

**Gruber v Seideman**

2009 NY Slip Op 30329(U)

February 4, 2009

Supreme Court, Nassau County

Docket Number: 14307/06

Judge: Thomas P. Phelan

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. THOMAS P. PHELAN,**  
*Justice.*

TRIAL/IAS PART 4  
NASSAU COUNTY

\_\_\_\_\_

MILDRED GRUBER,

Plaintiffs,

ORIGINAL RETURN DATE: 11/03/08  
SUBMISSION DATE: 12/05/08  
Index No. 14307/06

-against-

BRUCE SEIDEMAN, M.D., ORTHOPAEDIC  
ASSOCIATES OF MANHASSET, P.C., NORTH  
SHORE UNIVERSITY HOSPITAL and KOMANOFF  
CENTER FOR GERIATRIC AND REHABILITATIVE  
MEDICINE LONG BEACH MEDICAL CENTER,

Defendants.

\_\_\_\_\_

MOTION SEQUENCE #3, 4, 5

The following papers read on this motion:

Order to Show Cause.....	1
Notice of Cross Motion.....	2, 3
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Defendant, Komanoff Center for Geriatric and Rehabilitative Medicine s/h/a Komanoff Center for Geriatric and Rehabilitative Medicine Long Beach Medical Center ("Komanoff"), moves, by Order to Show Cause dated October 17, 2008 (Murphy, J.), for an order (1) pursuant to CPLR 3126 striking plaintiff's complaint or, alternatively, precluding plaintiff from offering evidence at time of trial; (2) striking references to Public Health Law §§ 2801-d and 2803-c from plaintiff's Bill of Particulars; (3) striking plaintiff's expert disclosure or, alternatively, compelling plaintiff to serve proper expert disclosure; and (4) granting this defendant leave to amend its answer. Plaintiff opposes the motion and cross moves for an order granting leave to amend the summons and complaint.

Defendants, Bruce Seideman, M.D. and Orthopaedic Associates of Manhasset, P.C. (Seideman and Orthopaedic Associates"), cross move to renew or reargue their prior motion and to vacate the order of this court dated November 6, 2008 (Phelan, J.) or in the alternative for summary judgment.

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Pursuant to the Certification Order, all parties had 90 days from the filing of the note of issue to move for summary judgment. Plaintiff filed the note of issue on February 26, 2008, thereby fixing May 27, 2008, as the deadline to move for summary judgment. Defendants' cross-motion seeking alternative relief for summary judgment, filed on December 3, 2008 (190 days late), is untimely (*Brill v. City of New York*, 2 NY3d 648 [2004]).

Absent permission of the court to bring a late motion, to be granted only upon a showing of good cause for the delay, the motion is barred (*Brill v. City of New York*, *supra*; *Miceli v. State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725 [2004]; *cf. Andrea v. Arnone, Hedin, Casker, Kennedy & Drake Architects & Landscape Architects P.C. (Habiterra Assoc.)*, 5 NY3d 514 [2005]). "Litigation cannot be conducted efficiently if deadlines are not taken seriously, and . . . disregard of deadlines should not and will not be tolerated (*see, Miceli v. State Farm Mutual Auto Ins. Co.*, 3 NY3d 725 [2004]; *Brill v. City of New York*, 2 NY3d 648 [2004]; *Kibl v. Pfeffer*, 94 NY2d 118 [1999])" (*Andrea v. Arnone*, 5 NY3d at 520).

That branch of the cross-motion alternatively seeking summary judgment is accordingly denied.

Plaintiff seeks to amend the complaint by asserting an additional cause of action under Public Health Law §2801-d. Defendant Komanoff argues that the three-year statute of limitations expired on May 25, 2007, and that the relation-back theory is inapplicable. CPLR 203(f) provides that "[a] claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transaction, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading."

Defendant Komanoff submits that plaintiff's original pleading failed to give notice of any claim under Public Health Law §2801-d. It is asserted by defendant Komanoff that inasmuch as an action under Public Health Law §2801-d may result in guaranteed minimum damages, attorneys' fees and punitive damages, it would be prejudiced by the inclusion of such additional cause of action, especially where the allegations in the complaint "do not rise to the level of moral culpability necessary to support a claim for punitive damages" (Hargrove Aff. in Opp'n ¶18).

"The pleadings may not be amended to state a new or changed cause of action if the time to file such an action has run (citations omitted). The new allegations set forth in the bill of particulars did not relate back to the date of the original complaint because the original pleadings did not fairly apprise [defendant Komanoff] of the need to defend against them (citations omitted)" (*Hyacinthe v. Edwards*, 10 AD3d 629 [2d Dept. 2004]).

Accordingly, plaintiff's cross motion to amend the complaint is denied and that branch of defendant Komanoff's motion for an order striking all references to Public Health Law §§ 2801-d. and 2803-c from plaintiff's Bill of Particulars and precluding her from offering evidence relating to any claims under Public Health Law §§ 2801-d and 2803-c at the time of trial is granted.

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By notice of motion dated August 18, 2008, defendants Seideman and Orthopaedic Associates moved to have a stipulation of discontinuance as to them so ordered by this court. That motion was denied without prejudice. Counsel for Komanoff declined to execute the stipulation in order to protect their client's rights under CPLR Article 16 and General Obligations Law 15-108. The order noted that "Komanoff has moved, by Order to Show Cause dated October 17, 2008 (Murphy, J.), for an order, *inter alia*, granting it leave to amend its answer to include an affirmative defense based on Article 16. Defendants Seideman and Orthopaedic Associates now seek leave to renew or reargue, and defendant Komanoff seeks leave to amend its answer to include an Article 16 affirmative defense.

A motion to renew is to be based upon any new evidence or any evidence that could not have been discovered with due diligence before the prior motion, which would warrant renewal. *In re Eshaghian*, 7 A.D.3d 707, 776 N.Y.S.2d 507 (2d Dept. 2004); *Orange and Rockland Utilities, Inc. v. Assessor of Town of Haverstraw*, 304 A.D.2d 668, 758 N.Y.S.2d 151 (2d Dept. 2003).

A motion to reargue is addressed to the discretion of the court and may be granted upon a showing that the court overlooked or misapprehended the facts or misapplied the law or for some other reason improperly decided the prior motion. (CPLR 2221(d)(2); *Foley v. Roche*, 68 A.D.2d 558, 418 N.Y.S.2d 588 [1<sup>st</sup> Dept. 1979]; *Collins v. Stone*, 8 A.D.3d 321, 778 N.Y.S.2d 79 (2d Dept. 2004).

It is submitted that Komanoff has failed to move to assert a cross-claim under General Obligations Law and that preservation of Komanoff's Article 16 rights will not be prejudiced. Taking into consideration the arguments of defendants Seideman and Orthopaedic Associates reargument is granted, and upon reargument the action is hereby discontinued with prejudice as to defendants, Bruce Seideman, M.D. and Orthopaedic Associates of Manhasset, P.C., only.

"In the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit" (*RCLA, LLC v. 50-09 Realty, LLC*, 48 A.D.3d 538 [2d Dept. 2008]). Accordingly, that branch of defendant Komanoff's motion seeking leave to amend its answer to include an Article 16 affirmative defense is granted. Defendant Komanoff is directed to serve and file its amended answer within twenty (20) days of the date hereof.

Those branches of defendant Komanoff's motion for disclosure related relief or otherwise relating to the directives of the Preliminary Conference Order dated January 5, 2007, and the Compliance Conference Order dated May 3, 2007, are decided as follows:

Counsel are directed to appear for a **conference on February 25, 2009, at 9:30 a.m.**, at which time the remaining issues addressed in the motion papers will be conferenced.

**No adjournment of this conference shall be permitted and all parties are forewarned that failure to attend may result in the striking of pleadings (22 NYCRR 202.27) or the imposition of monetary sanctions (22 NYCRR 130-2.1).**

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The caption of this action is amended to read as follows:

"MILDRED GRUBER,

Plaintiffs,

-against-

NORTH SHORE UNIVERSITY HOSPITAL and  
KOMANOFF CENTER FOR GERIATRIC AND  
REHABILITATIVE MEDICINE LONG BEACH  
MEDICAL CENTER,

Defendants."

This decision constitutes the order of the court.

Dated: 2-4-09

**HON THOMAS P. PHELAN**  
*THOMAS P. PHELAN*  
**THOMAS P. PHELAN, J.S.C.**

Targum, Britton & Tolud, LLP.  
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**ENTERED**

FEB 06 2009

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**

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