

Brennan v Watson

2023 NY Slip Op 30447(U)

February 8, 2023

Supreme Court, New York County

Docket Number: Index No. 805410/2019

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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EVELYN BRENNAN and GEORGE BRENNAN,
Plaintiffs,

- v -

ANIKA NINA WATSON, CAROLINE ABERG, NYU
LANGONE RADIOLOGY-NRAD, NRAD MEDICAL
ASSOCIATES, P.C., NYU LANGONE RADIOLOGY-
METROPOLITAN DIAGNOSTIC IMAGING,
METROPOLITAN DIAGNOSTIC IMAGING, P.C., NYU
RADIOLOGY ASSOCIATES, and NYU LANGONE HEALTH
SYSTEM,

Defendants.

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INDEX NO. 805410/2019
MOTION DATE 11/16/2022
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30

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

In this action to recover damages for personal injuries, the plaintiffs move pursuant to CPLR 3025(b) and CPLR 305(c) for leave to serve and file an amended summons and complaint substituting NYU Grossman School of Medicine (NYU GSOM) as a party defendant in place and stead of NYU Langone Radiology-NRAD, NYU Langone Radiology-Metropolitan Diagnostic Imaging, NYU Radiology Associates, and NYU Langone Health System (collectively the initial NYU entities). The plaintiffs request that the amendment be deemed effectuated, nunc pro tunc, as of February 9, 2022, the date that they served and filed a supplemental summons and amended complaint without leave of court. No party opposes the motion. The motion is granted to the extent that the plaintiffs may serve and file a supplemental summons and amended complaint in the form annexed as Exhibit E to their motion papers, subject to the assertion of any properly and timely asserted defenses and affirmative defenses, and the

motion is otherwise denied, that is, the service and filing will not be deemed to have been effectuated, nunc pro tunc, as of February 9, 2022 or as of any other earlier date.

The plaintiffs commenced this medical malpractice action on December 16, 2019, alleging that the individual defendant radiologists failed to diagnose lung cancer in the breast of the plaintiff Evelyn Brennan, causing, among other things, significant delay in diagnosis and treatment. They named, as defendants, the initial NYU entities, alleging that they employed the individual defendants and thus were vicariously liable for the individual defendants' malpractice. The plaintiffs served the summons and complaint upon all of the named defendants on January 7, 2020 or January 8, 2020. The plaintiffs stated that, after they commenced the action against the initial NYU entities, counsel for those entities contacted the plaintiffs' attorney and notified him that NYU GSOM was the entity that had employed the individual defendant radiologists.

On February 9, 2022, without leave of court, and before any of the defendants appeared or answered, the plaintiffs served and filed a supplemental summons and amended complaint, substituting NYU GSOM as a defendant for the initial NYU entities. NYU GSOM served an answer on March 4, 2022, representing that NYU GSOM was "a division of New York University." NYU GSOM asserted the statute of limitations as an affirmative defense, but it neither asserted improper service of process as an affirmative defense nor moved to dismiss the complaint for improper service of process within the time prescribed by CPLR 3211(e). NYU GSOM also served discovery demands. The plaintiffs now seek leave to serve and file the supplemental summons and amended complaint that they had previously served and filed without leave of court on February 9, 2022, and request that the court deem the service and filing to have been effectuated, nunc pro tunc, as of February 9, 2022.

CPLR 3025(a) provides that "[a] party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it." Here, the plaintiffs waited far longer than 20 days after their service of the initial summons and complaint, and far

longer than the defendants' responsive period had expired, before serving and filing a supplemental summons and amended complaint. Moreover, they did not wait for any of the defendants to answer or move with respect to the complaint before filing those papers and, hence, they could not and did not serve and file those papers within 20 days of service of a responsive pleading. Consequently, the plaintiff was obligated to obtain leave of court to serve and file a supplemental summons and amended complaint.

"CPLR 3025(b) allows a plaintiff to amend his 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 is not facially insufficient or devoid of merit. Hence, the plaintiffs are granted leave to serve and file a supplemental summons and amended complaint in the form annexed to their motion papers as Exhibit E. The amended pleading, however, is subject to all properly and timely asserted defenses and affirmative defenses, including the statute of limitations.

In this regard, while CPLR 305(c), relied upon by the plaintiffs, may be utilized to correct the name of an existing defendant (see *Smith v Garo Enters., Inc.*, 60 AD3d 751, 752 [2d Dept

2009;] *Benware v Schoenborn*, 198 AD2d 710, 711-712 [3d Dept 1993]; *Hart v Marriott Intl.*, 304 AD2d 1057, 1059 [3d Dept 2003]), it cannot be used by a party as a device to add or substitute a party defendant (see *Hart v Marriott Intl.*, 304 AD2d at 1059; *Security Mut. Ins. Co. v Black & Decker Corp.*, 255 AD2d 771, 773 [3d Dept 1998]). Consequently, a plaintiff may not invoke CPLR 305(c) to proceed against an entirely new defendant, who was not served, after the expiration of the statute of limitations (see *Smith v Garo Enters., Inc.*, 60 AD3d at 752; *Security Mut. Ins. Co. v Black & Decker Corp.*, 255 AD2d 771, 773 [1998]). The plaintiff has failed to establish that the initial NYU entities were simply misnamed, that they were divisions of, or alternative names for, NYU GSOM, or that they, like NYU GSOM, are merely divisions of New York University, as opposed to independent entities. In fact, no party has submitted evidence as to this issue. Hence, the filing of the supplemental summons and amended complaint will not be deemed to have been effectuated nunc pro tunc as of February 9, 2022, or any earlier date.

NYU GSOM has preserved its statute of limitations defense by raising it in its answer. The issue of whether the plaintiffs interposed their claims against NYU GSOM within the applicable two-year-and-six month limitations period of CPLR 214-a is not presently before the court, however, since the parties have not addressed the underlying issue of whether the initial NYU entities were merely misnamed or whether the plaintiff is seeking to add or substitute a party completely independent from the initial NYU entities (see *Nossov v Hunter Mtn.*, 185 AD3d 948, 949 [2d Dept 2020]). Hence, the court declines to determine whether the substitution will effectuate a timely interposition of the plaintiffs' claims against NYU GSOM.

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 October 6, 2022 (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 only to the extent that they are granted leave to serve and file a supplemental summons and amended complaint in the form annexed to their motion papers as Exhibit E, subject to any properly and timely asserted defenses and affirmative defenses, the motion is otherwise denied, the supplemental summons and amended complaint are deemed to be served as of the date of entry of this order, and the answer served by the defendant NYU Grossman School of Medicine on March 4, 2022 is deemed timely to have been served in response to the amended complaint; and it is further,

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

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EVELYN BRENNAN and GEORGE BRENNAN,

Plaintiffs,

Index No. 805410/2019

V

ANIKA NINA WATSON, CAROLINE ABERG,
NRAD MEDICAL ASSOCIATES, P.C.,
METROPOLITAN DIAGNOSTIC IMAGING, P.C.,
and NYU GROSSMAN SCHOOL OF MEDICINE,

Defendants.

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and it is further,

ORDERED that, on the court’s own motion, within 15 days of the entry of this order, the plaintiff 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) in 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.

2/8/2023
DATE


JOHN J. KELLEY, J.S.C.

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