Askordalakis v Mount Sinai Hosp.
2020 NY Slip Op 30554(U)
February 21, 2020
Supreme Court, New York County
Docket Number: 805260/2015
Judge: Martin Shulman
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 1

JOHN ASKORDALAKIS, JR., as Administrator of the Goods, Chattels and Credits of JOHN ASKORDALAKIS, deceased,

Plaintiff,

-against-

THE MOUNT SINAI HOSPITAL,

Defendant.

DECISION/ORDER
Index No.: 805260/2015
Motion Seq. No. 005

MARTIN SHULMAN, J.S.C.:

Recitation pursuant to CPLR 2219(a) of the papers considered in this motion to dismiss: documents numbered 1, 13-15, 64, 67-68, 155-195, and 200-204 listed in the New York State Courts Electronic Filing System (NYSCEF).

In this medical malpractice action defendant The Mount Sinai Hospital (MSH) moves pursuant to CPLR 3025(a) to amend its answer (Doc No. 14) [1] to include the affirmative defense of res judicata, and upon amendment MSH seeks to dismiss the Complaint (the Complaint) (Doc No. 1) pursuant to CPLR 3211 (a) (5). Alternatively, MSH moves pursuant to CPLR 2004 for an order extending its time to interpose a summary judgment motion pursuant to CPLR 3212 and granting summary judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In 2013 John Askordalakis (the decedent) was diagnosed with an aortic dissection (the medical condition). Between 2013 and 2015 he had two surgeries and received medical care and treatment for the medical condition from Farzan Filsoufi, M.D. (Dr. Filsoufi), George Dangas, M.D. (Dr. Dangas), Joanna Chikwe M.D. (Dr.

[1] References to "Doc No." followed by a number refers to documents filed in NYSCEF.

Chikwe), and Allan Stewart, M.D. (Dr. Stewart) (collectively, the doctors), all of whom were employed by MSH. On February 6, 2015, a day after his last surgery, 67-year-old John Askordalakis died at MSH.

On or about June 22, 2015, the decedent's son, John Askordalakis, Jr., commenced this wrongful death action as the administrator of his father's estate against the doctors and their employer MSH, alleging negligence and medical malpractice. Specifically, the Complaint avers that the doctors failed to conform with standards of good and accepted medical practice in the treatment of the decedent, that MSH is vicariously liable for the doctors' negligence under the theory of respondeat superior (first cause of action), and that plaintiff is entitled to damages arising from derivative familial claims (second cause of action). The doctors and MSH interposed answers (Doc Nos. 13, 14 and 15) generally denying the allegations in the Complaint and asserting several affirmative defenses.

On January 30, 2019, Dr. Dangas moved for summary judgment (CPLR 3212) dismissing the Complaint. Without submitting opposition papers, plaintiff executed a stipulation on April 9, 2019 (Doc No. 67) discontinuing the action against Dr. Dangas, who simultaneously withdrew the motion (Doc No. 64). Accordingly, Dr. Dangas' summary judgment motion was never marked fully submitted for final determination by the court.

After discovery and party depositions were completed, plaintiff filed the Note of Issue on April 29, 2019 (Doc No. 69). When the action was marked trial ready, Dr. Filsoufi, Dr. Chikwe and Dr. Steward filed summary judgment motions to dismiss within the 90-day deadline set by the court's rules. Those motions were also withdrawn after

the parties executed stipulations of discontinuance (Doc. Nos. 101 and 155) against the doctors (collectively, the stipulations of discontinuance, including that of Dr. Dangas). All the stipulations of discontinuance were executed "with prejudice and on the merits, without costs to either party against the other," and "so ordered" by the court.

MSH, the only remaining defendant in this action, failed to file a summary judgment motion within 90 days of the filing of the Note of Issue in accordance with the court's part rules (see also status conference order dated April 9, 2019, Doc No. 66). The last date upon which MSH could have sought dispositive relief was July 29, 2019. Instead, on or about September 23, 2019, MSH moved for the within application to amend its answer and dismiss the Complaint.

ARGUMENTS

MSH contends that the court should dismiss the Complaint upon granting leave to assert the defenses of res judicata and release because the stipulations of discontinuance were executed "on the merits," thereby extinguishing any basis for vicarious lability for the doctors' alleged negligence and medical malpractice. Alternatively, MSH seeks dismissal on the grounds set forth in the doctors' prior motions, contending that there is good cause for leave to file a late summary judgment motion insofar as those prior motions were withdrawn before MSH could cross move for that relief.

In opposition, plaintiff argues that the court must deny MSH's motion because: (1) the terms of the stipulations of discontinuance released only the doctors and MSH was not a party to the stipulations; (2) the voluntary discontinuance against the doctors did not forfeit or preclude the claim against MSH for vicarious liability; and (3) MSH is

not prejudiced by the continuation of the action against it because it can always seek indemnification from the doctors as the active tortfeasors. Plaintiff further contends that movants' alternative relief to file a late summary judgment motion must also be denied because: (a) MSH did not present a reasonable excuse for its untimeliness; and (b) plaintiff would be prejudiced if the court considered arguments raised in the doctors' previously filed motions because they were withdrawn before plaintiff had the opportunity to oppose them. If MSH's alternative relief to file a late summary judgment motion is granted, plaintiff seeks an opportunity to submit opposition papers thereto.

In reply, MSH contends that: (1) plaintiff's opposition is untimely; (2) plaintiff's failure to respond on the merits to MSH's alternative summary judgment relief constitutes a waiver; (3) MSH expeditiously moved for summary judgment after the doctors withdrew their motions; (4) "so ordered" stipulations have the same force and effect as a judicial determination and adjudication "on the merits"; (5) an "offensive use of collateral estoppel" does not require MSH to be a party to the stipulations of discontinuance; (6) Dr. Dangas and Dr. Chikwe were represented by the same counsel representing MSH, and when the stipulations of discontinuance were executed on their behalf, MSH's counsel was also executing the stipulation on its behalf; and (7) plaintiff did not assert that he is prejudiced by the proposed amended answer.

MSH's Motion Seq. No. 005 is denied in its entirety.

DISCUSSION

MOTION TO AMEND

Leave to amend a pleading pursuant to CPLR 3025 (b) should be freely granted unless the proposed amendment lacks merit, or results in prejudice or surprise to the

opposing party because of the delay in seeking leave to amend (*Brook v Peconic Bay Med. Ctr.*, 172 AD3d 468, 469 [1st Dept 2019]; *LDIR, LLC v DB Structured Prods., Inc.* 172 AD3d 1, 4 [1st Dept 2019], *quoting CIFG Assur. N. Am., Inc. v J.P. Morgan Sec. LLC*, 146 AD3d 60, 64-65 [1st Dept 2016]). When considering a motion to amend a pleading, the "party opposing leave to amend must overcome a heavy presumption of validity in favor of [permitting amendment]" (*LDIR,* 172 AD3d at 4, *quoting McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012] [internal quotation marks omitted]). In this case, MSH's proposed amended answer to add the affirmative defense of res judicata lacks merit.

"Under the doctrine of res judicata, a party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter. The rule applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation. The rationale underlying this principal is that a party who has been given a full and fair opportunity to litigate a claim should not be allowed to do so again" (*see Matter of Hunter*, 4 NY3d 260, 269 [2005]). The doctrine of res judicata applies not only to the party to the previous action but would also extend to those in privity with the party (*Avilon Auto. Group v Leontiev,* 168 AD3d 78, 85 [1st Dept 2019]).

MSH contends that the stipulations of discontinuance have a res judicata effect precluding plaintiff from continuing the action against it. A party may voluntarily discontinue an action against another party at any time, without court order, provided the case has not been submitted to the court to determine the facts, at which point an action may be discontinued "upon the stipulation of all parties appearing in the action"

(CPLR 3217 [a], [b]). Subdivision (c) of CPLR 3217 provides that "[u]nless otherwise stated in the . . . stipulation . . . of discontinuance, the discontinuance is without prejudice." Here, plaintiff voluntarily discontinued the action against the doctors, by stipulation, before the summary judgment motions were fully briefed and submitted to the court for final determination. To the extent that the stipulations of discontinuance were executed "with prejudice" and "on the merits," plaintiff is precluded from commencing another action against the doctors involving the same facts alleged herein (*Magen David of Union Sq. v 3 W. 16th St., LLC,* 132 AD3d 503, 504 [1st Dept 2015], *lv dismissed* 28 NY3d 977 [2016]). However, plaintiff is not precluded from continuing the action against MSH for vicarious liability because MSH was not a party to the stipulations of discontinuance and it was not the parties' intent to discontinue the action against MSH.

Stipulations of discontinuance should not be accorded "any greater scope" than what the parties intended (*Pace v Hazel Towers, Inc.*, 183 AD2d 588, 589 [1st Dept 1992]). The plain language of the stipulations of discontinuance identifies the doctors as the sole parties against whom the discontinuances would apply. Most notably, the additional agreed upon language in the stipulations of discontinuance amends the caption of the case to reflect that MSH is the only remaining party defendant to this action. The agreement to amend the caption is clear evidence that the parties did not intend for the action to be discontinued against MSH (*Frenk v Solomon,* 123 AD3d 416 [1st Dept 2014]). Additionally, a release against an employee does not preclude plaintiff's recovery against the employer on a theory of vicarious liability, especially where the stipulation contemplates proceeding against the employer, as it does here

(*Pace*, 183 AD2d at 588-589, *citing Riviello v Waldron*, 47 NY2d 297, 307 [1979]; see also General Obligations Law § 15-108).

Although there is a presumption that stipulations "with prejudice" or "on the merits" have a res judicata effect, the court has discretion to "limit or disregard, in the interest of justice, the 'on the merits' or 'with prejudice' language embodied in the parties' stipulations" (*see Forte v Kaneka Am. Corp.*, 110 AD2d 81, 84-85 [2nd Dept 1985], cited by *Karniol v Good Move Trucking,* 281 AD2d 287, 288 [1st Dept 2001]). Here, there was a plain and clear understanding between all the parties that this action would continue against MSH. Additionally, the assertion that the hospital's attorneys' signature on behalf of two doctors made MSH a party to the subject stipulations is directly contradicted by the plain language of the stipulations. Accordingly, MSH's motion to amend its answer is denied because the affirmative defense of res judicata is devoid of merit.

ALTERNATIVE RELIEF TO FILE A LATE SUMMARY JUDGMENT MOTION

MSH's alternative application to file a late summary judgment motion is denied. "[T]o rein in these late motions, brought as late as shortly before trial, CPLR 3212 (a) requires that motions for summary judgment must be brought within 120 days of the filing of the note of issue or the time established by the court; where a motion is untimely, the movant must show good cause for the delay, otherwise the late motion will not be addressed" [*see Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 83 [1st Dept 2013]).

In the absence of such a showing, the court has no discretion to entertain even a meritorious motion for summary judgment (*Brill v City of New York*, 2 NY3d 648, 650–

651 [2004]), regardless of how short or nonprejudicial the delay (*Cullity v Posner*, 143 AD3d 513 [1st Dept 2016] [reversing grant of summary judgment motion filed nine days past trial court's 60-day deadline]; *Corchado v City of New York*, 64 AD3d 429 [1st Dept 2009] [affirming denial of summary judgment motion filed twelve days past court's 90-day deadline, even though it was served two days earlier than the deadline]). Here, there is no dispute that MSH's motion for summary judgment is untimely because it was filed 56 days after the time to do so had expired. MSH has not demonstrated good cause for the delay. All of the doctors filed their summary judgment motions within the deadline, and nothing prevented the hospital from either filing its own motion or simply adopting the doctors' arguments and incorporating them by reference – precisely what it is attempting to do now.

MSH's argument that withdrawal of the doctors' motions somehow affected its ability to move must be rejected. The hospital could have relied upon the withdrawn submissions which, as noted, are the basis for the instant motion. Equally flawed is MSH's argument that the withdrawal of the motions left it with nothing against which to cross move. However, the hospital could not have done so even if the motions remained pending, as CPLR 2215 permits a cross motion only against a "moving party." Plaintiff was not a moving party on the prior motions, and thus a cross motion against him would have been improper (*Kershaw*, 114 AD3d at 87).

The court declines to consider MSH's new arguments for dismissal as they are raised for the first time in reply papers. "The function of reply papers is to address arguments made in opposition to the position taken by the movant, and not to permit the movant to introduce new arguments in support of, or new grounds for the motion" (*EPF*

Intl. Ltd. v Lacey Fashions Inc., 170 AD3d 575, 575 [1st Dept 2019]). The court has considered all remaining arguments raised by the parties and finds them to be unavailing, or without merit.

Accordingly, it is hereby

ORDERED that the motion to amend the answer and the alternative application to file a late summary judgment motion by defendant The Mount Saini Hospital, is denied, in its entirety.

Counsel for the parties are directed to appear for a pre-trial conference on March 10, 2020 at 9:30 p.m., at Part 1MMSP, 60 Centre St., Room 325, New York, NY, at which time they shall be prepared to stipulate to a firm trial date.

DATED: February 21, 2020

ENTER:

MARTIN SHULMAN, J.S.C.