

Piccoli v Vassar Bros. Hosp.
2012 NY Slip Op 33923(U)
November 29, 2012
Supreme Court, Dutchess County
Docket Number: 485-2012
Judge: Lewis J. Lubell
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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

SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF DUTCHESS

-----X
LINDA PICCOLI,

Plaintiff,

-against -

VASSAR BROTHERS HOSPITAL, SPYROS PANOS,
M.D., and MID HUDSON MEDICAL GROUP,
P.C.

Defendants.

-----X
LUBELL, J.

ORIGINAL

DECISION & ORDER

Index No. 485-2012

Sequence Nos. 1 - 2

The following papers were considered in connection with this
motion (Sequence 1) by defendant Vassar Brothers Hospital, for
an Order pursuant to CPLR §3211(a)(5) and CPLR §214-a dismissing
the complaint as against Vassar Brothers Hospital, together with
such other and further relief as the Honorable Court deems just
and proper; and the **cross-motion (Sequence 2)** by plaintiff for an
Order granting plaintiff permission to amend her complaint to add
a separate cause of action for fraud against Vassar Brothers
Hospital, and for any other further relief which this Court deems
necessary and proper:

PAPERS

NUMBERED

Motion Sequence 1

Motion (Vassar)	1A
Affidavit/Exhibits A-B	1B
Memorandum of Law in Support	1C

Motion Sequence 2

Cross-Motion/Affirmation/Exhibits A-H (Tracy)	2
Affirmation in Opposition/Exhibits A-D (Panos)	3
Reply Affidavit in Support (Vassar)	4
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Plaintiff commenced this action on January 26, 2012, to
recover damages for injuries sustained on April 2, 2009, to her
left shoulder due to alleged actions and/or inactions of

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defendant Spyros Panos, M.D. ("Panos"), an orthopedic surgeon, defendant Mid Hudson Medical Group, P.C. ("Mid Hudson"), the medical group with which Panos was employed, and defendant Vassar Brothers Hospital ("Vassar"), the medical facility at which the underlying medical procedure took place.

These motions follow.

Statute of Limitations - the First Cause of Action

Defendant Vassar's motion pursuant to CPLR §§3211(a)(5) and 214-a to dismiss the first cause of action as time barred is denied to the extent that it advances a cause of action for ordinary negligence, upon the condition that, within thirty days hereof, plaintiff serve and file a Supplemental Summons and Verified Amended Complaint separating out plaintiff's cause of action for ordinary negligence as against defendant Vassar from any other cause of action (see, *Vatco Contr., Ltd. v. Kirschenbaum*, 73 AD3d 1163, 1164 [2d Dept 2010] [Supreme Court's determination, *sua sponte*, granting plaintiff leave to amend complaint upheld as not an improvident exercise of its discretion even though complaint did not conform with the pleading requirements of CPLR 3015 (e)]).

Upon affording the complaint a liberal construction, as the Court must on a motion to dismiss pursuant to CPLR §3211 (see CPLR 3026; *Leon v. Martinez*, 84 NY2d 83, 87 [1994]), and "accept[ing] the facts as alleged in the complaint as true, accord[ing] plaintiff[] the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory" (*Philip F. v. R.C. Diocese of Las Vegas*, 70 AD3d 765, 766 [2d Dept 2010] citing *Leon v. Martinez*, 84 NY2d at 87-88), the Court is satisfied that the first cause of action sufficiently states a cause of action for ordinary negligence against Vassar, primarily based on its failure to maintain a coordinated program for the identification and prevention of medical malpractice (see, Public Health Law §§2805-k, 2805-j). This is so notwithstanding other language therein contained suggesting and even indicating that the claim against Vassar is for medical malpractice, and notwithstanding the inclusion in the first cause of action of a claim for medical malpractice against defendants Panos and Mid Hudson.

The allegations of negligence against Vassar are not merely incidental and are more than adequate to transmute what is otherwise identified as a medical malpractice claim against Vassar into one alleging ordinary negligence (compare, *Lanzer v.*

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Fairchild Publications, Inc., 46 AD2d 644 [1st Dept 1974][incidental references in complaint to Labor Law §194 are wholly inadequate to transmute complaint into one seeking relief under the Labor Law; however, denial without prejudice to application for leave to serve an amended complaint asserting same]).

As such, the Court finds that the applicable period of limitations is three years (CPLR §214[5]) as against Vassar to the extent that ordinary negligence is alleged. Therefore and to that text, this action is timely when measured from the April 2, 2009, date of accrual to the January 26, 2012, date of commencement.

The motion to dismiss the first cause of action is denied even though 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 defendant's 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.

Cross-motion to Amend the Pleadings to Add Fraud

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 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 Vassar is 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.

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

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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

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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 A VERIFIED AMENDED 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 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 J. LUBELL, J.S.C.

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