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| <b>Mitchell v Leyton</b>                                                                                                                                                                                                       |
| 2017 NY Slip Op 33025(U)                                                                                                                                                                                                       |
| July 14, 2017                                                                                                                                                                                                                  |
| Supreme Court, Richmond County                                                                                                                                                                                                 |
| Docket Number: 101481/14                                                                                                                                                                                                       |
| Judge: Thomas P. Aliotta                                                                                                                                                                                                       |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND

-----X  
ESTATE OF KADEEM MITCHELL  
and MEIR SEEMAN,

Plaintiff,

-against-

MARIA XIMENA LEYTON, OSWALDO  
GUTIERREZ and THE CITY OF NEW YORK,

Defendants.  
-----X

PART C-2  
HON. THOMAS P. ALIOTTA

DECISION AND ORDER  
Index No.101481/14

Motion No. 999 - 001

The following papers numbered 1 to 3 were marked fully submitted on the 17<sup>th</sup> day  
of May 2017.

|                                                                                                          | Papers<br>Numbered |
|----------------------------------------------------------------------------------------------------------|--------------------|
| Notice of Motion to Amend by Plaintiffs, with Supporting Papers,<br>Exhibits (dated March 6, 2017) ..... | 1                  |
| Affirmation in Opposition by Defendant OSWALDO GUTIERREZ,<br>(dated March 28, 2017) .....                | 2                  |
| Affirmation in Opposition by Defendant MARIA XIMENA LETON<br>(dated April 3, 2017) .....                 | 3                  |
| Reply Affirmation of Plaintiffs<br>(dated April 3, 2017) .....                                           | 4                  |

RICHMOND COUNTY CLERK  
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Upon the foregoing papers, plaintiffs' motion to amend the complaint to assert a  
derivative cause of action on behalf of decedent's father, KIRYA MITCHELL, is granted as  
against defendants MARIA XIMENA LEYTON and OSWALDO GUTIERREZ only.

Plaintiffs commenced this action on September 16, 2014 to recover damages for the  
wrongful death of KADEEM MITCHELL (hereinafter "decedent") after the motorcycle he was

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operating was involved in a collision with a vehicle owned and operated by defendant MARIA XIMENA LEYTON and a second vehicle owned and operated by defendant OSWALDO GUTIERREZ. The accident occurred on April 5, 2014 on School Road between Lily Pond Avenue and Dennis Torricelli Drive on Staten Island. Decedent passed away six days later on April 11, 2014. Plaintiffs have also asserted claims against defendant THE CITY OF NEW YORK (hereinafter THE CITY) for failing to properly maintain the roadway where the accident occurred in spite of actual or constructive notice of a dangerous condition existing at that location. In addition, a cause of action for property damage has been asserted on behalf of plaintiff MEIR SEEMAN, the owner of the motorcycle which decedent was operating. A Notice of Claim was served upon THE CITY on June 13, 2014, and a hearing was conducted pursuant to General Municipal Law §50-h on March 16, 2015.

In the current application, plaintiffs seek permission to amend their complaint pursuant to CPLR 3025(b) to add a new plaintiff, KIRYA MITCHELL, who is decedent's father, and to assert derivative causes of action on his behalf for loss of services, support and voluntary assistance which the decedent allegedly provided to MITCHELL.<sup>1</sup>

Following the deposition of plaintiff MEIR SEEMAN, plaintiffs concluded that an additional claim against defendants existed in favor of decedent's natural father, KIRYA MITCHELL, who is wheelchair-bound and permanently disabled. SEEMAN testified, *inter alia*,

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<sup>1</sup> Plaintiffs' motion to amend the complaint to add KIRYA MITCHELL as an additional plaintiff as against defendant THE CITY OF NEW YORK was denied by an Interim Order dated May 17, 2017, since the Court lacks discretion to permit plaintiffs to amend their Notice of Claim beyond the applicable Statute of Limitations for actions arising against THE CITY (*see* General Municipal Law §50-e).

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that KIRYA MITCHELL relied upon decedent to assist him with his daily activities due to his incapacitation. SEEMAN further stated that he no longer has the assistance and support of the decedent. According to plaintiffs, KIRYA MITCHELL has lost the services, support and voluntary assistance that decedent provided. Moreover, there would be no prejudice to defendants by allowing KIRYA MITCHELL to be added as a plaintiff, and to add his derivative causes of action since discovery is ongoing at this point, and depositions are still being held.

In opposition, defendant GUTIERREZ contends that the motion to amend should be denied since EPTL §5-4.1 requires that a wrongful death action be commenced within two years from a decedent's date of death. Here, plaintiffs waited almost three years after decedent's death to move to add the proposed plaintiff and assert additional causes of action on his behalf. According to GUTIERREZ, plaintiffs were aware of the existence of proposed additional plaintiff KIRYA MITCHELL and of his disability which existed since 1984 and which allegedly required the assistance of the decedent. GUTIERREZ argues that the mere fact that plaintiff SEEMAN testified at his deposition that proposed plaintiff KIRYA MITCHELL will be deprived of decedent's services is insufficient to toll the two-year wrongful death statute of limitations to allow the amendment.

Moreover, GUTIERREZ contends that only the personal representative of the estate may bring and maintain a wrongful death action, and that the proposed plaintiff cannot maintain a separate claim for non-pecuniary loss for his son's services.

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In her opposition, defendant MARIA XIMENA LEYTON adopts and incorporates by reference the arguments made by codefendant OSWALDO GUTIERREZ in his opposition to plaintiff's motion.

It is well settled that a party may amend a pleading at any time with leave of court, and that such leave shall be freely given in the absence of prejudice to the nonmoving party unless the proposed amendment is plainly lacking in merit (*see* CPLR 3025[b]). Here, in the opinion of this Court, the deposition testimony offers sufficient proof that KIRYA MITCHELL was decedent's disabled father, and that decedent assisted the family in caring for his father. Accordingly, there is merit to the derivative claims sought to be added by proposed additional plaintiff KIRYA MITCHELL. Moreover, the derivative claim certainly relates to the same events and is based upon the same liability asserted in the original complaint, *e.g.*, the subject motor vehicle accident and defendants' alleged negligence. In addition, the proposed additional plaintiff is decedent's father, as such, he is not a stranger to the within litigation. Accordingly, in view of the merit to the proposed amendment, and the lack of prejudice, the motion is granted.

Finally, while defendants argue that the statute of limitations serves to bar the addition of such a claim, leave to amend a pleading to assert a new cause of action is not precluded by untimeliness so long as the earlier pleading gave the adverse party sufficient notice of the transaction out of which the new claim arises (*see* CPLR 203[e]). Again, in the opinion of this Court, the derivative claims sought to be added by the proposed additional plaintiff all stem from the same occurrence of which defendants were aware since the subject litigation began. Any

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further arguments to the contrary have been considered and rejected. Therefore, the amendments should be permitted.

Accordingly, it is

ORDERED that plaintiffs' motion to amend the complaint to assert a derivative cause of action on behalf of decedent's father, KIRYA MITCHELL, is granted as against defendants MARIA XIMENA LEYTON and OSWALDO GUTIERREZ, only; and it is further

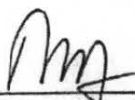
ORDERED that said amended complaint attached to the motion is deemed served upon said defendants and that said defendants shall serve a responsive pleading within 20 days after the service upon them of this Order with Notice of Entry; and it is further

ORDERED, that plaintiff shall file the amended complaint with the Clerk of the Court within 20 days of entry of this Order.

This constitutes the decision and order of the Court.

Dated: July 17, 2017

ENTER,



HON. THOMAS P. ALIOTTA, J.S.C.

GRANTED  
AUG 11 2017  
STEPHEN J. FIALA