

Pianin v Altorki

2021 NY Slip Op 32127(U)

November 1, 2021

Supreme Court, New York County

Docket Number: Index No. 805412/2019

Judge: John J. Kelley

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. JOHN J. KELLEY **PART** **56M**

Justice

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DEBORAH ACIERNO PIANIN and SCOTT PIANIN

Plaintiffs,

- v -

NASSER K. ALTORKI and NEW YORK PRESBYTERIAN
HOSPITAL/WEILL CORNELL MEDICAL CENTER,

Defendants.

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INDEX NO. 805412/2019

MOTION DATE 10/20/2021

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115 were read on this motion to/for AMEND CAPTION/PLEADINGS.

In this action to recover damages for medical malpractice, the plaintiffs move pursuant to CPLR 305(a), 1003, and 3025(b) for leave to file and serve a supplemental summons and amended complaint adding, as party defendants, David Posner, M.D., "John Doe, M.D.," an as yet unidentified radiologist (see CPLR 1024), Northwell Health (Lenox Hill Hospital), Northwell Health/Northwell Health Physician Partners, and East River Imaging, and to amend the caption accordingly. The defendants do not oppose the motion. The motion is granted.

"CPLR 3025(b) allows a plaintiff to amend his [or her] complaint, with leave of court, to add a party defendant" (*Pensabene v City of New York*, 172 AD3d 1396, 1397 [2d Dept 2019]). Leave to amend a pleading is to be freely given absent prejudice or surprise resulting from the amendment, provided that the evidence submitted in support of the motion indicates that the proposed amendment may have merit (see CPLR 3025[b]; *McCaskey, Davies and Assocs., Inc v New York City Health & Hospitals Corp.*, 59 NY2d 755 [1983]; *360 West 11th LLC v ACG Credit Co. II, LLC*, 90 AD3d 552 [1st Dept 2011]; *Smith-Hoy v AMC Prop. Evaluations, Inc.*, 52 AD3d 809 [1st Dept 2008]). The court must examine the sufficiency of the proposed

amendment only to determine whether the proposed amended pleading is “palpably insufficient or clearly devoid of merit” (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]; see *Hill v 2016 Realty Assoc.*, 42 AD3d 432 [2d Dept 2007]). The court also “should consider how long the amending party was aware of the facts upon which the motion was predicated [and] whether a reasonable excuse for the delay was offered” (*Haller v Lopane*, 305 AD2d 370, 371 [2d Dept 2003]).

The proposed amendment seeks to add several physicians and health-care entities as defendants in this medical malpractice action. The proposed amended complaint is not palpably insufficient or clearly devoid of merit, as the medical records obtained by the plaintiffs during the course of discovery provide a basis for the plaintiffs’ new allegations that these health-care providers may have committed malpractice in reading certain thoracic CT scans of the lungs of the plaintiff Deborah Acierno Pianin (the patient), and in otherwise treating her or referring her for further treatment. The plaintiffs established that they only recently learned of the identities and potential liability of these physicians and entities when they were able to review the patient’s medical records. Hence, they proffered a reasonable excuse for any delay in making the instant motion. Consequently, the plaintiffs’ motion must be granted.

The court notes that the limitations period applicable to claims against persons or entities sought to be added as defendants is tolled where, as here, a motion for leave to file and serve a supplemental summons and amended complaint is made prior to the expiration of the statute of limitations, and includes a copy of the proposed amended pleadings (see *Perez v Paramount Communications*, 92 NY2d 749, 754-756 [1999]; *Abreu v Casey*, 157 AD3d 442 [1st Dept 2018]). The toll encompasses the period from the date that the motion for leave to amend is made, here September 30, 2021 (see CPLR 2211), until the date that the order granting that motion is entered, with the limitations period commencing to run again “after entry of the order” (*Perez v Paramount Communications*, 92 NY2d at 756; see *Schlapa v Consolidated Edison Co. of N.Y., Inc.*, 174 AD3d 934, 935-936 [2d Dept 2019]).

In light of the foregoing, it is

ORDERED that the plaintiffs' motion is granted, without opposition, and they are granted leave to file and serve a supplemental summons and amended complaint, in the form annexed to their moving papers as Exhibit K, adding, as party defendants, David Posner, M.D., "John Doe, M.D.," an as yet unidentified radiologist, Northwell Health (Lenox Hill Hospital), Northwell Health/Northwell Health Physician Partners, and East River Imaging; and it is further,

ORDERED that the caption of the action is amended to read as follows:

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

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DEBORAH ACIERNO PIANIN and SCOTT PIANIN,

Plaintiffs,

v.

NASSER K. ALTORKI, M.D., DAVID POSNER, M.D.,
JOHN DOE, M.D. (as yet unidentified radiologist),
NORTHWELL HEALTH (LENOX HILL HOSPITAL),
NORTHWELL HEALTH/NORTHWELL HEALTH
PHYSICIAN PARTNERS, NEW YORK PRESBYTERIAN
HOSPITAL/WEILL CORNELL MEDICAL CENTER,
and EAST RIVER IMAGING,

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Defendants.

-----X

and it is further,

ORDERED that, on the court's own motion, within 15 days of the entry of this order, the plaintiffs shall serve a copy of this order upon the Trial Support Office (60 Centre Street, Room 148, New York, NY 10007), and shall separately file and upload the notice required by CPLR 8019(c) and a completed Form EF-22, and the Trial Support Office shall thereupon amend the court records accordingly.

This constitutes the Decision and Order of the court.

11/1/2021

DATE


JOHN J. KELLY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE