

<b>Acuria-Mack v Romita</b>
2019 NY Slip Op 32751(U)
September 13, 2019
Supreme Court, New York County
Docket Number: 805137/2016
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 6

-----X  
Maria Acuria-Mack and Scott R. Mack,

Index No.  
805137/2016

Plaintiffs,

**Decision and  
Order**

v.

Mauro C. Romita, MD; Renaissance Surgery  
Center LLC; Renaissance Surgery Center, LLC;  
Central Park East Office Broad Surgery, P.C.; and  
Manhattan Reconstructive Office Based Surgery  
Practice P.C.,

Mot. Seq. 3 and 4

Defendants.  
-----X

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff Maria Acuria-Mack (“Maria”) brings this action to recover for damages for personal injuries she sustained in 2014 and 2015 as a result of Mauro C. Romita, M.D.’s (“Romita”) negligent performance of three surgeries. Plaintiff Scott R. Mack (“Scott”) brings a cause of action for loss of consortium.

This action was commenced with the filing of the Summons and a Verified Complaint on March 31, 2016. The Verified Complaint contained a cause of action for medical malpractice and loss of consortium. Issue was joined with the filing of Answers on behalf of the defendants on June 15, 2019. Plaintiffs filed the Note of Issue on February 26, 2019.

Presently before the Court are two motions. In Motion Sequence 3, Plaintiffs seek to amend the Complaint to add an informed consent cause of action. In Motion Sequence 4, Defendants move to strike the Note of Issue on the grounds that discovery is still outstanding and to extend the time to move for summary judgment. Defendants also seek to renew and reargue their Order to Show Cause to dismiss Plaintiffs’ Complaint for failure to provide discovery.

## Motion Sequence 3

## A. Legal Standard

CPLR § 3025 permits a party to amend or supplement its pleading “by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties.” Such “leave shall be freely given upon such terms as may be just including the granting of costs and continuances.” CPLR § 3025(b); *Konrad v. 136 East 64th Street Corp.*, 246 AD2d 324, 325 [1st Dep’t 1998]. Leave to amend a pleading must be denied where the proposed amendment is plainly lacking in merit. *See Bd. of Managers of Gramercy Park Habitat Condo. v. Zucker*, 190 AD2d 636 [1st Dept. 1993]. Thus, “[w]here no cause of action is stated, leave to amend will be denied.” *Konrad*, 246 AD2d at 325.

“An action for medical malpractice must be commenced within two years and six months of the date of accrual. A claim accrues on the date the alleged malpractice takes place.” *Massie v. Crawford*, 78 NY2d 516, 516 [1991]; CPLR §214[a].

Pursuant to CPLR § 203(f), “[a] claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.” Thus, in order for a claim in the amended complaint to be deemed interposed at the time of the original complaint, the original Complaint must be read to “give notice of the transactions, occurrences or series of transaction or occurrences” that are plead in the amended complaint.

To establish a *prima facie* case of medical malpractice, “a plaintiff must show not only that the doctor deviated from accepted medical practice but also that the alleged deviation proximately caused the patient’s injury.” *Koepfel v Park*, 228 AD2d 288, 289 [1st Dept 1996].

To establish a *prima facie* case for failure to procure a patient’s informed consent to a procedure, the plaintiff must establish three elements. *Eppel v Fredericks*, 203 AD2d 152 [1st Dept 1994]. “First, the doctor must have failed to apprise [the plaintiff] of a reasonably foreseeable risk of the procedure. Secondly, having been informed of the risks and alternatives, the plaintiff must prove that a reasonable person in the plaintiff’s condition would have opted against it, and

thirdly, the plaintiff must prove that the procedure was the proximate cause of her injury.” *Id.*

“It is well settled that lack of informed consent is a distinct cause of action requiring proof of facts not contemplated by an action based merely on allegations of negligence.” *Jolly v. Russell*, 203 AD2d 527, 528 [2d Dept 1994]. “In creating the cause of action, the Legislature not only established the unique factual allegations which support such a cause of action, but also established equally unique defenses to liability, and placed specific limitations on the types of cases in which the cause of action may be asserted (*see*, Public Health Law § 2805–d).” *Id.* at 528-529.

In *Jolly*, 203 AD2d 527, the Second Department affirmed the lower grant’s denial of leave to file an amended complaint to add an informed consent claim after the statute of limitations had passed. The Second Department held, “Considering the nature of the cause of action, and the distinctions to be made between allegations of lack of informed consent and allegations of general negligence, we conclude that the original pleadings in this case did not provide notice of the series of transactions or occurrences to be proved in a cause of action based on lack of informed consent.” *Id.* at 529. The Second Department noted that case was factually distinguishable from a prior decision of *Grosse v. Friedman*, 118 AD2d 539 [2d Dept 1986] because “[u]nlike the case before us now, the record in *Grosse* indicates that the original bill of particulars clearly alleged facts to support a cause of action to recover damages for lack of informed consent, thereby alerting the defendant that such a claim was contemplated in the original complaint.” *Id.* *See also Torchia v. Garvey*, 987 N.Y.S 2d 62, 63-34 [1st Dept 2014] (citing to *Jolly* for the proposition that “the proposed claim of lack of informed consent [did not] relate back to the original claim for medical malpractice.”); *Quinones v. Waltz*, 258 A.D. 2d 420, 420-421 [1st Dept 1999].

#### B. Parties’ Contentions

Plaintiffs contend that Defendants will not be prejudiced by the proposed amendment because defense counsel questioned Maria about her informed consent and hypertrophic scarring. Plaintiffs further contend that only after Maria’s deposition was concluded on December 18, 2018 and Romita’s deposition was concluded on January 18, 2019 “that it fully solidified that Dr. Romita never informed Plaintiff Maria Acuria-Mack of the risks, benefits or the alternatives to the procedure, including the elevated risk of hypertrophic scarring in Latino women, or women with darker skin.” Plaintiffs further contend that “Defendants never tendered

Plaintiff Maria Acuria-Mack's medical records (which included all the consent forms that she signed) during discovery in this case, because Maria Acuria-Mack's records were seized by the New Jersey Attorney General as part of their investigation into insurance fraud where they believe that Dr. Romita was involved, and Plaintiff Maria Acuria-Mack only had records that were given to her, at her request, by Dr. Romita, well before any litigation was contemplated."

Defendants contend that Plaintiffs' motion to amend is untimely because it is brought beyond 2 ½ years from accrual of the informed consent claim and does not relate back to any of the causes of the action contained in the original complaint.

Defendants contend that it has been almost three years since Plaintiffs filed the original complaint on March 31, 2016, and Plaintiffs had sufficient time to bring an informed consent claim but instead waited until after depositions were completed and the Note of Issue was filed to amend the Complaint. Defendants contend that the original complaint gives no notice of the "transactions or occurrences" constituting the failure to advise Diaz-Chaparro of the risks of the surgeries on April 2, 2014 and January 22, 2015. Defendants claim that while Plaintiffs filed a Supplemental Bill of Particulars on October 1, 2018 which added an informed consent claim, that filing was almost a 1 ½ years after the statute of limitations had already run on the claim. If the Court grants Plaintiffs' motion to amend the Complaint, Defendants request the opportunity to re-depose both Plaintiffs as to the informed consent cause of action.

In reply, Plaintiffs contend that the medical malpractice cause of action the proposed cause of action for lack of informed consent "arise from the same facts, transactions and occurrences, the motion was to amend was timely interposed, and defendants have demonstrated no significant (undue) prejudice."

### C. Discussion

Here, Plaintiffs sought to amend their Complaint to add an informed consent claim almost five years from the date of Maria's initial surgery by Dr. Romita on April 2, 2014 and almost four years from the last surgery she had on January 22, 2015. Furthermore, neither the Complaint nor the original Bill of Particulars make any mention of the facts and circumstances underlying the proposed lack of informed consent cause of action. As such, the statute of limitations on the informed consent cause of action ran on or about July 2017, and the proposed cause of action is time-

barred. The Court notes that the statute of limitations had already run when Plaintiffs served their Supplemental Bills of Particulars on October 1, 2018.

#### Motion Sequence 4

Defendants move to strike the Note of Issue on the grounds that discovery is still outstanding and to extend the time to move for summary judgment. Defendants also seek to renew and reargue their Order to Show Cause to dismiss Plaintiffs; Complaint for failure to provide discovery.

Defendants state that they are owed a Supplemental Bill of Particulars. Defendants further contend that if Plaintiffs' motion to amend is granted, Plaintiffs would need to be re-deposed on the new allegations.

Plaintiffs oppose, contending that their proposed amendment of an informed consent claim would not warrant new discovery.

Since Plaintiffs have produced a Supplemental Bill of Particulars and Plaintiffs' motion to amend has been denied, there is no outstanding discovery. Defendants' motion to strike the Note of Issue is denied. In light of these pending motions, the time to move for summary judgment shall be extended for 20 days from the date of this Order.

Wherefore, it is hereby

ORDERED that Plaintiffs' motion to amend the Complaint to add an informed consent cause of action is denied (Motion Sequence 3); and it is further

ORDERED that Defendants' motion to strike the Note of Issue is denied (Motion Sequence 4); and it is further

ORDERED that the time to move for summary judgment shall be extended for 20 days from the date of this Order (Motion Sequence 4); and it is further

ORDERED that the parties are to appear for a pretrial conference on October 8, 2019 at 9:30 AM in Part 6.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: SEPTEMBER 13, 2019



Eileen A. Rakower, J.S.C.