

<b>Owens v Mobile Imaging Ltd.</b>
2017 NY Slip Op 32965(U)
May 5, 2017
Supreme Court, Albany County
Docket Number: 900096/2016
Judge: Christina L. Ryba
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STATE OF NEW YORK  
SUPREME COURT COUNTY OF ALBANY

JAYSHAWN OWENS,  
Plaintiff,

-against-

MOBILE IMAGING LTD., TRIEF, HAROLD MD,  
DIAGNOSTIC X-RAY SERVICE LLC, and  
DR. VLADISLAV VOSS DDS,  
Defendants.

*Duplicate Original*  
DECISION/ORDER

Index No. 900096/2016  
RJI No: 01-16-120279

APPEARANCES:

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RYBA, J.

On January 16, 2014, plaintiff was incarcerated at Albany County Correctional Facility when he sustained injuries to his jaw during a physical altercation with another inmate. After an initial examination by the facility's medical staff, an X-ray of plaintiff's jaw was taken and read by

defendant radiologist Harold Trief MD, who found no evidence of fracture or dislocation. Subsequently, on February 5, 2014, a panoramic X-ray of plaintiff's jaw performed following his release from custody apparently revealed an improperly healed mandibular fracture. Alleging that the failure to properly diagnose and treat the mandibular fracture prevented proper healing and caused a deformity of his jaw, plaintiff commenced this medical malpractice action on January 19, 2016 initially naming only Trief and Mobile Imaging Ltd as defendants.<sup>1</sup> Thereafter, on October 23, 2016, without prior leave of Court, plaintiff filed an amended summons and complaint purporting to add Vladislav Voss DDS, the dentist who treated plaintiff during his incarceration, as a defendant.<sup>2</sup> Voss now moves to dismiss the amended complaint against him, arguing that plaintiff's failure to obtain prior leave to amend the complaint is fatal and that, in any event, the claim is untimely under the applicable Statute of Limitations. Plaintiff opposes the motion and cross-moves for leave to amend the complaint. Voss opposes the cross motion.

CPLR 1003 provides that new parties may be added to an action without prior leave of court within 20 days after service of the original summons, at any time before the time to respond to that summons expires, or within 20 days after service of a pleading responding to the original summons. If these time periods have expired, the joinder of an additional defendant by the filing of an amended summons and complaint may only be accomplished with prior judicial permission (see, CPLR 1003; Perez v Paramount Commc'ns, Inc., 92 NY2d 749, 753 [1999]; Crook v E.I. du Pont de Nemours & Co., 81 NY2d 807 [1993]; Ospina v Vimm Corp., 203 AD2d 440 [1994]). It is well settled that

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<sup>1</sup> Defendant Diagnostic X-Ray Services LLC was later impleaded as a third-party defendant by Mobile Imaging Ltd.

<sup>2</sup> That portion of the amended complaint which asserts a direct claim against Diagnostic X-Ray Services LLC is not at issue herein.

the failure to comply with the foregoing requirements renders the pleadings jurisdictionally defective (see, Kelley v Schneck, 106 AD3d 1175, 1178 [2013], lv dismissed 21 NY2d 1069 [2013]).

Here, the original summons and complaint were served on or about January 19, 2016, and the answering defendants served their respective responsive pleadings on or about March 19, 2016. Accordingly, the latest that plaintiff was permitted to serve an amended complaint naming an additional defendant without leave of court was 20 days after service of defendants' responsive pleadings, or April 8, 2016. Clearly, plaintiff's service of an amended complaint on October 23, 2016 naming Voss as an additional defendant without leave of Court was impermissible and therefore a nullity (see, Perez v Paramount Commc'ns, Inc., 92 NY2d at 753[1999]). The Court must accordingly address plaintiff's application for permission to serve an amended complaint adding Voss as a defendant, as well as Voss' challenge to any such amendment as time barred.

It is well settled that the inclusion of additional parties after the expiration of the applicable Statute of Limitations is ordinarily not permitted (see, ). Here, the proposed amended complaint alleges a cause of action for dental malpractice, which is subject to a 2 ½-year Statute of Limitations (see, CPLR 214-a), and a cause of action for ordinary negligence, which is subject to a three-year Statute of Limitations (see, CPLR 214 [5]). The Statute of Limitations applicable to the cause of action sounding in dental malpractice accrued in January 2014 and expired 2 ½ years later in June 2016, thereby precluding any amendment adding a dental malpractice claim against Voss. As for the negligence cause of action, however, it would appear that the claim was timely asserted inasmuch as the applicable three-year Statute of Limitations had yet to expire when plaintiff filed the motion to amend (see, Perez v Paramount Commc'ns, Inc., 92 NY2d at 753[1999]; Kelley v Schneck, 106 AD3d at 1178 [2013]). Nonetheless, Voss argues that the cause of action is time barred because,

although couched in terms of negligence, the cause of action sounds in dental malpractice and is therefore subject to a 2 ½-year Statute of Limitations.

“The distinction between ordinary negligence and malpractice turns on whether the acts or omissions complained of involve a matter of medical science or art requiring special skills not ordinarily possessed by lay persons or whether the conduct complained of can instead be assessed on the basis of the common everyday experience of the trier of the facts” (Miller v Albany Med. Ctr. Hosp., 95 AD2d 977, 978 [1983]; see, Halas v Parkway Hosp., 158 AD2d 516 [1990]).

“Conduct may be deemed malpractice, rather than negligence, when it ‘constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician’” (Scott v Uljanov, 74 NY2d 673, 674-675 [1989], quoting Bleiler v Bodnar, 65 NY2d 65, 72 [1985]; see, Newell v Ellis Hosp., 117 AD3d 1139, 1140 [2014]). The issue distills to whether the conduct complained of requires the exercise of medical judgment (see, Martuscello v Jensen, 134 AD3d 4, 11 [2015]; D’Elia v Menorah Home & Hosp. for Aged & Infirm, 51 AD3d 848, 850–51 [2008]).

Here, the proposed amended complaint alleges that Voss was negligent in failing to order the appropriate type of X-ray that would detect a mandibular fracture and in choosing to rely upon Trief’s medical judgment to interpret plaintiff’s X-ray results. In the Court’s view, these allegations bear a substantial relationship to the provision of medical treatment and Voss’ exercise of medical judgment in deferring to Trief’s interpretation of plaintiff’s X-rays.

Accordingly, this cause of action sounds in dental malpractice subject to 2 ½-year Statute of Limitations, rendering the claim time barred. Notably, plaintiff does not argue that amendment of the complaint beyond the Statute of Limitations is warranted in this case, and therefore the

Court does not purport to address that issue herein.

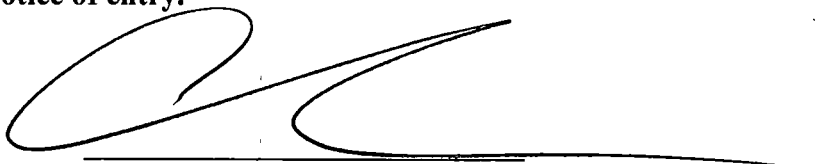
For the foregoing reasons, it is

ORDERED that the motion is granted, without costs, and the amended complaint is dismissed as to Vladislav Voss MD, and it is further

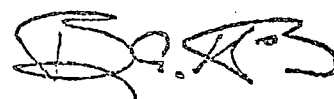
ORDERED that the cross motion is denied, without costs.

This Memorandum constitutes the Decision and Order of the Court. This original Decision and Order is being returned to the attorney for the plaintiff. The original papers are being transferred to the Albany County Clerk. **The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the provision of that rule regarding filing, entry, or notice of entry.**

Dated: *May 5, 2017*



**HON. CHRISTINA L. RYBA**  
**Supreme Court Justice**



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