

**Martinez v Fromer Eye Ctrs.**

2023 NY Slip Op 34536(U)

December 21, 2023

Supreme Court, New York County

Docket Number: Index No. 805048/2021

Judge: John J. Kelley

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

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

PAULA MARTINEZ,

Plaintiff,

- v -

FROMER EYE CENTERS and MARK D. FROMER, M.D.,

Defendants.

-----X

**INDEX NO.** 805048/2021

**MOTION DATE** 08/02/2023

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 71, 72, 73, 74, 75, 76, 77, 78

were read on this motion to/for DISCOVERY/X-MOTION TO AMEND COMPLAINT .

In this action to recover damages for medical malpractice, the defendants move pursuant to CPLR 3124 to compel the plaintiff to provide outstanding discovery, specifically, fully executed authorizations permitting the defendants to obtain records from the plaintiff’s treating cardiologists, pulmonologists, internists, and treating facilities, and other relevant records, such as Medicaid records. The plaintiff opposes the motion and cross-moves pursuant to CPLR 3025(b) for leave to serve and file an amended complaint adding a cause of action to recover for lack of informed consent. The motion is granted, and the plaintiff shall provide the outstanding authorizations on or before January 31, 2024. The cross motion is denied.

The plaintiff commenced this action on February 10, 2021. On March 18, 2021, the defendants served an answer, and made numerous discovery requests, including demands for medical authorizations. In a preliminary conference order dated September 13, 2021, the court (Rakower, J.) directed the plaintiff to provide authorizations in response to the defendants’ demands on or before October 4, 2021. In a compliance conference order dated March 22,

2022, this court directed the plaintiff to “respond to Defendants' demand for authorizations dated March 22, 2022 within 30 days.” In a status conference order dated April 18, 2023, the court authorized the defendants to move, on or before May 19, 2023, to compel the plaintiff to comply both with their prior demand and the March 22, 2022 order. The defendants made the instant motion on May 19, 2023, and noticed it to be heard on June 16, 2023. In an interim order dated June 14, 2023, the court adjourned the return date of the motion until July 14, 2023, and directed the plaintiff to serve any responsive papers on or before July 7, 2023. The plaintiff failed to do so, and instead waited until July 10, 2023 to oppose the motion. The plaintiff also cross-moved for leave to serve an amended complaint on that date as well.

“[A]lthough a plaintiff who commences a personal injury action has waived the physician-patient privilege to the extent that his [or her] physical or mental condition is affirmatively placed in controversy . . . , the waiver of that privilege does not permit discovery of information involving unrelated illnesses and treatments” (*Bozek v Derkatz*, 55 AD3d 1311, 1312 [4th Dept 2008] [internal quotation marks omitted]; see *Barnes v Habuda*, 118 AD3d 1443, 1444 [4th Dept 2014]; *Felix v Lawrence Hosp. Ctr.*, 100 AD3d 470, 471 [1st Dept 2012]; *Elmore v 2720 Concourse Assoc., L.P.*, 50 AD3d 493 [1st Dept 2008]). Here, however, the defendants established, with a physician’s affirmation, that the plaintiff’s treatments with cardiologists, pulmonologists, internists, and other treating facilities were indeed “related to [the] physical or mental conditions affirmatively placed in controversy by” the plaintiff (*Mayer v Cusyck*, 284 AD2d 937, 938 [4th Dept 2001]), specifically, the vision loss that the plaintiff asserted was caused by the defendants. Thus, the records that the defendants seek here are relevant “to the mental and physical conditions that plaintiffs placed in controversy” (*Shamicka R. v City of New York*, 117 AD3d 574, 575 [1st Dept 2014]), and “[a] defendant is entitled to discovery to determine the extent, if any, that plaintiff’s claimed injuries and damages are attributable” to causes other than the one at issue here (*McGlone v Port Auth. of N.Y. & N.J.*, 90 AD3d 479, 480 [1st Dept 2011] quoting *Rega v Avon Prods., Inc.*, 49 AD3d 329, 330 [1st Dept 2008]).

In response to the defendants' showing that the records they seek to obtain through the outstanding authorizations are relevant to the injuries that the plaintiff claimed, the plaintiff failed to submit timely opposition. "Litigation cannot be conducted efficiently if deadlines are not taken seriously, and . . . disregard of deadlines should not and will not be tolerated" (*Andrea v Arnone, Hedin, Casker, Kennedy and Drake, Architects and Landscape Architects, P.C.*, 5 NY3d 514, 521 [2005]). "If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity" (*Kihl v Pfeffer*, 94 NY2d 118, 123 [1999]). The court thus need not consider the plaintiff's opposition papers. Even if it were to do so, the result would not be any different, since the plaintiff submitted no proof that the records sought by the defendants were not relevant to her claims of injury here.

Contrary to the defendants' contention, the plaintiff's cross motion was not untimely, since it was made more than three days prior to the adjourned date of the defendants' motion (see CPLR 2215). The court also rejects the defendants' contention that the plaintiff now is barred from amending the complaint to interpose of a cause of action to recover for lack of informed consent because such a claim is time-barred. The statutory lack of informed consent cause of action "simply adds a new theory of recovery arising from the same occurrence upon which the original claims are grounded . . . [and] the proposed amendment relate[s] back to the time of the original complaint" (*Leclaire v Fort Hudson Nursing Home, Inc.*, 52 AD3d 1101, 1102 [4th Dept 2008]; see *Caffaro v Trayna*, 35 NY2d 245, 249-250 [1974]; *Secore v Allen*, 27 AD3d 825, 829 [3d Dept 2006]).

Nonetheless, although 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 *Greene v Esplanade Venture Partnership*, 36 NY3d 513, 526 [2021]; *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 court concludes that the proposed amendment is palpably insufficient and that the defendants would be prejudiced by the amendment as well.

To establish a lack of informed consent cause of action, the plaintiff will be required to adduce evidence showing that (1) the defendants failed to disclose information as to the risks and benefits of, and alternatives to, the procedure that would and should have been disclosed by a reasonable medical practitioner, (2) a reasonably prudent person in her position would not have undergone the treatment had that person been fully informed, and (3) the lack of informed consent was a proximate cause of her injury (see *King v Jordan*, 265 AD2d 619, 620 [3d Dept 1999]; Public Health Law § 2805-d[1]). “[T]his showing of qualitative insufficiency of the consent [is] required to be supported by expert medical testimony” (*id.*, quoting *Hylick v Halweil*, 112 AD2d 400, 401 [2d Dept 1985]; see CPLR 4401-a). Consequently, where a plaintiff moves for leave to amend a complaint to add a cause of action to recover for lack of informed consent, the motion must be supported by an expert affirmation, explaining why the consent that the defendants obtained was, in fact, qualitatively insufficient (see *Leighton v Lowenberg*, 103 AD3d 530, 530 [1st Dept 2013]; see also *Leighton v Lowenberg*, 125 AD3d 427 [1st Dept 2015] [affirming denial of renewal motion because expert affirmation was belatedly submitted]). Inasmuch as the plaintiff failed to submit an expert affirmation or affidavit in support of her cross motion, opining that the consent obtained was qualitatively insufficient, the amendment must be considered palpably insufficient, and the cross motion must be denied on that ground.

In addition, “[w]hile delay alone is insufficient to deny a motion to amend, when

unexcused lateness is coupled with prejudice to the opposing party, denial of the motion is justified” (*Clark v MGM Textiles Indus., Inc.*, 18 AD3d 1006, 1006 [3d Dept 2005]). Here, the plaintiff waited for more than four years after the subject surgery, and two years after the commencement of the action, to request leave to amend the complaint. Inasmuch as a lack of informed consent claim is a distinct cause of action, requiring proof of facts not contemplated by an action based merely on allegations of negligence, and is one that necessarily depends on the recollections of the parties, which unavoidably diminish over time, the defendants would be prejudiced by the plaintiff’s delay in seeking the proposed amendment under the circumstances presented here (*see Pagan v Quinn*, 51 AD3d 1299, 1301 [3d Dept 2008]).

Accordingly, it is,

ORDERED that the defendants’ motion is granted and, on or before January 31, 2024, the plaintiff shall provide the defendants with fully executed authorizations permitting them to obtain her records from Arber Kodra, M.D., Michael Kim, M.D., Luciano DelGuzzo, M.D., Umar Rashid, M.D., Bushra Mina, M.D., Benjamin Shepherd, M.D., Lenox Hill Hospital, and New York Langone Medical Center, along with updated Medicaid records, updated pharmacy records, updated records from Dr. Valentine beyond January 3, 2020, records from the facility where the plaintiff underwent a procedure for the placement of cardiac stents, the facility where any other cardiac surgery or treatment was performed or rendered to the plaintiff prior to and after the subject cataract extraction surgery, and records from all prior and subsequent treating ophthalmologists, optometrists, and opticians; and it is further,

ORDERED that the cross motion is denied.

This constitutes the Decision and Order of the court.

12/21/2023  
DATE

  
\_\_\_\_\_  
JOHN J. KELLEY, J.S.C.

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