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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER Justice

IA PART 16

PART _____

Index Number : 106530/2010
BARAN, JANET
vs
SWIFT, RICHARD
Sequence Number : 006
AMEND

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is granted and plaintiff's may file the Amended Complaint in accordance with the accompanying memorandum decision.

FILED

DEC 03 2012

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: NOV 29 2012

ALICE SCHLESINGER, 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

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

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JANET BARAN and DR. WILLIAM WINKLER,

Plaintiffs,

-against-

Index No. 106530/10
Motion Seq. No. 006

RICHARD W. SWIFT, M.D., SANOFI-AVENTIS US., INC., and AVENTIS PHARMACEUTICALS, INC.

Defendants.

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SCHLESINGER, J.

Before the Court is a motion by plaintiffs to amend the complaint to add language which would then provide a predicate for claims for punitive damages. Moving counsel points out that despite the commencement of the action in March 2010, more than two years before the motion, discovery is still in its infancy. The opposition papers then trade accusations with the moving papers as to whose fault this is, but the fact remains that at the time of the motion, only the two plaintiffs have been deposed.

The action is one that sounds in medical malpractice and products liability. With regard to the latter claims against the "Sculptra defendants" (the term used by moving counsel referring to the second and third named defendants Sanofi-Aventis, US, Inc. and Aventis Pharmaceuticals, Inc.), their counsel does not object to the requested relief, noting the liberal policy New York has toward allowing the amendment of complaints, but he does sharply dispute the allegations.

But the position is quite different with respect to Dr. Richard W. Swift, the plastic surgeon who administered Sculptra to his patient, Janet Baran. His counsel objects strenuously to any such amendment. She argues that the plaintiffs do not have a viable claim for punitive damages and that New York case law supports this position. In this regard,

she points out that the allegations that are used to support a claim for punitive damages are essentially the same as those spelled out by counsel in his Bills of Particulars and make out claims that "merely sound in ordinary medical malpractice and are in fact standard allegations of departures from accepted practice [and] do not rise to the extreme level of quasi-criminal conduct that is necessary in order to support an award of punitive damages" (¶25 of Affirmation in Opposition).

So what is the case about and what are the allegations? Plaintiffs claim that in the first instance the Sculptra defendants "deceptively" got its drug Sculptra approved by the FDA and then "illegally" marketed it while knowing that the drug was "unsafe and unfit for injection into healthy or non-HIV humans" (¶3 of Affirmation in Support). As to Dr. Richard Swift, "a doctor certified by Sanofi-Aventis", he injected Janet Baran, who is not and was not HIV positive, knowing it was dangerous, with "willful and wanton disregard for the public" and certainly for Ms. Baran, who allegedly suffered injury from multiple injections of this substance by Dr. Swift. All defendants allegedly did this for "monetary gain" (¶4 Affirmation in Support).

Moving counsel explains that his evaluation of the action, as to whether it sounded in the kind of extreme conduct meriting punitive or exemplary damages, took place in the two years after he filed the complaint. He states that at the commencement of the suit, which was filed toward the end of the two and one-half year statute of limitations, he did not believe the conduct complained of was reckless or showed willful and wanton behavior. However, in the ensuing time, he obtained information through the Freedom of Information Law, the Food and Drug Administration (FDA), medical journals, and other attorneys experienced in FDA matters and Sculptra lawsuits. This subsequently obtained information gave him a

"good-faith belief, that the level of conduct on both the part of the doctor and the manufacture[r]s is and was reckless, willful and wanton..." (¶31).

Counsel then lists specific acts which he suggests a jury might find to be reckless or wanton and willful. They consist of injecting Sculptra around the eyes and mouth when injecting in this kind of skin was specifically not recommended by the manufacturer. The second act is the use of the drug itself "off-label" for a non-HIV patient. He also points to Dr. Swift's failure to test Sculptra on Ms. Baran for adverse side effects before scheduling more injections. Another act mentioned is Dr. Swift's alleged misrepresentation that the patients shown in the Sculptra brochure were his own patients, when they were not, to convince the plaintiff that the drug was safe. Finally, and with the aid of an opinion stated in an affidavit from a Dr. Amy Newburger, a board certified dermatologist who has served on various governmental boards and panels, the claim is made that Dr. Swift "modified or back-filled" Janet Baran's records for his own purposes (Exhibit I, Affidavit of June 13, 2012). This final misconduct, counsel suggests, was the doctor's attempt to cover-up his own deficiencies.

Defense counsel for the doctor makes good arguments in opposition to plaintiff's motion. First she relates the history of the treatment relationship between Dr. Swift and Ms. Baran which began on October 4, 2007 and ended on March 13, 2008. There was an appointment for June 23, 2008, but plaintiff did not keep it. Then she argues that the above conduct that counsel lists simply does not present a viable claim for punitive damages. She says, as stated earlier, that these were essentially the same allegations as stated in the plaintiff's Bills of Particulars and at both times sound as allegations of ordinary medical malpractice.

Here, counsel cites to a number of medical malpractice cases, virtually all from the Second Department, where punitive damages were not allowed. One involved scalding an infant with hot water. *Lee v. Health Force, Inc.*, 268 AD2d 564 (2000). Another involved a surgeon's leaving a tip of an instrument in plaintiff's leg while removing varicose veins, *Gravitt v. Newman*, 114 AD2d 1000 (1985), and another involved permanent nerve damage resulting from a vein puncture, *Morton v. Brookhaven Memorial Hospital,* 32 AD3d 381 (2006). Yet another involved a surgeon choosing a more expensive fragmented surgery, *Spinosa v. Weinstein*, 168 AD2d 32 (1991), and the final one involved an anesthesiologist allowing the patient in an MRI machine to be hit in the head with a metal fragment, *Colombini v. Westchester County Health Care. Corp.*, 24 AD3d 712 (2005). While all of the above cases involved allegations of malpractice, they all involved purely negligent or even careless acts, but none of a quasi-criminal nature.

In contrast, however, counsel cites to a First Department case, *Graham v. Columbia-Presbyterian Medical Center*, 185 AD2d 753 (1992), where the defendant, a urologist, was charged with abandoning his 71 year-old patient who had undergone surgery and died from cardiac arrest a few days after that surgery. There the court said that there was an issue of fact as to whether the defendant's conduct rose to the level of wanton, intentional and/or reckless behavior warranting punitive damages.

On the issue of using an off-label drug, defense counsel argues that this is done regularly by physicians and it is permitted as an exercise of judgment by those physicians. *Sita v. Long Island Jewish Hillside Medical Center*, 22 AD3d 743 (2nd Dept 2005). The *Sita* case involved the use of a pedicle screw system that was not approved by the FDA. Similarly, a claim of "back-filling" or altering records did not warrant punitive damages

because even though it was gross and morally culpable, it had occurred after the treatment and it was not a part of any alleged malpractice.

Plaintiffs reply that their burden at this time does not require them to establish the merits of the proposed new allegations. It is enough to "simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit," as held in *MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 AD3d 499 (1st Dep't 2010). But *MBIA* did not involve an amendment to add punitive damages. Rather, it concerned adding an individual defendant by piercing the corporate veil. Similarly, in another case cited in Reply by plaintiffs, *Hospital for Joint Diseases Orthopaedic Institute v. James Katsikis Environmental Contractors, Inc.* 173 AD2d 210 (1st Dep't, 1991), punitive damages was not an issue. Rather, the amended claim concerned the unlicensed practice of engineering.

Despite what moving counsel believes is his minimal burden, I find that it is this Court's function to evaluate the merits, at least to some extent, where the plaintiff in a malpractice case wants to include punitive damages. After all, in virtually all of the cases cited by the defense, the courts were allowing or not allowing the addition of claims for punitive damages before the trial, although in most cases virtually all discovery had been completed. In other words, the query was whether the allegations really sounded like outrageous, unprincipled, reckless behavior, or whether instead those allegations sounded more like negligent conduct.

Here, I think it is a close question. I say that because the proffered claims rely in large part on the motivations of the defendant, Dr. Swift. For example, if Dr. Swift was truly aware that Sculptra was a dangerous drug for non-HIV patients, one that could cause serious injuries in healthy patients as was alleged here, but he proceeded to offer it anyway without

sharing that information with the patient, that could be seen as reckless or worse by a jury. Further, here, as stated earlier, the depositions of the defendants have not yet occurred. Therefore, counsel cannot know what testimony will be given. If I allow the amendments, then counsel will have a broader opportunity to pursue these issues.

For the above reasons, I am granting the motion and allowing the proposed amended complaint to be substituted. However, I want to make clear that this amendment, now being allowed while discovery is ongoing, is clearly without prejudice to the right of all the defendants to move to strike them when discovery has been completed.

Accordingly, it is hereby

ORDERED that the motion by plaintiffs for leave to amend the complaint to add language and claims for punitive damages is granted without opposition by the Sculptra defendants and over the opposition of Dr. Swift, and the amended complaint in the proposed form annexed to the moving papers as Exhibit G shall be deemed served upon service of a copy of this order with notice of entry thereof on counsel for the defendants and filing with the County Clerk; and it is further

ORDERED that the defendant shall serve an answer to the amended complaint or otherwise respond thereto within twenty days from the date of said service; and it is further

ORDERED that counsel shall nevertheless appear before this Court on December 12, 2012 as previously scheduled to arrange for the depositions of the defendants and the completion of any other outstanding discovery.

Dated: November 29, 2012

ALICE SCHLESINGER