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| Nedeltcheva v MTE Transp. Corp. |
| 2019 NY Slip Op 30453(U) |
| February 22, 2019 |
| Supreme Court, New York County |
| Docket Number: 160991/2015 |
| Judge: Adam Silvera |
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ADAM SILVERA PART IAS MOTION 22

Justice

TATIANA NEDELTCHEVA, PLAMEN NEDELTCHEV, IRINA PARVANOV
Plaintiff,
INDEX NO. 160991/2015
MOTION DATE 01/22/2019
MOTION SEQ. NO. 004

- v -

MTE TRANSPORTATION CORP., MOREL VASQUEZ,
Defendant.

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 004) 114, 115, 116, 117, 118, 119, 121, 122, 123, 124, 125

were read on this motion to/for AMEND CAPTION/PLEADINGS

Upon the foregoing documents, it is ordered that defendants' motion seeking to amend the answer, pursuant to CPLR §3025(b) is granted as set forth below. Here, defendants seek to amend their answer to include the affirmative defense of failure to state a cause of action. Defendants further seek to dismiss plaintiff Irina Parvanov's claim for the loss of services of plaintiff Tatiana Nedeltcheva as caretaker of plaintiff Parvanov's children. Plaintiffs oppose and defendants reply.

In support of the motion, defendants argue that motions to amend are typically freely granted, and that due to a clerical error, their original answer failed to raise the affirmative defense of failure to state a cause of action. Defendants also argue that plaintiff Parvanov's claim alleging loss of childcare services of plaintiff Tatiana Nedeltcheva must be dismissed as New York only recognizes loss of service claims by a spouse. Here, plaintiff Tatiana Nedeltcheva is plaintiff Parvanov's mother.

In opposition, plaintiffs argue that an amendment to the answer at this juncture would be prejudicial to plaintiffs as they have litigated on the basis of the Answer served in 2016.

Specifically, plaintiffs contend that the Answer was the focal point of several motions. Plaintiffs further argue that plaintiff Parvanov's claim regarding plaintiff Tatiana Nedeltcheva sounds in negligence rather than loss of parental consortium. According to plaintiffs, defendants' negligence incapacitated the caretaker of plaintiff Parvanov's children, namely plaintiff Tatiana Nedeltcheva, such that plaintiff Parvanov suffered damages equal to the amount she was required to pay for substitute child care.

As to the portion of defendants' motion to amend the answer, CPLR §3025(b) states that "[a] party may amend his 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." Leave to amend pleadings is generally freely granted, absent prejudice and surprise resulting from the delay. *See Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 (1983); *Antwerpse Diamantbank N.V. v Nissel*, 27 AD3d 207, 208 (1st Dep't 2006). To find prejudice, there must be some indication that a party has been hindered in the preparation of his case or prevented from taking some measure in support of his position. *See Abdelnabi v NYC Transit Authority*, 273 AD2d 114, 115 (1st Dep't 2000).

Here, plaintiffs' conclusory statement that they will be prejudiced is belied by the record. Furthermore, aside from plaintiffs' bald statement that they will be prejudiced, plaintiff has failed to provide any detail as to how they will be hindered in preparing the case. Notably, the first motion filed in this action was plaintiffs' motion for a default judgment (mot. seq. no. 001). However, by Decision/Order dated August 9, 2016, Honorable Leticia M. Ramirez denied plaintiffs' motion for a default judgment for improper service, and granted defendants' cross-motion to file a late answer *nunc pro tunc*. Thereafter, plaintiffs appealed such decision, and also moved to reargue (mot. seq. no. 002). Plaintiffs' motion to reargue was denied. By Decision and

Order dated January 2, 2018, the Appellate Division, First Department affirmed Judge Ramirez's decision dated August 9, 2016 finding that "[p]laintiffs were not entitled to a default judgment because the affidavits of service of the summons and complaint indicate that service was not effectuated at the proper address". Thus, litigation on the basis of the Answer served in 2016 was resolved by the Appellate Division in 2018. Moreover, the Court notes that although this action was filed in 2015, and even though there have been twelve (12) discovery conferences in this action, discovery is still at its infancy. In fact, on the twelfth appearance, the Court had to order plaintiffs to comply with prior court orders directing their depositions. Thus, plaintiffs have wholly failed to articulate how they would be prejudiced in the amendment of defendants' answer. As such, defendants' motion is granted to the extent that defendants are permitted to amend the answer.

With regards to the portion of defendants' motion seeking to dismiss plaintiff Parvanov's claim of negligence regarding the loss of child care services of plaintiff Tatiana Nedeltcheva, it is well settled that a motion to dismiss the complaint for failure to state a cause of action "will generally depend upon whether or not there was substantial compliance with CPLR 3013." *Catli v Lindenman*, 40 AD2d 714, 715 (2d Dep't 1972). If the allegations are not "sufficiently particular to give the court and parties notice of the transactions intended to be proved and the material element of each cause of action", the cause of action will be dismissed. *See Catli*, 40 AD2d at 715. CPLR §3013 provides that "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense."

Here, plaintiffs' argument regarding plaintiff Parvanov's negligence claim fails as

the complaint fails to comply with CPLR §3013. A review of the allegations in the complaint reveal that plaintiff Parvanov's negligence cause of action is not sufficiently pled, and is devoid of the particulars necessary to give notice of the material elements of negligence. In order to establish negligence, a plaintiff is required to prove "the existence of a duty, that is, a standard of reasonable conduct in relation to the risk of reasonably foreseeable harm; a breach of that duty and that such breach was a substantial cause of the resulting injury". *Baptiste v New York City Tr. Auth.*, 28 AD3d 385, 386 (1st Dep't 2006), citing *Palsgraf v Long Is. R.R. Co.*, 248 NY 339 (1928). Plaintiffs' complaint states that "[d]efendants' negligence has further caused damages to Irina Parvanov equal to the amount paid for substitute services for Tatiana Nedeltcheva's loss as a caretaker for Irina's two children of \$ 600 per week beginning on May 9th, 2015 to this date and going forward to be determined at trial." Complaint, ¶ 41. Such claim fails to even allege that defendants had a duty to plaintiff Parvanov, a material element in plaintiff Parvanov's cause of action for negligence. As plaintiffs have failed to comply with CPLR §3013, plaintiff Parvanov's cause of action for negligence against defendants as to child care services is dismissed.

Accordingly, it is

ORDERED that defendants Morel Vasquez and MTE Transportation Corp's motion to amend is granted and the Proposed Amended Verified Answer and Counter-Claim with Demand for Bill of Particulars in the proposed form annexed to the moving papers shall be deemed served upon service, by defendants on plaintiffs, of a copy of this order with notice of entry within 30 days; and it is further

ORDERED that defendants Morel Vasquez and MTE Transportation Corp's motion to dismiss is granted as to plaintiff Irina Parvanov's cause of action for negligence in paragraph 41

of the complaint, and such cause of action is dismissed; and it is further

ORDERED that all parties shall appear for a previously scheduled compliance conference on April 12, 2019 at 9:30am in room 103 of 80 Centre Street, New York, NY.

This constitutes the Decision/Order of the Court.

ADAM SILVERA, J.S.C.

2/22/2019
DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE