

Ross v Dialysis Clinic, Inc.
2017 NY Slip Op 32895(U)
April 21, 2017
Supreme Court, Westchester County
Docket Number: 60104/15
Judge: Mary H. Smith
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

DECISION AND ORDER

To commence the statutory period of 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
IAS PART, WESTCHESTER COUNTY**

**Present: HON. MARY H. SMITH
Supreme Court Justice**

-----X
GEORGE ROSS,

Plaintiff,

**MOTION DATE: 4/21/17
INDEX NO.: 60104/15**

-against-

**DIALYSIS CLINIC, INC. A/K/A WESTCHESTER COUNTY
DIALYSIS CLINIC, INC.,**

Defendant.
-----X

The following papers numbered 1 to 7 were read on this motion by plaintiff for an Order pursuant to CPLR 3025, subdivision (b), granting amendment of the complaint, etc.

Papers Numbered

Notice of Motion - Affirmation (Kanfer) - Exhs. (A-B)	1-3
Answering Affirmation (O'Dwyer) - Exhs. (A-K)	4-5
Replying Affirmation (Kanfer) - Exh. ¹	6-7

Upon the foregoing papers, it is Ordered that this motion by plaintiff for an Order pursuant to CPLR 3025, subdivision (a), permitting the filing of an amended complaint to

¹The Court observes that plaintiff, in response to defendant's argument that plaintiff had failed to properly support his motion to amend with the required Certificate of Merit, has submitted a Certificate of Merit in his replying papers.

plead a new cause of action for medical and nursing malpractice and additionally to grant plaintiff a special trial preference pursuant to CPLR 3403, subdivision (b), is disposed of as follows:

Addressing first plaintiff's request for a trial preference pursuant to CPLR 3403, subdivision (a), based upon plaintiff's presently being 75 years of age, said motion is granted without opposition.

Addressing next plaintiff's amendment motion pursuant to CPLR 3025, subdivision (b), the Court initially notes that plaintiff need not file a supplemental summons, as is proposed by plaintiff, since no new parties are being added to this action. See CPLR 305, subd. (a).

To the extent that plaintiff also seeks to amend his complaint to add an additional cause of action, said relief is denied. While plaintiff correctly argues that leave to amend or supplement pleadings should be freely granted unless the amendment sought is palpably improper or insufficient as a matter of law, or unless prejudice and surprise directly results from the delay in seeking the amendment. See CPLR 3025, subd. (b); McCasky, Davies, & Assoc. v. New York City Health & Hosps. Corp., 59 N.Y.2d 755 (1983); Moyse v. Wagner, 66 A.D.3d 976 (2nd Dept. 2009); Shovak v. Long Island Commercial Bank, 50 A.D.3d 1118, 1120 (2nd Dept. 2008); Bolanowski v. Trustees of Columbia University in City of New York, 21 A.D.3d 340 (2nd Dept. 2005); Santori v. Met Life, 11 A.D.3d 597 (2nd Dept. 2004); Pirrotti & Pirrotti, LLP v. Estate of Warm, 8 A.D.3d 545 (2nd Dept. 2004), and that the legal sufficiency or merits of a proposed amended pleading should not be examined unless the insufficiency or lack of merit is clear and free from doubt, see Benyo v. Sikorjak, 50 A.D.3d 1074, 1076 (2nd Dept. 2008), here, plaintiff's

proposed malpractice claims clearly are time-barred; plaintiff therefore is not entitled to the relief he seeks.

Plaintiff's originally filed complaint alleges a single cause of action seeking monetary compensation for injuries that plaintiff allegedly had sustained, on September 1, 2014, as a result of his having fallen while being lawfully present at defendant's Yorktown Heights premises. Plaintiff has litigated this action from the outset alleging defendant's negligence in the ownership, operation, control and maintenance of the premises, defendant's negligent failure to have provided plaintiff with safe ingress and egress, and defendant's failure to have warned plaintiff of the existing dangerous and trap-like condition.² Plaintiff had filed his note of issue and certificate of readiness, on April 14, 2017.

In his proposed amended complaint, plaintiff seeks to assert a new cause of action for medical-nursing malpractice alleging that plaintiff previously had been assessed by defendant as having a fall risk factor of 9 and that plaintiff had fallen at defendant's premises during a dialysis treatment as a result of his not having been properly escorted at the time of his fall. A cause of action for malpractice is governed by the two and one-half year statute of limitations provided in CPLR 214-a. Accordingly, any malpractice action would have accrued, on September 1, 2014, rendering said cause of action time-barred.

The Court rejects plaintiff's argument that the continuous treatment doctrine in CPLR 214-a tolls plaintiff's claim. While plaintiff apparently did continue to receive further

²In plaintiff's bill of particulars and amended bill of particulars, he alleges that he had tripped and fallen over lose wires/cords; however, at his deposition, plaintiff had testified that he had fallen on a wet floor.

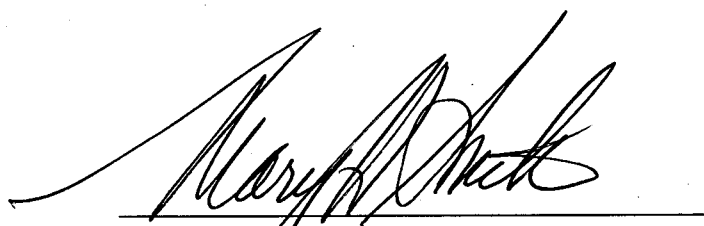
dialysis treatment after his alleged fall date, any subsequent dialysis treatment had not been part of a “continuous treatment for the same illness, injury or condition which gave rise to said act, omission or failure. Emphasis supplied.” CPLR 214-a; see Young v. New York City Health & Hospitals Corp., 91 N.Y.2d 291 295-296 (1998).

In light of the Court’s finding that plaintiff’s proposed malpractice claim is time-barred, the Court need not address the additional issue raised as to whether a malpractice claim otherwise properly is stated upon the alleged facts. Nevertheless, it appears that defendant’s argument that said malpractice claim does not properly lie has merit given that plaintiff’s fall appears to have happened after his having received his dialysis treatment on the accident date and he had been discharged from the unit early, at plaintiff’s own request, and plaintiff physically had left the unit, but then plaintiff had re-entered the unit, unannounced, to retrieve his personal blanket that he inadvertently had left behind. See D’Elia v. Menorah Home and Hosp. for Aged and Infirm, 51 A.D.3d 848, 851-852 (2nd Dept. 2008); see, also Cerniglia v. Cardiology Consultants of Westchester, P.C., 97 A.D.3d 520 (2nd Dept. 2012); cf. Martuscello v. Jensen, 134 A.D.3d 4, 12 (3rd Dept. 2015).

Concomitantly, plaintiff’s request that this Court vacate the filed note of issue is denied.

The parties shall appear in the Settlement Conference Part, room 1600, at 9:15 a.m., on May 23, 2017, for the scheduling of trial.

Dated: April 21, 2017
White Plains, New York



MARY H. SMITH
J.S.C.

The Law Office of Martin Kanfer
Attys. For Pltf.
3 Northern Blvd.
Great neck, New York 11021

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP
Attys. For Deft.
1133 Westchester Avenue
White Plains, New York 10604

Frances Schiel Doyle; Settlement Conference Part