

**Kekeshkeeva v Vyshnia**

2025 NY Slip Op 30263(U)

January 21, 2025

Supreme Court, New York County

Docket Number: Index No. 805408/2023

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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ANNA KEKESHKEEVA,

Plaintiff,

- v -

ALLA VYSHNIA, RN, NADEZHDA TIHOMIROVS, NP, also known as "NADEJDA TIHOMIROVS, NP," YEVGENIY SCHUSTER, M.D., REVIVAL MED SPA AND SALON, INC., doing business as REVIVAL MED SPA, and REVIVAL MED SPA, LLC, doing business as REVIVAL MED SPA,

Defendants.

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INDEX NO. 805408/2023

MOTION DATE 11/27/2024

MOTION SEQ. NO. 002

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 75, 76, 77, 79, 80, 84, 85, 86

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

In this action to recover damages, inter alia, for medical malpractice, the defendant Alla Vyshnia, RN, moves pursuant to CPLR 3025(b) for leave to amend her answer to add cross claims for contribution and indemnification against several of her codefendants, as well as an allegation that the defendants Revival Med Spa and Salon, Inc., doing business as Revival Med Spa, and Revival Med Spa, LLC, doing business as Revival Med Spa (together the Revival defendants), are vicariously liable for any malpractice or negligence she may have committed. The plaintiff and the former defendant Nadezhda Tihomirovs, NP, also known as "Nadejda Tihomirovs, NP," separately oppose the motion. The motion is denied, without prejudice to renewal upon proper papers with respect to any cross claims sought to be asserted against the Revival defendants, and without prejudice to the commencement of a third-party action against Tihomirovs in accordance with CPLR 304(a) and 1007.

In the first instance, CPLR 3025(b) requires that "[a]ny motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly

showing the changes or additions to be made to the pleading.” Consequently, “[r]elief pursuant to CPLR 3025(b) requires the movant to include any proposed amendment or supplemental pleading with the motion” (*U.S. Bank, N.A. v Nathan*, 173 AD3d 1112, 1114 [2d Dept 2019] see *G4 Noteholder, LLC v LDC Props., LLC*, 153 AD3d 1326, 1327 [2d Dept 2017]). Where, as here, the movant fails to submit a proposed amended pleading, a motion for leave to amend that pleading must be denied on that ground alone (see *Board of Mgrs. of Residential Section of Plaza Condominium v Franzese*, 228 AD3d 571, 572 [1st Dept 2024]; *U.S. Bank, N.A. v Nathan*, 173 AD3d at 1114; *G4 Noteholder, LLC v LDC Props., LLC*, 153 AD3d at 1327; *Dragon Head LLC v Elkman*, 102 AD3d 552, 553 [1st Dept 2013]; *Muro-Light v Farley*, 95 AD3d 846, 847 [2d Dept 2012]). Hence, the motion is denied. With respect to Vyshnia’s request to amend her answer to assert vicarious liability as an affirmative defense against the Revival defendants, and indemnification as a cross claim against them as well, the denial is without prejudice to renewal upon proper papers, which must, at the very least, include an appropriate proposed amended answer asserting facts that support that affirmative defense and cross claim.

In any event, that branch of Vyshnia’s motion seeking leave to assert proposed cross claims for contribution and indemnification against Tihomirovs must be denied on the merits as well. 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 nonetheless must examine the sufficiency of the proposed amendment 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 *Badesch v Fort 710 Assoc., L.P.*, \_\_\_\_\_ AD3d \_\_\_\_\_, 2024

NY Slip Op 06650, \*1 [1st Dept, Dec. 31, 2024]; *Ferrer v Go New York Tours Inc.*, 221 AD3d 499, 500 [1st Dept 2023]).

Vyshnia's request to amend her answer to assert cross claims against Tihomirovs is palpably insufficient and clearly devoid of merit. The court notes that, after the plaintiff amended her complaint to add causes of action against Tihomirovs, while Tihomirovs was still a party, Vyshnia never amended her answer as of right to assert any cross claims against Tihomirovs. Nor did she seek leave to amend her answer in this respect while Tihomirovs remained a party. Rather, in a stipulation dated August 30, 2024, all parties, save Vyshnia, stipulated to permit the plaintiff voluntarily to discontinue the action against Tihomirovs. Inasmuch as Vyshnia declined to agree to the discontinuance, in order to effectuate the terms thereof, the remaining parties were required to, and did, obtain the court's approval (see CPLR 3217[b]). In this respect, the court so-ordered the stipulation on September 26, 2024, and Tihomirovs no longer was a party to this action as of that date.

Had Vyshnia initially asserted cross claims against Tihomirovs, this court could have converted those cross claims into third-party causes of action (see *Eddine v Federated Dept. Stores, Inc.*, 72 AD3d 487, 487 [1st Dept 2010]; see also *Cole v Mraz*, 77 AD3d 526, 527 [1st Dept 2010]; *Singh v Singh*, 294 AD2d 487, 488 [2d Dept 2002]). Inasmuch as Vyshnia did not do so, and Tihomirovs is no longer a party, Vyshnia cannot amend her answer to add cross claims against Tihomirovs (see *Figueroa v Kahn*, 101 Misc 2d 821, 822 [Sup Ct, N.Y. County 1979]; see also *Playboy Enters. Intl. v Meredith Corp.*, 2021 NY Misc LEXIS 4272 [Sup Ct, N.Y. County, May 26, 2021]; *Lancer Ins. Co. v General Motors, Inc.*, 2018 NY Slip Op 31973[U], \*4, 2018 NY Misc LEXIS 3490, \*4-5 [Sup Ct, Kings County, Aug. 6, 2018]). Nonetheless, although Vyshnia did not assert cross claims against Tihomirovs prior to the discontinuance, "[t]he discontinuance does not preclude [Vyshnia] from bringing a third-party action against [Tihomirovs]" for contribution or indemnification (*Shepherd v Workmen's Circle Multicare Ctr.*, 224 AD3d 485, 486 [1st Dept 2024]).

Accordingly, it is,

ORDERED that the motion of the defendant Alla Vyshnia, RN, is denied, without prejudice to renewal upon proper papers solely with respect to that branch of the motion seeking to amend her answer to assert the affirmative defense of vicarious liability and a cross claim for indemnification against the defendants Revival Med Spa and Salon, Inc., doing business as Revival Med Spa, and Revival Med Spa, LLC, doing business as Revival Med Spa, and without prejudice to the proper commencement of a third-party action for contribution and indemnification against the former defendant Nadezhda Tihomirovs, NP, also known as "Nadejda Tihomirovs, NP."

This constitutes the Decision and Order of the court.

1/21/2025

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