

Ortiz v Fort Tyron Rehabilitation & Nursing Ctr.

2022 NY Slip Op 31011(U)

March 28, 2022

Supreme Court, New York County

Docket Number: Index No. 151657/2016

Judge: Dakota D. Ramseur

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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. DAKOTA D. RAMSEUR PART 34M

Justice

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HECTOR ORTIZ,

Plaintiff,

- v -

FORT TYRON REHABILITATION AND NURSING CENTER,
FORT TYRON CENTER FOR REHABILITATION AND
NURSING, INC., FORT TYRON REHABILITATION AND
HEALTH CARE FACILITY LLC, JOHN-JANE DOE

Defendants.

-----X

INDEX NO. 151657/2016
MOTION DATE N/A
MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 92

were read on this motion to/for AMEND CAPTION/PLEADINGS.

In this action seeking damages for personal injuries, plaintiff, Hector Ortiz (plaintiff), now moves pursuant to CPLR 3025 for leave to file and serve the "second amended verified complaint" and amended verified bill of particulars. Defendants, Fort Tryon Center, LLC, Fort Tryon Center for Rehabilitation & Nursing, Inc., Fort Tryon Rehabilitation and Health Care Facility, LLC (defendants), cross-move pursuant to CPLR 3024 to strike paragraph 23 of the proposed amended verified complaint. Both motions are opposed. For the following reasons, both motions are granted in part.

The now-deceased plaintiff, Vicky Ortiz, and her son, Hector Ortiz, commenced this action by filing the summons and complaint on February 28, 2016, alleging, among other things, that Vicky Ortiz was injured as a result of defendants' negligence and recklessness while she was a resident of defendants' nursing facility. On March 7, 2019, another justice of this court granted plaintiffs' motion to amend the complaint to substitute Vicky Ortiz for Hector Ortiz, as Temporary Administrator of the Estate of Vicky Ortiz. On June 4, 2020, plaintiff filed the purported amended complaint reflecting the substitution and adding an additional cause of action (NYSCEF doc. no. 68). Plaintiff filed the amended complaint well after the time permitted in CPLR 3025(a) and without a stipulation reflecting the amendment. As plaintiff failed to seek leave to amend the complaint, as required by CPLR 3025, the amended complaint is a nullity, and the original complaint is operative.

At issue in the instant motion and cross motion is paragraph 23 of the proposed amended complaint, which states:

“Defendants have a history of négligence, having multiple cases before this very Supreme Court, including Elizabeth Anderson v. Fort Tryon Rehabilitation, index # 104773/2011; Miguelina Quezada v. Fort Tryon Rehab, index # 159546/2013; Frank Austin v. Fort Tryon Rehabilitation, index # 159619/2013; Cynthia Anderson v. Fort Tryon Center, index # 805043/2015; and Bruce J. Simmons v. Fort Tryon Rehabilitation, index # 156707/2019.”

(NYSCEF doc. no. 83, second amended compliant at ¶ 23)

In support of their cross-motion, defendants argue that the cases listed in paragraph 23 are unrelated to the instant action and are prejudicial. Plaintiff contends that the cases are relevant to the extent they support plaintiff’s claims for punitive damages under Public Health Law § 2801–d(2). Plaintiff further contends that the motion is untimely as to the cases corresponding to index numbers 104773/2011, 159546/2013, and 159619/2013.

“It is fundamental that leave to amend a pleading should be freely granted, so long as there is no surprise or prejudice to the opposing party” (*Kocourek v Booz Allen Hamilton Inc.*, 925 NYS2d 51 [1st Dept 2011], citing CPLR 3025[b]). Moreover, the party seeking amendment must make some evidentiary showing that the proposed amendment has merit (*Hynes v Start Elevator, Inc.*, 2 AD3d 178 [1st Dept 2003]).

CPLR 3024(b) provides “[a] party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading.” “In reviewing a motion pursuant to CPLR 3024 the inquiry is whether the purportedly scandalous or prejudicial allegations are relevant to a cause of action” (*Soumayah v Minnelli*, 41 AD3d 390 [1st Dept 2007]; see *Irving v Four Seasons Nursing & Rehab. Ctr.*, 121 AD3d 1046, 1047 [2d Dept 2014] [“Matters that are unnecessary to the viability of the cause of action and would cause undue prejudice to the defendants should be stricken from the pleading or bill of particulars”]). Further, a motion made under CPLR 3024 “[s]hall be served within twenty days after service of the challenged pleading” (CPLR 3024[c]).

Punitive damages are available under Public Health Law (PHL) § 2801–d(2) where the patient has been deprived of a right or benefit and the deprivation “is found to have been willful or in reckless disregard of the lawful rights of the patient” (*Hairston v Liberty Behav. Mgmt. Corp.*, 138 AD3d 467, 468 [1st Dept 2016]).

Initially, defendants’ cross-motion is timely as to the entirety of paragraph 23 contained in the proposed “second amended complaint.” In *SGM Holdings LLC v Lisiak* (2015 NY Slip Op 30411[U] [Sup Ct, NY County 2015), the defendants moved pursuant to CPLR 3024 to strike allegations from the amended complaint beyond the 20 days from the service of the original complaint. In granting the defendants’ motion, the court determined that although the allegations the defendants sought to strike appeared in the original complaint, “[t]he Amended Complaint supersedes the Original Complaint and is the only complaint in this action” (*id.*). Accordingly, the court determined, “[t]he pleading to which the motion to strike is properly addressed is the Amended Complaint” (*id.*). Like in *SGM Holdings*, the “second amended complaint,” and not the original complaint, is the challenged pleading. Accordingly, the scope of the court’s analysis under CPLR 3024 encompasses the entirety of paragraph 23 of the “second amended complaint.”

The court finds the inclusion of unrelated cases where defendants were alleged to have been negligent is prejudicial to defendants. Importantly, the unrelated cases are not probative, as those cases are separate matters from the instant case and in opposition defendant fails to address the applicability of the facts in those cases to establish plaintiff's claims for punitive damages under PHL 2801-d(2) (see *Soumayah v Minnelli*, 41 AD3d 390, 392 [1st Dept 2007]; *Chowaiki & Co. Fine Art v Lacher*, 115 AD3d 600, 601 [1st Dept 2014]). The court notes that there was no determination in those cases as to whether defendants were liable under PHL 2801-d(2).

As for the branch of plaintiff's motion for leave to amend the bill of particulars to include certain regulations in support of plaintiff's claims pursuant to PHL 2801-d(2), defendants fail to demonstrate prejudice or surprise by the proposed amendments (see *Alvarado v Beth Israel Med. Ctr.*, 78 AD3d 873, 874 [1st Dept 2010]). Discovery concerning those allegations, if any, will be addressed at the next discovery conference.

Accordingly, it is hereby

ORDERED that plaintiff's motion is granted, in part, and the amended caption shall read as follows:

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

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HECTOR ORTIZ, AS TEMPORARY ADMINISTRATOR
OF THE ESTATE OF VICKY ORTIZ,

Index No.: 151657/2016

Plaintiff,

-against-

FORT TRYON REHABILITATION AND NURSING
CENTER, FORT TRYON CENTER FOR
REHABILITATION AND NURSING, INC., FORT
TRYON REHABILITATION AND HEALTH CARE
FACILITY LLC AND JOHN/JANE DOE.,

Defendants.
-----X

; and it is further

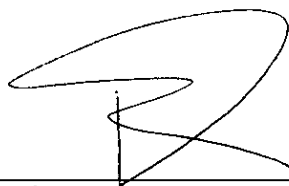
ORDERED that plaintiff shall serve the amended verified bill of particulars in the proposed form annexed to the moving papers (NYSCEF doc. no. 86) and the "second amended complaint" in the proposed form annexed to the moving papers (NYSCEF doc. no. 83), without paragraph 23 and as identified as the "amended complaint," upon defendants within fourteen (14) days of entry; and it is further

ORDERED that plaintiff shall serve a copy of this decision and order upon defendants and the Trial Support Office, with notice of entry, within fourteen (14) days of entry; and it is further

ORDERED that defendants shall serve an answer to the amended complaint or otherwise move within twenty (20) days from the date of said service; and it is further

ORDERED that the court will address discovery at the next discovery conference scheduled for May 10, 2022 at 11:00 a.m.

This constitutes the decision and order of the Court.



3/28/2022
DATE

DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input checked="" type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE
			<input type="checkbox"/>	OTHER