Diaz-Chaparro v Romita
2019 NY Slip Op 32752(U)
September 13, 2019
Supreme Court, New York County
Docket Number: 805396/2016
Judge: Eileen A. Rakower

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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Andrea Diaz-Chaparro and Rogelio Chaparro,

Index No. 805396/2016

Plaintiffs,

Decision and Order

-against-

Mauro C. Romita, MD; Mauro C. Romita, MD, P.C., Mauro C. Romita Plastic Surgery P.C., Central Park East Office Based Surgery, P.C., Manhattan Reconstructive Office Based Surgery Practice, P.C.,

Mot. Seq. 2 and 3

Defendants.

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

Plaintiff Andrea Diaz-Chaparro ("Andrea") brings this action to recover for personal injuries she sustained in 2014 as a result of Mauro C. Romita, M.D.'s negligent performance of cosmetic surgeries on Andrea Diaz-Chaparro. Specifically, Dr. Romita performed breast implants, a "tummy tuck," and liposuction on Andrea's thighs and buttocks.

This action was commenced with the filing of the original Summons and a Verified Complaint on September 29, 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 November 30, 2016, Plaintiffs filed their Note of Issue on February 26, 2019.

Presently before the Court are 2 motions. In Motion Sequence 2, Plaintiffs move for an Order pursuant to CPLR 3025(b) for leave to amend the Complaint to include a third cause of action for medical malpractice under NYS Public Health Law 2805-d due to lack of informed consent. In Motion Sequence 3, Defendants move to vacate the Note of Issue. Plaintiffs oppose the motion.

Motion Sequence 2

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." *Koeppel 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 Diaz-Chaparro about her informed consent and hypertrophic scarring. Plaintiffs further contend that only after Diaz-Chaparro's deposition was concluded on November 28, 2018 and after Dr. Romita's deposition was concluded on January 18, 2019 "that it fully solidified that Dr. Romita never informed Plaintiff Andrea Diaz-Chaparro of the risks, benefits or the alternatives to the procedure, including the elevated risk of hypertrophic scaring in Latino women, or women with darker skin." Plaintiffs further contend that

Defendants only provided Diaz-Chaparro's medical records on February 8, 2019 which included all consent forms she had signed after Dr. Romita's EBT, pursuant to a further demand. Plaintiffs contend that defense counsel had previously represented that Diaz-Chaparro's medical records had been seized by the New Jersey Attorney General as part of their investigation into insurance fraud.

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.

C. Discussion

Here, Plaintiffs sought to amend their Complaint to add an informed consent claim more than five years from the date of Maria's initial consultation with Romita on January 14, 2014, and more than four years from the second surgery by Romita on December 19, 2014. Dr. Romita's last contact with Maria was in January 2015. The statute of limitations on the informed consent cause of action therefore ran on or about July 2017. The original complaint does not make any mention of the facts and circumstances underlying the proposed lack of informed consent cause of action. As such, the proposed informed consent cause of action is time-barred.

Motion Sequence 3

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 state that they are owed a Supplemental Bill of Particulars. Plaintiffs oppose the motion to strike.

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 to 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 2); and it is further

ORDERED that Defendants' motion to strike the Note of Issue is denied (Motion Sequence 3); and it is further

ORDERED that the time to move for summary judgment shall be extended to 20 days from the date of this Order (Motion Sequence 3); 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.