

Gressman v Stephen-Johnson
2010 NY Slip Op 33969(U)
December 10, 2010
Supreme Court, Kings County
Docket Number: 30021/08
Judge: Marsha L. Steinhardt
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

At an IAS Part 15 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 10th day of December 2010

-----X
 NOAH GRESSMAN, an infant by his mother and :
 natural guardian, NOVA TORRES, :
 :
 Plaintiff, :
 :
 -against- :
 :
 DR. GAIL ALLISON STEPHEN-JOHNSON, :
 CENTRAL BROOKLYN MEDICAL GROUP, :
 P.C., and THE BROOKLYN HOSPITAL CENTER, :
 :
 Defendants :
 -----X

Index No. 30021/08

PRESENT: HON. MARSHA L. STEINHARDT

The following papers numbered 1 to 3 read on this motion

	<u>Papers Numbered</u>
Notice of Motion-Notice of Cross Motion and Affidavits (Affirmations) Annexed _____	1, 2
Answering Affidavit (Affirmation) _____	3
Reply Affidavit (Affirmation) _____	4, 5
Affidavit (Affirmation) _____	_____
Pleadings-Exhibits _____	_____
Stipulations-Minutes _____	_____
Filed Papers _____	_____

Defendant THE BROOKLYN HOSPITAL CENTER (TBHC) moves for an Order pursuant to CPLR §3212 dismissing the complaint upon the ground that the action against it cannot be maintained due to a discharge in bankruptcy. Plaintiffs do not submit opposition to

TBHC's claim of discharge in bankruptcy Defendants GAIL ALLISON STEPHEN-JOHNSON, M.D. and CENTRAL BROOKLYN MEDICAL GROUP, P.C. oppose the motion of TBHC only in so far as it pertains to preserving their claims against TBHC for contribution. Plaintiffs cross move pursuant to CPLR §3025 seeking leave to amend the complaint to include a claim against TBHC for negligent and intentional impairment of plaintiff's right to sue a third party. Defendant TBHC opposes the cross motion.

Now, upon the foregoing and upon oral argument on December 2, 2010, and due deliberation had thereon, the motion of THE BROOKLYN HOSPITAL CENTER is GRANTED to the extent that the action is dismissed as against it; any cross claims asserted by defendants GAIL ALLISON STEPHEN-JOHNSON, M.D. and CENTRAL BROOKLYN MEDICAL GROUP, P.C. and/or recovery pursuant to CPLR Article 16 are preserved. The Cross Motion of plaintiff is DENIED.

This is an action sounding in medical malpractice regarding the prenatal care and labor and delivery of plaintiff up to and including February 3, 2005 at TBHC. Counsel for plaintiff claims that beginning in December 2007 they sought to secure a complete copy of the hospital record including the fetal monitoring strips from TBHC. They contend that the fetal monitoring strips have never been provided in its entirety. By letter and affidavit dated September 21, 2010 TBHC advised plaintiff that the fetal monitoring strips generated during the labor and delivery had not been located.

Plaintiff seeks to amend the complaint to add a claim for negligent and intentional impairment of plaintiff's right to sue a third party stating that based on the missing evidence they have been deprived of their right to sue TBHC, a third party upon dismissal of this party due to

the discharge in bankruptcy. Plaintiff claims that this cause of action accrued on September 21, 2010, the date of the missing records affidavit. As TBHC has not obtained a discharge of post-petition claims or in that the loss occurred subsequent to the filing of the bankruptcy petition, plaintiff argues that this claim is viable against TBHC.

The court, however, finds plaintiff's arguments in support of adding such a claim unavailing. Although differently stated, plaintiff's proposed claim is merely one sounding in spoliation of evidence. In Ortega v. City of New York, 9 N.Y.3d 69, 73, the Court of Appeals held that no independent tort of third-party negligent spoliation of evidence was cognizable in New York. The Court reasoned that such a tort would require resort to "hypothetical theories or speculative assumptions about the nature of the harm incurred or the extent of plaintiff's damages" Supra at 81. Clearly, the court declined to recognize spoliation of evidence as an independent tort claim discussing, among other things, the speculative nature of the claim.

Recently, this same issue came before the Second Department in Hillman v Sinha, 77 A.D.3d 887 (2d Dept 2010). In that case, plaintiff interposed a cause of action seeking recovery of damages for negligent spoliation of evidence based upon the destruction of plaintiff's original medical records. The court, following the holding in Ortega, stated "we see no reason to hold otherwise with respect to a proposed independent tort of 'first-party negligent spoliation.'"

While leave to amend a complaint should be freely given (see CPLR 3025[b]), where the proposed amendment "is palpably insufficient or patently devoid of merit" G.K. Alan Assoc., Inc. v. Lazzari, 44 A.D.3d 95, 99, the amendment should not be permitted. Beja v. Meadowbrook Ford, 48 A.D.3d 495 (2d Dept.,2008).

Here, the claim sought to be interposed by amendment of the complaint is not a

cognizable cause of action in New York. Accordingly, leave to amend is denied.

As the claims for contribution accrue when the party entitled to contribution pays more than the apportioned share of the original judgment, the bankruptcy court order does not preclude this claim. Therefore, the rights of defendants GAIL ALLISON STEPHEN-JOHNSON, M.D. and CENTRAL BROOKLYN MEDICAL GROUP, P.C. to recover against TBHC for contribution are herein preserved.

This constitutes the decision, opinion and order of this court.

Enter,



J. S. C.