

Karlsson v Putnam Hosp. Ctr.
2018 NY Slip Op 34286(U)
July 27, 2018
Supreme Court, Westchester County
Docket Number: Index No. 50250/16
Judge: David F. Everett
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To commence the 30-day statutory time period for appeals as of right under 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 WESTCHESTER

-----X
JAMIE-ANN KARLSSON and MICHAEL B.
KARLSSON II,

Plaintiffs,

-against-

PUTNAM HOSPITAL CENTER, EOS MEDICAL
GROUP, P.C., STUART ROBERTS, MD, PUTNAM
IMAGING ASSOCIATES, P.C., MASAH KAI, MD,
DAVID SPIELVOGEL, MD,

Defendants.

-----X
EVERETT, J.

Index No. 50250/16
Motion Seq. Nos. 003, 004
Decision and Order

The following papers were read on the motions:

003 Notice of Motion/Affirmation in Supp/Exhibits A-G (docs 57-65)
Affirmation in Response/Exhibits A-D (docs 78-82)
Reply Affirmation (doc 86)

004 Notice of Cross Motion/Affirmation in Supp/Redaction Cover Page/Aff of Serv/
Exhibit 1 (docs 68-72)
Affirmation in Opp/Exhibits A-B (docs 83-85)
Reply Affirmation/Redaction Cover Page/Aff of Serv/Exhibit 2 (docs 89-92)

Under motion sequence number 003, defendant Westchester County Healthcare Corporation (WCHC) moves, on behalf of co-defendants Masahi Kai, M.D. (Kai) and David Spielvogel, M.D. (Spielvogel), for an order, pursuant to CPLR 3215 (c), dismissing the complaint with prejudice against Kai and Spielvogel and removing their names from the caption.

Under motion sequence number 004, defendant Putnam Imaging Associates, P.C. (Putnam Imaging) moves for an order, pursuant to CPLR 3211 (a) (10), dismissing the complaint based on plaintiffs' failure to properly sue Kai and Spielvogel who should be proper parties in the action.

The motions, under motion sequence numbers 003 and 004, are consolidated for disposition, and upon the foregoing papers, WCHC's motion is granted to the extent set forth below and Putnam Imaging's motion is denied.

The following facts are taken from the pleadings, motion papers, affidavits, documentary evidence and the record, and are undisputed unless otherwise indicated.

On or about October 2, 2013, plaintiff Jamie-Ann Karlsson (JA Karlsson) and her husband, plaintiff Michael B. Karlsson II, served a notice of claim on WCHC with respect to the medical care and treatment she received at that facility between July 10, 2013 and July 14, 2013. When the municipal defendant failed to adjust or pay their claim, plaintiffs commenced a medical malpractice action against WCHC under Westchester County Index No. 66927/14 (Prior Action). Issue was joined in the Prior Action by service of WCHC's answer with affirmative defenses on or about November 17, 2014. Approximately a year later, plaintiffs commenced a separate medical malpractice action under Westchester County Index No. 50250/16, against Putnam Hospital Center (Putnam Hospital), Eos Medical Group, P.C. (EOS), Stuart Roberts, MD (Roberts), Kai and Spielvogel based on a sequence of medically related events that are connected to the Prior Action. Issue was joined by service of Roberts's answer with affirmative defenses on or about May 26, 2016, by service of EOS's answer with affirmative defenses on or about May 26, 2016, by service of Putnam Hospital's answer with affirmative defenses on or about January 27, 2017, and by service of Putnam Imaging's answer with affirmative defenses on or about April 18, 2017. Issue was not joined by either Kai or Spielvogel, who were served on May 5, 2016 and May 6, 2016, respectively. Thereafter, by so ordered stipulation dated August 23, 2017, the Prior Action was consolidated into the above-captioned action under Westchester County Index No. 50250/16 for all purposes.

For the purpose of the instant motions, it is undisputed that, prior to being transferred by helicopter to WCHC's Westchester Medical Center facility (WMC) from Putnam Hospital late in the evening of July 10, 2013, JA Karlsson was a patient under the professional care of Putnam Hospital, EOS, Putnam Imaging and Roberts. It is also undisputed that, based on testing/imaging performed at, performed and/or interpreted by or under the direction of, Putnam Hospital, EOS, Putnam Imaging and/or Roberts, JA Karlsson presented to WCMC with a diagnosis of a type A aortic dissection, where thoracic and cardiac surgeons Kai and Spielvogel were assigned to, and did, perform her open heart surgery, and that they did so without the benefit of any additional diagnostic studies to confirm her presenting diagnosis.

WCHC now moves for a CPLR 3215 (c) dismissal of the complaint as against Kai and Spielvogel on the ground of abandonment in that plaintiffs' failed to seek a default against either of these defendants within one year after effecting service, and that the applicable two and a half year statute of limitations (CPLR 214-a) has now expired.

CPLR 3215 (c) provides, in relevant part:

"[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed."

Plaintiffs do not meaningfully oppose a dismissal of the complaint as against Kai and Spielvogel, nor do they oppose the removal of their names from the caption. In fact, plaintiffs prepared a stipulation to that effect that was never executed by WCHC (*see* aff in response, exhibit D). Inasmuch as no factual or legal cause has been proffered for denying the motion, WCHC's motion for an order dismissing the complaint as against Kai and Spielvogel is granted, as is its motion to remove their names from the caption.

The cross motion of Putnam Imaging for a CPLR 3211 (a) (10) dismissal of the entire complaint based on plaintiffs' failure to prosecute its complaint against Kai and Spielvogel is, however, denied. CPLR 3211 (a) (10) states that: "the court should not proceed in the absence of a person who should be a party," and it is Putnam Imaging's position that, since the complaint alleges that Kai and Spielvogel performed unnecessary open heart surgery without JA Karlsson's informed consent, these individuals are indispensable to the action.

In response, plaintiffs assert that Kai and Spielvogel are not indispensable to the prosecution of the action. This, plaintiffs contend, is because WCHC can be held vicariously liable for their alleged malpractice based on their status as WCHC employees (*Bradshaw v. Lenox Hill Hosp.*, 126 AD3d 484, 485 [1st Dept 2015]). Plaintiffs further contend that, even if Kai and Spielvogel were not WCHC employees, it would still be vicariously liable for their alleged malpractice, because "an exception to the general rule exists when a patient [such as JA Karlsson] comes to the emergency room seeking treatment from the hospital and not from a particular physician of the patient's choosing" (*Orgovan v Bloom*, 7 AD3d 770, 771 [2d Dept 2004]). It is on these alternate theories, by which WCMC could be held vicariously liable for Kai and Spielvogel's alleged malpractice, that plaintiffs do not deem them indispensable for complete relief to be accorded in this action.

In New York, an action cannot proceed in the absence of an indispensable party. In determining whether Kai and Spielvogel are indispensable parties to plaintiffs' action, the Court must consider whether they are so essential to the litigation that the action cannot proceed without them without inequitably affecting, or otherwise prejudicing, either parties to the action,

or persons or entitles who should be party to the action (*see Strough v Incorporated Vil. of W. Hampton Dunes*, 78 AD3d 1037, 1040 [2d Dept 2010]; CPLR 1001, 1003).

At this juncture, both Kai and Spielvogel have been noticed for depositions in this action. Despite Putnam Imaging’s insistence that, as the surgeons who “put knife to skin,” they must be necessary parties, it fails to demonstrate how it, or any other party, will be inequitably affected or otherwise prejudiced by plaintiffs’ decision not to pursue their complaint against them, and electing instead, to seek a vicarious liability finding against WCHC for any malpractice they committed.

Accordingly, it is

ORDERED that the motion of defendant Westchester County Healthcare Corporation is granted to the extent that plaintiff’s complaint is dismissed as against defendants Masahi Kai, MD and David Spielvogel, MD; and it is further

ORDERED that the names of defendants Masahi Kai, MD and David Spielvogel, MD shall be removed from the caption, which is amended and shall read as follows:

-----X
JAMIE-ANN KARLSSON and MICHAEL B.
KARLSSON II,
Plaintiffs,

-against-

PUTNAM HOSPITAL CENTER, EOS MEDICAL
GROUP, P.C., STUART ROBERTS, MD, and
PUTNAM IMAGING ASSOCIATES, P.C.,
Defendants.
-----X

; And it is further

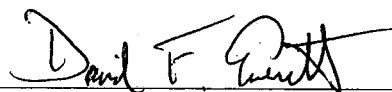
ORDERED that the motion of defendant Putnam Imaging Associates, P.C., is denied; and
it is further

ORDERED that counsel are directed to appear for a compliance conference in courtroom
800, 111 Dr. Martin Luther King, Jr. Boulevard, White Plains, New York, on August 7, 2018:

This constitutes the decision and order of the Court.

Dated: White Plains, New York
July 27, 2018

ENTER:



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