifications of each expert witness, and a summary of the grounds for each expert's opinion (CPLR 3101). The Supplemental Expert Disclosure

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<sup>4</sup>The motion was ultimately denied as untimely. The Court also noted that, were the court to reach the merits of the motion, the result would be the same, as the Court found factual issues existed as to the status of both Dr. Moonthungal and Nurse Muchiutti.

adequately provides that the experts are expected to testify that NYEEI, their agents, servants and/or employees were negligent, and specifically alleges the ways in which defendants (including NYEEI) deviated and departed from accepted and proper medical and ophthalmological practice and standards. Contrary to NYEEI's contention, the expert disclosures make claims as to NYEEI's negligence, and, as vicarious liability is at issue here, said claims do not need to specifically and directly refer to the hospital in order to pertain to it. The expert disclosures are sufficient, as an issue of fact remains with regard to whether the Hospital can be held vicariously liable for any alleged negligent conduct by Dr. Cohen, Dr. Moonthungal and Muchiutti. Further, there does not appear to be any "demonstrable prejudice or surprise" to NYEEI as to the experts' proposed testimony (*see, e.g., Castellani v Bagdasarian*, 286 AD2d 870 [2001]). Accordingly, that aspect of NYEEI's motion to preclude plaintiff's expert witnesses from testifying and dismissing plaintiff's complaint is denied.

In the alternative, NYEEI seeks to amend the answer to assert cross claims against co-defendants for indemnification and contribution. It argues that plaintiff's allegations against it are solely based on the acts and omissions of treating physician Dr. Cohen, Dr. Moonthungal, and Machiutti, who are not NYEEI employees. Accordingly, it asserts that NYEEI could only be vicariously liable to plaintiff and is entitled to indemnity from Dr. Cohen, Dr. Moonthungal and Muchiutti for damages it may be obligated to pay to the plaintiff.

Dr. Moonthungal and Muchiutti (hereinafter the “Moonthungal defendants”) oppose NYEEI’s request for an order granting leave to amend its answer to include a cross claim against them, arguing that they will be prejudiced in the event that plaintiff is granted leave to amend its pleadings on the eve of trial, barring any further discovery.<sup>5</sup> The Moonthungal defendants argue that they were never on notice of a potential claim by NYEEI, and thus did not pursue any further inquiry into the possibility of NYEEI’s own contributing negligence. They also argue that granting leave to amend the cross-claims is premature given the question of the hospital’s own negligence, and cite to plaintiff’s allegations including the failure to provide adequate restraints, safeguards and/or personnel to eliminate moving during the cataract procedure; failure to provide competent medical personnel; and failure to appoint adequate numbers of anesthesiologists on duty.

In general, leave to amend the pleadings is freely granted absent prejudice or surprise resulting from delay (CPLR 3025; *Edenwald Contracting Co., Inc. v City of New York*, 60 NY2d 957 [1983]). The proponent of the motion is required demonstrate the merit of the proposed pleading (*East Asiatic Co. v Corash*, 34 AD2d 432 [1970]). While the theory of indemnity affords relief to a party who is compelled to pay for a loss caused by another party, the theory of contribution affords the party who is compelled to pay more than his share of obligation upon which several persons are equally liable contribution from the others and

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<sup>5</sup>Dr. Cohen also submitted opposition; however, NYEEI no longer seeks leave to amend the complaint to add claims of indemnification and contribution as to him.

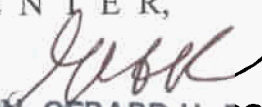
obtains payment of their respective shares (*see, generally, Figueiredo v New Palace Painters Supply Co., Inc.*, 13 Misc3d 1229A [2006][citations omitted]).

The Court denies NYEEI's request for leave to amend its answer to add the proposed cross claims for common law indemnification and contribution, as it is made on the eve of trial (*see e.g. Nociforo v Penna*, 42 AD3d 514, 514 [2007]; *Singh v Rosenberg*, 32 AD3d 840, 842 [2006]). NYEEI's motion, made by Order to Show Cause, was originally returnable on the scheduled pick-jury date of April 22, 2008. Where there is extended delay in filing such motion, an affidavit of reasonable excuse for the delay and an affidavit of merit should be submitted in support (*Cherebin v Empress Ambulance Serv. Inc.*, 43 AD3d 364 [2007], *citing Volpe v Good Samaritan Hosps. Corp.*, 213 AD2d 398 [1995]). NYEEI gives no cause for the delay in the filing of the motion, and the Moonthungal defendants have demonstrated that they will be prejudiced by the amendment. Prejudice requires an indication that the defendant has been prevented from taking some measure in support of his or her position (*Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18 [1981]). Here, the Moonthungal defendants argue that they were never on notice of a potential claim by the hospital, and therefore did not pursue an inquiry into the possibility of NYEEI's negligence. Accordingly, that aspect of NYEEI's motion seeking leave to amend its answer is denied.

Lastly, the Court denies that aspect of NYEEI's motion seeking an order granting contribution and indemnification pursuant to CPLR 3212, since it is not clear whether the hospital may be liable based on any negligence alleged by plaintiff. An order granting

contribution and indemnification cannot be sought until NYEEI has been found vicariously liable.<sup>6</sup>

In sum, NYEEI's motion is denied. This constitutes the Decision and Order of the Court.

ENTER,  
  
HON. GERARD H. ROSENBERG  
J. S. C.

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<sup>6</sup>In his opposition papers, Dr. Cohen notes that, in support of its motion for summary judgment, NYEEI states that it is not vicariously liable for the acts of Dr. Cohen, Muchiutti or Moonthungal.