Johnson v Montefiore Med. Ctr.
2020 NY Slip Op 30645(U)
January 29, 2020
Supreme Court, Bronx County
Docket Number: 30053/2017E
Judge: George J. Silver
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Index №. 30053/2017E

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 19A

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ALMA JOHNSON **Index №. 30053/2017E**

Plaintiff

-against-

MONTEFIORE MEDICAL CENTER, MONTEFIORE HEALTH SYSTEM, INC., JACK D. WEILER HOSPITAL, DEVIN MILLER, DENNIS KUO, HARRIET SMITH

Defendants

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HON. GEORGE J. SILVER:

In this medical malpractice action, defendants MONTEFIORE MEDICAL CENTER, DEVIN MILLER, DENNIS KUO, and HARRIET SMITH ("defendants") move, pursuant CPLR §3025(b), for leave to amend their verified answers to assert the affirmative defenses of culpable conduct and comparative negligence. Plaintiff ALMA JOHNSON ("plaintiff") opposes the application.

In this lawsuit plaintiff alleges that she suffered a perforated ureter due to defendants' negligent execution of a hysterectomy. Plaintiff commenced this action by filing a summons and complaint on October 24, 2017. Issue was subsequently joined by service of answers on defendants' behalf on December 18, 2017. Plaintiff was deposed on April 12, 2019. During her deposition, defendants' elicited testimony that plaintiff is a long-standing smoker who smoked before and after her surgery.[1] Defendants also state that plaintiff is "morbidly obese."

In support of the instant motion, defendants argue that leave to amend their answers to assert the affirmative defenses of culpable conduct and comparative negligence should be granted because this motion was not unduly delayed, not made in bad faith and plaintiff will not be prejudiced by the new answers and affirmative defenses. To be sure, defendants argue that plaintiff's counsel is aware of plaintiff's long-standing smoking habit, and the extent to which that habit may have negatively impacted plaintiff's health. Defendants further argue that plaintiff's counsel is aware of plaintiff's long-standing weight issues, and the way those issues can make surgical operations more difficult to perform.

In opposition, plaintiff argues that a motion for leave to amend must be supported by the proposed amendment itself. Plaintiff highlights that defendants did not include defendants' proposed answer. Such an omission, plaintiff states, is enough to warrant denial of the motion.

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[1] Notwithstanding, according to defendants, evidence of plaintiff's smoking is also readily apparent from a reading of her hospital chart, which is annexed as an exhibit to this motion.

Moreover, plaintiff argues that defendants' application must be accompanied by an affidavit of merit. Plaintiff argues that defendants have failed to carry their burden of providing proof to support their motion for leave to amend by disregarding the need to submit an affidavit of merit.

In reply, defendants attach a proposed amended answer to cure their failure to include a proposed pleading with their moving papers. Defendants' further submit that they are not held to the same high standard of competent medical proof ascribed to plaintiffs seeking to add a cause of action in an amended complaint (*see Frangiadakis v. 51 W. 81st St. Corp.*, 161 AD3d 478 [1st Dept 2018]). Rather, defendants state they must simply show that their proposed amendment is not palpably improper for the court to grant them leave.

This court recognizes that a party may move to amend its pleadings under CPLR §3025(b). Under CPLR §3025(b), "[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." CPLR §3025(b). Section 3025(b) continues, "Leave shall be freely given upon such terms as may be just including the granting of costs and continuances" (*id.*).

In determining whether a motion to amend should be granted, "the court should consider the merit of the proposed defense and whether the plaintiff will be prejudiced by the delay in raising it" (*Norwood v. City of New York, et al.*, 203 AD2d 147, 148 [1st Dept 1994]). The Appellate Division, First Department, has stated, "[a]lthough leave to amend a pleading is freely granted, such leave should 'not be granted upon mere request, without appropriate substantiation' " (*Hoppe v. Bd. of Dir. of the 51-78 Owners Corp. et al.*, 49 AD3d 477,477 [1st Dept 2008]). The standard is not a high one as the moving party only needs to show that the amendment "is not palpably insufficient or devoid of merit" (*MBIA v. Greystone & Co., Inc., et al.*, 74 AD3d 499, 500 [1st Dept 2010][stating "[o]n a motion for leave to amend, plaintiff need not establish the merits of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit"]).

An affidavit of merit in support of a motion to amend the pleadings shows that the moving party has a reasonable excuse for the delay and the proposed amendment is not meritless (*Cherebin v. Empress Ambulance Service, Inc.*, 43 AD3d 364, 365 [1st Dept 2007]). The First Department has held that "[w]here there is 'extended delay in moving to amend, an affidavit of reasonable excuse for the delay in making the motion and an affidavit of merit should be submitted in support of the motion.' " (*id.*). Thus, the purpose of an affidavit of merit is two-fold: 1) to show excuse for the delay or a lack of prejudice to the non-moving party; and 2) to show that the proposed amendment has merit.

Here, defendants have not shown any reason for the delay in filing the instant motion for leave to amend. Moreover, defendants' submission to amend their answers do not include an affidavit of merit. Instead, defendants have submitted potions of plaintiff's deposition as well as the medical chart to substantiate the merit of defendants' motion. Notably, however, defendants' proposed answer is not included in defendants' moving papers, but rather is only submitted in reply *after* plaintiff highlighted its absence. Neither the proposed verified answer nor defendants'

affirmations in support of their motion explain defendants' failure to submit an affidavit of merit or a timelier proposed amendment.

In *Schulte Roth & Zabel, LLP v. Kassover*, the First Department upheld the lower court's denial of defendant's motion to amend his answer to assert a counterclaim (*Schulte Roth & Zabel, LLP v. Kassover*, 28 AD3d 404, 404-5 [1st Dept 2006]). There, defendant had supported his motion to amend with his attorney's affirmation attempting to "negate the existence of surprise or prejudice," but failed to include an accompanying affidavit of merit (*id.*). Defendant attempted to remedy that deficiency with his affidavit in reply (*id.*). However, the court found that defendant's submissions in support of his motion to amend were insufficient.

As in *Schulte*, defendants' submissions are inadequate to support the instant motion for leave to amend. Whereas in *Schulte* defendant's attorney included an affirmation addressing the lack of surprise or prejudice, defendants, in this matter, have not offered any reason for the delay. Moreover, defendants' have not indicated the significance of the exhibits annexed to defendants' moving papers. Indeed, defendants want to amend their answers to add culpable conduct and comparative negligence based on plaintiff's weight and smoking history without offering any competent proof that these issues pose a causal connection to her injuries. None of the three defendant doctors nor the hospital offered any proof that plaintiff's smoking or weight contributed to her injuries. Plaintiff's hospital chart is not, by itself, proof of the adverse impacts of plaintiff's smoking and weight. Moreover, if defendants are taken at their word, and plaintiff's chart does provide such proof, then defendants once again have failed to explain their failure to assert the affirmative defenses of culpable conduct and comparative negligence at an earlier juncture in the litigation given their knowledge of plaintiff's smoking history. The same applies to plaintiff's weight, as plaintiff did not suddenly gain weight during this litigation. Instead, defendants are claiming that plaintiff's weight was an issue at the time of her surgery. To be sure, not only did defendants know about plaintiff's conditions while they were treating plaintiff, defense counsel also knew that plaintiff smoked and questioned her about her smoking at her deposition on April 12, 2019. Then defendants waited a full seven months following the deposition of plaintiff before filing the instant motion. Without providing any basis for the delay in moving for the relief requested, defendants cannot overcome the presumption that plaintiff had suffered prejudice.

Second, the verified pleading signed by defendants' principal does not take the place of an affidavit of merit in showing that the proposed amendment is not "palpably insufficient or devoid of merit" (*MBIA v. Greystone & Co., Inc., et al.*, 74 AD3d at 500, *supra*). To be sure, the proposed verified pleading does not include statements made by a party with personal knowledge supporting an evidentiary basis for the proposed affirmative defenses. Defendants' principal only verifies the truth of the pleading but does not provide any evidentiary basis for the merit of the proposed claims.

Moreover, while *Frangiadakis v. 51 W. 81st St. Corp.*, 161 AD3d 478 (1st Dept 2018) was decided in the context of plaintiffs being required to "submit competent medical proof" to support an amendment to a complaint, the spirit of that holding supports the supposition that all parties moving to amend a pleading must show some modicum of competent corroboration supporting their proposed pleading. Here, in the absence of such a proclamation attesting to the merits of the

proposed pleading, defendants' request is "palpably insufficient" and "devoid of merit" (*MBIA v. Greystone & Co., Inc., et al.*, 74 AD3d at 500, *supra*).

Finally, the timing of defendants' motion evinces prejudice to plaintiff. Indeed, this is not a circumstance where there was no prejudice in granting leave to amend an answer given a dearth of discovery completed (*see Antwerpse v. Diamontbank N.V. v. Nissel*, 27 AD3d 207, 208 [1st Dept 2006][amendment allowed because there was a "lack of significant discovery or other progress in the case."]). Rather, here plaintiff and defendant Kuo, the gynecologist surgeon in charge, have already been deposed. Permitting the proposed amended answer, and other proposed answers for that matter, under such a circumstance would reward defendants for their undisclosed reasons for submitting a late proposed answer unsupported by competent proof and an affidavit of merit.

For these reasons, defendants' motion for leave to amend is denied, with leave to renew; and it is further

ORDERED that the parties are directed to appear for a conference on April 15, 2020 at 9:30 AM at the courthouse located at 851 Grand Concourse, Room 600 (Part 19A).

This constitutes the decision and order of the court.

Dated: 1-29-2020

HON. GEORGE J. SILVER