

**Corrales v Urgent Care Physician of N.Y.-Hartsdale,
PLLC**

2020 NY Slip Op 35533(U)

March 6, 2020

Supreme Court, Bronx County

Docket Number: Index No. 31889/2018E

Judge: Julia I. Rodriguez

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

-----X **Index No. 31889/2018E**

Bolivar Corrales,
Plaintiff,

-against-

DECISION & ORDER

Urgent Care Physician of New York-Hartsdale,
PLLC, American Family Care, Inc.
d/b/a AFC Urgent Care Bronx, Whitney Hoyt, R.N.
and “Jane Doe, R.N.”

Present:
Hon. Julia I. Rodriguez
Supreme Court Justice

Defendants.

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Recitation, as required by CPLR 2219(a), of the papers considered in review of defendants’ motion to compel plaintiff to provide a certificate of merit and affidavit of merit, pursuant to CPLR 3012-a, and plaintiff’s cross-motion to amend the complaint.

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion, Affirmation & Exhibits	1
Notice of Cross-Motion, Affirmation & Exhibits	2
Affirmation in Opposition to Cross-Motion & in Reply	3

Plaintiff commenced this action alleging he was injured on March 23, 2018 when he fainted and fell from an examining table at an Urgent Care facility in Bronx, NY. On March 23, 2018 plaintiff presented to the Urgent Care facility complaining of abdominal pain and a nurse was directed by a medical doctor to draw some of plaintiff’s blood for diagnostic testing; plaintiff fell during a venipuncture procedure being performed by a nurse.

Plaintiff filed a Verified Complaint on October 18, 2018 and an Amended Verified Complaint on November 27, 2018. In each of those complaints, plaintiff alleged that the defendants “failed to adequately treat, appropriately monitor, sufficiently warn, properly diagnose and properly care for” the plaintiff and that the “medical care and treatment rendered and afforded by the Defendants . . . were . . . not in accordance with the accepted medical practices then and there existing.” Plaintiff filed a Verified Bill of Particulars on September 11, 2019 in which he alleges that “[a]s a result of the Defendants malpractice and/or wrongdoing the Plaintiff sustain[ed]” various injuries, including “vasovagal syncope,” the medical term for fainting. The Verified Bill of Particulars also alleges that the defendants: “failed to adequately

treat, appropriately monitor, sufficiently warn, properly diagnosis and properly care for the Plaintiff;" failed "to obtain proper, appropriate and complete medical history;" and failed to "properly secure the Plaintiff prior to performing a venipuncture procedure."

Defendants now move for an order compelling plaintiff to file a Certificate of Merit and an Affidavit of Merit for his failure to provide a Certificate of Merit pursuant to CPLR 3012-a, and/or dismissal upon his failure to provide said Certificate of Merit and Affidavit of Merit.

Plaintiff cross-moves to amend the Amended Verified Complaint, pursuant to CPLR R 3025.

* * * * *

CPLR 3012-a provides that in any action for medical malpractice, the complaint shall be accompanied by a certificate executed by the attorney for the plaintiff which declares, among other things, that the attorney has reviewed the facts of the case and has consulted with at least one physician. Plaintiff contends that this is a general negligence action and, therefore, a certificate is not required.

"[A] negligent act or omission by a nurse that constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician constitutes malpractice." *Bleiler v. Bodnar*, 65 N.Y.2d 65, 72, 489 N.Y.S.2d 885 (1985). Here, at a minimum, the alleged negligent acts of the nurse who attempted to perform the venipuncture procedure bore a substantial relationship to the rendition of medical treatment by a licensed physician. *Kim v. New York Presbyt.*, 170 A.D.3d 624, 95 N.Y.S.3d 516 (1st Dept. 2019); *Lang-Salgado v. Mount Sinai Medical Center, Inc.*, 157 A.D.3d 532, 69 N.Y.S.3d 292 (1st Dept. 2018). As such, this action sounds in medical malpractice.

To avoid dismissal for neglecting to serve a certificate with the pleadings, plaintiff must present a reasonable excuse for failure to comply with the statute and an affidavit of merit from a medical expert. *Grad v. Hafliker*, 68 A.D.3d 543, 889 N.Y.S.2d 459 (1st Dept. 2009). As plaintiff should not be made to suffer due to his attorney's error, the Court finds a reasonable excuse exists for plaintiff's failure to serve a certificate.

In support of his cross-motion to amend the Amended Verified Complaint, pursuant to CPLR R 3025, plaintiff submitted a proposed Amended Verified Complaint, which plaintiff contends does not sound in medical malpractice. Like his two prior complaints, the proposed Amended Verified Complaint includes allegations that defendants: “failed to adequately treat, appropriately monitor, sufficiently warn, properly diagnose and properly care for” the plaintiff; failed to “obtain proper, appropriate and complete medical history,” failed to “properly secure the Plaintiff prior to performing a venipuncture procedure;” and that the defendants were negligent in “performing a venipuncture procedure.” These allegations sound in medical malpractice. As such, the first and third causes of action in the proposed Amended Verified Complaint sound in medical malpractice. The second cause of action in the proposed Amended Verified Complaint asserts a claim of negligent hiring, retention and training. Leave to amend pleadings should be freely given absent prejudice or surprise resulting directly from the delay. CPLR R 3025(b); *Fahey v. County of Ontario*, 44 N.Y.2d 934, 935 (1975). While Defendants dispute the merits of such cause of action, they do not allege prejudice or surprise.

Based upon the foregoing, Defendants’ motion is **granted solely to the extent that it is ORDERED** that Plaintiff shall serve and file a Certificate of Merit and an Affidavit of Merit from a medical expert within 30 days after date of entry of this Order.

Plaintiff’s cross-motion to amend the Amended Verified Complaint is **granted**, and it is ORDERED that Plaintiff is granted leave to amend his Amended Verified Complaint and may serve the (Second) Amended Verified Complaint upon all defendants. Defendants may serve an answer within twenty days after service of the (Second) Amended Verified complaint. See CPLR 3025(d); and it is further

ORDERED that Defendants shall serve a copy of this Order with Notice of Entry upon Plaintiff forthwith.

Dated: Bronx, New York
March 6, 2020



Hon. Julia I. Rodriguez, J.S.C.