

**Nanomedicon, LLC v Research Found. of State Univ.  
of N.Y.**

2013 NY Slip Op 33835(U)

February 25, 2013

Supreme Court, Suffolk County

Docket Number: 36815-10

Judge: Elizabeth H. Emerson

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SHORT FORM ORDER

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NO.: 36815-10

ORIGINAL

**SUPREME COURT - STATE OF NEW YORK  
COMMERCIAL DIVISION  
TRIAL TERM, PART 44 SUFFOLK COUNTY**

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 7-30-12  
SUBMITTED: 8-23-12  
MOTION NO.: 006-MD; ACAP

\_\_\_\_\_  
NANOMEDICON, LLC, x

Plaintiff,

-against-

THE RESEARCH FOUNDATION OF STATE  
UNIVERSITY OF NEW YORK and PELAGIA-  
IRENE GOUMA,

Defendants.

\_\_\_\_\_  
PELAGIA-IRENE GOUMA, x

Third-Party Plaintiff,

-against-

MEDICON, INC and ANASTASIA RIGAS,  
individually and in her capacity as officer,  
employee and/or shareholder of Nanomedicon,  
LLC and Medicon, Inc.,

Third-Party Defendants.

\_\_\_\_\_  
x

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Upon the following papers numbered 1-25 read on this motion to reargue/amend ; Notice of Motion and supporting papers 1-11 ; Notice of Cross Motion and supporting papers \_\_\_\_\_ ; Answering Affidavits and supporting papers 12-19 ; Replying Affidavits and supporting papers 20-25 ; and upon oral argument; it is,

**ORDERED** that the branch of the motion by the defendant Pelagia-Irene Gouma which is for leave to reargue so much of an order of this court (Pines, J.) dated March 15, 2012, as granted the motion (002) by the third-party defendant Medicon, Inc., to dismiss the third-party complaint insofar as asserted against it and granted the motion (003) by the plaintiff and the third-party defendant Anastasia Rigas to dismiss the counterclaims and third-party complaint insofar as asserted against them is denied; and it is further

**ORDERED** that the branch of the motion by the defendant Pelagia-Irene Gouma which is for leave to amend her answer is denied; and it is further

**ORDERED** that, on the court's own motion, the caption is amended to read as follows:

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SUFFOLK

\_\_\_\_\_  
NANOMEDICON, LLC,

Plaintiff,

-against-

THE RESEARCH FOUNDATION OF STATE  
UNIVERSITY OF NEW YORK and PELAGIA-  
IRENE GOUMA,

Defendants,

MEDICON, INC., and ANASTASIA RIGAS,  
individually and in her capacity as officer, employee  
and/or shareholder of Nanomedicon LLC, and  
Medicon, Inc.,

Additional Defendants on the Counterclaim.

\_\_\_\_\_  
X

A motion for leave to reargue is addressed to the sound discretion of the court and

may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision (*see, Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27). Reargument is not designed to afford the unsuccessful party successive opportunities to argue issues previously decided or to present arguments different from those originally asserted (**Id.**). The court finds that it did not overlook or misapprehend the relevant facts or misapply any controlling principle of law in denying the prior motions to dismiss (*see, CPLR 2221[d]; Foley v Roche*, 68 AD2d 558, 567), and the additional arguments raised by Ms. Gouma in support of the present motion do not warrant a different result. Accordingly, the branch of the motion which is for reargument is denied.

The standard for granting an application for leave to amend a pleading is statutorily prescribed as one that should be "freely granted" (*see, CPLR 3025 [b]*). Case authorities provide that, in the absence of prejudice or surprise to the non-moving party, leave should be granted without an examination of the merits of the proposed amendments (*see, Deutsche Bank Natl. Trust Co. v Torres*, 24 Misc 3d 1216[A] at \*3 [and cases cited therein]). However, proposed amendments that are palpably insufficient or patently devoid of merit will be rejected without a showing of surprise or prejudice (**Id.**). The court finds that the proposed second amended answer with counterclaims and third-party complaint does not correct the deficiencies of Ms. Gouma's earlier pleading which, except for the fourth counterclaim/third-party claim, was rejected by this court. Accordingly, the branch of the motion which is to amend the answer is denied.

The court notes, however, that the third-party action is procedurally improper. CPLR 1007 provides, in pertinent part, as follows:

After service of his answer, a defendant may proceed against a person not a party who is or may be liable to that defendant for all or part of the plaintiff's claim against that defendant, by filing...a third-party summons and complaint with the clerk of the court in the county in which the main action is pending....

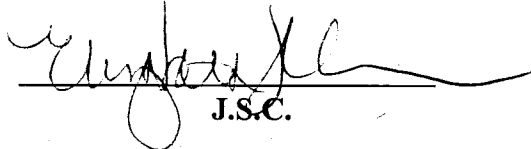
The impleader language of CPLR 1007 has been liberally construed and does not limit the amount that may be recovered (**Cohen Agency v Perlman Agency**, 51 NY2d 358, 364-366) or the legal theory that may be asserted as the basis for a third-party claim (**Garrett v Holiday Inns**, 58 NY2d 253, 262-263). Nonetheless, the statutory language requires some minimal jural relationship, aside from possible common questions of fact or law, between the liability of the defendant asserted in the main action and liability for the over-claim in the third-party complaint. At the least, the third-party claim must be sufficiently related to the main action to raise the question of whether the third-party defendant may be liable to the third-party-plaintiff for the damages for which the latter may be liable to the plaintiff (**Zurich Ins. Co. v White**, 129 AD2d 388; **Long Is. Women's Health Care Assocs. v Haselkorn-Lomasky**, 10 Misc 3d 1068[A] at \*8). Thus, the liability of the third-party defendant must arise from or be conditioned upon the liability asserted against the third-party plaintiff in the main action (**Lucci v Lucci**, 150

AD2d 649, 650; **Hoboken Wood Flooring Corp. v Fischhoff**, 10 Misc 3d 1065[A] at \*2).

It is clear that the third-party cause of action against Medicon, Inc., and Anastasia Rigas does not contain the claim-over component required by CPLR 1007 and controlling case law. However, it is also asserted as a counterclaim against the plaintiff. When, as here, the defendant's claim against a third person implicates a party who is already in the main action as a plaintiff or co-defendant, the third person may be joined by way of a counterclaim against the plaintiff or cross claim against the co-defendant (*see*, CPLR 3019[a], [b] & [d]). Such counterclaims and cross claims may be asserted without the need for a connection of any kind to the plaintiff's original cause of action (Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, C1007:4 at 45), but they must have a link to someone already named and joined as a party (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, C3019:6 & C3019:13).

In view of the foregoing, the court finds that the third-party cause of action against Medicon, Inc., and Anastasia Rigas is merely a counterclaim and that they are not third-party defendants, but additional defendants on the counterclaim. On the court's own motion, the caption is amended accordingly.

Dated: February 25, 2013

  
J.S.C.