

**Brown v Grace Plaza Nursing & Rehabilitation Ctr.**

2018 NY Slip Op 34369(U)

October 26, 2018

Supreme Court, Nassau County

Docket Number: Index No. 602531/17

Judge: Randy Sue Marber

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granting the Plaintiff leave to serve and file a late Notice of Medical Malpractice and Certificate of Merit, and leave to amend the Complaint to add a cause of action for medical malpractice, together with a derivative claim, are decided as provided herein.

The Plaintiff, commenced this action on April 27, 2016, to recover monetary damages for the pain, suffering and wrongful death of her husband, the Decedent, Elijah Brown, due to the Defendant's alleged negligence and violations of Public Health Law §§ 2801 and 2803-c, relating to the care and treatment rendered to the Decedent while he was a patient/resident at the Defendant's nursing facility.

On April 11, 2014, the Decedent was transferred from North Shore University Hospital (hereinafter "NSUH") to GRACE PLAZA for rehabilitation. At NSUH, the Decedent underwent treatment for several issues, including, but not limited to, cellulitis, sepsis, diabetes, multiple myeloma, renal failure, coronary artery disease, etc. At GRACE PLAZA, a care plan was established which included a goal to discharge the Decedent home within approximately 6 weeks.

The Decedent was a resident at Grace Plaza from April 11, 2014 until approximately 9:00 p.m. on April 28, 2014, when he was transferred to Long Island Jewish Hospital ("LIJ"). The Decedent expired shortly after his transfer to LIJ on April 28, 2014.

The gravamen of the Plaintiff's claims concerns the alleged treatment or non-treatment rendered by the Defendant, GRACE PLAZA, to the Defendant during his admission from April 11, 2014 to April 28, 2014. The Plaintiff's Complaint asserted the following claims: (i) negligence; (ii) violations of Public Health Law § 2801-d; and (iii) wrongful death. However, despite certain allegations in the Complaint sounding in

medical malpractice, the Plaintiff did not file a Notice of Medical Malpractice or Certificate of Merit. During discovery, the Plaintiff specifically asserted, including in the Bill of Particulars, that there was no claim of medical malpractice being asserted.

Issue was joined by service of the Defendant's Answer, dated September 23, 2016. Discovery was conducted, and the case was certified ready for trial on February 20, 2018. The Plaintiff filed the Note of Issue on February 22, 2018, despite outstanding nonparty depositions<sup>1</sup>. By So Ordered Stipulation dated May 18, 2018, the deadline by which to file motions for summary judgment was extended to June 1, 2018.

In support of its summary judgment motion, the Defendant avers that although the Complaint asserts claims fundamentally within the realm of medical malpractice (*e.g.* diagnosis and treatment), no cause of action for medical malpractice was alleged and no Certificate of Merit for a medical malpractice action was filed. The Defendant further asserts that in response to its discovery demands concerning the purported acts and omissions that constitute general negligence and malpractice, the Plaintiff asserted that no cause of action for medical malpractice was being alleged. Rather, the Plaintiff's Bill of Particulars set forth claims sounding in general negligence. The Defendant asserts that the Plaintiff's claims of general negligence are vague, boilerplate and designed to encompass every aspect of the Decedent's admission without

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<sup>1</sup> Depositions of nonparty witnesses, Michelle Aventi and Dr. Myles Gombert were taken after the Note of Issue was filed on February 22, 2018.

the requisite specificity to put the Defendant on notice of the actual conduct that Plaintiff alleges was negligent.

In support of its motion, the Defendant submits the deposition transcripts of all parties and those of the nonparty witnesses deposed, as well the Decedent's records from (i) GRACE PLAZA; (ii) NSUH; (iii) other prior treating facilities (*See* Defendant's Exhibits "B" through "Y"); and (iv) an Affirmation from the Defendant's geriatrics expert, Vincent Marchello, M.D. (*See* Dr. Marchello Affirmation, annexed to Defendant's Motion as Exhibit "A").

The Defendant argues that it is entitled to summary judgment dismissing the Plaintiff's Complaint based upon the submitted documentary evidence and Dr. Marchello's expert opinions establishing that: the Plaintiff failed to set forth any evidence of negligence, malpractice, or statutory violations because at all times during the relevant admission the care and treatment of the Decedent was appropriate and proper; the Defendant's care and treatment did not proximately cause the Decedent's death; and the Plaintiff failed to establish the essential elements on the alleged causes of action for general negligence, wrongful death or any statutory violations. The Defendant further avers that the Plaintiff's blanket claims of recklessness and demand for punitive damages are improper and not based on fact as the record is devoid of any facts that would support such claim. Accordingly, the Defendant seeks summary judgment dismissing the Plaintiff's claims sounding in medical malpractice, negligence, wrongful death, recklessness, punitive

damages, and statutory violations of the Public Health Law.

The Plaintiff opposes the Defendant's motion and cross-moves for leave to file a late Notice of Medical Malpractice and Certificate of Merit and to amend the Complaint to add a medical malpractice claim. In support of the cross-motion, the Plaintiff submits: (i) the Affirmation of Perry Starer, M.D.; (ii) the proposed Amended Summons and Amended Verified Complaint (*See* Exhibit "2" annexed to Plaintiff's Cross-Motion); (iii) an Amended Bill of Particulars; and (iv) the Decedent's death certificate, medical records, stipulations, etc.

The Plaintiff asserts that a claim for medical malpractice was not originally alleged because, at the time, it was not necessary based on the language contained in PHL § 2801-d and PHL § 2803-c. The Plaintiff avers that due to numerous omissions contained in the Decedent's medical records from GRACE PLAZA, the extent of which were only discovered at the deposition of nonparty witness Dr. Gombert<sup>2</sup> on April 20, 2018, it was not thought that there was a claim for medical malpractice. Dr. Gombert is the Medical Director for GRAZE PLAZA and the last physician who examined and treated the Decedent at GRACE PLAZA. The Plaintiff avers that, based upon Dr. Gombert's testimony, he is the person primarily responsible for the omissions in the Decedent's records from GRACE PLAZA.

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<sup>2</sup> Dr. Gombert is Grace Plaza's medical director and the last physician associated with Grace Plaza to treat the Decedent. However, he was deposed as a nonparty witness since he is not an actual employee of Grace Plaza, but rather, an outside consultant (i.e. independent contractor).

The Plaintiff avers that it was only after Dr. Gombert's deposition was held, and upon reviewing his deposition transcript, the medical records and consulting with Dr. Starer, that a determination was able to be made that a valid medical malpractice claim exists. The Plaintiff further contends that the Defendant cannot claim prejudice or surprise if leave is granted to file a late Notice of Medical Malpractice and an amended complaint based upon the Defendant's assertion that the Complaint contains claims fundamentally within the realm of medical malpractice. According to the Plaintiff, even though the Complaint contains allegations sounding in medical malpractice, the reason why a medical malpractice claim was not asserted, and no Certificate of Merit or Notice of Medical Malpractice was filed, was due to the omissions in the Decedent's records received from GRACE PLAZA.

The Plaintiff further submits that there can be no prejudice or surprise to the Defendant by amending the Complaint to permit the Decedent's wife to assert a derivative claim on her own behalf because the Complaint already contains a wrongful death claim and the Plaintiff has already testified about her pecuniary losses resulting from her husband's death. Such pecuniary loss included funeral expenses and loss of his pension and Social Security payments. The Plaintiff also asserts that the proposed Amended Complaint does not allege any new facts. As such, the Plaintiff avers that the original Complaint provided the Defendant with sufficient notice of a claim sounding in medical malpractice.

In reply, the Defendant reiterates its entitlement to summary judgment and opposes the Plaintiff's cross-motion as untimely, extremely prejudicial and tantamount to trial by surprise. The Defendant argues that the Plaintiff's alleged excuse for failing to timely assert a claim for medical malpractice is without merit since the Plaintiff had been on notice of that issue from the outset but chose to expressly disclaim the existence of a medical malpractice claim. The Defendant further asserts that due to the Plaintiff's failure to assert a medical malpractice claim from the inception of this matter, discovery in this action was required to be completed on a "standard" track as opposed to a "complex" track which would have afforded all parties sufficient time to obtain all necessary discovery prior to certifying the case as ready for trial. Moreover, the Defendant contends that the Plaintiff argued throughout this litigation that, since this was not an action for medical malpractice, the Defendant was only entitled to limited (time restricted) authorizations for the Decedent's past medical records. Thus, despite the Decedent's longstanding medical issues, the Defendant was prevented from obtaining necessary medical records and the opportunity to communicate with certain witnesses and medical providers so as to evaluate the medical malpractice claim.

The Defendant further argues that the Plaintiff's untimely request for leave to amend the Complaint at this late juncture is merely a litigation tactic being used to frustrate the Defendant's entitlement to summary judgment as it would be impossible to move to dismiss these unknown claims.

The Plaintiff submitted a reply and the Defendant duly submitted a sur-reply with leave of Court based upon new matters impermissibly raised for the first time in the Plaintiff's reply papers.

**Legal Analysis**

Pursuant to CPLR § 3025(b), leave to amend pleadings should be freely granted and denied only if there is “prejudice or surprise resulting directly from the delay” (*McCaskey, Davies & Assoc. v. New York Health & Hosp. Corp.*, 59 N.Y.2d 755, 757 [1983]), or if the proposed amendment is palpably insufficient or patently devoid of merit (*Smith-Hoy v. AMC Property Evaluations, Inc.*, 52 A.D.3d 809, 811 [2d Dept. 2008]; *Bleakley Platt & Schmidt, LLP v. Barbera*, 136 A.D.3d 725 [2d Dept. 2016]; *Shepherd v. New York City Tr. Auth.*, 129 A.D.2d 574 [2d Dept. 1987]). A party opposing leave to amend “must overcome a heavy presumption of validity in favor of [permitting the amendment]” (*Otis Elev. Co. v. 1166 Ave. of Ams. Condominium*, 166 A.D.2d 307 [1st Dept. 1990]). In an action alleging medical malpractice, a motion for leave to amend a complaint must be supported by competent medical proof showing a causal nexus between the alleged injury and the alleged malpractice (*See Pagan v. Quinn*, 51 A.D.3d 1299 [3d Dept. 2008]; *Torchia v. Garvey*, 118 A.D.3d 426 [1st Dept. 2014] [expert medical affidavit of merit was required to support proposed claim for medical malpractice]).

The party seeking such amendment must demonstrate a proper basis for same (*See Wieder v. Scala*, 168 A.D.2d 355 [1st Dept. 1990]). Such an application must be

supported by an affidavit that the proposed amendment is meritorious (*See Zaid Theatre Corp., v. Sona Realty Co.*, 18 A.D.3d 352 [1st Dept. 2005]). A motion for leave to serve an amended pleading will only be denied where the amendment is wholly devoid of merit or is significantly prejudicial to the non-moving party (*See Norman v. Ferrara*, 107 A.D.2d 739 [2d Dept. 1985]). The merits of the proposed amended pleading will not be reviewed “...unless the insufficiency or lack of merit is clear and free from doubt” (*Id.* at 740-741). “The mere delay in seeking to amend to simply add a new legal theory of recovery is not sufficient to warrant denial of the motion since the original complaint gave notice of the occurrence giving rise to the proposed new cause of action.” (*Goldstein v. Brogan Cadillac Oldsmobile Corp.*, 90 A.D.2d 512 [2d Dept. 1982]).

CPLR §3012-a requires that, in an action for medical malpractice, the complaint shall be accompanied by a certificate executed by the plaintiff’s attorney declaring that the attorney has reviewed the facts of the case and consulted with at least one physician in medical malpractice actions, and who the attorney reasonably believed is knowledgeable in the relevant issues involved in this action and upon the basis of that review and consultation the attorney has concluded there is a reasonable basis for the action. The failure to file a certificate of merit contemporaneous with the complaint does not warrant the dismissal of the claim “as such sanction is unauthorized” (*Russo v. Pennings*, 46 A.D.3d 795, 797 [2d Dept. 2007]; *Kolb v. Strogh*, 158 A.D.2d 15, 16 [2d Dept. 1990]; *see also Casiano v. New York Hospital-Cornell Med. Ctr.*, 169 A.D.2d 806,

807 [2d Dept. 1991]).

CPLR § 3406 (a) and 22 NYCRR § 202.56 (a) require the filing of a Notice of Medical Malpractice within 60 days after issue is joined. However, the failure to file such notice within the prescribed period is not grounds for dismissal of the action, as neither the statute nor the regulation authorizes such relief (*See Tewari v. Tsoutsouras*, 75 N.Y.2d 1 [1989]). The court may extend the time to file the notice up “upon such terms that may be just and on good cause shown” (*Id.* at 9).

“To establish liability in a medical malpractice action, a plaintiff must prove that the defendant deviated from good and accepted standards of medical practice, and that the departure was the proximate cause of the injury.” (*Hanley v. St. Charles Hosp. and Rehabilitation Center*, 307 A.D.2d 274, 277 [2d Dept. 2003]; *see also Prestia v. Mathur*, 293 A.D.2d 729 [2d Dept. 2002]; *Kaffka v. New York Hosp*, 228 A.D.2d 332 [1st Dept. 1996]).

In this matter, where no new facts are being alleged and the original Complaint contained allegations sounding in medical malpractice as well as a claim for wrongful death, there can be no surprise or prejudice to the Defendant by the amendment (*Tinajero v. Bd. of Educ.*, 294 A.D.2d 564 [2d Dept. 2002]). As such, there is no true claim of surprise. Further, the Defendant’s claim of prejudice due to the shortened discovery timeframe and being deprived of obtaining the Decedent’s prior medical records is easily resolved as more fully set forth hereinbelow.

Moreover, the Plaintiff has established a reasonable excuse for the delay due to the alleged gaps or omissions in the Decedent's medical records from GRACE PLAZA and the fact that Dr. Gombert's deposition was not conducted until after the action was certified ready for trial. Similarly, the Plaintiff has shown good cause for not filing the Certificate of Merit required in a medical malpractice action and for failing to timely file a Notice of Medical Malpractice action due to the timing of Dr. Gombert's deposition.

Additionally, via the Affirmation of the Plaintiff's expert, Dr. Starer, the Plaintiff has established a meritorious claim for medical malpractice.

Accordingly, where, as here, the Plaintiff has set forth both a reasonable excuse for the late pleading and a meritorious claim, and the absence of any true surprise or significant prejudice to the opposing party, leave to amend should be granted.

In light of the foregoing, since the Amended Complaint is now alleging new claims of medical malpractice and a derivative claim on behalf of the Decedent's wife, the Defendant is entitled to additional discovery. The Defendant is also entitled to refile a motion for summary judgment once the additional discovery is complete and this matter is re-certified ready for trial.

Accordingly, it is hereby

**ORDERED**, that the Plaintiff's cross-motion (Seq. 02), seeking leave to file and serve an Amended Summons and Amended Verified Complaint adding a cause of action for medical malpractice and a derivative claim on behalf of the Decedent's wife, and

seeking leave to serve and file a late Notice of Medical Malpractice and Certificate of Merit, is **GRANTED**; and it is further

**ORDERED**, that the Defendant's motion (Seq. 01), seeking an Order granting it summary judgment, is **DENIED**, without prejudice, and leave to refile upon completion of discovery relating to the newly added claims; and it is further

**ORDERED**, that, pursuant to 22 NYCRR § 202.21 (e), the Plaintiff's Note of Issue and Certificate of Readiness for Trial, is hereby **VACATED**; and it is further

**ORDERED**, that the Plaintiff's proposed Amended Summons and Amended Verified Complaint, Certificate of Merit, and Amended Verified Bill of Particulars, as annexed to the Plaintiff's cross-motion, are hereby deemed filed and served, *nunc pro tunc*; and it is further

**ORDERED**, that the Defendant shall file its Answer, or otherwise respond to the Amended Complaint, together with discovery demands, if any, within twenty (20) days of the date of Entry of this Order; and it is further

**ORDERED**, that the Plaintiff shall serve responses to the Defendant's discovery demands, if any, within twenty (20) days of receipt thereof; and it is further

**ORDERED**, that any further party-depositions shall be completed prior to the scheduled Re-Certification Conference directed herein; and it is further

**ORDERED**, that the caption of this action is hereby amended, and the Clerk of the Court is directed to amend the caption accordingly as follows:

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X  
**CAROLYN M. BROWN, as Administrator of the  
Estate of ELIJAH BROWN, deceased, and  
CAROLYN M. BROWN, in her Individual Capacity,**

**Plaintiffs,**

**-against-**

**GRACE PLAZA NURSING AND REHABILITATION  
CENTER and PINEGROVE MANOR II, LLC,**

**Defendants.**

\_\_\_\_\_  
X

and it is further

**ORDERED**, that counsel for the parties shall appear before the Hon. Randy Sue Marber for a **Re-Certification Conference on January 31, 2019 at 9:30 a.m. ALL DISCOVERY MUST BE COMPLETED BY THE RE-CERTIFICATION CONFERENCE.**

This constitutes the decision and Order of this Court.

Dated: October 26, 2018  
Mineola, New York

  
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HON. RANDY SUE MARBER, J.S.C.

**ENTERED**  
NOV 01 2018  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE