

Law v New York-Presbyterian Hosp.

2019 NY Slip Op 32542(U)

July 11, 2019

Supreme Court, Bronx County

Docket Number: 20408/2017E

Judge: George J. Silver

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Index No.: 20408/2017E
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX



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GERALDINE LAW and DONALD LAW, Index No.: 20408/2017E
Individually,

-against-

Hon. GEORGE J. SILVER

NEW YORK-PRESBYTERIAN HOSPITAL, et al. Justice Supreme Court

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HON. GEORGE J. SILVER:

The following papers numbered 1 to 2 were read on this motion for (Seq. No. 001)

Notice of Motion - Order to Show Cause - Exhibits and Affidavits	No(s).	1
Answering Affidavit and Exhibits	No(s).	2

Upon the foregoing documents, this motion is DENIED.

In this medical malpractice action, plaintiffs GERALDINE LAW (“Ms. Law”) and DONALD LAW (“Mr. Law”) (collectively, “plaintiffs”) move to amend plaintiffs’ complaint pursuant to CPLR §3025(b). Specifically, plaintiffs seek to expand the dates of malpractice in this action back to January 2012. In plaintiffs’ initial complaint, filed on January 17, 2017, plaintiffs alleged malpractice against defendant NEW YORK PRESBYTERIAN HOSPITAL (“NYPH”) and Drs. John and Jane Doe from January/February 2015 to 2016. The claims in plaintiffs’ initial bill of particulars were premised on NYPH’s failure to properly treat a foot ulcer on Ms. Law’s left leg following Ms. Law’s presentation to NYPH. Plaintiffs specifically allege that because of NYPH’s malpractice, Ms. Law had to undergo a partial amputation of her left foot. Plaintiffs similarly contend that deficiencies in NYPH’s treatment of Ms. Law’s presenting complaints resulted in Ms. Law suffering permanent kidney damage, the need for dialysis, and future surgery.

Plaintiffs’ proposed amended complaint seeks to expand the dates of malpractice back to January 2012. Plaintiffs argue the amendment is permissible, because the expanded dates of malpractice include “continuous treatment” for diabetic foot ulcers and the failure to properly treat an infection which resulted in osteomyelitis of the left foot.

Plaintiffs further argue that amendment of a complaint should be freely granted so long as there is no surprise or prejudice. NYPH opposes plaintiff’s application, noting that all medical care rendered prior to July 17, 2014 is time-barred, as the continuous treatment toll does not apply.

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Most glaringly, NYPH underscores that the conditions treated from 2012 to 2014 involve separate ulcers and ailments related to Ms. Law's right foot. As such, the continuous treatment toll does not apply to toll the statute of limitations. Moreover, NYPH contends that the proposed amendment would constitute a surprise, and would severely prejudice NYPH's rights in this lawsuit.

The court agrees.

CPLR §3025 (b) states as follows:

"A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances."

In general, a motion to amend under CPLR §3025(b) will be freely granted unless there is prejudice, surprise or if the proposed pleading is palpably insufficient as a matter of law (*Ancrum v St. Barnabas Hosp.*, 301 AD2d 474, 475 [1st Dept 2003]). "The matter of allowing an amendment is committed almost entirely to the court's discretion" (*Murray v New York*, 43 NY2d 400, 404-405 [1977]).

However, despite such discretion, a court cannot grant a motion to amend unless the motion is "supported by an affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgment" (*Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352, 355 [1st Dept 2005]). A court must also examine a proposed amended complaint's underlying merit (*Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005]). A motion to amend must pass a two-prong test:

First, the proponent must allege legally sufficient facts to establish a prima facie cause of action or defense in the proposed amended pleading. If the facts alleged are incongruent with the legal theory relied on by the proponent, the proposed amendment must fail as a matter of law.

The next step is for the court to test the pleading's merit. The merit of a proposed amended pleading must be sustained, however, unless the alleged insufficiency or lack of merit is clear and free from doubt. The party opposing the motion to amend, therefore, must overcome a presumption of validity in favor of the moving party, and demonstrate that the facts alleged and relied upon in the moving papers are obviously not reliable or are insufficient. This does not mean, however, that those facts need to be proven at this stage.

Notably, and as conceded by plaintiffs, it is also well-settled that a proposed amended pleading, the purpose of which is to amplify the original pleadings, limit proof, and prevent surprise at the trial "may add specific statements of fact to a general allegation in the pleading but cannot add or substitute a new theory or cause of action" (*B. & F. Leasing Co. v Ashton Cos.*, 42 AD2d 652, 653 [3d Dept 1973]).

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Moreover, the continuous treatment doctrine is based on the policy which “seeks to maintain the physician-patient relationship in the belief that the most efficacious medical care will be obtained when the attending physician remains on a case from onset to cure [internal citation omitted]” (*McDermott v Torre*, 56 NY2d 399, 408 [1982]). The doctrine's toll “was created to enforce the view that a patient should not be required to interrupt corrective medical treatment by a physician and undermine the continuing trust in the physician-patient relationship to ensure the timeliness of a medical malpractice action....” (*Young v New York City Health & Hosps. Corp.*, 91 NY2d 291, 296 [1998]). The doctrine requires that a course of treatment has been established regarding the condition giving rise to the lawsuit (*Nykorchuck v Henriques*, 78 NY2d 255, 258-259 [1991]).

Therefore, the failure to diagnose a condition and the consequent failure to establish a course of treatment does not constitute continuous treatment (*Treback v Brown*, 250 AD2d 449, 449-450 [1st Dept 1998]; *Chesrow v Galiani*, 234 AD2d 9, 11 [1st Dept 1996]). Neither the patient's general continuing relationship with the doctor (*id.* at 11), periodic routine examinations of a patient who seems to be in good health (*Massie v Crawford*, 78 NY2d 516, 520 [1991]), nor complete, discrete and isolated treatment constitutes continuous treatment (*Nykorchuck*, 78 NY2d at 259, *supra*).

Finally, once a statute of limitations expires, the court cannot extend or revive it (*Lennox v Rhodes*, 39 AD2d 801, 802 [3d Dept 1972]; 3A Carmody-Wait 2d § 21:4 [2015][while a court may extend the time fixed by various statutes for performing certain procedural requirements, it has no power to extend statutes of limitation creating substantive rights]).

Here, plaintiffs have failed to meet the requirements of the first-prong of the court's two-step CPLR §3025 (b) analysis. To be sure, as part of their motion to amend, plaintiffs submit the affirmation of attorney Larry Wallace. Neither this affirmation nor any documents annexed to plaintiffs' moving papers satisfy plaintiffs' requirement to submit an affidavit of merits on a motion to amend (*Zaid Theatre Corp.*, 18 AD3d at 355, *supra*). Larry Wallace's affirmation is not an affidavit insofar as it is not notarized, sworn, or attested to by a notary or other party authorized to administer an oath or affirmation (CPLR §2309[a]), as is required of an affidavit (CPLR §3021). Therefore, plaintiffs' submission does not conform to the requirements of an affidavit of merit (CPLR §2309[a]; *Zaid Theatre Corp.*, 18 AD3d at 355, *supra*). Plaintiff offers no other documents as affidavits of merit in this matter. Therefore, because plaintiffs do not include the required documentation for a motion to amend, plaintiffs' motion to amend must be denied (*Zaid Theatre Corp.*, 18 AD3d at 355).

However, even upon examining the merits of plaintiff's motion, leave to amend must still be denied. To be sure, plaintiffs' motion to amend raises new allegations that were not contemplated by plaintiffs' initial pleadings (*B. & F. Leasing Co.*, 42 AD2d at 653, *supra*). Specifically, plaintiffs' allegations from 2012-2014 relate to separate and discrete treatment that Ms. Law underwent for foot ulcers on her right foot rather her left foot. It would constitute unfair

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surprise, and would be highly prejudicial, to NYPH to allow such claims to be advanced where plaintiffs have failed to proffer even the most minute showing that Ms. Law's ulcers on her right foot had the same etymology as the ulcers on her left foot. Moreover, the prejudice to NYPH is compounded by the fact that defense counsel first learned of plaintiff's counsel's intention to include claims dating back to 2012 upon receipt of an e-filed letter dated March 29, 2019 that stated that the medical malpractice claims would include treatment from 2012 to 2016. As the letter was sent more than two years after the complaint was filed, it would be highly prejudicial to permit plaintiffs to advance the proposed amendment.

Plaintiffs' arguments regarding continuous treatment are also unpersuasive, as the proposed amendment contains discrete and isolated treatment that does not appear to be linked to the conditions giving rise to the lawsuit (*Nykorchuck*, 78 NY2d at 259, *supra*). There is no evidence that between the break in Ms. Law's treatment from 2012-2014, to the subsequent resumption in treatment in 2015, that NYPH contemplated continuous treatment of Ms. Law (*Kasten v. Blaustein*, 214 AD2d 539 [2d Dept 1995][resumption of treatment rather than continuous treatment for the "same illness, injury or condition" underlying the cause of action to recover damages for malpractice does not warrant continuous treatment toll]). To the contrary, Ms. Law presented to NYPH in 2015 without a medical appointment, and with no indication that her expected treatment for ulcers on her left foot had any relation to prior ulcers on her right foot (*Chesrow*, 234 AD2d at 11, *supra*). To be sure, no medical records proffered in this lawsuit suggest that Ms. Law perceived her left foot ulcers as having any relationship to her right foot ulcers. As such, based on the filing date of January 17, 2017, all medical care rendered prior to July 17, 2014 is time-barred. Moreover, the court has no means by which to extend the statute of limitations (*Lennox*, 39 AD2d at 802, *supra*). Consequently, plaintiffs' instant motion to amend is denied.

Separately, plaintiff's motion to strike NYPH's answer is denied, as the court finds that NYPH has complied with its discovery obligations, and is conducting further searches for additional information. Notably, plaintiff's motion to strike NYPH's answer is premised upon discovery demands served March 29, 2019, for which responses were provided less than 20 days later.

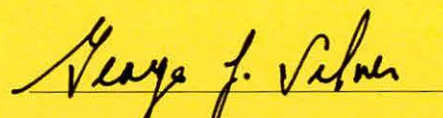
Accordingly, it is hereby

ORDERED that plaintiffs' motion is denied in its entirety; and it is further

ORDERED that the parties are directed to appear for a conference on Wednesday August 14, 2019 in Part 19A of the courthouse located at 851 Grand Concourse, Room 600.

✓ This constitutes the decision and order of the court.

Dated: July 11, 2019


HON. GEORGE J. SILVER