

Levine v Marc Brown, M.D.

2015 NY Slip Op 30772(U)

May 8, 2015

Supreme Court, New York County

Docket Number: 805063/2013

Judge: Martin Shulman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 1

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 CAROLE LEVINE and HARVEY LEVINE,

Plaintiffs,

Index No: 805063/2013

-against-

Decision and Order

MARC BROWN, M.D., COLUMBIA -
 PRESBYTERIAN EASTSIDE RADIOLOGY
 D/B/A COLUMBIA DOCTORS MIDTOWN
 RADIOLOGY and THE NEW YORK AND
 PRESBYTERIAN HOSPITAL,

Defendants.

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Hon. Martin Shulman, JSC:

With the implicit permission of this court in its Decision and Order dated January 26, 2015 (“January 26th Order”)¹(Exhibit A to Renewal Motion), the defendants, Marc Brown, M.D., the Trustees of Columbia University in the City of New York, s/h/a Columbia-Presbyterian Eastside Radiology, d/b/a Columbia Doctors Midtown Radiology, and the New York and Presbyterian Hospital (“Defendants”), renewed their earlier motion dated June 26, 2014, pursuant to CPLR 3025(b), permitting them to amend their answers to assert additional affirmative defenses against plaintiff Carole Levine (“Plaintiff” or “Levine”) of comparative negligence (i.e., failure to follow recommendation for earlier breast cancer diagnosis and treatment) and mitigation (i.e., failure to mitigate damages with earlier breast cancer diagnosis and treatment

¹ The January 26th Order recited the factual background of this medical negligence action, detailed the parties’ arguments *vis-a-vis* Defendants’ CPLR 3025(b) motion, made references to the exhibits (e.g., medical records, deposition transcripts, etc.) and discussed the relevant case law governing the permissibility of pleading amendments. In the interest of brevity, this extensive discussion will not be reiterated, but is deemed fully incorporated here by reference.

preventing metastasis). Defendants' proposed verified amended answers are attached to the moving papers(Exhibit B to Renewal Motion).

Defendants' renewal motion specifically highlights a First Department decision issued just a few days after the January 26th Order (see *Goodwin v Empire City Subway Co. Ltd.*, 124 AD3d 559 [1st Dept 2015][“*Goodwin*”]) which they believe supercedes the case law this court relied on in its January 26th Order denying Defendants' CPLR 3025(b) motion, without prejudice, and expressly vitiates this court's decretal provision directing Defendants to submit an affidavit of merit as to these proposed affirmative defenses from a CPLR §3101(d) expert establishing specific causation due to Levine's purported self-created delay. Stated simply, Defendants argue that unlike for a summary judgment motion, competent medical proof via a merit-based expert affidavit is not required to support a proposed amended pleading, but rather a more permissive standard showing that, as in this case, the proposed affirmative defenses are not “palpably insufficient or patently devoid of merit.”

In opposition, Levine's counsel argues that the January 26th Order was correctly decided as the court did not “overlook[] or misapprehend[] the facts or misapply[] controlling case law with regard to the requirement of an affidavit from a qualified medical expert demonstrating the merits of the proposed amendments of the affirmative defenses . . .” (Coffinas Opp Aff at ¶ 3). Counsel further argues that *Goodwin* should not be controlling as the litigation posture there is distinguishable from this case, *viz.*, the defendant City of New York's motion in *Goodwin* was unopposed and made during early stages of discovery, whereas Defendants' initial motion to amend its verified answers was made months after the note of issue was filed.

The January 26th Order preliminarily noted that “plaintiffs’ opposition [to Defendants’ initial CPLR 3025[b] motion] does not allege, let alone establish, that they will be prejudiced by the proposed amendment. Nor does the filing of a note of issue require denial of a motion to amend . . .” (bracketed matter added)(January 26th Order at p. 9). See *Jacobson v Croman*, 107 AD3d 644, 645 (1st Dept 2013).

Despite the foregoing, it cannot be overlooked that this action is now trial ready as discovery has been completed and the note of issue filed, yet, months afterwards, Defendants seek to add affirmative defenses which essentially seek to blame Levine for the metastatic progression of her breast cancer. And obviously if proven, these defenses could be adversely outcome-determinative for plaintiffs.

Accordingly, given the nascent stage of the litigation as well as plaintiff’s non-opposition to defendants’ proposed affirmative defenses in *Goodwin*, it cannot be said with certainty and certitude that its holding now overturns *Leighton v Lowenberg*, 103 AD3d 530 (1st Dept 2013)(evidence-based affidavit of merit required for proposed medical malpractice claim after note of issue filed). Nor should it be perceived as constituting the First Department’s newly emerged, definitive concurrence with recent appellate case law of other Departments reflecting a liberal trend towards granting a pleading amendment ostensibly at all times and under all circumstances merely on its facial sufficiency without requiring a moving party to demonstrate its evidence-based merit (see illustratively, *Lucido v Mancuso*, 49 AD3d 220 [2d Dept 2008]).

As observed in the January 26th Order, the seemingly conflicting case law in the First Department suggests a case-by-case analysis in addressing the appropriate standard to apply to a pleading amendment leave application (i.e., a facially sufficient


showing will be adequate during earlier stages of litigation where there is minimal prejudice versus an evidentiary showing of merit during its advanced stages). It will be inevitable here that Defendants must timely proffer competent medical proof to ultimately sustain their proposed affirmative defenses to Levine' malpractice claim (e.g., CPLR 3101[d] expert witness disclosure with documentary support, etc.), and it is an anticipated burden they will readily accept. Moreover, this court's directive to compel an evidentiary showing of merit as to the proposed affirmative defenses, namely, an "affidavit from a qualified medical expert demonstrating that Levine's [perceived self-created] delay . . . was the proximate cause of the . . . metastasis to her lymph node . . ." is not only required in accordance with the *Leighton* holding, *supra*, but it is also fair, reasonable and not an abuse of discretion under these circumstances.

Accordingly, Defendants' renewal motion for leave to amend their verified answer is conditionally granted upon Defendants serving and filing a supporting medical expert affidavit within 30 days of the issuance date of this decision and order, otherwise the renewal motion shall be deemed denied.

Counsel for the parties are directed to appear for a pre-trial conference on June 30, 2015, at 9:30 a.m. at 60 Centre Street, Room 325, New York, New York.

The foregoing constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for the parties.

Dated: New York, New York
May 8, 2015



HON. MARTIN SHULMAN, J.S.C.