Gurbuzturk v Jamron
2017 NY Slip Op 32595(U)
December 12, 2017
Supreme Court, New York County
Docket Number: 0805284/2013
Judge: Eileen A. Rakower

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

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Sadan Gurbuzturk, as Administrator of the Estate of Sait Koc, Deceased, and on behalf of his distributes of Next of Kin,

Plaintiff,

Index No.

0805284/2013

Decision and Order

Lisa Jamron, M.D., Lisa Jamron, M.D., P.C., John Sherman, M.D., John Sherman, M.D., P.C., Richard P. Cohen, M.D., and Richard P. Cohen, M.D., P.C.,

Mot. Seq. 5

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HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff, Sadan Gurbuzturk, as Administrator of the Estate of Sait Koc, Deceased, and on behalf of his distributees of Next of Kin, commenced this action on August 13, 2013 alleging claims of medical malpractice, informed consent, and wrongful death.

On July 18, 2012, Sait Koc ("decedent") underwent an elective liposuction procedure performed by defendant, John Sherman, M.D. ("Dr. Sherman"), with co-defendant Lisa Jamron, M.D. ("Dr. Jamron"), administering the anesthesia. Recently discontinued co-defendant, Dr. Richard Cohen, performed preoperative surgical clearance. According to the New York County Medical Examiner's office, decedent died from "Ventilatory Insufficiency." Dr. Jamron and Dr. Sherman each contend that the other was negligent in their administration of medical treatment to decedent which caused decedent's death. On July 11, 2017, Plaintiff filed his Note of Issue and Certificate of Readiness.

By Notice of Motion filed on September 8, 2017, Plaintiff moves pursuant to CPLR § 3025(b) for leave to amend the Complaint to add a claim for punitive damages against Dr. Sherman and his professional corporation (collectively referred to as "Dr. Sherman") based on the allegation that Dr. Sherman was "wanton,

dishonest, reckless and gross[ly] negligence (sic) in altering the plaintiff's anesthesia chart in an attempt to deceive and defraud the plaintiff and decedent's beneficiaries as to what really occurred in the Operating Room in this case." Plaintiff states that the amendment is being sought at this juncture based upon the recent deposition testimony of Dr. Sherman's circulating nurse, Diane Mafla, taken on June 22, 2017. Plaintiff's original complaint contains a punitive damage claim only as against Dr. Jamron and her professional corporation, not Dr. Sherman.

In support of the motion to amend, Plaintiff submits: the attorney affirmation of Michael Gunzburg; anesthesia chart produced by Dr. Jamron; anesthesia chart produced by Dr. Sherman; pleadings; transcript of Diane Mafla's deposition; Bill of Particulars; and proposed amended pleading. Dr. Sherman opposes Plaintiff's motion to amend. Dr. Sherman submits, *inter alia*, the attorney affirmation of Jared A. Smith; the transcript of Dr. Jamron's deposition; transcript of Dr. Sherman's deposition; and transcript of Vanessa Colon's deposition. Plaintiff submits a reply. After the motion was fully submitted, Dr. Sherman filed a sur-reply, and Plaintiff thereafter a "sur sur reply". Both of these submissions were filed without the court's permission and will not be considered.

Dr. Sherman argues that Plaintiff's motion to amend the Complaint after the Note of Issue has been filed is untimely. Dr. Sherman also argues that the proposed amendment to assert punitive damages against him is devoid of merit and lacks sufficient facts to establish a claim for punitive damages. Dr. Sherman alleges that Ms. Mafla's testimony does not establish proof that Dr. Sherman altered the chart.

Factual background

Plaintiff filed a complaint on August 13, 2013. Dr. Jamron interposed an answer on April 18, 2014. Plaintiff served a Bill of Particulars on Defendants on June 2, 2014. On April 20, 2016, Dr. Lisa Jamron was deposed. On June 16, 2016, and June 30, 2016, Dr. Sherman was deposed. On March 3, 2017, Vanessa Colon, Dr. Sherman's scrub nurse, was deposed. On June 22, 2017, Diana Mafla, Dr. Sherman's circulating nurse, was deposed.

Based on Plaintiff's submission, Plaintiff learned in March 2013 that there were two anesthesia charts prepared in this case for decedent's surgery. There is one chart that is purported to be a photocopy of the original anesthesia chart. This chart was produced by Dr. Jamron. There is also the purported "original" anesthesia chart that was maintained in Dr. Sherman's office records for decedent and produced by Dr. Sherman. According to Plaintiff, there are three significant differences between

these two charts: (1) Dr. Sherman's chart contains an additional 15 minutes which shows that the medical care was "normal" between 4:00 pm and 4:15 pm, and the chart produced by Dr. Jamron contains no such notes; (2) Dr. Sherman's chart shows a Mallampati assessment (the opening of the airway) of MII-III while the chart produced by Dr. Jamron shows a Mallampati assessment of MI-II, or a less difficult airway; (3) Dr. Sherman's chart has an additional footnote which states "Local anesthesia injected by surgeon," and the chart produced by Dr. Jamron contains no such footnote.

Dr. Jamron was shown the two charts at her deposition. Dr. Jamron testified that she could not explain why there are two different charts. (*See* transcript of Dr. Jamron's deposition at 332:16-35 attached as Exhibit E to Jared E. Smith's affirmation). Dr. Jamron testified, "I have no idea how that happened. I told you, I left the original copy in Dr. Sherman's office when I left that day. I called them back afterwards and I said can I have a copy of the whole chart. And that's what I was sent back [referring to the copy that she produced to plaintiff's counsel]." (*Id.* at 332:9-14). When asked whether she could explain why the records she sent to plaintiff's counsel has an indication of M1 to 2 airway, and the chart that Dr. Sherman produced says M2-M3, she responded, "I have no idea." Dr. Jamron testified, "All I can tell you is that I have a copy of that – there was no, there is no other chart." When asked whether it was "fair to say that after you took a copy of it, somebody changed it," she responded, "I have no idea." When asked whether her assessment at the time of decedent's surgery was M1 to 2, she testified, "I'm telling you that's what I had. You asked me for my notes. I sent you what I have. I have no control over what was done or not done to that chart… I left it in Dr. Sherman's office the day of the incident, and I never saw it again." (*Id.* at 190:9-191:22). When asked if she had any recollection of filling out the anesthesia chart from 4:00 pm to 4:15 pm, she testified, "I have no recollection of exactly filling out anything." (*Id.* at 332:9-14).

Dr. Sherman testified at his deposition that the medical records that are maintained in his office are not "lock and key," are accessible to "[a]nyone in the staff," including his nurses, office manager, photographer, and the anesthesiologist that he works with. (*See* transcripts of Dr. Sherman's deposition at 148:10-25 annexed as Exhibit to Jared E. Smith's affirmation). Dr. Sherman also testified that Dr. Jamron had unrestricted access to all of his medical charts in his office in July 2012 and thereafter. (*Id.* at 149:2-25,150:2-7)

At her deposition on June 22, 2017, Ms. Mafla, the circulating nurse at the time of decedent's liposuction surgery, testified concerning access to the patient files in Dr. Sherman's office:

> Q: Back in July of 2012, who generally had access to those patient files?
> A: Front desk.
> Q: Anyone else?
> A: Yes.
> Q: Who else?
> A: The doctors, the manager.
> Q: Anybody else?
> A: No.
> Q: When you say the doctors, what doctors are you referring to back in July of 2012?
> A: Dr. Sherman,
> Q: Anybody else?
> A: No.
> Q: Do you know if any of the anesthesiologists ever had occasion to go behind the reception desk and walk into the patient filing room?
> A: No.

(*See* transcript of Mafla's deposition attached as Exhibit C to Michael Gunzberg's affirmation at 14:2-22)

Discussion

CPLR § 3025[b] permits a party to amend or supplement its pleading "by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties." Such "leave shall be freely given upon such terms as may be just including the granting of costs and continuances," absent prejudice or surprise resulting from the delay. (CPLR § 3025[b]; *MBIA Ins. Corp. v. Greystone & Co.*, 74 A.D.3d 499, 500 [1st Dep't 2010]; *Konrad v. 136 East 64th Street Corp.*, 246 A.D.2d 324, 325 [1st Dep't 1998]). Furthermore, "where the amendment is sought after a long delay, and a statement of readiness has been filed, judicial discretion in allowing the amendment should be 'discreet, circumspect, prudent and cautious.'" (*Cseh v. New York City Transit Authority*, 240 A.D.2d 270 [1st Dept. 1997).

"[L]eave to amend will be denied where the proposed pleading fails to state a cause of action or is palpably insufficient as a matter of law." (*Davis & Davis, P.C. v. Morson*, 286 A.D.2d 584, 585 [1st Dept 2001]). "It is essential that a party seeking leave to amend a complaint demonstrate the merit of the proposed pleading." (*Peretich v. City of New York*, 263 A.D.2d 410, 410 [1st Dept 1999]). The moving party "must allege legally sufficient facts to establish a prima facie cause of action or defense in the proposed amended pleading." (*Daniels v. Empire-Orr, Inc.*, 151 A.D.2d 370, 371 [1st Dept 1989]). "If the facts alleged are incongruent with the legal theory relied on by the proponent the proposed amendment must fail as a matter of law." (*Daniels*, 151 A.D.2d at 371).

"Punitive damages are not to compensate the injured party but rather to punish the tortfeasor and to deter this wrongdoer and others similarly situated from indulging in the same conduct in the future." (*Ross v. Louise Wise Services, Inc.*, 8 N.Y.3d 478, 489 [2007]). "Punitive damages are permitted when the defendant's wrongdoing is not simply intentional but 'evince[s] a high degree of moral turpitude and demonstrate[s] such wanton dishonesty as to imply a criminal indifference to civil obligations.'" (*Id.* [citations omitted]). "The misconduct must be exceptional, 'as when the wrongdoer has acted maliciously, wantonly, or with a recklessness that betokens an improper motive or vindictiveness . . . or has engaged in outrageous or oppressive intentional misconduct or with reckless or wanton disregard of safety or rights.'" (*Id.*).

"To sustain a claim for punitive damages in tort, one of the following must be shown: intentional or deliberate wrongdoing, aggravating or outrageous circumstances, a fraudulent or evil motive, or a conscious act that willfully and wantonly disregards the rights of another." (*Don Buchwald & Associates, Inc. v. Rich*, 281 A.D.2d 329, 330 [1st Dept 2001]). In a medical malpractice action, punitive damages are not recoverable unless "the conduct is wantonly dishonest, grossly indifferent to patient care, or malicious and/or reckless." (*Schiffer v. Speaker*, 36 A.D.3d 520, 521 [1st Dept 2007]).

Where "[t]he complaint lacks the requisite allegations of egregious conduct or moral turpitude necessary to support punitive damages," it is properly stricken. (*Denenberg v. Rosen*, 71 A.D.3d 187, 196 [1st Dept 2010]).

Here, Plaintiff's proposed claim for punitive damages does not arise from the medical treatment provided to the decedent by Dr. Sherman, but rather from actions allegedly taken by Dr. Sherman after the treatment was completed in altering the anesthesia chart to avoid malpractice.

In *Pharr v. Cortese*, 147 Misc. 2d 1078, 1079 [Sup. Ct., NY County 1990], the plaintiff sought to amend the complaint to add claims for spoliation and punitive damages based on allegations that the defendant doctor altered three medical notes to avoid liability. The Court declined to recognize spoliation of evidence as a separate tort "when a physician allegedly falsified his records in order to avoid malpractice liability, when the plaintiff cannot show any injury, either by effectively depriving her of the prosecution of a malpractice claim or by adversely affecting her medical treatment...." (*Id.* at 1081) The Court also denied plaintiff s request to add a claim for punitive damages arising out of the alleged conduct in altering medical records. (*Id.*)

In *Devadas v. Niksarli*, 2009 NY Slip Op 30922(U) at *6 [Sup. Court, NY County], the plaintiffs sought to amend the complaint to add a claim for prima facie tort and a claim for punitive damages. The plaintiffs claimed that the defendant doctor had intentionally altered his treatment records to conceal his malpractice. And submitted the affidavit of a forensic evidence as evidence. (*Id.*) The Court denied the motion to amend. (*Id.* at *8). The Court held, "New York Courts have not recognized a cause of action for the intentional falsification of records by a physician in an effort to avoid malpractice liability," and "[t]herefore, this Court cannot permit plaintiffs to proceed against defendants under this theory of liability, even if they seek to label the cause of action as one for *prima facie* tort." (*Id.*) The Court further held, "To the extent that plaintiffs seek to amend the complaint to seek punitive damages in connection with the existing causes of action for medical malpractice and lack of informed consent, such amendment must also be denied as it too is without merit." (*Id.*) The Court stated that the alleged claim of alteration of medical records by the defendant doctor "does not arise from medical treatment to [the plaintiff], as it is alleged to have occurred subsequent to the time of the malpractice herein, and, thus, it may not provide a basis for imposing punitive damages as against defendants in connection with plaintiffs' causes of action for medical malpractice and lack of consent." (*Id.*) The Court found "the record devoid of any evidence that the treatment rendered by [the defendant] to [the plaintiff] was so wantonly dishonest, grossly indifferent to patient care, or so malicious and/or reckless to sustain any award of punitive damages." (*Id.*)

The proposed amendment to assert punitive damages against Dr. Sherman is devoid of merit and lacks sufficient facts to establish a claim for punitive damages. Here, the claim is that certain alterations to the plaintiff's medical records were made by Dr. Sherman after the conclusion of medical treatment and after the alleged medical malpractice. The proposed claim therefore "does not arise from medical

treatment to [the plaintiff], as it is alleged to have occurred subsequent to the time of the malpractice herein, and, thus, it may not provide a basis for imposing punitive damages as against defendants in connection with plaintiffs' causes of action for medical malpractice and lack of consent." (*Devadas*, 2009 NY Slip Op 30922(U) at *8). The record is "devoid of any evidence that the treatment rendered by [the defendant] to [the plaintiff] was so wantonly dishonest, grossly indifferent to patient care, or so malicious and/or reckless to sustain any award of punitive damages." (*Id.*)

In *Abraham v. Kosinski*, 251 A.D.2d 967, 968 [4th Dept. 1998], a case upon which Plaintiff relies in the motion papers, the Court upheld a claim for punitive damages where it was alleged that the defendant doctor "intentionally, willfully and wantonly withheld medical records and information from plaintiff in order to avoid the malpractice claim." Here, however, there are no allegations that medical records were withheld.

Wherefore, it is hereby

ORDERED that plaintiff's motion to amend the complaint to add a punitive damages claim against Dr. Sherman is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: DECEMBER 12, 2017

EILEEN A. RAKOWER, J.S.C.