

Taveras v Tuck-It-Away Assoc., L.P.

2024 NY Slip Op 33298(U)

September 16, 2024

Supreme Court, New York County

Docket Number: Index No. 159848/2022

Judge: Lynn R. Kotler

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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. LYNN R. KOTLER PART **08**

Justice

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JUANA TAVERAS,

Plaintiff,

- v -

TUCK- IT- AWAY ASSOCIATES, L.P., THE TRUSTEES OF
COLUMBIA UNIVERSITY IN THE CITY OF NY, THE
TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF
NY 412 LOW MEMORIAL LIBRARY

Defendant.

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INDEX NO. 159848/2022
MOTION DATE 07/24/2024
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43

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

Upon the foregoing documents, this motion is decided as follows. This is a personal injury action arising from a slip and fall on a sidewalk near Columbia University on July 15, 2022. Defendants The Trustees of Columbia University in the City of NY and The Trustees of Columbia University in the City of NY 412 Low Memorial Library (collectively, "Columbia") move for an order pursuant to CPLR § 3101 and § 3025 to amend their answer to include additional affirmative defenses and compel plaintiff to produce HIPPA authorizations releasing non-party medical records. Juana Taveras ("Plaintiff") opposes the motion. Defendant Tuck-It-Away Associates, L.P. has not appeared in this action. For the reasons that follow, the motion is granted to the extent that Columbia's answer shall be amended to include the additional affirmative defenses of fraud but denied as to their motion to compel Plaintiff to produce HIPPA authorizations for a non-party's medical records.

Facts

In Columbia's affirmation of support for its motion, Columbia alleges that it discovered new information entitling it to amend its answer to assert a number of additional affirmative defenses relating to fraud allegedly committed by Plaintiff. On an unspecified date, but no later than January 2024 at plaintiff's deposition, Columbia discovered that Plaintiff's daughter Nitzaly Fabal ("Fabal") brought a similar lawsuit for a sidewalk trip and fall in the Bronx that occurred on June 25, 2022, 20 days prior to Plaintiff's injury. Her lawsuit was commenced in Supreme Court, Bronx County entitled *Nitzaly Fabal v. Dekalb 3572 LLC and Asden Management LLC* under Index No. 801336/2023E.

Both Plaintiff and Fabal are represented by the same attorneys, Subin & Associates LLP ("Subin"), and both sustained similar injuries including a right shoulder tendon tear, lumbar spine disc herniation, and cervical spine disc bulges. During a deposition held on January 25, 2024, Plaintiff claimed she had no knowledge of Fabal's injuries, accident, or pending lawsuit despite testifying that she speaks to Fabal on a weekly basis and having spent the day of the accident at Fabal's apartment. Further, the slip and fall that plaintiff is suing for in this action occurred shortly after she left her daughter's apartment on July 15, 2022.

Dr. Gbolahan Okubadejo ("Dr. Okubadejo") performed a spinal fusion surgery on Plaintiff on October 26, 2022 for injuries sustained in her fall. Columbia has provided to the court a copy of a New York Post article dated June 16, 2024 and entitled "MS-13, Russian mobsters use migrants in elaborate injury scam – even getting spinal surgery to pull it off: sources". In that article, the Post writes that Dr. Okubadejo allegedly performed "unnecessary fusion operations on patients to pump up payouts for them and make money for himself."

In opposition to the motion, plaintiff's counsel maintains that Columbia's allegations are "based on nothing more than hyperbole and speculative and conclusory claims" and that Columbia has not established any link between this action and the one commenced by Fabal. They claim that in such a large city it is not unusual to have such accidents and that both sets of injuries are consistent with what would be expected in a slip and fall on a sidewalk.

Discussion

Pursuant to CPLR § 3025(b), "A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances." A motion to amend the pleadings should be liberally granted absent prejudice or surprise to the opposing party (*Favourite Ltd. v Cico*, 2024 WL 1161607, at *3 [2024]; see *Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 411 [2014]; *McCaskey, Davies & Assoc. v New York City Health & Hosps. Corp.*, 59 NY2d 755, 757 [1983]). "Prejudice requires 'some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position'" (*Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365 [1st Dept 2007] quoting *Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 19 [1981]; see also *Kimso*, 24 NY3d at 411).

Mere delay does not constitute prejudice sufficient to defeat a motion to amend (*Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 [1st Dept 2011]; see also *176 W. 87th St. Owners Corp. v Guercio*, 216 AD3d 401, 402 [1st Dept 2023]; *Machado v Gulf Oil, L.P.*, 195 AD3d 26, 30 [1st Dept 2021] [prejudice is not assumed just because the amendment occurs late in the proceeding]). In determining if the delay was excessive, the court will consider "how long

the amending party was aware of the facts upon which the motion was predicated, and whether it offers a reasonable excuse for its lengthy delay” (*F.G.L. Knitting Mills v 1087 Flushing Prop.*, 191 AD2d 533, 534 [2d Dept 1993] quoting *Pellegrino v New York City Tr. Auth.*, 177 AD2d 554, 557 [2d Dept 1991]).

A party does not need to establish the merits of their new allegations on a motion for leave to amend, but rather only need to “show that the proffered amendment is not palpably insufficient or clearly devoid of merit” (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]; see also *Ferrer v Go N.Y. Tours Inc.*, 221 AD3d 499, 500 [1st Dept 2023]). “The legal sufficiency or merits of a proposed amendment to a pleading will not be examined unless the insufficiency or lack of merit is clear and free from doubt” (*Ferrer*, 221 AD3d at 500 quoting *Sample v Levada*, 8 AD3d 465, 467-468 [2d Dept 2004]). The presumption of validity in an amended pleading must be overcome by the opposing party by showing “the facts alleged and relied on... are obviously unreliable or insufficient to support the amendment” (*Peach Parking Corp. v 346 W. 40th St., LLC*, 42 AD3d 82, 86 [1st Dept 2007]). “If the opposing party wishes to test the merits of the proposed added cause of action or defense, that party may later move for summary judgment upon a proper showing” (*Lucido v. Mancuso*, 49 AD3d 220, 229 [2d Dept 2008]).

Plaintiff does not contend that the amended pleadings are prejudicial but rather claims that the affirmative defenses are without merit and that Columbia excessively delayed in bringing this motion to amend the answer. Plaintiff also argues that Columbia cannot succeed on the merits and a counterclaim for fraud may only be brought in an action alleging a fiduciary or contractual relationship, which does not exist here.

The court does not agree that the delay was excessive. When this action was commenced in 2022, the facts that Columbia relies on in support of this motion were not then known to it. Columbia had no reason to suspect fraudulent activity by the Plaintiff. Instead, facts essential to support Columbia's counterclaim for fraud were discovered during plaintiff's 2024 deposition and after the recent New York Post article.

Plaintiff also argues that Columbia has failed to meet the pleading requirements for fraud, to wit "a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" (*Joseph v Fensterman*, 204 AD3d 766, 768 [2d Dept 2022], quoting *Emby Hosiery Corp. v Tawil*, 196 AD3d 462, 464 [2d Dept 2021]). The court disagrees. Otherwise, plaintiff has failed to show that the proposed counterclaim is patently meritless.

Columbia also moves to compel Plaintiff to produce HIPPA authorizations for the release of her daughter's medical records. Columbia makes the argument that the medical records are discoverable under CPLR § 3101(a)(1), which requires "full disclosure of all matter material and necessary in the prosecution of defense of an action, regardless of the burden of proof, by ... a party, or the officer, director, member, agent or employee of a party." However, Fabal is not a party to this action and "waiver of [plaintiff's] own doctor-patient privileges d[oes] not constitute a waiver of their relatives' privileges" (*Van Epps v County of Albany*, 184 Misc 2d 159, 166 [Sup Ct, Albany County 2000] citing *Matter of New York County DES Litig.*, 168 AD2d 44, 47 [1st Dept 1991]). Moreover, a medical provider would not honor plaintiff's authorization of medical records not belonging to her absent a power of attorney, which is not present here. Accordingly, the balance of the motion is denied.

Conclusion

Accordingly it is hereby

ORDERED that the defendant’s motion for leave to amend the answer herein is granted, and the amended answer in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the plaintiff shall serve a reply to defendants’ counterclaims or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that the motion is denied as to Columbia’s request to compel Plaintiff to produce HIPPA authorizations releasing Fabal’s medical records; and it is further

ORDERED that the deadline to file note of issue is extended to November 15, 2024 and on or before that date, the parties shall meet and confer and present a stipulation to the court setting deadlines for all outstanding discovery to be so ordered.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby rejected and this constitutes the decision and order of the court.

9/16/2024
DATE


LYNN R. KOTLER, 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"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE