

Stevens v Cutler

2023 NY Slip Op 34337(U)

December 7, 2023

Supreme Court, New York County

Docket Number: Index No. 805037/2019

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

-----X

LISA STEVENS,

Plaintiff,

- v -

BRADLEY J. CUTLER, D.D.S.,

Defendant.

-----X

INDEX NO. 805037/2019

MOTION DATE 08/08/2023

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88

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

In this action to recover damages for dental malpractice, the plaintiff moves pursuant to CPLR 305(a), 1003, and 3025(b) for leave to file and serve a supplemental summons and amended complaint adding her husband, Michael Stevens, as a party plaintiff, thereupon to add causes of action to recover for lack of informed consent and loss of consortium, and to amend the caption accordingly. The plaintiff also seeks to extend the time to file the note of issue. The defendant does 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 a cause of action to recover for lack of informed consent, to add the plaintiff’s husband, Michael Stevens, as a party plaintiff, and to assert a derivative cause of action to recover for loss of consortium. The proposed amended complaint is not palpably insufficient or clearly devoid of merit, as it is based upon treatment and occurrences already alleged in the verified complaint. The plaintiff has established that her previous attorney inadvertently failed to add the lack of informed consent claim, or to name her husband as a party. Hence, she proffered a reasonable excuse for any delay in making the instant motion. Moreover, the defendant would not be prejudice by the proposed amendments as the parties have only had three discovery conferences, and have yet to start depositions. Consequently, the plaintiff’s motion must be granted.

In light of the foregoing, it is,

ORDERED that the plaintiff’s motion is granted, without opposition, and she is granted leave to file and serve a supplemental summons and amended complaint, in the form annexed to her moving papers as Exhibit L, adding a cause of action to recover for lack of informed consent, adding Michael Stevens as a party plaintiff, and adding a cause of action to recover for loss of consortium; and it is further,

ORDERED that the amended complaint, in the form annexed to the plaintiff’s motion papers as Exhibit L, is deemed filed and served as of the date of entry of this order; 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

-----X
LISA STEVENS and MICHAEL STEVENS,

Plaintiffs,

v.

BRADLEY J. CUTLER, D.D.S.,

Index No. 805037/2019

Defendants.

-----X

and it is further,

ORDERED that, within 15 days of the entry of this decision and order, the plaintiff shall serve a copy of this decision and order upon both the County Clerk and the Clerk of the General Clerk’s Office, which shall be effectuated in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases, accessible at the “E-Filing” page on the court’s website at <https://www.nycourts.gov/LegacyPDFS/courts/1jd/supctmanh/Efil-protocol.pdf> ([nycourts.gov](https://www.nycourts.gov)), and, to comply with those procedures, the plaintiff shall (1) upload the decision and order to the NYSCEF system under document title “SERVICE ON SUPREME COURT CLERK (GENL CLERK) W/COPY OF ORDER” **AND** (2) separately file and upload the notice required by CPLR 8019(c) in a completed Form EF-22, along with a copy of the decision and order, under document title “NOTICE TO COUNTY CLERK CPLR 8019(C),” and the County Clerk and all appropriate court support offices shall thereupon amend the court records accordingly; and it is further,

ORDERED that the parties shall submit a proposed status conference order to the Part 56 Part Clerk on January 3, 2024, in a form which shall be provided by the court, whereupon the note of issue filing deadline will be extended.

This constitutes the Decision and Order of the court.

12/7/2023

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