

Giambrone v Samuel
2020 NY Slip Op 31015(U)
March 4, 2020
Supreme Court, Bronx County
Docket Number: 21531/2018E
Judge: George J. Silver
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SUPREME COURT OF THE STATE OF NEW YORK — BRONX COUNTY

PRESENT: GEORGE J. SILVER

PART 10

Justice

BENEDETTO GIAMBRONE,

Index No. 21531/2018E

Motion Seq. No. 001

Plaintiff,

- v -

DECISION & ORDER

SHAWN K. SAMUEL, D.O. AND MONTEFIORE
MEDICAL CENTER,

Defendants.

Cross-Motion: Yes No

Plaintiff BENEDETTO GIAMBRONE (“plaintiff” or “Mr. Giambrone”) moves, pursuant to CPLR § 3025, to amend the caption to substitute “Martina Bachorik, Executrix of the Estate of Benedetto Giambrone,” as plaintiff in this action. Plaintiff also moves, pursuant to CPLR §§ 2004 and 3406(a), and 22 NYCRR 202.56(a)(3), to extend plaintiff’s time to file a notice of medical malpractice, and to deem plaintiff’s notice of medical malpractice annexed to his moving papers as filed, *nunc pro tunc*.¹ Defendants SHAWN K. SAMUEL, D.O. AND MONTEFIORE MEDICAL CENTER (“Montefiore” collectively “defendants”) do not oppose the motion. For the reasons discussed below, the motion is granted.

BACKGROUND AND ARGUMENTS

This action was commenced with the filing of the summons and complaint on February 7, 2018. Defendants thereafter served an answer on or about March 14, 2018.² Plaintiff alleges that he developed multiple decubitus ulcers during his admission at Montefiore between February 20, 2017 and April 21, 2017.

¹ While plaintiff does not specifically request that his notice of medical malpractice be deemed “timely” filed, *nunc pro tunc*, the court will treat plaintiff’s application as such.

² Plaintiff’s time to file a notice of medical malpractice expired on or about May 14, 2018.

On March 24, 2018, plaintiff passed away. On October 17, 2018, Surrogate's Court, Bronx County issued letters testamentary to Martina Bachorik.

Plaintiff argues that the complaint and certificate of merit set forth a *prima facie* case of medical malpractice. Plaintiff also asserts that defendants will not be prejudiced if the court grants plaintiff leave to amend the complaint to substitute Martina Bachorik as the plaintiff in this action.

Additionally, plaintiff argues that the court should extend plaintiff's time to file a notice of medical malpractice, and deem plaintiff's annexed notice of medical malpractice as filed, *nunc pro tunc*. Plaintiff contends that because this action was stayed by Mr. Giambrone's death on March 24, 2018, plaintiff did not file a notice of medical malpractice within 60 days after issue was joined. However, plaintiff notes that Surrogate's Court, Bronx County, subsequently issued letters testamentary on October 17, 2018 appointing Martina Bachorik as the personal representative of the estate of Mr. Giambrone. As such, plaintiff submits that in the absence of any prejudice to defendants, coupled with a strong public policy that matters be disposed of on the merits, the court should grant plaintiff's application for leave to deem plaintiff's notice of medical malpractice annexed to his moving papers as timely filed, *nunc pro tunc*.

DISCUSSION

I. Leave to Amend Caption

"Leave to amend pleadings should be freely granted in the absence of prejudice or surprise to the opposing party [or] unless the proposed amendment is palpably insufficient or patently devoid of merit" (*Lucido v. Mancuso*, 49 A.D.3d 220, 226–27 [2d Dept. 2008]; CPLR § 3025[b]). "Prejudice has been defined as a special right lost in the interim, a change in position, or significant trouble or expense that could have been avoided had the original pleading contained the proposed amendment" (*Ward v. City of Schenectady*, 204 A.D.2d 779, 781 [3d Dept. 1994]). "Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side" (*Edenwald Contracting Co. v. City of New York*, 60 N.Y.2d 957, 959 [1983]; see also *Sheppard v. Blitman/Atlas Bldg. Corp.*, 288 A.D.2d 33, 34 [1st Dept. 2001] ["In the absence of prejudice, mere delay is insufficient to defeat the amendment."]). "A motion for leave to amend is committed to the sound discretion of the trial court" (*Colon v. Citicorp Inv. Servs.*, 283 A.D.2d 193, 193 [1st Dept. 2001]).

Here, in light of plaintiff's relatively short delay to amend the caption, the lack of prejudice to defendants,³ and defendants' lack of opposition to plaintiff's application, plaintiff's request to amend the caption to substitute Martina Bachorik as the plaintiff in this action is granted.

II. Notice of Medical Malpractice

CPLR § 3406(a) provides that in an action to recover damages for dental, medical or podiatric malpractice, a plaintiff must file a notice of malpractice action "not more than sixty days after issue is joined." "The time for filing a notice of dental, medical or podiatric malpractice action may be extended by the court only upon a motion made pursuant to section two thousand four of this chapter" (CPLR § 3406(a)). CPLR § 2004 allows a court to "extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown."

Here, plaintiff's notice of medical malpractice was filed on September 27, 2019, approximately six months after issue was joined. In light of plaintiff's relatively short delay, the lack of prejudice to defendants (*see, Casiano v. New York Hosp.-Cornell Med. Ctr.*, 169 A.D.2d 806, 807 [2d Dept. 1991]; *Nagi v. Chan*, 159 A.D.2d 278, 278 [1st Dept. 1990]), and defendants' lack of opposition to plaintiff's application, plaintiff's application to deem the notice of medical malpractice action annexed to his moving papers timely filed, *nunc pro tunc*, is granted.

As such, it is hereby

ORDERED that plaintiff's application to substitute Martina Bachorik as the plaintiff in this action is GRANTED; and it is further

ORDERED that the caption is amended as follows:

³ See, *Greco v. Grande*, 160 A.D.3d 1345 [4th Dept. 2018] [granting leave to amend where the record is devoid of any potential prejudice flowing from the proposed amendment"]; *Sheppard v. Blitman/Atlas Bldg. Corp.*, 288 A.D.2d 33, 34 [1st Dept. 2001]; *Brunetti v. City of New York*, 286 A.D.2d 253, 253 [1st Dept. 2001] [motion to amend was properly granted absent a showing of prejudice]; *Powe v. City of Albany*, 130 A.D.2d 823, 823 [1st Dept. 1987] ["There being no prejudice or surprise occasioned directly by defendants' delay in amending their answer, the proposed amendment should have been granted."].

MARTINA BACHORIK, as EXECUTRIX of the ESTATE
of BENEDETTO GIAMBRONE,

Plaintiff,

-against-

SHAWN K. SAMUEL, D.O. and MONTEFIORE MEDICAL
CENTER,

Defendants.

; and it is further


ORDERED that plaintiff is directed to serve the amended summons and complaint upon
defendants within 30 days of this decision; and it is further

ORDERED that plaintiff's application to deem the notice of medical malpractice action
annexed to plaintiff's moving papers timely filed, *nunc pro tunc*, is GRANTED; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on
April 1, 2020 at 9:30 a.m. at 851 Grand Concourse (Part 19A, Room 600), Bronx,
New York, 10451.

This constitutes the decision and order of the court.

Dated: March 4, 2020


HON. GEORGE J. SILVER

HON. GEORGE J. SILVER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION