

Martino v Morgantini
2013 NY Slip Op 30067(U)
January 17, 2013
Supreme Court, Dutchess County
Docket Number: 7878-2011
Judge: Lewis Jay Lubell
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
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

SUPREME COURT OF THE STATE of NEW YORK COUNTY OF DUTCHESS

-----X BARBARA MARTINO and JOSEPH MARTINO,

Plaintiffs,

-against -

AMENDED DECISION & ORDER¹

Index No. 7878-2011

Sequence Nos. 1 - 3

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

Defendants.

-----X LUBELL, J.

The following papers were considered in connection with this motion (Sequence 1) pursuant to CPLR §3211(a)(5) by defendant, Robert Morgantini, R.N.F.A., for an Order dismissing with prejudice any claims related to the plaintiff's September 27, 2007, May 15, 2008, and May 19, 2009 surgeries as the two and one-half year statute of limitations proscribed by CPLR §214-a has expired for those claims, and for such other and further relief as to this Court may seem just and proper; the cross-motion (Sequence 2) by defendant, Vassar Brothers Hospital, for an Order pursuant to CPLR 3211(a)(5) and CPLR 214-a dismissing with prejudice all claims relating to plaintiff's September 27, 2007, May 15, 2008 and May 19, 2009 surgeries as the applicable statute of limitations has expired for those claims, together with such other and further relief as the Court may deem just and proper; and the cross-motion (Sequence 3) by plaintiff for an Order granting plaintiff permission to amend her complaint to add a separate cause of action against unspecified defendants for fraud, and for any other further relief which this Court deems necessary and proper:

¹ In response to the January 3, 2013 letter from Morgantini's counsel to the Court, the Decision & Order of November 29, 2012 is amended, sua sponte, to merely strike the following language from the first full paragraph of page 2: "the medical group with which they were employed." Such action does not alter the outcome of the Decision & Order nor constitute a finding of fact one way or the other.

PAPERS**NUMBERED****Motion Sequence 1**

Motion/Affirmation/Exhibit A (Morgantini)	1
---	---

Motion Sequence 2

Cross-Motion/Affidavit/Exhibits A-B (Vassar)	2A,B,C
--	--------

Motion Sequence 3

Cross-Motion/Affirmation/Exhibits A-H (Martino)	3
Reply Affidavit in Support (Vassar)	4A,B
Affirmation in Opposition/Exhibits A-D (Panos)	5
Attorney Affirmation (Mid-Hudson)	6
Reply Affirmation (Morgantini)	7
Reply Affirmation (Martino)	8

Plaintiff commenced this action on December 12, 2011, to recover damages against (I) defendant Spyros Panos, M.D. ("Panos"), an orthopedic surgeon, defendant Robert Morgantini, R.N.F.A. ("Morgantini"), the surgical nurse first assistant to Panos, defendant Mid Hudson Medical Group, P.C. ("Mid Hudson"), and defendant Vassar Brothers Hospital ("Vassar"), the medical facility at which the underlying medical procedure took place, in connection with a September 24, 2007, surgery to her left knee, a May 15, 2008, surgery to her right shoulder, and a May 19, 2009, surgery to her right shoulder.

Through this action, plaintiff also seeks to recover damages for another or other surgeries which are not the subject of these motions which include defendant Hudson Valley Center at Saint Francis, L.L.C. ("HVC").

These motions follow.

Sequences 1 & 3**Morgantini Motion to Dismiss/Cross-motion to Amend Pleadings**

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 [2d Dept 2007]). "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 [internal quotation marks and citation omitted]; see Ricca v. Valenti, 24 A.D.3d 647, 648 [2d Dept 2005]).

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 (Simcuski 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 estop 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.

Sequence 2 & 3

Vassar Motion to Dismiss/Motion to Amend

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 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.

As to the injuries stemming from the May 19, 2009, surgery, 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 as to ordinary negligence upon the condition that plaintiff serve and file a Supplemental Summons and Amended Verified Complaint alleging ordinary negligence as hereinbelow permitted (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 movant, more particularly 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 movant is for medical malpractice, and notwithstanding the inclusion in the first cause of action of a claim for medical malpractice against defendants Panos, Mid Hudson and movant.

The allegations of negligence against movant are not merely incidental and are more than adequate to transmute what is otherwise identified as a medical malpractice claim against movant into one alleging ordinary negligence (compare, Lanzer v. 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 since the applicable period of limitations to the claim against movant for negligence is three years (CPLR §214[5]), this action as measured from the May 19, 2009, date of accrual to the December 12, 2011, date of commencement, is timely, but only upon the condition that, within thirty days hereof, plaintiff serves and files a Supplemental Summons and Amended Verified Complaint separating out plaintiff's cause of action for ordinary negligence as against movant into a separate cause of action which is, in all respects, within the three year period limitations.

To any further extent, the motion to dismiss the first cause of action is denied even though the alleged facts are otherwise facially beyond the period of limitations as applicable to medical malpractice and/or ordinary negligence. 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.

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 COMPLIANT 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
January 17 , 2013

S/ _____
HON. LEWIS J. LUBELL, J.S.C.

TO: Donna Marie Baloy, Esq.
Wilson, Elser, Moskowitz, Edelman & Dicker, LLP
ATTORNEYS FOR DEFENDANT ROBERT MORGANTINI, R.N.F.A.
3 Gannett Drive
White Plains, New York 10604

Jack Phelan, Esq.
Phelan, Phelan & Danek, LLP
ATTORNEYS FOR DEFENDANT VASSAR BROTHERS HOSPITAL
302 Washington Avenue, Suite 3
Albany, New York 12203

John T. Wisell, Esq.
ATTORNEY FOR PLAINTIFF
80-02 Kew Gardens Road, Suite 307
Kew Gardens, New York 11415

Jeffrey Feldman, Esq.
Feldman, Kleidman & Coffey, LLP
ATTORNEYS FOR SPYROS PANOS, M.D.
995 Main Street
PO Box A
Fishkill, New York 12524-0395

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

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