

Palmer v New York Presbyt.-Columbia

2012 NY Slip Op 30787(U)

March 28, 2012

Sup Ct, NY County

Docket Number: 400609/11

Judge: Joan B. Lobis

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: Joan B. Lobis
Justice

PART 6

Index Number : 100469/2011
PALMER, LATIA
vs.
NEW YORK PRESBYTERIAN-
SEQUENCE NUMBER : 001
AMEND SUPPLEMENT PLEADINGS

INDEX NO. _____
MOTION DATE 2/8/12
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause -- Affidavits -- Exhibits _____ **No(s)** 1-35
Answering Affidavits -- Exhibits _____ **No(s)** 6-7/1
Replying Affidavits _____ **No(s)** _____

FILED

Upon the foregoing papers, it is ordered that this motion is

MAR 29 2012
NEW YORK
COUNTY CLERK'S OFFICE

**THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION &
Order**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 3/28/12

Joan B. Lobis, J.S.C.
JOAN B. LOBIS

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

-----X
LATIA PALMER,

Plaintiff,

Index No. 400609/11

-against-

Decision and Order

NEW YORK PRESBYTERIAN-COLUMBIA
UNIVERSITY, DR. ANNETTE PEREZ-DELBOY, M.D.,
DR. STEFANIE WETHINGTON, M.D., and DR.
CYNTHIA GYAMFI, M.D.,

Defendants.

-----X
JOAN B. LOBIS, J.S.C.:

FILED
MAR 29 2012
NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff LaTia Palmer, who is proceeding pro se, seeks an order granting her a default judgment against defendant Cynthia Gyamfi, M.D., pursuant to C.P.L.R. § 3215; granting her leave to amend her complaint, pursuant to C.P.L.R. § 3025; and removing a separate action presently pending in Westchester County Supreme Court and consolidating it with this action, pursuant to C.P.L.R. § 602. Defendants New York Presbyterian Hospital ("NYPH"), and Drs. Annette Perez-Delboy, Stefanie Wethington, and Cynthia Gyamfi oppose the motion.

Plaintiff commenced this action by filing a summons and complaint on or about March 8, 2011. She alleges claims sounding in medical malpractice and lack of informed consent, related to a cerclage surgery performed on her by Drs. Perez-Delboy and Wethington. Plaintiff alleges that she suffered pain, mental suffering, and urinary incontinence as a result of defendants' departures from the standard of care. On or about May 2, 2011, plaintiff filed an amended complaint, adding Dr. Cynthia Gyamfi as a defendant, alleging that Dr. Gyamfi failed to properly

3] treat and monitor her pregnancy on or about November 9, 2010. Additionally, plaintiff added a wrongful death claim on behalf of her deceased fetus. On or about May 4, 2011, plaintiff commenced a separate action in Westchester County Supreme Court, alleging negligence, personal injury and wrongful death against Shahram Razman, Philip Lawrence Florio, Southern Westchester OB-GYN Associates, LLP, and Paul Gleason, under the index number 8821/11.

Plaintiff's motion for a default judgment against Dr. Gyamfi is denied. To obtain a default judgment against a defendant for failure to timely answer, a plaintiff must prove proper service, the facts constituting the claim, and the default. C.P.L.R. § 3215(f). Plaintiff has failed to prove any of the above. Moreover, in opposition, Dr. Gyamfi submitted an affidavit of service indicating that she served plaintiff with her answer on June 2, 2011, by mail, to the address that plaintiff used on both her amended complaint and this motion. "[A] properly executed affidavit of service raises a presumption that a proper mailing occurred, and a mere denial of receipt is not enough to rebut this presumption." Kihl v. Pfeffer, 94 N.Y.2d 118, 122 (1999). Accordingly, that branch of plaintiff's motion seeking a default judgment against Dr. Gyamfi is denied.

Plaintiff further seeks to amend her complaint to add claims for violations of N.Y. Pub. Health L. § 4160-a and to consolidate the Westchester County action into this New York County action. Plaintiff states that by virtue of commencing the case as a pro se litigant, she was at a disadvantage and would now like to correct the errors in order to procure representation.¹ She

¹ Plaintiff states that she has legal counsel willing to represent her who has experience litigating medical malpractice claims. Plaintiff appends as an exhibit the affirmation of Margaret C. Jasper, Esq., who states that she has initially reviewed plaintiff's case and believes it is

further states that the proposed amendments would cure any procedural defects and are meritorious. Additionally, she states that there is minimal prejudice to defendants because there is adequate time to conduct discovery. Further, plaintiff argues that she has not engaged in dilatory conduct in pursuing her claims.

In opposition, defendants argue that plaintiff has failed to comply with the requirements for amending a complaint because she has not submitted a proposed amended complaint. Defendants argue that without the proposed amendments, they are unable to determine if they will be prejudiced or surprised by the amendments.

C.P.L.R. Rule 3025(b) states:

[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. . . Any 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.

Leave to amend a pleading should be "freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit." Lucido v. Mancuso, 49 A.D.3d 220, 222 (2d Dep't 2008).

Here, plaintiff simply states that she desires to make amendments to her complaint, but fails to articulate which specific amendments she wishes to make. Stating that the proposed amendments will "contain meritorious and new matters of law" does not apprise defendants of the substance of

meritorious. However, Ms. Jasper is hesitant to represent her unless the complaint can be amended to comply with statutory requirements.

* 5]

plaintiff's pleading and does not satisfy the requirements that the motion be accompanied by the proposed amendments. Accordingly, that branch of plaintiff's motion seeking to amend her complaint is denied, without prejudice to renewal upon the proper papers.

Plaintiff further seeks to remove the action presently pending in Westchester County Supreme Court, under index number 8821/11, and consolidate it with this action. Plaintiff argues that a consolidation of the two cases is proper because she alleges similar injuries and causes of action in both actions. She argues that a venue transfer to New York County is proper because it is where the cause of action arose and the venue in which the action was first filed. She further states that there will be minimal prejudice to defendants because discovery has yet to commence in this case and is only in the preliminary stages in the Westchester County action. Additionally, she states that no trial date has been set in either county.

In opposition, defendants argue that plaintiff's application to consolidate the two actions is defective. Defendants point out that plaintiff failed to serve the defendants in the Westchester County action, as required by law. Defendants additionally argue that plaintiff failed to apprise them of the pleadings, discovery documents, or motions from the Westchester County action, and that without this information, they are unable to determine the stage of the litigation in the Westchester County action or whether the two actions have common questions of law and fact. Furthermore, defendants state that plaintiff already has a motion to consolidate pending before the Westchester County Supreme Court, and that an inconsistent ruling between the two counties will cause confusion.

[* 6]

C.P.L.R. § 602(b) provides for an action pending in the supreme court to be transferred and consolidated with an action pending in another court. However, an action should not be consolidated where it will result in prejudice to a substantial right. The court agrees with defendants that plaintiff's failure to serve this motion on the Westchester County defendants renders her application defective. The motion must be made on notice to all parties who will be affected. C.P.L.R. § 2103(e); 22 N.Y.C.R.R. § 202.8(c). Furthermore, because plaintiff failed to attach any pleadings from the Westchester County action, the court is unable to consider whether consolidation is proper. Accordingly, it is hereby

ORDERED that plaintiff's motion is denied in its entirety, without prejudice to the renewal of those portions seeking to amend the complaint and to consolidate the action, upon the proper papers and proof of service; and it is further

ORDERED that the parties shall appear for a preliminary conference on Tuesday, May 1, 2012, at 9:30 a.m., at 60 Centre Street, Room 345, Part 6, New York, New York.

Dated: March 28, 2012

FILED

ENTER:
MAR 29 2012

NEW YORK
COUNTY CLERK'S OFFICE
JOAN B. LOBIS, J.S.C.

