

**Cady v Varma**

2023 NY Slip Op 30867(U)

March 20, 2023

Supreme Court, New York County

Docket Number: Index No. 805050/2022

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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JENNIFER ANNE CADY,

Plaintiff,

- v -

VIKAS VARMA, M.D., and MOUNT SINAI HEALTH  
SYSTEM

Defendants.

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**INDEX NO.** 805050/2022

**MOTION DATE** 12/23/2022

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23

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

In this action to recover damages for medical malpractice, the plaintiff moves pursuant to CPLR 305(c) and 3025(b) for leave to serve and file a supplemental and amended summons, and an amended complaint, so as to substitute Mount Sinai Hospital for Mount Sinai Health System as a party defendant. The defendant Vikas Varma, M.D., stipulates to the amendment. The motion is granted, the summons and complaint are amended accordingly, and they are deemed filed as of February 9, 2022. The supplemental and amended summons and the amended complaint shall be deemed timely served upon Varma as of the date that this order is entered. The plaintiff shall serve the supplemental and amended summons and the amended complaint upon Mount Sinai Hospital on or before May 5, 2023.

Mount Sinai Health System, Inc., is a corporation that was incorporated in New York on September 19, 2019, and operates the corporate and business functions of eight New York City metropolitan area hospitals and infirmaries, including Mount Sinai Hospital in Manhattan. The Mount Sinai Hospital is a teaching hospital that has been providing medical and hospital care since 1852. It is an independent entity that is affiliated with Mount Sinai Health System, Inc.

On February 9, 2022, the plaintiff commenced this action against Mount Sinai Health System, among others, alleging that it committed malpractice in caring for her in the emergency department of Mount Sinai Hospital between August 8, 2020 and August 10, 2020, and that it was vicariously liable for Varma's malpractice. The plaintiff caused a copy of the summons and complaint to be served upon Mount Sinai Health System, by delivering copies thereof to Rodassia Lewis on March 29, 2022 at Mount Sinai Hospital, located at 1468 Madison Avenue, 1st Floor, New York, New York. Mount Sinai Health System has yet to answer the complaint.

The plaintiff now seeks leave to amend and supplement the summons, and to amend the complaint, to substitute Mount Sinai Hospital as a party defendant in place and instead of Mount Sinai Health System.

“CPLR 305 (c) authorizes the court, in its discretion, to ‘allow any summons or proof of service of a summons to be amended, if a substantial right of a party against whom the summons issued is not prejudiced.’ This provision, and its predecessors, has been consistently interpreted as allowing a misnomer in the description of a party defendant to be cured by amendment, even after the Statute of Limitations has run. Generally, such an amendment should be granted where (1) there is evidence that the correct defendant (misnamed in the original process) has in fact been properly served, and (2) the correct defendant would not be prejudiced by granting the amendment sought (see, *Stuyvesant v Weil*, 167 NY 421; *Simpson v Kenston Warehousing Corp.*, 154 AD2d 526; *Creative Cabinet Corp. v Future Visions Computer Store*, 140 AD2d 483; *Gajdos v Houghton Elevator*, 131 AD2d 428; *Yanni v Chopp*, 130 AD2d 489, 490-491; *Connor v Fish*, 91 AD2d 744; *Luce v Pierce Muffler Shops*, 51 Misc 2d 256, *affd* 28 AD2d 826; McLaughlin, 1988 Supp Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C305:4, 1990 Supp Pamph, at 193; Siegel, NY Practice § 65, at 66-67; 3 Carmody-Wait 2d, NY Prac §§ 19:11, 19:19)”

(*Ober v Rye Town Hilton*, 159 AD2d 16, 19-20 [2d 1990]; see *Jordan-Covert v Petroleum Kings, LLC*, 199 AD3d 666, 668 [2d Dept 2021]; *Martin v Witkowski*, 158 AD3d 131, 139 [4th Dept 2017]; *Houghtalen v Norstar Bank*, 191 AD2d 371, 371 [1st Dept 1993]).

The plaintiff has demonstrated that she already had delivered process to the Mount Sinai Hospital at its usual place of business, that Mount Sinai Hospital, as the correct defendant, would not be prejudiced were the court to grant the amendment sought, and that “the misnomer could not possibly have misled the defendant concerning who it was that the plaintiff was in fact

seeking to sue” (*Jordan-Covert v Petroleum Kings, LLC*, 199 AD3d at 668, quoting *Creative Cabinet Corp. of Am. v Future Visions Computer Store*, 140 AD2d 483, 484-485 [2d Dept 1988]). Moreover, the amendment may be made nunc pro tunc (see *Jordan-Covert v Petroleum Kings, LLC*, 199 AD3d at 668; *Jaramillo v Asconcio*, 151 AD3d 947, 949-950 [2d Dept 2017]). Hence, the plaintiff is entitled to supplement and amend the summons, and to amend the caption and the complaint, to substitute Mount Sinai Hospital as a party defendant in place and instead of Mount Sinai Health System. The summons, the caption, and complaint are deemed amended to add the Mount Sinai Hospital as a defendant, nunc pro tunc, as of February 9, 2022, the date that the action was commenced.

The court notes that, in any event, the limitations period otherwise 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 December 14, 2022 (see CPLR 2211), at which time the plaintiff had approximately two months to run on the applicable limitations period, 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]). Hence, even were the court to deem the action commenced against Mount Sinai Hospital on the date this order is entered, instead of on February 9, 2022, the action would be timely insofar as asserted against it.

In light of the foregoing, it is

ORDERED that the plaintiff’s motion is granted, without opposition; and it is further,

ORDERED that the summons is deemed supplemented and amended, and the caption of the action and the complaint are deemed amended, nunc pro tunc as of February 9, 2022, so as to substitute Mount Sinai Hospital as a party defendant in place and instead of Mount Sinai Health System, and it is further,

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

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JENNIFER ANNE CADY,

Plaintiff,

-v-

Index No. 805050/2022

VIKAS VARMA, M.D., and MOUNT SINAI HOSPITAL,

Defendants.

-----X

and it is further,

ORDERED that the supplemental and amended summons and the amended complaint that were uploaded to the New York State Court Electronic Filing system under Docket Entry 22 are deemed served upon the defendant Vikas Varma, M.D., as of the date of entry of this order; and it is further,

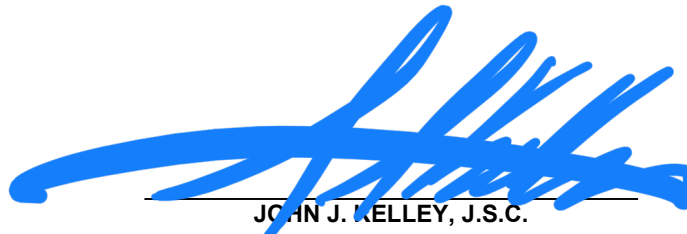
ORDERED that, on or before May 5, 2023, the plaintiff shall, pursuant to CPLR 311(a)(1), serve upon Mount Sinai Hospital a copy of a properly supplemented and amended summons and the amended complaint in the form uploaded to the New York State Court Electronic Filing system under Docket Entry 22; and 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) setting forth 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.

3/20/2023

DATE

  
JOHN J. KELLEY, 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