

Calvo v Hylan Plaza 1339, LLC.

2025 NY Slip Op 31059(U)

March 21, 2025

Supreme Court, Kings County

Docket Number: Index No. 518045/2020

Judge: Ingrid Joseph

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 83, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 21st day of March, 2025.

P R E S E N T:

HON. INGRID JOSEPH,

Justice.

-----X
AMILCAR ZACARIAS CALVO,

Plaintiff,

Index No. 518045/2020

-against-

HYLAN PLAZA 1339, LLC., and HUDSON MERIDIAN CONSTRUCTION GROUP, LLC,

Defendants.

DECISION & ORDER

(Mot. Seq. No. 4)

-----X
HUDSON MERIDIAN CONSTRUCTION GROUP LLC.,

Third Party Plaintiff,

-against-

BUILDER SERVICES GROUP, INC., d/b/a TRUTEAM COMMERCIAL SERVICES, A TOPBUILD COMPANY,

Third Party Defendants.
-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Affirmation/Exhibits.....	123 – 131
Affirmation in Opposition/Exhibit.....	139 – 140
Affirmation in Reply.....	145

Upon the foregoing papers, Defendant Hylan Plaza 1339, LLC. (“Hylan”) and Defendant/Third-Party Plaintiff Hudson Meridian Construction Group, LLC. (“Hudson”) (collectively, “Defendants”) move for an order: (1) pursuant to CPLR 3025 (b), granting them leave to amend their answer to include counterclaims and affirmative defenses for fraud, fraud on

the court, and unjust enrichment; and (2) pursuant to 22 NYCRR § 202.21 (e), vacating Plaintiff Amilcar Zacarias Calvo's ("Plaintiff") Note of Issue and Certificate of Readiness for Trial, to allow Defendants to conduct discovery as to these allegations; or, (3) in the alternative, pursuant to CPLR 2201, the common law and the interests of justice, staying the action pending resolution of the RICO litigation (Mot. Seq. No. 4). Plaintiff opposes the motion.

This Labor Law action arises out of an accident that occurred on July 8, 2020, while Plaintiff was working at a construction site at 123 Mill Avenue in Staten Island, New York. Hylan owned the site, and Hudson was the general contractor. As a result of his alleged injury to his left ankle, Plaintiff underwent certain medical treatment. At issue here, are MRIs taken at Lenox Hill Radiology ("Lenox Hill") and surgery performed by Dr. Siddharta Sharma ("Dr. Sharma") at Surgicore Surgical Center ("Surgicore") in Saddlebrook, New Jersey.

In their motion, Defendants assert that on March 1, 2024, Roosevelt Road Re. Ltd. and Tradesman Program Managers commenced a lawsuit pursuant to the Racketeering and Corrupt Organization Act (the "RICO Action"), alleging a scheme to defraud the insurance industry through fraudulent claims and treatment. Lenox Hill, Dr. Sharma and Surgicore are named in the RICO Action complaint as co-conspirators. According to Defendants, prior to Plaintiff's treatment with Dr. Sharma, his left ankle MRI performed at Aris Diagnostic on April 16, 2021, revealed no tears. Nonetheless, Defendants assert that after Plaintiff started treatment with Dr. Sharma, he was sent for two MRIs at Lenox Hill: (1) he first MRI, performed on June 23, 2021, revealed a single tear; and (2) an "updated MRI", performed on August 12, 2022, revealed multiple tears.

Defendants now move to amend their answer to include affirmative defenses and counterclaims for fraud, fraud on the court, and unjust enrichment. Defendants argue that granting them leave to amend does not "remotely pose a danger of unfair prejudice or surprise to the plaintiff" (NYSCEF Doc No. 124, ¶ 38). In addition, Defendants contend that the "nature of the conduct at issue in the RICO action goes directly to the heart of not only the overall credibility of plaintiff's medical witnesses and their ability and capacity to testify in *any* litigation, but also goes to the credibility for their actual medical treatment decisions, record-keeping, and motivations" (*id.* at ¶ 39). With respect to fraud, Defendants assert that

plaintiff has made intentional misstatements of fact as it pertains to [his] left ankle injury and necessary treatment; that same was made with the intention of inducing defendants' reliance on same in determining potential value of the case; that defendants justifiably relied on the medical information conveyed, and that

defendants have been injured by this reliance. As plaintiff's course of treatment with the RICO defendants closely mirrors that of which is alleged in the RICO complaint, defendants can sufficiently plead same with particularity (NYSCEF Doc No. 124, ¶ 41).

Defendants also assert that should Lenox Hill, Dr. Sharma and Surgicore be found liable in the RICO Action, "any resolution of the instant matter by settlement or verdict will inevitably become subject to collateral attack and a new trial on the basis of fraud, or fraud on the court, or other grounds" (NYSCEF Doc No. 124, ¶ 42). Defendants further seek to vacate the Note of Issue to allow them to conduct discovery into the allegations of fraud. If the Court does not grant leave to amend or vacate the Note of Issue, Defendants request that this matter be stayed until the RICO Action is resolved.

In opposition to the motion, Plaintiff avers that Defendants' fraud defense relates to his treating physician, Dr. Sharma, and not Plaintiff. Plaintiff further avers this defense is without merit. According to Plaintiff, any professional negligent acts by Dr. Sharma, which have not yet been proven, cannot be imputed to Plaintiff. Plaintiff contends that Defendant has not offered any independent evidence of fraud. Plaintiff questions how Dr. Sharma's treatment modalities can be deemed fraudulent since Defendants do not contest that Workers Compensation approved Plaintiff's surgeries. Plaintiff further argues that any allegation of an improper treatment plan by Dr. Sharma can be proven by Defendants' own independent medical treatments. Plaintiff contends that any unnecessary surgery, intentionally performed, is medical malpractice. Since Defendants would be liable for any aggravation of injuries sustained during the treatment of injuries arising from the accident, Plaintiff submits that the alleged intentional negligence of Dr. Sharma is imputable to Defendants. In addition, Plaintiff asserts that Defendants cannot establish the element of justifiable reliance since they actually contest Dr. Sharma's medical opinions. Moreover, Plaintiff argues that Defendants failed to assert any factual allegation that Plaintiff "made any statement, much less one that is incorrect or fraudulent" (NYSCEF Doc No. 139, ¶ 40).

In their reply, Defendants assert that Plaintiff did not argue prejudice or surprise in his opposition. Defendants also argue that Plaintiff's opposition contained irrelevant arguments and caselaw regarding impeachment. Defendants further claim that Plaintiff's opposition only addressed the element of justifiable reliance, which is only an element of common law fraud. Defendants maintain that at this stage of the litigation, they are not required to prove their allegations of fraud. Contrary to Plaintiff's contention, Defendants states that they are not alleging

that Dr. Sharma's treatment amounted to medical malpractice. Defendants note that Plaintiff failed to oppose the portion of their motion seeking to vacate the Note of Issue and conduct further discovery.

Under CPLR 3025 (b), a defendant may amend his answer by leave of court and such leave "shall be freely given" unless the party opposing the motion establishes that the proposed amendment is palpably insufficient or patently devoid of merit, or that the delay in seeking the amendment would cause prejudice or surprise to the other parties (CPLR 3025 [b]; *Lucido v Mancuso*, 49 AD3d 220, 229 [2d Dept 2008]; *Wells Fargo Bank, N.A. v Spatafore*, 183 AD3d 853, 853 [2d Dept 2020]). It is not for this Court to determine on a motion to amend an answer the "legal sufficiency or merits" of the proposed amendment (*Sample v Levada*, 8 AD3d 465, 467-468 [2d Dept 2004]). However, "[w]here the lack of merit of a proposed defense is clear and free from doubt, a motion for leave to amend an answer to raise that defense should be denied" (*Lucido*, 49 AD3d at 226 [2d Dept 2008]). Lateness in seeking an amendment or a party's failure to offer an excuse for the delay will not bar the amendment absent prejudice (*Quiros v Polow*, 135 AD2d 697, 699 [2d Dept 1987]; *Smith v D.L. Peterson Trust*, 254 AD2d 479, 480 [2d Dept 1998]). Ultimately, "the determination to permit or deny amendment is committed to the sound discretion of the trial court" (*US Bank N.A. v Murillo*, 171 AD3d 984, 986 [2d Dept 2019]).

Linares v City of New York addresses an appeal arising from the denial of defendants' motion to (i) amend its answer to assert a counterclaim for fraud based on an unrelated RICO complaint, (ii) vacate the Note of Issue, and (iii) stay the trial pending discovery (*Linares v City of NY*, ___AD3d___, 223 NYS3d 62, 63, 2024 NY Slip Op 06156, *1 [1st Dept 2024]). Similar to Defendants' allegations here, the *Linares* defendants asserted that plaintiff's medical providers, including Lenox Hill Radiology, engaged in a scheme designed to exploit the New York Workers' Compensation and the legal system (*id.*). In deciding *Linares*, the First Department found that the defendants' "counterclaim failed to allege any facts that *plaintiff* knowingly made material misrepresentations so as to support a fraud claim" (*id.* at 64 [emphasis added] [internal citation omitted]). The First Department further noted that "unproven allegations of fraud against plaintiff's . . . medical providers in the RICO complaint do not, without more, warrant a counterclaim for fraud against plaintiff himself" (*id.*).

Upon further consideration of Defendants' papers, the Court finds that they have not asserted any factual allegations giving rise to a counterclaim and defense of unjust enrichment. With respect to their fraud on the court claim, Defendants' papers merely recite what the purported standard is: "requiring willful conduct that is deceitful, injecting misrepresentations into the judicial system" (NYSCEF Doc No. 124, ¶ 40). Again, Defendants failed to allege any actual misrepresentations made by Plaintiff.

Accordingly, it is hereby


ORDERED, that the portion of Defendants' motion to amend their answer (Mot. Seq. No. 4) is denied; and it is further

ORDERED, that the portion of Defendants' motion to vacate the Note of Issue is denied; however, this does not preclude the parties from continuing discovery; and it is further

ORDERED, that the portion of Defendants' motion seeking to stay this action pending a determination of the RICO Action is denied.

All other issues not addressed are either without merit or moot.

This constitutes the decision and order of the Court.


HON. INGRID JOSEPH, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice