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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:

HON. DANIEL PALMIERI
Acting Justice Supreme Court

----------x **TRIAL TERM PART: 45**

RITA CASO f/k/a RITA GALLO,

INDEX NO.: 4605/07

Plaintiff,

MOTION DATE:12-10-09
SUBMIT DATE:2-2-10
SEQ. NUMBER - 005

-against-

TROY KESSLER, MISIANO SHULMAN CAPETOLA & KESSLER, LLP, and CAPETOLA & DODDATO,

Defendants.

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The following papers have been read on this motion:

Notice of Motion, dated 11-24-09.....1
Affirmation in Opposition, dated 1-7-10.....2
Reply Affirmation, dated 2-1-10.....3

The motion by the plaintiff to amend the complaint is granted CPLR §3025(b). The proposed amended complaint attached to the motion is to be deemed served upon the defendants as of the date of this decision and order and they shall have 20 days from the date of this decision and order to respond.

The motion by plaintiff for leave to serve an amended bill of particulars asserting lost income as a claim of damages is granted. Plaintiff shall serve an amendment to her bill of particulars upon the defendants within 10 days after the date of this order. All other requests for relief are denied.

This is an action for legal malpractice. Plaintiff was once represented by an attorney who left the practice of law and her then pending case for personal injuries was taken over by the firm of defendant Capetola & Doddato (C & D)where defendant Kessler was then employed as an associate. When C & D was dissolved in December 2002, a new firm, defendant Misiano, Shulman, Capetola and Kessler, LLP (MSC&K) was formed and assumed representation. Defendant Kessler, who at all relevant times was in charge of the plaintiff's case characterizes his status with MSC&K as "a partner".

Representation by Kessler and MSC&K ceased in 2006, when plaintiff learned that her case had been dismissed as to one defendant in January 2000, when defendant Kessler failed to oppose a defense motion to dismiss based on improper service and in 2001, dismissed as to a defendant who had not appeared and defaulted for failure to obtain a default judgment.

Plaintiff alleges that she first learned of these events in 2006, and that during the years prior, she had been deceived by Kessler into believing that her case was still pending and active. This action began in 2006, was on this court's trial calendar until May 2009, when it was removed therefrom and this motion was made in late November 2009.

By this motion, plaintiff seeks to amend her complaint to add a cause of action, without particularizing under which sections, for violations of Judiciary Law §487 and to amend her bill of particulars to add a claim for lost income as an element of her damages.

Plaintiff has not offered any reasons why the above claims were not previously asserted or why they were not first asserted until now and the Court is discomforted by the

lack of any explanation for the delay. However, the claim under the Judiciary Law and the claim of lost income are based on the same set of facts as all of plaintiff's other claims. The case is no longer on the trial calendar and the Court considers it in the interests of justice to entertain this motion on its merits. Moreover, although defendants properly raise the delays as a basis for denial of this motion and claim prejudice, the Court does not find that there is any unreasonable prejudice to the defendants by reason of the granting of this motion and defendant shall be afforded discovery with respect to the new cause of action and the lost income claim. Absent is any allegation that witnesses, evidence or experts might not be available or any other facts to support the assertion of prejudice.

Leave to amend a bill of particulars is to be freely granted in the absence of prejudice or surprise, unless the proposed amendment is patently insufficient or devoid of merit. *Unger v. Leviton*, 25 A.D.3d 689 (2d Dept. 2006); *Dimino v. Rosenfeld*, 306 A.D.2d 371 (2d Dept. 2003). Mere lateness is not a barrier. However, lateness coupled with significant prejudice to the other side is a bar. *St. Paul Fire and Marine Insurance Co. v. Town of Hempstead*, 291 A.D.2d 488 (2d Dept. 2002).

Prejudice requires some indication that the defendant has been hindered in the preparation of the case or has been prevented from taking some measure in support of its position. *Cherebin v. Empress Ambulance Service, Inc.*, 43 A.D.2d 364 (1st Dept. 2007). Prejudice is not found in the mere exposure of a party to greater liability. *An Cor, Inc., v. BSB Bank & Trust Co.*, 34 A.D.3d 1282 (4th Dept. 2006).

In the case at bar there has been discovery sought with respect to plaintiff's income tax records and the issue of whether plaintiff would be permitted to assert a claim for lost

income did not come into focus until an exchange of letters by the attorneys in April - May 2009. Therefore, the Court finds that amending the bill of particulars is in no way prejudicial but that defendant is entitled to discovery on that claim.

Leave to amend pleadings is usually freely given unless the proposed amendment will prejudice or surprise the opposing party or the proposed amendment is patently insufficient or devoid of merit. *Unger v. Leviton, supra.* Mere lateness is not a barrier. However, as noted above, lateness coupled with significant prejudice to the other side, the very element of the laches doctrine, is a bar. *St. Paul Fire and Marine Insurance Company v. Town of Hempstead, supra.*

Prejudice to the nonmoving party is shown where that party is hindered in the preparation of its case or has been prevented from taking some measure in support of its position. *AnCor, Inc. v. BSB Bank & Trust Company, supra.* Here, defendants have not demonstrated significant prejudice or surprise as to the proposed amendment. The Court notes that the seventy-two paragraphs which precede the proposed new cause of action are the same in the proposed new and existing complaints.

The underlying facts remain substantially the same and although defendants contest the merits of the new claim, a court will not examine the merits of a proposed amendment unless the insufficiency or lack of merit is clear and free from doubt. It cannot be said here that the proposed amendment is palpably insufficient as a matter of law or totally devoid of merit and no prejudice or surprise has been claimed or demonstrated. *Long Island Title Agency, Inc., v. Frisa*, 45 AD3d 649 (2d Dept. 2007). *See Lucido v. Mancuso*, 49 AD3d 220 (2d Dept. 2008), which pointedly held that it is not necessary for the movant to establish the merit of a proposed amendment in the first instance. *Id* at 229.

Claims under Judiciary Law §487 have been the subject of recent court rulings. *See Amalfitano v. Rosenberg*, 12 NY3d 8 (2009); *Dupree v. Voorhees*, 24 Misc 3d 396 (Sup. Ct. Nassau Cty 2009), *mod* 68 AD3d 807 (2d Dept. 2009).

In a case factually similar to this one, a plaintiff was permitted to amend his complaint in a legal malpractice action to assert a cause under the Judiciary Law and this Court finds persuasive and adopts the legal authority, rationale and result so reached. *Cinao v. Reers*, 2010 WL 118212 (Sup. Ct. Kings Cty. 2010) relying on *Boglia v. Greenberg*, 63 AD3d 973 (2d Dept. 2009). Moreover, plaintiff has made a prima facie showing of damages sustained as a result of the Kessler's conduct, namely the loss of a viable claim against the defendants in the underlying action, one of whom had actually defaulted in answering. *See Izko Sports Wear Co., Inc. v. Flaum*, 25 AD3d 534 (2d Dept. 2006); *cf Kashelkar v. Bluestone*, 306 Fed. Appx 690 2009 WL 102942 (2d Cir. 2009).

The contention that a claim of fraud must be made in the pending action is incorrect and was dealt with in this Court's decision in *Dupree v. Vorrhees,* 24 Misc 3d 396, *supra.* This Court held that under the lead Court of Appeals case, *Amalfitano v. Rosenberg* (12 NY3d 8 [2008]), there was no requirement that a potential Judiciary 487 plaintiff had to raise the wrongful act before the court in which the underlying action was pending. A later action was permissible unless its purpose was to collaterally attack the judgment in the underlying action, not the case here.

Defendant's argument that neither C & D nor MSC&K should be vicariously liable for Kessler's conduct is without merit. Up until December 31, 2003, Kessler was an

employee of C & D and as such, that firm could be responsible for his conduct. It is not necessary for the purposes of this motion to determine the outcome of the claim against C & D but merely to address the contentions in opposition.

> "Under the doctrine of respondeat superior, an employer can be held vicariously liable for the torts committed by an employee acting within the scope of the employment" (*Fernandez v. Rustic Inn, Inc.*, 60 AD3d 893, 896; *see Judith M. v. Sisters of Charity Hosp.*, 93 N.Y.2d 932, 933). Significantly, liability will not attach for torts committed by an employee who is acting solely for personal motives unrelated to the furtherance of the employer's business (*see Carnegie v. J.P. Phillips, Inc.*, 28 AD3d 599, 600; *Schuhmann v. McBride*, 23 AD3d 542, 543; *Lombardo v. Mastec North American Inc.*, 2009 WL 4855749 (N.Y.A.D. 2 Dept.)." *See also Shapiro v. Good Samaritan Regional Hosp.* 55 AD3d 821 (2d Dept. 2008).
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> "An act is considered to be within the scope of employment if it is performed while the employee is engaged generally in the business of his employer, or if his act may be reasonably said to be necessary or incidental to such employment (*see Oliva v. City of New York*, 297 A.D. 2d 789, 748 N.Y.S.2d 164; *Smith v. Midwood Realty Assoc.*, 289 AD2d 391, 734 N.Y.S.2d 237; *Felberbaum v. Weinberger*, 54 Ad3d 717 (2 Dept. 2008)."

It cannot be said as a matter of law that the conduct of Kessler was, as a matter of law, outside the scope of his employment with C & D. *Cf McArthur v. J.M. Main Street, Inc.*, 46 AD3d 639 (2d Dept. 2007).

After 2002, Kessler styles himself as a "partner" in MSC&K. Pursuant to the Appellate Division decision on the appeal of this Court's decision in *Dupree v. Voorhees, supra*, it was held that a claim under Judiciary Law §487, may lie against a partner of the

attorney who is alleged to have been responsible for the fraudulent conduct under principles of partnership law notwithstanding the passive role played by the nonactive partner. *Dupree v. Voorhees*, 68 AD3d 807 (2d Dept. 2009). In so holding the Appellate Division modified this Court's decision, *supra* which dismissed a claim against a nonactive partner.

MSC&K is styled as in the caption as an "LLP", however, neither side has submitted evidence as to the nature of its legal existence. If MSC&K is a traditional partnership, then the Appellate Division holding in *Dupree, supra,* might apply. If MSC&K owes its existence to Article 8-B of the Partnership Law and Kessler is an employee thereof, then the above cited rules of an employer's liability for its employees will control but the exceptions and responsibilities of Partnership Law §26 might come into play. As neither side has addressed these issues beyond what is noted above and a determination thereof is not necessary to decide this motion, the Court expresses no further opinions on these matters.

Since, it cannot be said that the proposed amendment of the complaint is without merit under the principles set forth above, the amendment is permitted.

The motion is granted.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: February 5, 2010

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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