

**Morante v Studin**

2009 NY Slip Op 33467(U)

July 23, 2009

Supreme Court, Nassau County

Docket Number: 19885/06

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

ORIGINAL

Present: ANTONIO I. BRANDVEEN  
J. S. C.

JOAN K. MORANTE and ALEX MORANTE,  
Plaintiff,

TRIAL / IAS PART 31  
NASSAU COUNTY

Index No. 19885/06

- against -

Motion Sequence No. 001

JOEL R. STUDIN, M.D. and PREMIER  
MEDICAL, PC,

Defendant.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits .....	<u>1</u>
Answering Affidavits .....	<u>2</u>
Replying Affidavits .....	_____
Briefs: Plaintiff's / Petitioner's .....	_____
Defendant's / Respondent's .....	_____

The plaintiffs move pursuant to CPLR 3124 to compel the defendants to disclose certain information pertaining to the issues raised in this matter on the ground the discovery is essential to the plaintiffs' case preparation, pursuant to CPLR 3126 for sanctions for the defense wilful failure to disclose contact information their transcriptionists, and pursuant to CPLR 3025 to permit the plaintiffs to supplement the amended complaint by adding fifth and sixth causes of actions for fraud, and a seventh cause of action for tortuous interference with contract and punitive damages. The defense opposes the motion on the grounds the plaintiffs' discovery demands are unreasonable; access to the doctor's hard drive, which contain confidential and privileged medical records of all of the physician's patients, is

contrary to statutory and case law; some of the plaintiffs' demands are duplicative; sanctions are misplaced against the defense, but requests sanctions against the plaintiffs for bringing this motion; and the additions to the amended complaint are without legal foundation. The plaintiffs reply the defense misrepresents or overstates the plaintiffs' requests, and reiterates the plaintiffs' assertions from the previous moving papers. This Court has carefully reviewed and considered all of the parties' papers submitted with respect to this motion.

CPLR 3101 provides, in pertinent part:

(a) There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by: (1) a party, or the officer, director, member, agent or employee of a party; (2) a person who possessed a cause of action or defense asserted in the action; (b) Upon objection by a person entitled to assert the privilege, privileged matter shall not be obtainable;...(I) In addition to any other matter which may be subject to disclosure, there shall be full disclosure of any films, photographs, video tapes or audio tapes, including transcripts or memoranda thereof, involving a person referred to in paragraph one of subdivision (a) of this section. There shall be disclosure of all portions of such material, including out-takes, rather than only those portions a party intends to use. The provisions of this subdivision shall not apply to materials compiled for law enforcement purposes which are exempt from disclosure under section eighty-seven of the public officers law.

CPLR 3124 provides: "If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response." CPLR 3126 provides:

If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them: (1) an order that the issues to which the information is relevant shall be

deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or (2) an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or (3) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

This Court determines the plaintiffs have met their burden, in part, with respect to their discovery demand for the contact information regarding the defendants' transcriptionists who transcribed the voice-recorded notes of the defendant Joel R. Studin, M.D.; the contact information regarding the employees of the defendants whom the plaintiff Joan K. Morante spoke of her pain at the time of her treatment with the defendants; and the contact information regarding the individuals present in the operating room during the surgery which is the subject of this lawsuit during which the alleged medical malpractice occurred. This Court determines the plaintiffs have met their burden, in part, with respect to information from the defense computer hard drive, to wit a written transcription of the information relevant solely to the plaintiff Joan K. Morante.

CPLR 3025 (a) provides: "A party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it." CPLR 3025 (a) provides: "A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances." Here, the plaintiffs request leave to amend the answer

[\* 4]

to add causes of action, and the defense challenges that request. The Second Department holds:

We adhere to the rule applied in *Norman v. Ferrara*, 107 A.D.2d at 740, 484 N.Y.S.2d 600 as an accurate reflection of the Legislature's express policy that motions for leave to amend pleadings should be freely granted (see *G.K. Alan Assoc., Inc. v. Lazzari*, 44 A.D.3d 95, 99, 840 N.Y.S.2d 378 [(i)n 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"]; *Trataros Constr., Inc. v. New York City Hous. Auth.*, 34 A.D.3d 451, 452-453, 823 N.Y.S.2d 534). Additionally, "[t]he legal sufficiency or merits of a pleading will not be examined unless the insufficiency or lack of merit is clear and free from doubt" (*Sample v. Levada*, 8 A.D.3d 465, 467-468, 779 N.Y.S.2d 96; see *Sleepy's Inc. v. Orzechowski*, 7 A.D.3d 511, 775 N.Y.S.2d 581; *Zacma Cleaners Corp. v. Gimbel*, 149 A.D.2d 585, 586, 540 N.Y.S.2d 268). These cases make clear that a plaintiff seeking leave to amend the complaint is not required to establish the merit of the proposed amendment in the first instance (*Lucido v. Mancuso*, 49 A.D.3d 220, 226-227, 851 N.Y.S.2d 238 [2<sup>nd</sup> Dept., 2008]).

This Court determines the proposed amendment is sufficient to state a cause of action, and the proposed amendment is not patently devoid of merit (*Lucido v. Mancuso, supra*). Hence, the plaintiffs, in the instant matter, have met their burden as a matter of law, and the opposition has not demonstrated otherwise. The *Lucido* Court has held "If the opposing party wishes to test the merits of the proposed added cause of action or defense, that party may later move for summary judgment upon a proper showing ( see CPLR 3212)"(*Lucido v. Mancuso, supra*, at 229).

22 NYCRR § 130-1.1 (a) provides:

The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Part.

22 NYCRR § 130-1.1 (c) provides:

For purposes of this Part, conduct is frivolous if: 1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken

primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false. Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues, (1) the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct; and (2) whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.

This Court has considered all of the criteria set forth in 22 NYCRR § 130-1.1 (c). The Court determines neither side has met the burden with respect to this provision.

Accordingly, the motion is granted solely in accord with this decision. The defendants are directed to comply with this order within 60 days after service of a copy of this order with notice of entry upon defense counsel, and if there is noncompliance with this order the defendants' answer will be stricken.

So ordered.

Dated: **July 23, 2009**

ENTER:



J. S. C.

FINAL DISPOSITION

NON FINAL DISPOSITION XXX

**ENTERED**  
AUG 06 2009  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE