

**Corey v St. Vincent's Catholic Med. Ctr. of
NY-Manhattan**

2012 NY Slip Op 32848(U)

November 21, 2012

Sup Ct, New York County

Docket Number: 117120/07

Judge: Alice Schlesinger

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

PRESENT: ALICE SCHLESINGER
Justice

~~PART~~ PART 16

Index Number : 117120/2007
COREY, RICHARD
VS.
SAINT VINCENT'S CATHOLIC
SEQUENCE NUMBER : 002
DISMISS

FILED
NOV 26 2012
COUNTY CLERK'S OFFICE
NEW YORK

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

Id on this motion to/for _____

PAPERS NUMBERED

Answering Affidavits — Exhibits _____
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *by defendant to*
dismiss and the cross-motion by plaintiff
to amend are determined in accordance
with the accompanying memorandum
decision.

Dated: NOV 21 2012

Alice Schlesinger
ALICE SCHLESINGER *J.S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 16

RICHARD COREY and ILENTHAI COREY,

Plaintiffs,

-against -

ST. VINCENT'S CATHOLIC MEDICAL CENTER OF
NEW YORK-MANHATTAN, ROBIN MITNICK, M.D.,
MICHAEL GERARDI, M.D., DANIEL SILVERSHINE,
M.D., CONCORDE MEDICAL GROUP, and TOKO
MORIMOTO, M.D.,

Defendants.

FILED

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COUNTY CLERK'S OFFICE
NEW YORK
Index No. 117120/07
Motion Seq. No. 002

SCHLESINGER, J:

In this action, I have competing motions from the remaining parties, who are Richard Corey and his wife Ilen Thai Corey as plaintiffs and St. Vincent's Catholic Medical Center of New York ("St. Vincent's" or "the Hospital") as defendant. In the first instance, St. Vincent's is moving pursuant to §3211(a)(5) and (7) of the CPLR to dismiss any and all claims constituting medical malpractice that occurred after July 5, 2005. The plaintiff opposes but also cross-moves to amend the complaint and caption pursuant to §§3025(b) and © and 203(f) of the CPLR.

On December 22, 2009, I had granted a motion by St. Vincent's to dismiss all claims which predated July 5, 2005. However, there I made clear (pg. 7 minutes of oral decision) that the motion was "denied vis-a-vis anything that post-dated July 5, and that would of course include the July 13 reading of the chest X-Ray". That is what the hospital is now requesting.

The motion to strike all pre-July 5th claims was predicated on St. Vincent's filing for Chapter 11 bankruptcy protection and plaintiff's failure to file timely proof of claim. During

argument on the earlier motion, which was a motion to dismiss all claims, plaintiff's counsel distinguished between claims that arose after July 5th. Moving defense counsel urged me to dismiss all claims, arguing that any allegation regarding the alleged failure to properly read a chest X-Ray by Dr. Botorabi, a radiologist at the hospital, was a new claim, one that was barred by the Statute of Limitations.

In alluding to the above, I directed the defendant to move to strike an amended Bill of Particulars, dated December 5, 2008, where the July 13 chest X-Ray was specifically referenced. The motions now before the Court are a response by counsel to this directive. It is a response made more than two years since the direction because St. Vincent's was, until very recently still in Bankruptcy Court where a stay of this action was in effect. On October 22, 2012, that stay was vacated. Therefore, a decision on the motions is now warranted.

The events that gave rise to this action involve Richard Corey's admission to the defendant hospital during the early days of July 2005 for a complaint of seizures. During that admission, Mr. Corey underwent various tests, which included a CT scan of his head taken on July 2, 2005 as well as an X-Ray of his lungs. Both were read as normal. But counsel for plaintiff in the complaint filed in November 2007, maintained that the readings were wrong and specifically that the doctors failed to diagnose a tumor in his head.

However, the plaintiff's position has altered twice since the original complaint was filed. First, as reflected in the Bill of Particulars of December 2008, plaintiff claimed that in addition to the cancerous tumor in the brain that there was a malignant mass in the lungs, also not detected. The final position is reflected in counsel's cross-motion, which is supported by an affirmation from a Board Certified Radiologist, Dr. Robert Laurance Bard,

dated February 19, 2010. Dr. Bard opines that Mr. Corey did have a mass measuring 1x1 centimeter in the right lung overlying the aorta, a mass that could and should have been seen during the defendant hospital's review of the X-Rays on July 13, 2005. Further, Dr. Bard opines that his review of the July 2005 brain scan showed no evidence of a mass or tumor, consistent with the reading and deposition testimony of defendant Dr. Robin Mitnick.

Dr. Bard also reviewed subsequent X-Rays taken at Sharon Hospital on April 30, 2007 and May 1, 2007, as well as a latter CT Scan of Mr. Corey's lungs done at Memorial Sloan Kettering Hospital, also in 2007. He compared the lesions, the 2007 "ones in the exact location where the mass was shown to exist in 2005" (page 4 of affirmation) and the lesion which now measured 2x3 centimeters and was described in the CT scan as "probable neoplasm in the right upper lobe bronchus".

Counsel explains that the original complaint of December 24, 2007, emphasizing an undetected brain tumor, was brought in good faith only twelve days before the two and one-half year Statute of Limitations was to expire. Therefore, in his opposition to St. Vincent's motion to dismiss all claims and his cross-motion to amend the complaint and its caption, he explains that when he brought the original complaint, Mr. Corey was suffering confusion from the brain tumor and its treatment. Further, when the complaint was written, counsel did not yet have copies of the 2007 records from Sharon and Memorial Hospitals. These records show conclusively that plaintiff's brain cancer had originated in his lungs. Therefore, the only malpractice was that of Dr. Baktash Bootorabi's, in his misreading of the chest X-Rays on July 13, 2005. As stated earlier, counsel specifically included this allegation in the December 5, 2008 Bill of Particulars. Now

plaintiff's counsel wants to withdraw all claims against all named defendants except the defendant Hospital, who is responsible for the actions of Dr. Bootorabi, its radiologist.

But moving defense counsel contends that all claims in the original complaint fail to make out a cause of action and that it is well beyond the Statute of Limitations to add new claims that are not related to the original ones. It is pointed out that all of the original claims were dealt with by my prior order of December 2009 where I dismissed all claims that predated July 5, 2005.

Specifically, defense counsel anticipating plaintiff's cross-motion, argues against any amendment pursuant to CPLR §3025. In this regard, she discusses the relation-back doctrine codified in §203(f) of the CPLR. The relevant part of that section reads as follows:

A claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

Counsel dissects the original complaint to show that all it deals with is brain cancer and the brain scan failing to pick it up. There is no mention of the X-Rays of the chest read on July 13, 2005 or of lung cancer. In fact, the only mention of lung cancer is to show the extensive injuries suffered by the plaintiff and allegedly caused by the failure to properly read the July 2, 2005 scan of the brain. Counsel argues that the rationale for the relation-back doctrine, providing for the addition of time-barred claims, is that notice of the new claim(s) had been timely given in the complaint. But the converse of that is also true, that new time-barred claims are not allowed when there has been no forewarning of that claim.

Counsel attaches an affidavit from a Dr. Malcolm Phillips, an internist also board

certified in Cardiology, to opine the somewhat obvious point that an X-Ray of the chest is a radiographic study of the heart, lungs and other structures in the chest and that there is no overlap to a CT scan of the head. The studies of these two body parts, not surprisingly, are entirely different from each other. "Therefore" he says, an "allegation of a failure to diagnose lung cancer on a radiological study showing the chest is a completely independent claim of medical negligence, requiring an independent and entirely different showing of facts and proof than a claim of a failure to properly interpret a CT of the head and diagnose a brain tumor" (§7 of Phillips affidavit of 2/2/10).

Discussion

What seems to be perfectly clear here is that the Hospital is not asserting, nor even suggesting, that the amended complaint would be prejudicial to it, except of course that the action would continue and not be completely dismissed. Counsel is not claiming that the chest X-Ray has been lost or that a probable new witness, though not a new party, Dr. Baktash Bootorabi, is unavailable for a deposition. Because St. Vincent's has closed, all of the defendant doctors named in the amended complaint, are no longer employed. Only one defendant remains, St. Vincent's, which of course was named as a defendant when the action was commenced in 2007.

On this point, defense counsel specifically says in her Reply (§4) that:

Defendant has not argued that the plaintiff's amendment must be denied because of prejudice. Defendant has argued that the proposed amendment must be denied [as] a clear matter of law.

What is also clear, therefore, is that the amended complaint would not make it harder for the hospital to defend. As Justice Breitel said in his dissent in *Caffaro v. Trayna*,

35 NY2d 245-254 (1974):

It is staleness of proof to which Statutes of Limitation are primarily addressed, not to bar valid claims, but to prevent the assertion of claims, dubious, or difficult to disprove because of the lapse of time and its adverse effect on the availability and reliability of evidence...

Caffaro involved a newly asserted cause of action for wrongful death, many years after the two-year Statute of Limitations had run. The Court allowed the original complaint to be amended to add this claim, even though by doing so, the decedent's wrongful death was now alleged in a document dated well before he died.

In another Court of Appeals case, *Duffy v. Horton Memorial Hospital*, 66 NY2d 473 (1985), an action was commenced sounding in medical malpractice, similar to this case, based on the allegation that the hospital had failed to recognize and diagnose an early stage of the husband's lung cancer. The issue there, unlike the one here, was whether a third-party action naming a doctor for the first time, asserted after the husband's death by the hospital, could be used by the plaintiff to also name him in an amended complaint. The Court said "Yes" it could.

But more important to this discussion, the *Duffy* Court in arriving at this conclusion discussed CPLR 203(e) (now (f)) and policy considerations underlying Statutes of Limitations. They were fairness to a defendant and "the need to protect the judicial system from the burden of adjudicating stale and groundless claims" 66 NY2d at 476-477. As to fairness to the defendant, it should not have to be called on to resist stale claims. However, "an amendment which merely adds a new theory of recovery or defense arising

out of a transaction or occurrence already in litigation clearly does not conflict with these policies". *Id.* at 477.

Here while there is a new theory, the failure to recognize and diagnose early lung cancer from tests taken while he was a patient at St. Vincent's, Mr. Corey's admission and treatment at St. Vincent's in the early days of July 2005, where he was given an array of tests and scans, were transactions already in litigation.

Plaintiffs' counsel cites the Second Department case of *Stephan v. Shulman*, 130 AD2d 484 (1987), which defense counsel believes is easily distinguishable. But there, contrary to what counsel says in Reply, a plaintiff was allowed to raise for the first time in her answering affidavit at Special Term a common law marriage entered into while on a trip to Rhode Island. These newly announced facts formed the basis for a cause of action for support now relying on an actual marriage. The Appellate Court allowed these new facts and new theory and directed plaintiff to so amend her complaint to include them.

Defense counsel in her moving papers cites many cases where amendments were not allowed under CPLR 203(e) or (f) because the new claim did not relate back to the original complaint. So for example in *Roig v. Queens Surface Corp.* 2003 WL 22518234 Sup. Ct., Bronx Co. (2003), a trial court dealing with injuries sustained in a bus accident, did not allow an amendment to the complaint by the plaintiff adding a new cause of action which sounded in negligent hiring and retention of the driver. This new theory had nothing to do with, and did not relate back to, the original complaint that alleged the negligent driving of that same bus driver.

In another case, *Jolly v. Russell*, 203 AD2d 527 (1994), the Second Department declined to allow the plaintiff in a medical malpractice case centering on the diagnosis and

treatment of his gallstones and duodenal ulcer, to add a new cause of action sounding in lack of informed consent. There was no notice of this new theory and it did not relate back to the theory of negligence originally asserted.

However, the First Department case, *Cherebin v Empress Ambulance Service, Inc.*, 43 AD3d 364 (2007), is more similar to the circumstances here. The trial court in *Cherebin* had denied plaintiff's motion to amend her bill of particulars. She commenced a medical malpractice action in 2004 and wanted to amend her bill of particulars two years later, after the note of issue had been filed, to add an additional theory of negligence causing her neurological injuries. This new theory alleged that the defendant failed to use the proper oxygenation device, a bag valve mask, while the plaintiff was trapped in a vehicle after an accident. Counsel there explained that this theory came to light in late May 2006, a month before seeking to amend, when his expert paramedic received and reviewed all of the treating physicians' depositions and other relevant records. However, this decision was reversed and the plaintiff was permitted to amend. The appellate court allowed the amendment because there was an explanation for the delay and no prejudice to the defendant was found since the amendment was based upon the defendant's own records.

That is precisely the situation here. Plaintiff's counsel explains that he was forced to file this complaint before completing his investigation because the Statute of Limitations was running out in late November 2007 based on events that had occurred in July 2005. In November of 2007, Mr. Corey knew he had lung and brain cancer but was confused as to when each became evident. It was not until some time toward the end of 2008, the following year, that counsel received and reviewed Mr. Corey's subsequent hospital records from Sharon and Memorial Hospitals. It was then that he saw that it was the lung

cancer that was primary and that led to the brain cancer. Counsel then asked Dr. Bard, an experienced board certified radiologist, to review Mr. Corey's X-Rays and CT scans taken not only at St. Vincent's in 2005, but also at Sharon and Memorial Hospitals in 2007. As noted earlier, Dr. Bard submitted an affirmation as to his findings that a lung mass was visible in the July 2005 chest X-Ray, which mass grew and metastized as shown in the later records. Counsel put defendant's attorney on notice of the allegation involving lung cancer in 2008, a year after the action was commenced.

I find that there is a relation back here which allows the complaint to be amended in the manner sought by the plaintiff. The complaint always alleged a failure to recognize and diagnose cancer via radiological tests. While the focus in the complaint was on the brain, that is understandable because in late 2007, Mr. Corey did have brain cancer. It turned out, pursuant to the subsequent records that the brain cancer he had then was metastatic brain cancer which developed from a primary lung cancer. That is the cancer which was allegedly not diagnosed by the defendant's radiologist. But since the X-Rays still exist and can be analyzed by an expert retained by St. Vincent's, there is no prejudice to the defendant. Nor does this implicate "staleness of proof" referred to in *Caffaro* (supra). Rather, the only end that would be achieved here by refusing permission to amend would be "to bar (allegedly) valid claims". *Caffaro*, supra.

Further, as requested alternatively by defense counsel, they may take a second deposition of Mr. Corey focusing on his chest and lung symptoms and complaints.

Finally, after the above deposition has taken place and any other discovery, I am allowing defendant to move for summary judgment on the allegations in the amended complaint.

Accordingly, it is hereby

ORDERED that plaintiff's cross-motion to amend the complaint is granted and the plaintiff shall proceed to serve and file with the County Clerk the Amended Verified Complaint in the form attached as Exhibit A to the cross-motion; and it is further

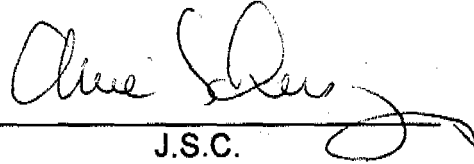
ORDERED that, upon plaintiff's filing of a copy of this decision and the Amended Complaint with the Clerk in Room 119, the records shall be amended to reflect the amendment of the caption; and it is further

ORDERED that defendant's motion is granted to the extent of allowing a further deposition of the plaintiff's amended claims and is otherwise denied, and it is further

ORDERED that counsel shall appear in Room 222 on December 5 for a status conference to confirm a date for the deposition and any further discovery.

Dated: November 21, 2012

NOV 21 2012


J.S.C.

ALICE SCHLESINGER

FILED

NOV 26 2012

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