

**Khurdayan v Kassir**

2018 NY Slip Op 32861(U)

November 8, 2018

Supreme Court, New York County

Docket Number: 159480/17

Judge: Joan A. Madden

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK, IAS PART 11

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AREVIK KHURDAYAN,,  
Plaintiff,

INDEX NO. 159480/17

-against-

RANTIN KASSIR, M.D., NY SNORING AND SINUS  
CLINIC, NY SNORING AND SINUS P.C.,  
And NEW YORK SNORING AND SINUS MEDICAL  
TREATMENT, P.C.,

Defendants.

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JOAN A. MADDEN, J.:

Plaintiff moves pursuant to CPLR 3025(b) to amend the complaint to assert claims of medical malpractice against defendants and to add Danielle Tosi, M.D. as a defendant. Dr. Tosi opposes the motion, which is granted for the reasons below.

This action arises out of allegations defendant Dr. Rantin Kassir, M.D., while working at the defendant entities, performed the wrong type of surgery on plaintiff, who was having breathing problems. Specifically, it is alleged that instead of performing a septorhinoplasty which would have addressed plaintiff's structural problems and cosmetic issues, In February 9, 2016, Dr. Kassir performed a cosmetic rhinoplasty which did not improve plaintiff's breathing problems. Dr. Tosi was the anesthesiologist during the surgery and the proposed amended complaint asserts claims for medical malpractice and lack of informed consent against her.

The original complaint, which was filed in the Commercial Division of this court in October 2017, asserted claims for breach of contract, violations of General Business Law §§ 349, and 350 (deceptive practices), for fraud, fraudulent inducement, for unjust enrichment and promissory estoppel. Defendants answered. In April 2018, plaintiff's current counsel was

substituted as counsel and sought medical records from defendants, which were provided in June 29, 2018. These medical records identified Dr. Tosi as the anesthesiologist in the medical records. After defendants failed to consent to the amendments, plaintiff made this motion to amend, which is opposed only by Dr. Tosi.<sup>1</sup>

Dr. Tosi opposes the motion on the grounds that she is prejudiced by the delay in joining her as a defendant. Specifically, Dr. Tosi argues that as the claims in the original complaint, which does not assert any claims for medical malpractice, do not arise out the same transaction or occurrence as the claims against her in the proposed amended complaint, the amendment would be prejudicial to her. In addition, Dr. Tosi asserts that she will be prejudiced as she first became aware of the lawsuit in July 2018, after receiving correspondence from plaintiff's attorney regarding medical records.

Leave to amend a pleading should be 'freely given' (CPLR 3025[b]) as a matter of discretion in the absence of prejudice or surprise." Zaid Theatre Corp. v. Sona Realty Co., 18 AD3d 352, 355-356 (1<sup>st</sup> Dept 2005)(internal citations and quotations omitted). Leave to amend will be granted as long as the proponent submits sufficient support to show that proposed amendment is not "palpably insufficient or clearly devoid of merit." MBIA Ins Corp. v. Greystone & Co., Inc., 74 AD3d 499 (1<sup>st</sup> Dept 2010)(citation omitted).

Here, Dr. Tosi does not allege that the proposed amended complaint lacks merit and instead argues that she was prejudiced and surprised by the delay in asserting the claims against her which do not relate to the claims in the original pleading.

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<sup>1</sup>Defendants have submitted opposition papers objecting to certain statements made by plaintiff's counsel regarding his efforts to obtain medical records from defendants but do not oppose the motion to amend.

However, it is well settled that “delay alone does not provide a sufficient ground for denying leave to amend.” Greenburgh Eleven Union Free School District v. National Union Fire Insur. Co., 298 AD2d 180, 181 (1<sup>st</sup> Dept 2002). Instead, the delay must be accompanied by prejudice as well. Edenwald Contracting Co. Inc. v. City of New York, 60 N.Y.2d 957, 959 (1983 ). In this context, the courts define prejudice as a “some special right lost in the interim, some change of position, or some significant trouble or expense which could have been avoided had the original pleading contained what the amended one wants to add.” Barbour v. Hospital for Special Surgery, 169 A.D.2d 385, 386 (1<sup>st</sup> Dept. 1991)(citations omitted).

Here, there is no basis for finding that Dr. Tosi was prejudiced by the delay in naming her as a defendant. As for Dr. Tosi’s argument that the malpractice claim does not arise out of the same transactions or occurrences as the claims asserted in the initial complaint, such argument is not pertinent to the prejudice inquiry nor is it a basis for denying the motion to amend in the absence of any statute of limitations issues. In this connection the court notes that the motion to amend was filed the day before the expiration of the two and half year statute of limitations period governing medical malpractice claims. See Perez v. Paramount Communications, Inc., 92 NY2d 749, 754 (1999)(filing a motion to amend to add a defendant to pending action tolls statute of limitations until entry of order deciding the motion with respect to party to be added); CPLR 214-a.

In view of the above, it is

ORDERED that the motion to amend is granted; and it is further

ORDERED that within 30 days of e-filing this decision and order, plaintiffs shall serve a supplemental summons and proposed first amended complaint annexed to the motion on Dr.

Tosi; and it further

ORDERED that Dr. Tosi shall served an answer or otherwise respond to the first amended complaint within 30 days of such service; and it is further

ORDERED that the first amended complaint shall be deemed served on the appearing defendants upon efileing of this decision and order who shall answer the first amended complaint within 30 days of such efileing; and it is further

ORDERED that the parties shall appear on January 31, 2019 at 11:00 am. for a preliminary conference in Part 11, room 351, 60 Centre Street, New York, NY.

DATED: November 8 2018

  
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J.S.C.  
HON. JOAN A. MADDEN  
J.S.C.