Davenport v Lumibao

2025 NY Slip Op 33479(U)

September 16, 2025

Supreme Court, New York County

Docket Number: Index No. 805325/2023

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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DIANE DAVENPORT, as Guardian of the Person and Property of EVELYN LEDYARD,

Plaintiff,

- v -

ALA-MAY LUMIBAO, M.D., ALLAN SANTIAGO, M.D., FORT TRYON REHABILITATION & HEALTH CARE FACILITY, LLC, doing business as FORT TRYON CENTER FOR REHABILITATION AND NURSING, and FORT TRYON CENTER, LLC,

Defendants.

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INDEX NO. 805325/2023

MOTION DATE 05/14/2025

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 41, 42, 43, 44, 45, 46

were read on this motion to/for LEAVE TO FILE AMENDED COMPLAINT.

In this action to recover damages pursuant to Public Health Law §§ 2801-d and 2803-c for purported violations of statutes and regulations governing nursing homes, for medical malpractice based on alleged departures from good and accepted practice, for common-law negligence, and for negligent hiring, training, supervision, and retention of healthcare personnel, the plaintiff moves pursuant to pursuant to CPLR 305(a), 1003, and 3025(b) for leave to file and serve a supplemental summons and amended complaint adding Integrated Wound Care Management New Jersey, LLC, doing business as Integrated Wound Care (IWCM), as a party defendant, and to assert causes of action against IWCM as set forth in the proposed amended complaint that she uploaded to the New York State Court Electronic Filing system as Docket Entry No. 46. No party opposes 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, 757 [1983]; *360 West 11th LLC v ACG Credit Co. II, LLC*, 90 AD3d 552, 553 [1st Dept 2011]; S*mith-Hoy v AMC Prop. Evaluations, Inc*., 52 AD3d 809, 811 [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]). CPLR 1003 provides, in relevant part, that "[p]arties may be added at any stage of the action by leave of court," and that "[p]arties may be dropped by the court, on motion of any party."

The proposed amendment seeks to add a new defendant that provided treatment to the plaintiff's ward. 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 initial verified complaint. The plaintiff has established that the new party was involved in the relevant wound care treatment almost to the same extent as the existing parties. Moreover, the current defendants would not be prejudiced by the proposed amendment, as the parties are only in the initial phase of the discovery process.

The court notes, however, that "'[a] claim is palpably insufficient or patently devoid of merit where it would be barred by the applicable statute of limitations'" (*Lilley v Greene Cent. Sch. Dist*., 187 AD3d 1384, 1390-1391 [3d Dept 2020], quoting *Belair Care Ctr., Inc. v Cool Insuring Agency, Inc.,* 161 AD3d 1263, 1266 [3d Dept 2018]). Nevertheless, as long as a plaintiff's motion for leave to amend a complaint to add a new party is made prior to the expiration of the relevant limitations period, and that plaintiff submits a proposed supplemental

summons and amended complaint in support of the motion, the limitations period is tolled from the date that the motion papers are served until the entry of the order granting leave to amend (*see Perez v Paramount Communications*, 92 NY2d 749, 754-755 [1999]; *Karagiannis v North Shore Long Is. Jewish Health Sys., Inc.,* 80 AD3d 569, 569 [2d Dept 2011] [where plaintiff, in support of a motion for leave to add a new party, files a proposed supplemental summons and amended complaint prior to the running of the applicable statute of limitations, the limitations period is tolled from the date that the motion is made until the date when the motion is granted]; *Diaz v 611 W. 158th St. Corp*., 2015 NY Slip Op 32862[U], *2-3, 2015 NY Misc LEXIS 5776, *4 [Sup Ct, N.Y. County, Jan. 20, 2015]; *cf. Vastola v Maer*, 48 AD2d 561, 565-566 [2d Dept 1975], *affd* 39 NY2d 1019 [1976] [applying rule to wrongful death cause of action against existing defendant]). The last date of treatment rendered by IWCM to the plaintiff's ward was alleged to have been May 30, 2022. Consequently, the three-year limitations period applicable to the common-law negligence and negligent hiring causes of action that the plaintiff seeks to assert against IWCM (*see* CPLR 214[5]) expired on May 30, 2025. Inasmuch as the plaintiff submitted a proposed supplemental summons and amended complaint in support of her motion, and she made the motion on April 14, 2025, which was prior to the expiration of that limitations period, the toll ran from that date until the date of this order, and, hence, the amendment is timely in connection with the common-law negligence cause of action.

Nonetheless, the two-year-and-six-month limitations period applicable to the medical malpractice cause of action against IWCM (*see* CPLR 214-a) expired on December 2, 2024 (*see* General Construction Law §§ 20, 25-a), and, thus, prior to the date on which the plaintiff made the instant motion. The court, however, will allow the plaintiff to amend her complaint to assert the medical malpractice cause of action against IWCM, subject to its opportunity to assert a statute of limitations affirmative defense as to that cause of action. "Since the proposed defendant is not yet before the court, it is not proper at this juncture to consider whether it may have a defense based on the statute of limitations" (*Diaz v 611 W. 158th St. Corp*., 2015 NY

Slip Op 32862[U], *3-4, 2015 NY Misc LEXIS 5776, *4-5; *see DeFilippo v Knolls of Melville Redev. Co.,* 29 Misc 3d 1228[A], 2010 NY Slip Op 52077[U], *3, 2010 NY Misc LEXIS 5791, *9 [Sup Ct, Suffolk County, Nov. 30, 2010]). As one appeals court explained it,

> "under the circumstances of this case, we find that the validity of any Statute of Limitations' defense which might be raised on behalf of the prospective additional defendant should not be decided at this juncture, and should instead be litigated in the context of a motion to dismiss made by that prospective additional defendant, who, unlike the existing defendant, has a real interest in the outcome"

(*Levykh v Laura*, 274 AD2d 418, 418 [2d Dept 2000]). The court concludes that the record suggests that IWCM may have been united in interest with one or more of the current defendants and that, consequently, the relation back doctrine may be applicable to the claims that the plaintiff seeks to assert against it. Application of this doctrine would permit the court to deem the claims asserted against IWCM to have been timely interposed on the date that the claims initially were interposed against the party with whom IWCM was united. If IWCM moves to dismiss the medical malpractice cause of action insofar as asserted against it as time-barred, the plaintiff would only be able to save that cause of action by establishing that

> "(1) that the claims arose out of the same occurrence, (2) that the later-added defendant is united in interest with a previously named defendant, and (3) that the later-added defendant knew or should have known that, but for a mistake by defendant as to the later-added defendant's identity, the proceeding would have also been brought against him or her"

(*Koplinka-Loehr v County of Tompkins*, 189 AD3d 2039, 2042 [3d Dept 2020], quoting *Matter of Sullivan v Planning Bd. of the Town of Mamakating*, 151 AD3d 1518, 1519-1520 [3d Dept 2017] [citations omitted]; *see Buran v Coupal*, 87 NY2d 173, 178 [1995]).

In light of the foregoing, it is,

ORDERED that the plaintiffs' motion is granted, without opposition, and she is granted leave to file and serve a supplemental summons and amended complaint, in the form uploaded to the New York State Court Electronic Filing system as Docket Entry No. 46, subject to the assertion by the newly added defendant, Integrated Wound Care Management New Jersey,

LLC, doing business as Integrated Wound Care, of the affirmative defense of the statute of limitations, as it applies to the medical malpractice cause of action; and it is further,

ORDERED that the supplemental summons and amended complaint, in the form uploaded to the New York State Court Electronic Filing system as Docket Entry No. 46, is deemed filed and served upon all current defendants as of the date of entry of this order; and it is further,

ORDERED that the plaintiff shall serve a copy of the supplemental summons and amendded complaint upon Integrated Wound Care Management New Jersey, LLC, doing business as Integrated Wound Care, in accordance with the CPLR within 120 days of the entry of this order (*see* CPLR 306-b); 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
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DIANE DAVENPORT, as Guardian of the Person and Property of EVELYN LEDYARD,

Plaintiff,

v. INDEX NO. 805325/2023

ALA-MAY LUMIBAO, M.D., ALLAN SANTIAGO, M.D., FORT TRYON REHABILITATION & HEALTH CARE FACILITY, LLC, doing business as FORT TRYON CENTER FOR REHABILITATION AND NURSING, FORT TRYON CENTER, LLC, and INTEGRATED WOUND CARE MANAGEMENT NEW JERSEY, LLC, doing business as INTEGRATED WOUND CARE,

Defendants.
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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, 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.

This constitutes the Decision and Order of the court.

9/16/2025
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:		**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**		
	[X]	**GRANTED**	[ ] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**