

Campone v Panos
2012 NY Slip Op 33919(U)
November 29, 2012
Supreme Court, Dutchess County
Docket Number: 1032-2012
Judge: Lewis J. Lubell
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.

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

DUTCHESS COUNTY
CLERK'S OFFICE
RECEIVED

2012 DEC 10 AM 9:20

SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF DUTCHESS

-----X
WINIFRED CAMPONE,

Plaintiff,

-against -

SPYROS PANOS, M.D., MID HUDSON MEDICAL
GROUP, P.C., HUDSON VALLEY CENTER AT
SAINT FRANCIS, L.L.C., ROBERT MORGANTINI,
R.N.F.A. and ST. FRANCIS HOSPITAL
AND HEALTH CENTERS,

Defendant.
-----X

LUBELL, J.

DECISION & ORDER

Index No. 1032-2012

Sequence Nos. 1 6

2012 JAN 10 PM 2:20

CLERK'S OFFICE
RECEIVED

The following papers were considered in connection with this **motion (Sequence 1)** by defendant, Hudson Valley Center at Saint Francis, LLC, for an Order dismissing the plaintiff's complaint as time barred pursuant to CPLR §3211(a)(5) as the applicable two and one-half year statute of limitations proscribed by CPLR §214-a has expired, and for such other and further relief as to this Court may deem just and proper; the **motion (Sequence 2)** by defendant, Robert Morgantini, R.N.F.A., for an Order (1) pursuant to CPLR §3211(a)(5) dismissing with prejudice the plaintiff's complaint as to defendant, Robert Morgantini, R.N.F.A., as the two and one-half year statute of limitations proscribed by CPLR §214-a has expired and for such other and further relief as to the Court may seem just and proper; the **cross-motion (Sequence 4)** by plaintiff for an Order granting plaintiff permission to amend her complaint in the form annexed hereto to add a separate cause of action for fraud against Hudson Valley Center at Saint Francis, and for any other further relief which this Court deems necessary and proper; the **cross-motion (Sequence 3)** by plaintiff for an Order granting plaintiff permission to amend her complaint to add a separate cause of action for fraud against Robert Morgantini, HVC and St. Francis and for any other further relief which this Court deems necessary and

proper; the **motion (Sequence 5)** by defendant, Mid-Hudson Medical Group, P.C., for an Order (1) pursuant to CPLR §214-a and 3211(a)(5) dismissing the plaintiff's verified complaint against Mid-Hudson Medical Group, P.C. as time-barred as a matter of law; (2) deleting Mid-Hudson Medical Group, P.C., from the caption; (3) permitting Mid-Hudson Medical Group, P.C. to enter judgment; and (4) for such other and further relief as this Court may deem just and proper; and the **motion (Sequence 6)** by defendant, St. Francis Hospital, for an Order, pursuant to CPLR §3211(a)(5), dismissing the plaintiff's complaint, with prejudice, on the ground that this action is barred by the applicable Statute(s) of Limitations, and awarding the cross-moving defendant, St. Francis Hospital, costs, disbursements and attorney's fees on this motion, and such other and further relief as the Court may deem just and proper:

PAPERS**NUMBERED**

Motion Sequence 1	
Motion/Affirmations/Exhibits A-B (Hudson Valley)	1
Motion Sequence 2	
Motion/Affirmation/Exhibit A (Morgantini)	2
Motion Sequence 3	
Cross-Motion/Affirmation/Exhibits A-H (Campone)	3
Motion Sequence 4	
Cross-Motion/Affirmation/Exhibits A-F (Campone)	4
Affirmation in Opposition/Exhibits A-D (Panos)	5
Reply Affirmation (Hudson Valley)	6
Motion Sequence 5	
Motion/Affirmation/Exhibits A-B (Mid-Hudson)	7
Reply Affirmation (Hudson Valley)	8
Attorney Affirmation (Mid-Hudson)	9
Reply Affirmation (Morgantini)	10
Affirmation in Opposition/Exhibits A-B (Campone)	11
Motion Sequence 6	
Cross-Motion/Affirmation/Exhibit A (St. Francis)	12
Reply Affirmation (Mid-Hudson)	13
Reply Affirmation (Campone)	14
Affirmation in Opposition/Exhibits A-H (Campone)	15

Plaintiff commenced this action on February 24, 2012, to recover damages for injuries sustained on May 6, 2008, to her left knee and on May 15, 2007, to her left shoulder due to alleged actions and/or inactions of defendant Spyros Panos, M.D. ("Panos"), an orthopedic surgeon, defendant Robert Morgantini, R.N.F.A. ("Morgantini"), the surgical nurse first assistant to Panos with respect to the May 15, 2007, surgery herein alleged, Mid Hudson Medical Group, P.C., the medical group with which Panos and Morgantini were employed, defendant Hudson Valley Center at Saint Francis, L.L.C. ("HVC"), the medical facility at which the May 6,

[* 3]
2008, medical procedure took place, and defendant St. Francis Hospital and Health Centers ("St. Francis"), the location at which the May 15, 2007, medical procedure took place.

As against defendants Panos, Morgantini and vicariously as to Mid Hudson, plaintiff alleges continuous treatment up to April 13, 2011.

These motions follow.

Sequence 4

Plaintiff's Cross-Motion to Amend to add Fraud against HVC and St. Francis

CPLR 3025(b) provides that leave to amend pleadings "shall be freely given upon such terms as may be just." Thus, motions for leave to amend are liberally granted absent prejudice or surprise (see Long Is. Tit. Agency, Inc. v. Frisa, 45 A.D.3d 649, 846 N.Y.S.2d 253). "A court hearing a motion for leave to amend will not examine the merits of the proposed amendment unless the insufficiency or lack of merit is clear and free from doubt ... In cases where the proposed amendment is palpably insufficient as a matter of law or is totally devoid of merit, leave should be denied" (id. at 649, 846 N.Y.S.2d 253 [internal quotation marks and citation omitted]; see Ricca v. Valenti, 24 A.D.3d 647, 648, 807 N.Y.S.2d 123).

Plaintiff's cross-motion for leave to amend her complaint in the form annexed to the cross-moving papers to add a separate cause of action for fraud as against HVC and St. Francis denied. Most notable, the Court is not satisfied that the proposed pleading meets the particularity requirements of CPLR §3016, nor has plaintiff otherwise made a sufficient evidentiary showing to support the proposed claim (D'Orazio v. Mainetti, 39 AD3d 981, 982 [3d Dept 2007]).

A cause of action for fraud must be stated with detail (CPLR 3016 [a]). Further, "in order to establish fraud, a plaintiff must show a material misrepresentation of an existing fact, made with knowledge of its falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages" (MBIA Ins. Corp. v. Countrywide Home Loans, Inc., 87 A.D.3d 287 [1st Dept 2011]). "[B]are allegations of fraud without any allegation of the details constituting the wrong are clearly not sufficient to sustain such a cause of action" (Gill v. Caribbean Home Remodeling Co., 73 A.D.2d 609 [2d Dept 1979]; see also Glassman v. Catli, 111 A.D.2d 744, 745 [2d Dept 1985] ["bare conclusory allegations of fraud are insufficient to sustain a cause of action sounding in fraud"]).

Although a viable cause of action for fraud need not be met with "unassailable proof" of same, at the very least, movant had to come forward with "facts . . . sufficient to permit a reasonable inference of the alleged conduct" (Pludeman v. Northern Leasing Sys., Inc., 10 N.Y.3d at 492, 860 N.Y.S.2d 422, 890 N.E.2d 184), which it has failed to do.

However, denial of the cross-motion is without prejudice to an otherwise timely and proper reapplication upon the close of disclosure.

Sequence 1

HVC's Motion to Dismiss (Statute of Limitations)

HVC's motion to dismiss the first cause of action is denied, although facially beyond the period of limitations. The Court is satisfied from the papers currently before it, that plaintiff has made an adequate showing that facts essential to justify opposition to defendant's statute of limitations defense may exist (such as estoppel based upon fraud) which cannot now be stated (CPLR §3211[d]). Denial, however, is with leave for movant to assert said defense in its responsive pleading (id).

Sequence 2 and Sequence 3

Morgantini Motion to Dismiss Medical Malpractice on Statute of Limitations Grounds

Cross-motion by plaintiff to Amend Pleadings to Add Fraud

Although the proposed pleading does not meet the particularity requirements of CPLR §3016, a viable cause of action for fraud can be sustained where, as here, one comes forward with "facts . . . sufficient to permit a reasonable inference of the alleged conduct" (Pludeman v. Northern Leasing Sys., Inc., 10 N.Y.3d 486, 492 [2008]). There need not be "unassailable proof" of same (id).

The Court is satisfied that there are sufficient allegations which if not express then by fair and reasonable intendment are sufficient to allege fraud against Morgantini on an acting in concert basis with defendant Panos, such that a cause of action for fraud has been sufficiently made out as asserted against Morgantini. Since, however, the Court is not persuaded that the damages arising out of the alleged fraud are separate and distinct from those flowing from the alleged malpractice, the motion to add such a cause of action is denied (Simcusi v. Saeli, 44 NY2d 442 [1978]). Denial, however, is without prejudice to reapplication upon the close of disclosure (see CPLR 3211[d]).

The determination denying leave to add a cause of action for

fraud where a cause of action for medical malpractice exists is not necessarily dispositive as to whether a medical malpractice defendant can be estopped from asserting a statute of limitations defense to a medical malpractice cause of action.

As noted by Mr. Justice Earle C. Bastow in Erbe v. Lincoln Rochester Trust Co., 13 A.D.2d 211, 213 . . . : "Fraudulent representations may play a dual role. They may be the basis for an independent action for fraud. They may also, in equity, be a basis for an equitable estoppel barring the defendants from invoking the statute of limitations as against a cause of action for breach of fiduciary relations."

(Simcuski v. Saeli, 44 NY2d at 448).

Principles of equitable estoppel may act to relieve a plaintiff from the proscriptions of the statute of limitations where, for example, a complaint alleges "that defendant intentionally concealed the alleged malpractice from plaintiff and falsely assured her of effective treatment, as a result of which plaintiff did not discover the injury . . . [until later then he or she would have]" (Simcuski v. Saeli, *id.* at 448).

Here, the Court is satisfied that the proposed pleadings can be fairly construed to allege that through the use of various misrepresentations, concealments and other deceitful devices occasioned by both or one or the other, including Panos on behalf of Morgantini, these two defendants operated and otherwise maintained an enterprise of deceit and fraud, among other things, fostered by their close working relationship. This asserted concerted fraudulent conduct and concealment is sufficient to equitably estopp Morgantini from successfully advancing a statute of limitations defense to the cause of action against him for medical malpractice.

Having determined that the complaint can fairly be susceptible of such construction, the Court denies Morgantini's motion to dismiss on statute of limitations grounds the first cause of action against him for medical malpractice upon the condition that plaintiff serve and file an amended complaint incorporating the allegations otherwise sought to be incorporated into a separate cause of action for fraud, hereinabove denied, into a separate cause of action against Morgantini for medical malpractice (see McCarthy v. Weaver, 99 AD2d 652 [4th Dept 1984] [although cause of action for civil conspiracy could not be maintained, there being no such substantive tort, plaintiff granted leave to replead factual allegations that defendants acted in concert to defraud them]),

which shall be served and filed so as to be received within thirty days hereof.

Sequences 5 & 6

Mid Hudson Motion to Dismiss (Statute of Limitations) St. Francis Motion to Dismiss (Statute of Limitations)

These motions to dismiss the first cause of action are denied even if the alleged facts are otherwise facially beyond the period of limitations. The Court is satisfied from the papers currently before it, that plaintiff has made an adequate showing that facts essential to justify opposition to defendants' statute of limitations defense may exist (such as estoppel based upon fraud) which cannot now be stated (CPLR 3212[f]). Denial, however, is with leave for reapplication at the close of disclosure.

To the extent that plaintiff relies on the continuous treatment doctrine to extend the period of limitations in any asserted negligence claim, such is rejected (see Schrank v. Lederman, 52 AD3d 494, 496 [2d Dept 2008][ordinary negligence claims are not eligible for a toll of the statute under the doctrine of continuous treatment] citing Bleiler v. Bodnar, 65 N.Y.2d 65, 66; Van Slyke v. Columbia Mem. Hosp., 118 Misc.2d 203, 205).

To any further extent, the motions and cross-motions are denied.

Any amended pleadings herein permitted or directed or otherwise hereafter filed and served in this action, shall be in **full and strict compliance** with CPLR 3014 which, the Court notes, is woefully not the case with respect to the current complaint. This directive applies to the entirety of the verified amended complaint as it relates to all defendants and all causes of action and theories of recovery as against each, even though same may not have been addressed in this Decision & Order.

Section 3014 provides:

Every pleading shall consist of plain and concise statements in consecutively numbered paragraphs. Each paragraph shall contain, as far as practicable, a single allegation. Reference to and incorporation of allegations may subsequently be by number. Prior statements in a pleading shall be deemed repeated or adopted subsequently in the same pleading whenever express repetition or

adoption is unnecessary for a clear presentation of the subsequent matters. Separate causes of action or defenses shall be separately stated and numbered and may be stated regardless of consistency. Causes of action or defenses may be stated alternatively or hypothetically . . . [Emphasis added]

Among other things, plaintiff is directed to serve and file a verified amended complaint wherein causes of action against the various defendants are broken out as to one defendant from the other and, where there are multiple theories of liability as against a defendant, same shall be stated in separate causes of action against that particular defendant.

In this and the many related cases against these and other defendants, the Court has been presented with a complaint containing two causes of action. The first cause of action seemingly combines medical malpractice claims against one or more defendants with claims of ordinary negligence against one or more defendants, not necessarily the same defendants, with theories of recovery ranging from primary liability to vicarious liability and even liability based upon an acting in concert theory. In addition, the various allegations against the various defendants, although set forth separately as to each defendant, are stated in a bill-of-particular style, run-on paragraph, all contrary to the dictates of section 3014 ("Each paragraph shall contain, as far as practicable, a single allegation").

Furthermore, all future motions in this and any related action and any responses and replies to same shall be captioned with particularity so that one can readily determine, without the need to delve into the text of the submission, what the submission is for. For example, "Notice of Motion to Dismiss" is not helpful where the Court is presented with a plethora of motions by various defendants seeking to dismiss various causes of action or parts thereof. Nor is "Affirmation in Opposition" or "Attorney Affirmation" instructive where the Court is presented with fourteen separate submissions to various motions and cross-motions. Each submission shall identify the nature of the paper (Notice of Motion, Affirmation in Opposition, etc), the party for whom the submission is made, and the nature of the underlying motion. For example, "Notice of Motion by Defendant Vassar to dismiss First Cause of Action - Statute of Limitations"; "Affirmation in Opposition by Plaintiff to Defendant Mid Hudson's Motion to Dismiss - Statute of Limitations").

Finally, the word "defendant" should not be used without the

name of the particular defendant immediately following it.

PLAINTIFF SHALL SERVE AND FILE AN AMENDED VERIFIED COMPLAINT IN THE FORM HEREIN DIRECTED SO AS TO BE RECEIVED WITHIN THIRTY DAYS HEREOF.

EVEN WHERE PLAINTIFF'S MOTION TO AMEND THE COMPLAINT HAS BEEN DENIED, PLAINTIFF IS DIRECTED TO RECAST IT'S COMPLAINT IN CONFORMITY WITH THE DICTATES OF CPLR 3014 AND SERVE AND FILE AN AMENDED VERIFIED COMPLAINT WITHIN THIRTY DAYS OF THE DATE HEREOF.

DEFENDANTS SHALL RESPOND TO SAME SO AS TO BE RECEIVED WITHIN TWENTY FIVE DAYS OF SERVICE.

The parties are directed to appear before the Court at 9:30 A.M. on January 8, 2013, for a Status Conference.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: Carmel, New York
November 29, 2012


HON. LEWIS N. LUBELL, J.S.C.

TO: Tracey Reiser, Esq.
Kaufman, Borgeest & Ryan, LLP
ATTORNEYS FOR HUDSON VALLEY CENTER AT SAINT FRANCIS
200 Summit Lake Drive, 1st Floor
Valhalla, New York 10595

John T. Wisell, Esq.
Wisell & McGee, LLP
ATTORNEYS FOR PLAINTIFF
80-02 Kew Gardens Road, Suite 307
Kew Gardens, New York 11415

Christopher Keenan, Esq.
Westermann, Sheehy, Keenan, Samaan & Aydelott, LLP
ATTORNEYS FOR DEFENDANT MID HUDSON MEDICAL GROUP, LLC
222 Bloomingdale Road, Suite 305
White Plains, New York 10605