

Hudak v New York-Presbyterian Hosp.

2011 NY Slip Op 32366(U)

September 6, 2011

Sup Ct, NY County

Docket Number: 101448/10

Judge: Joan B. Lobis

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LoBis
Justice

PART 6

CHRISTOPHER HUDAK
- v -
NY-PRESBYTERIAN HOSPITAL

INDEX NO. 101448/10
MOTION DATE 6/21/11
MOTION SEQ. NO. 2
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED
1-12
Xmot. 13-17, 11's off sep mot. seq 003

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION *and*
Order

FILED

SEP 08 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 9/6/11

JBL
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

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

-----X
CHRISTOPHER HUDAK, as Administrator of the Estate
of MICHELLE LYNN HUDAK, and CHRISTOPHER
HUDAK, individually,

Plaintiff,

Index No. 101448/10

-against-

Decision and Order

NEW YORK-PRESBYTERIAN HOSPITAL, a/k/a
COLUMBIA PRESBYTERIAN MEDICAL CENTER,
TRUSTEES OF COLUMBIA UNIVERSITY,
COLUMBIA UNIVERSITY COLLEGE OF PHYSICIANS
AND SURGEONS, PATRICIA CONNOR DEVINE, M.D.,
GOOD SAMARITAN HOSPITAL OF SUFFERN, N.Y.,
RAMAPO VALLEY OB/GYN P.C., CARRIE FRANCES
PANDOFF, D.O., and DANIEL EDWARD VINICK, M.D.

Defendants.

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

In Motion Sequence Number 002, defendant Good Samaritan Hospital s/h/a Good Samaritan Hospital of Suffern, N.Y. ("Good Samaritan"), moves, pursuant to C.P.L.R. Rule 3212, for an order dismissing the complaint due to plaintiff's lack of legal capacity to sue. In Motion Sequence Number 003, defendants New York-Presbyterian Hospital, a/k/a Columbia Presbyterian Medical Center, Trustees of Columbia University, Columbia University College of Physicians and Surgeons, and Patricia Connor Devine, M.D. (collectively the "NYPH Defendants"), move for an order, pursuant to C.P.L.R. Rule 3025, granting them leave to amend their answers to include the affirmative defense of lack of capacity to sue, and upon granting such leave, an order dismissing the complaint. Defendant Daniel E. Vinick, M.D. ("Dr. Vinick), and defendants Ramapo Valley OB/GYN P.C. and Carrie Frances Pandoff, D.O. (the "Ramapo Defendants"), separately cross-move for similar relief. Plaintiff opposes the motions and cross motions, which are hereby consolidated

for disposition.

This action was commenced by the filing of a summons and verified complaint on or about February 3, 2010. Plaintiff has also initiated a second, separate action against Westchester Medical Center, a public facility. The instant complaint alleges causes of action for pain and suffering (the First Cause of Action); wrongful death (the Second Cause of Action); and loss of services (the Third Cause of Action). Each cause of action sounds in medical malpractice. The complaint sets forth that the action concerns care and treatment rendered to plaintiff's decedent in September and December 2008 and thereafter; however, the bills of particulars set forth that the medical malpractice occurred solely on January 29, 2009. Decedent died on January 29, 2009 survived by her husband and five children. All of the defendants answered; only Good Samaritan asserted an affirmative defense of lack of capacity to sue. The case continued with discovery thereafter.

During the discovery period, plaintiff revealed that he filed for bankruptcy on or about December 30, 2008. Throughout the pendency of the bankruptcy action, which ended on April 29, 2009 with a Order of Discharge and Order of Final Decree, plaintiff failed to list any potential cause of action as an asset.

The NYPH Defendants, Dr. Vinick, and the Ramapo Defendants all assert that under the court's liberal rules for amendments they should be permitted to amend their answers to add the affirmative defense of lack of capacity to sue on the grounds that they did not learn of plaintiff's

bankruptcy filing until after the suit was commenced. These defendants have attached proposed amended answers to their respective papers and ask the court to deem them served nunc pro tunc. All of the defendants argue that plaintiff was required to list any potential lawsuit as an asset in bankruptcy and that his failure to do so divests him of any capacity to maintain this lawsuit, both individually and as an administrator. Defendants further argue that plaintiff cannot claim that the cause of action accrued after his bankruptcy filing, because the complaint alleges that the malpractice occurred in September and December 2008. They assert that even the bills of particulars contain allegations related to care rendered well before January 29, 2009. Defendants argue that plaintiff knew or should have known that he had potential claims against them during the pendency of the bankruptcy proceeding, because he was required to file a Notice of Claim for the suit against Westchester Medical Center within ninety (90) days of January 29, 2009 (see Gen. Mun. Law § 50-h), which was the day on which the Order of Discharge and Order of Final Decree was issued.

In opposition, plaintiff maintains that he does not lack the capacity to bring this action. Plaintiff asserts that the malpractice alleged herein occurred after the bankruptcy filing, therefore he was not required to list the any potential action as an asset. Further he argues that his individual filing of bankruptcy should have no effect on the decedent's estate.

"It is well established that leave to amend a pleading is freely given 'absent prejudice or surprise resulting directly from the delay.'" Anoun v. City of New York, 85 A.D.3d 694 (1st Dep't 2011) (citations omitted). The party seeking to amend must "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). In light of plaintiff's bankruptcy proceeding, the proposed amendments are not palpably insufficient or clearly devoid of merit. See C.P.L.R. Rule 3211(a)(5). Plaintiff has not shown, or even alleged, that "he would be prejudiced or surprised by the amendment[s]." Santori v. Met Life, 11 A.D.3d 597, 598 (2d Dep't 2004). Therefore, Dr. Vinick and the NYPH and Ramapo Defendants are granted leave to amend their answers, and the answers annexed to their motion papers are deemed served and filed nunc pro tunc.

Turning to the motions to dismiss, when filing a bankruptcy petition, the debtor must include "a schedule of assets and liabilities." 11 U.S.C. § 521(2)(B)(i). Assets include potential lawsuits so long as the debtor "knew or should have known of the facts allegedly giving rise to the . . . cause of action at the time" of the bankruptcy filing (Whelan v. Longo, 7 N.Y.3d 821, 822 [2006]; see also Goldstein v. St. John's Episcopal Hosp., 267 A.D.2d 426 [2d Dep't 1999]) or while the bankruptcy proceeding was pending. Gazes v. Bennet, 38 A.D.3d 287, 288 (1st Dep't 2008); Barranco v. Cabrini Med. Ctr., 50 A.D.3d 281, 282 (1st Dep't 2008); Williams v. Stein, 6 A.D.3d 197 (1st Dep't 2004); 11 U.S.C. § 541(a)(7). Only lawsuits pursued in the debtor's individual capacity must be scheduled. See Monson v. Israeli, 35 A.D.3d 680, 681 (2d Dep't 2006); Burton v. Rogovin, 262 A.D.2d 72 (1st Dep't 1999).

As to the First Cause of Action, in which plaintiff claims that defendants' malpractice caused the decedent pain and suffering, "[a] cause of action brought on behalf of the deceased to recover damages for conscious pain and suffering suffered by the deceased is personal to the deceased." Monson, 35 A.D.3d at 681; Heslin v. County of Greene, 14 N.Y.3d 67, 76 (2010).

Plaintiff's bankruptcy filing has no bearing on his capacity to prosecute a claim that is personal to the decedent. Monson, 35 A.D.3d at 681. Accordingly, the First Cause of Action shall not be dismissed at this time.

As to the Second Cause of Action, a wrongful death claim "is not a simple devolution of a cause of action which the deceased would have had * * * but it is an entirely new cause of action." George v. Mt. Sinai Hosp., 47 N.Y.2d 170, 176 (1979) (internal quotations and citations omitted) (asterisks in original). A wrongful death action is meant to compensate the decedent's distributees for injuries that they suffered as a result of the decedent's death. Id.; see also E.P.T.L. § 5-4.1 A wrongful death claim must be brought by a personal representative (Id.), i.e., the "person who has received letters to administer the estate of a decedent." E.P.T.L. § 1-2.13. "The personal representative is a 'mere nominal party,' acting in the capacity of trustee or agent for the beneficiaries." Hernandez v. New York City Health & Hosps. Corp., 78 N.Y.2d 687, 693 (1991) (citations omitted). The administrator sues not in his or her personal capacity "but rather on behalf of the decedent's distributees." George, 47 N.Y.2d at 176 (internal quotations and citations omitted). In this case, aside from the plaintiff-spouse herein, the decedent left behind five children who are also distributees of the estate. E.P.T.L. § 4-1.1(a)(1). Plaintiff, as the personal representative of the decedent, is the only person eligible to bring the proceeding on behalf of the infant distributees. E.P.T.L. § 5-4.1(1). His failure to list his interest as a distributee as an asset in the bankruptcy filing should not affect his capacity to bring this action on behalf of the death action that is personal to the infant distributees; there is no one else eligible to bring that action on their behalf. Accordingly, the Second Cause of Action survives the motion to dismiss.

Turning to the lack of services claim, such a claim is brought in the spouse's individual capacity and as such, plaintiff herein lacks "the capacity to sue on [his] own behalf" (Monson, 35 A.D.3d at 681), regardless of whether the malpractice took place before the filing, as set forth in the complaint, or after the filing but while the bankruptcy proceeding was pending, as set forth in the bills of particulars. See e.g., Barranco, 50 A.D.3d at 282. The court notes that plaintiff does not dispute that he knew or should have known that he had a potential medical malpractice claim against defendants at the time of pendency of the bankruptcy action. As of August 30, 2011, plaintiff has notified the court that the bankruptcy proceeding has been reopened and that he is now seeking an order from the Bankruptcy Court appointing a trustee to prosecute his individual claim. Nevertheless, under these circumstances, a trustee cannot be substituted as plaintiff in this action, and the claim for loss of consortium must be dismissed. See Rivera v. Markowitz, 71 A.D.3d 449, 450 (1st Dep't 2010); Gazes v. Bennet, 38 A.D.3d at 287. "Instead, the trustee must commence a new action in a representative capacity on behalf of [plaintiff's] bankruptcy estate and, in doing so, [the trustee] will receive the benefit of the 6-month extension embodied in CPLR 205." Pinto v. Ancona, 262 A.D.2d 472, 473 (2d Dep't 1999); see also Rivera, 71 A.D.3d at 450. Accordingly, it is hereby

ORDERED that those branches of the NYPH Defendants', Dr. Vinick's, and the Ramapo Defendants' respective motions and cross motions for leave to amend are granted, and the answers annexed to their papers are deemed served and filed nunc pro tunc; and it is further

ORDERED that those branches of the respective motions and cross motions seeking to dismiss the First and Second Causes of Action are denied; and it is further

ORDERED that those branches of the respective motions and cross motions seeking to dismiss the Third Cause of Action are granted and the cause of action alleging loss of services is dismissed without prejudice to refileing under C.P.L.R. § 205; and it is further

ORDERED that the parties shall appear for a status conference on September 27, 2011 at 9:30 a.m.

Date: September 6, 2011



JOAN B. LOBIS, J.S.C.

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