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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN B. LOBIS PART 6
Justice

Garcia, Cristina

-v-

New York -Presbyterian, et al

INDEX NO. 101039/10

MOTION DATE 4-8-11

MOTION SEQ. NO. 002

The following papers, numbered 1 to 14, were read on this motion to/for amend/add parties

Notice of Motion / Order to Show Cause – Affidavits – Exhibits ____ No(s). 1-7

Answering Affidavits – Exhibits ____ No(s). X not 8-9

Replying Affidavits ____ No(s). 10-12, 13-14

Upon the foregoing papers, it is ordered that this motion is decided in accordance with accompanying decision and order.

FILED

JUN 20 2011

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 6/17/11

J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....*.....MOTION IS ☑ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

* Cross motion is DENIED

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

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CRISTINA GARCIA and ESTERVINO GUZMAN NOVES,

Plaintiffs,

-against-

NEW YORK-PRESBYTERIAN HOSPITAL a/k/a THE UNIVERSITY HOSPITAL OF COLUMBIA AND CORNELL, THE ALLEN HOSPITAL, AKUEZUNKPA O. UDE, M.D., HYANAH KIM, M.D., and PIRUZ MONTAMEDINIA, M.D.,

Defendants.

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Index No. 101039/10

Decision and Order

JOAN B. LOBIS, J.S.C.:

Plaintiffs Cristina Garcia and Estervino Guzman Noves move for an order granting them leave to add two more defendants to this action pursuant to C.P.L.R. § 1003; leave to amend the caption accordingly; and leave to serve the amended summons and complaint pursuant to C.P.L.R. Rules 305 and 3025(b). Defendants The New York and Presbyterian Hospital s/h/a New York-Prebyterian Hospital a/k/a The University Hospital of Columbia and Cornell ("NYPH"), Akuezunkpa O. Ude, M.D., Hyonah Kim, M.D. s/h/a Hyanah Kim, M.D., and Piruz Motamedinia, M.D. (collectively, the "Moving Defendants") cross-move for an order striking inflammatory, scandalous, and prejudicial language that they allege is in the proposed amended complaint pursuant to C.P.L.R. Rule 3024(b); precluding plaintiffs from relying upon the doctrine of res ipsa loquitur; and requiring plaintiffs to provide authorizations for the Moving Defendants to obtain the records of and speak to the physician who submitted expert testimony in support of plaintiffs' motion. The Moving Defendants also oppose plaintiffs' motion in its entirety.

This action sounding in medical malpractice arises out of the performance of a laparoscopic cholecystectomy and the aftercare that Ms. Garcia received between July 31, 2008 through November 11, 2008. Plaintiffs seek to add to their complaint medical malpractice claims against Ragy Girgis, M.D., and Steven Kushner, M.D., who were residents rotating in NYPH's psychiatric service at the time of Ms. Garcia's aftercare and who treated Ms. Garcia. Although plaintiffs fail to specifically so-move, in reviewing plaintiffs' proposed amended complaint, it appears that they are also adding a departure against NYPH that it failed to enforce its internal rules and regulations, and departures against Dr. Montamedinia that he failed to properly manage/prescribe Ms. Garcia's medications.[1] Plaintiffs submit a redacted affirmation from a physician board certified in psychiatry and neurology in support of the proposed amended complaint. The Moving Defendants argue that plaintiffs' expert affirmation is insufficient to establish a basis for the proposed amendments; that the proposed claims against Dr. Girgis and Dr. Kushner are time-barred; and that the new claims against Dr. Montamedinia and NYPH are improper because a party may only supplement or amend his/her pleadings to set forth subsequent occurrences, not to add new claims.

The court rejects the Moving Defendants' arguments. First, pursuant to C.P.L.R. Rule 3025(b), leave to amend pleadings is to be freely granted by the court, absent prejudice or surprise. Given the disposition of the Moving Defendants' motion to amend their answers in Motion Sequence Number 001 (decided in this court's decision and order dated February 17, 2011), the argument that plaintiffs' expert's affidavit is insufficient to demonstrate merit is specious. "On a

[1] The court notes that these allegations were included in plaintiffs' bill of particulars served in or about April 2010.

motion for leave to amend, plaintiff need not establish the merit of its proposed new allegations but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit." MBIA Ins. Corp. v. Greystone & Co., Inc., 74 A.D.3d 499, 500 (1st Dep't 2010) (citations omitted). Even if they had entirely omitted their expert's affirmation, plaintiffs' amended pleading is sufficient to make out the causes of action and is not palpably insufficient nor clearly devoid of merit. Second, the proposed claims against Dr. Girgis and Dr. Kushner are not clearly time-barred, because the alleged malpractice took place from July 31, 2008 to November 11, 2008, and the instant motion to amend was filed on or about February 25, 2011, within the two-and-one-half year statute of limitations for medical malpractice actions. See Perez v. Paramount Communications, 92 N.Y.2d 749, 754 (1999) (filing a motion for leave to add defendant tolls statute of limitations as to that defendant until entry of order deciding motion). Third, the court declines to consider the Moving Defendants' argument that a party may only supplement or amend pleadings to set forth subsequent occurrences, not to add new claims, because this argument appears to result from counsel's misreading of C.P.L.R. Rule 3025(b). Defendants do not assert that they are prejudiced by the proposed amendments, and given New York's well-established rule that leave to amend shall be given freely, and the fact that the amendments are not palpably insufficient nor clearly devoid of merit, leave to amend is granted.

Turning to the Moving Defendants' cross-motion, they seek to strike those portions of plaintiffs' amended complaint that assert recklessness as "scandalous or prejudicial matter unnecessarily inserted in a pleading." C.P.L.R. § 3024(b). The court notes that plaintiffs asserted claims of recklessness in their original complaint, which defendants did not seek to strike. There is

nothing prima facie scandalous or prejudicial about asserting recklessness. Discovery, including examinations before trial, remains outstanding, so it is too early to determine the viability of plaintiffs' assertions of recklessness. Accordingly, this branch of the cross motion is denied without prejudice to renewal after discovery is complete.

The Moving Defendants also cross-move for an order precluding plaintiffs from relying on the doctrine of res ipsa loquitur. Although the Moving Defendants do not set forth which statute they are moving under to preclude plaintiffs from relying on res ipsa loquitur, it appears that they are moving under C.P.L.R. Rule 3211, on the grounds that plaintiff has failed to state a cause of action for res ipsa loquitur, because plaintiffs will require expert testimony to establish their theory of malpractice. At this point, there is no reason to preclude plaintiffs from relying on the theory of res ipsa loquitur at trial. Res ipsa loquitur is not a separate cause of action (Abbott v. Page Airways, Inc., 23 N.Y.2d 502, 512 [1968]) nor an element of a cause of action. Indeed, even a failure to specifically plead res ipsa will not bar a plaintiff from relying on the theory at trial, if the facts so warrant. Weeden v. Armor Elevator Co., Inc., 97 A.D.2d 197, 201-02 (2d Dep't 1983). "Res ipsa is merely an evidentiary rule allowing the jury to infer negligence from circumstances when the event would not ordinarily occur in the absence of negligence." Nesbit v. New York City Transit Auth., 170 A.D.2d 92, 99 (1st Dep't 1991). If, at trial, plaintiffs' proof establishes that the event does not ordinarily occur in the absence of negligence, that it was "caused by an agency or instrumentality within the exclusive control of the defendant," and that it could not have been caused by plaintiffs' "voluntary action or contribution," then "a prima facie case of negligence exists and plaintiff[s are] entitled to have res ipsa loquitur charged to the jury." Kambat v. St. Francis Hosp., 89 N.Y.2d 489, 494 (1997). Preclusion of the application of this theory is premature at this time.

Finally, the Moving Defendants cross-move for order compelling plaintiffs to provide them with authorizations permitting them to obtain the records of and to speak to the physician who submitted the affirmation annexed to the motion. This physician set forth that he/she was retained by plaintiffs' law firm and reviewed Ms. Garcia's records and interviewed and examined her in connection with his/her evaluation of her psychiatric condition. The Moving Defendants assert that plaintiffs' expert has "admitted to being [Ms. Garcia's] treating physician." Other than the statement that the physician examined her in connection with preparing his expert opinion that the proposed amendments , the Moving Defendants offer no other indication that this physician is anything other than an expert retained for the purposes of the litigation, who may or may not testify at trial. As such, there is no need to disclose his/her identity at this point, so it certainly follows that the Moving Defendants are not entitled to authorizations permitting them to obtain the records of, or to speak to, this physician.

Accordingly, it is hereby

ORDERED that the cross motion is denied it its entirety; and it is further

ORDERED that the motion is granted, and the proposed amended complaint annexed to the moving papers shall been deemed served on the Moving Defendants upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the Moving Defendants shall serve answers to the amended complaint or otherwise respond within twenty (20) days of the date of said service; and it is further

ORDERED that plaintiffs shall serve a copy of this order with notice of entry and the amended summons and complaint upon Ragy Girgis, M.D., and Steven Kushner, M.D., within one hundred twenty (120 days) of the date of entry of this order, in accordance with C.P.L.R. § 306-b, et seq; and it is further

ORDERED that the scheduled status conference is adjourned from July 19, 2011, to September 20, 2011 at 10:00 a.m., in Part 6, courtroom 345, at 60 Centre Street, New York, New York. The parties may request an earlier date for their conference by arranging a conference call with the part clerk at (646) 386-3312.

Dated: June 17, 2011

JOAN B. LOBIS, J.S.C.

FILED

JUN 20 2011

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